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## United they Diverge?

From Conflicts of Law  
to Constitutional Theory?  
On Christian Joerges' Theory

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## **Abstract**

This working paper offers a reconstruction and critical analysis of Joerges' conflicts theory of European Union law. It is claimed that the theory of European conflicts is structured around three key premises: first, that there are functional and normative reasons to transcend the autarchic national constitutional state; second, that the public philosophy of European constitutional law should operationalise the regulatory ideal of unity in diversity, and that this is better done by having resort to Currie's democratic theory of conflicts of law; and third, that any European constitutional theory should be 'grounded' on the empirical analysis and resolution of specific supranational conflicts. This leads to a theory sensitive to the institutional implications of European integration (to Europeanisation processes of national institutions as an alternative to the European superstate, in particular through mutual recognition of legal standards and through the production of common norms in decentralized structures of which comitology is the paradigmatic example) but deeply interested in the specific *problématique* of constitutional and infra-constitutional European legal practice. However, the paper also finds that the theory of European conflicts, first, remains incomplete as a constitutional theory, something which comes a long way to explain its downplaying the genuinely federal dimension of European integration; second, fails to provide a satisfactory account of the legitimacy foundations of Community law (as it does not engage either with constitutional beginnings nor with political constitutional transformation); and third, underestimates the structural implications of the combination of the doctrines of primacy, direct effect and mutual recognition, in particular, the resulting structural bias against redistributive politics. All these three factors lead to lack of full attention to the normative and functional sources of stability of European integration and European Union law.

## **Keywords**

Christian Joerges – Comitology – Conflicts of Law – Constitutional Law of the European Union – David P. Currie – European Constitutional Pluralism – European Law – Mutual Recognition



The failure of the international system let loose the energies of history -  
the tracks were laid down by the tendencies inherent in a market  
society

*Karl Polanyi, The Great Transformation*

For I know that victory lies with him who can journey home to  
childhood

*Axel Sandemose, A Fugitive Crosses his Tracks*

## **1. Joerges' conflicts theory as the public philosophy of European constitutional law**

### **1.1. The regulatory ideal and constitutional implications**

Joerges' conflicts theory of European Union law (hereinafter European conflicts) is grounded on the normative vision of a plurality of legal orders committed to the realisation of the Sozialer Rechtsstaat not only within national borders, but also across them. United in diversity, or perhaps even better, united they diverge, is the motto that perhaps summarises more faithfully Joerges' vision and regulatory ideal of European integration.<sup>1</sup>

This regulatory ideal is perhaps better specified by considering A) the negative image against which European conflicts are built, namely, that of the autarchic national constitutional state; B) its public philosophy, which corresponds to that of Currie's democratic conflicts of law; C) the particular kind of "grounded" constitutional pluralism that Joerges embraces, which result from his life-long interest in droit economique; and D) the main distinguishing features of Joerges' constitutional theory as a legal theory, especially with regard to what concerns the characterisation of foreign law.

#### **1.1.1. The negative image: the autarchic national constitutional state**

The positive regulatory ideal of European conflicts comes hand in hand with a negative image, that of the autarchic national constitutional state. This is only natural given that Joerges is very much the conscious child of a tragic century,<sup>2</sup> which was, indeed, marred by the failure of the emancipated, unencumbered market, and of the reactionary and disastrous endorsement of the unlimited sovereignty of the national

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<sup>1</sup>Since the approval of the Convention's draft of the Constitutional Treaty, Joerges has used the motto of "unity in diversity" enshrined in the Preamble of the said text several times. See, for example, "Integration through de-legalisation. An irritated heckler?", European Governance Papers, 07/03, available at: <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf>.

<sup>2</sup>Christian Joerges & Navraj Singh-Ghaleigh (eds), *Darker Legacies of Law in Europe*, Oxford: Hart Publishing, 2001. See, also, the special issues of the (2005) 6 *German Law Journal*, (especially Joerges' Introduction to the Special Issue: "Confronting Memories: European 'Bitter Experiences' and the Constitutionalisation Process": entitled "Constructing Europe in the Shadow of its Pasts", pp. 7-15), and (2004) 15 *Law and Critique*, number 1, "The Darker Side of a Pluralist Heritage: Anti-Liberal Traditions in European Social Theory and Legal Thought".

constitution. European conflicts are thus both a positive vision *and* a remedy against the *malaise* of unbridled national sovereignty exerted through law (and politics). This is the wider general claim behind Joerges (and Neyer's) analysis of comitology. What they labelled then as "deliberative supranationalism" did aim to *tame* and to *democratise* the nation state, to operate the "normative" rescue of the state from its national and autarchic constitutional form. As Joerges recently put it:

We must conceptualize supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimized states and with the supranational prerogatives that an institutionalization of this interdependence requires.<sup>3</sup>

European conflicts thus aims to be the theory of a reflexive and open constellation of legal orders which have transcended legal autarchy for good: "The purpose of European law is to discipline the actors within the Community in their interactions and to guide strategic interaction into a deliberative style of politics."<sup>4</sup> Joerges has further argued that the public philosophy of European conflicts also underpinned a good number of the debates in the 1970s and 1980s on the proceduralisation of law and on the "reflexive" nature of law.<sup>5</sup>

### 1.1.2. The public philosophy: Currie's conflicts of laws

The ultimate theoretical reference of Joerges is no other than Brainerd Currie, the founding father of the modern theory of federal conflicts of law. This is not as odd as one may think at first sight, because Currie's theory is not merely a legal-dogmatic theoretical construction of US law. It is underpinned by a cosmopolitan public philosophy, which is then applied to the resolution of normative conflicts *among* democratically-produced legal norms.<sup>6</sup> This is why European conflicts can be regarded as both a re-elaboration of Currie's public philosophy *and* an application of its key elements to the European Union.<sup>7</sup>

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<sup>3</sup>Christian Joerges, "Deliberative Political Processes' Revisited: What have we learnt about the legitimacy of Supranational Decision-Making?", (2006) 44 *Journal of Common Market Studies*, pp. 779-802, at 790; see, also, Christian Joerges & Jürgen Neyer, "Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector"; (1997) 4 *Journal of European Public Policy*, see pp. 609-625, at 611.

<sup>4</sup>See "Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts", EUI Law Working Papers, 2007/25, p. 14.

<sup>5</sup>See Christian Joerges, "Socialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalism", (2009) 10 *German Law Journal*, pp 335-360.

<sup>6</sup>Perhaps in the most crystal clear manner in Brainerd Currie, "The Constitution and the Choice of Law: 'Governmental Interests and the Judicial Function'", 26 (1958) *University of Chicago Law Review*, pp. 9-84 and "Notes on Methods and Objectives in the Conflict of Laws", (1959) 10 *Duke Law Journal*, pp. 171-181. See, in general, the anthology of Currie's legal writings published as *Selected Essays on the Conflicts of Law*, (Durham NC: Duke University Press, 1963).

<sup>7</sup>Christian Joerges, "The Challenges of Europeanisation in the Realm of Private Law: A Plea for a New Legal Discipline" (2005) 14 *Duke Journal of International and Comparative Law*, pp. 149-196.

Indeed, Joerges finds that conflicts are the legal answer to the limits of *national* laws:

“[Conflict law] is helpful wherever legal principles differing in content and objectives come up against each other. It needs to guide the search for responses to conflicting claims where no higher law is available for decision-makers to refer to.”<sup>8</sup>

### 1.1.3. “Grounded” constitutional pluralism: the pluralism of *droit économique*

Joerges’ conflict theory strives to give legal form to constitutional pluralism, an aim prominently shared with Häberle’s theory of co-operative constitutionalism,<sup>9</sup> Weiler’s theory of constitutional tolerance,<sup>10</sup> and Neil Walker’s theory of constitutional pluralism.<sup>11</sup>

The far from negligible differences between these theories are due to the fact that Joerges builds his theory from the legal underground, so to speak. Instead of focusing on “structural” constitutional principles (as Häberle and Walker do, given that theirs is a theory of the federal state in the post-national constellation), or economic freedoms as constitutional principles (a key focus of Weiler’s, reflected in his groundbreaking analysis of economic freedoms and of his theorising about Europe’s *sonderweg*), Joerges has been thoroughly concerned with the *droit économique*, with the legal norms which cut across the public law/private law divide, but which are at the core of modern economic life. That is well-reflected in his work on the interplay of anti-trust and contract law,<sup>12</sup> on standardisation,<sup>13</sup> and more recently, on economic freedoms and labour law.<sup>14</sup>

By focusing on the aspects of the law which make the economy function Joerges places himself in a position from which he can offer a dual grounding to European conflicts, of the ideal of a reflexive and open constellation of legal orders. The first is a *prudential* imperative, resulting from the phenomenology of societal and economic

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<sup>8</sup>Joerges, note 6 *supra*, p. 349.

<sup>9</sup>Peter Häberle, *Pluralismo y Constitucionalismo*, Estudios de la Teoría Constitucional de la Sociedad Abierta (Madrid: Tecnos, 2002).

<sup>10</sup>Joseph H.H. Weiler, “The Transformation of Europe”, (1991) 100 *Yale Law Journal*, pp. 2403-2483; and of the same author, *idem*, “Federalism Without Constitutionalism: Europe’s *Sonderweg*”, in Kalypso Nikolaïdis & Robert Howse (eds) *The Federal Vision*, (Oxford: Oxford University Press, 2001), pp. 54-71.

<sup>11</sup>Neil Walker, “The Idea of Constitutional Pluralism”, (2002) 65 *Modern Law Review*, pp. 317-359; “Legal Theory and the European Union: A 25th Anniversary Essay”, (2005) 25 *Oxford Journal of Legal Studies*, pp. 581-601; “Taking Constitutionalism Beyond the State”, (2008) 56 *Political Studies*, pp.519-543.

<sup>12</sup>Christian Joerges “Relational Contract Theory in a Comparative Perspective: Tensions between contract and antitrust law principles in the assessment of contract relations between automobile manufacturers and their dealers in Germany”, (1985) vol 581 *Wisconsin Law Review*, pp. 581-613.

<sup>13</sup>“Transnational governance and its Legitimacy Problems: The Examples of Standardization and Food Safety”, available at: <http://www.iilj.org/courses/documents/HC2004.Joerges.pdf>. On this, see also the work of a former doctoral student of Joerges’, Harm Schepel, *The Constitution of Private Governance-Product Standards in the Regulation of Integrating Markets*, (Oxford: Hart Publishing, 2005).

<sup>14</sup>Christian Joerges & Florian Rödl, “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval”, (2009) 15 *European Law Journal*, pp. 1-19.

relationships. The breadth and scope of societal and economic relationships tends to overflow borders. Economic borders, as we know them, are a relatively recent phenomenon, not older than the modern state itself. While the constitutional lawyer may see elements of social engineering orchestrated by technocrats in processes such as the creation of the single market, the jurist interested in socio-economic law would also discern bottom-up societal pressures to liberate social and economic relationships from a straitjacket imposed by the state.<sup>15</sup> The second is a *normative imperative*, stemming from the structural democratic deficit associated with a system of autarchic sovereign states. Precisely because societal and economic relationships do not stop at borders, national regulation which proceeds on the assumption that they do, cannot but render impossible a proper legitimation of law. Under the referred circumstances, there is, by necessity, a large class of the permanently excluded citizens, comprising at least those who are affected by national norms but who are situated on the other side of the border, and those who are economically or socially active within the border but who, as foreigners, are deprived of the right to vote.<sup>16</sup> This is the normative grounding of the negative image of the autarchic constitutional state to which I have referred.

### 1.1.3. The three distinct features of Joerges' constitutional theory

This double prudential-cum-normative grounding of European integration goes a long way to account for the three key "constitutional" features which underpin European conflicts, namely:

- (1) The imperative to re-consider whether the equation of societal interests involved in cross-border relationships may make such situations *intrinsically* different from those which a purely national law would regard as identical. While holding fast to the principle of equality before the law, an open and reflexive legal order must be sensitive to the specific *problématique* of societal integration across borders, and be ready to renounce the automatic application of its own law (whether by ignoring *trans-frontier* situations and not foreseeing specific normative instruments to regulate them; or by formally pretending that there are special rules of conflict applicable to the case, but then *de facto* reverting to the imposition of the same solution by establishing a general, automatic and unqualified preference of the *lex fori*);
- (2) The re-characterisation of foreign law as law, and not as mere fact; thus opening the door to the transformation of national institutions, both parliaments and courts, into the guardians of interests which are wider than those of national voters *for very good normative*

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<sup>15</sup>Christian Joerges, "The Market without the State? The 'Economic Constitution' of the European Community and the rebirth of Regulatory Politics", (1997) 1 *EloP*, available at: <http://eiop.or.at/eiop/texte/1997-019a.htm>.

<sup>16</sup>Christian Joerges & Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3 *European Law Journal*, pp. 273-299, at 293 *et seq.*; Joerges & Neyer, note 4 *supra*; Christian Joerges, "'Good governance' through comitology?", in: Joerges & Vos (eds), *EU Committees*, (Oxford: Hart Publishing, 1999), pp. 311-338; Christian Joerges & Jürgen Neyer, "Deliberative Supranationalism Revisited", EUI Law Department Working Paper 20/2006, available at: <http://cadmus.eui.eu/dspace/bitstream/1814/6251/1/LAW-2006-20.pdf>.



*reasons*; namely, the transcendence of the autarchic constitutional state; and

- (3) The realisation that the process of the reflexive opening of the national legal order must also be accompanied by the simultaneous establishment of mechanisms which render possible the institutional consolidation of mutual normative learning, and the elaboration of *common normative standards*.

## 1.2. The institutional hardware of European conflicts

European conflicts law is the *hermeneutic* theory, which according to Joerges, provides the best account of the process of European integration, while containing a normative core which allows it to *criticise* specific developments within it, such as the Viking/Laval jurisprudential line. But it is not only a general theory, but is also one sensitive to institutional structures and decision-making processes.

### 1.2.1. Inner europeanisation as the alternative to a European super-state

Deliberative supranationalism strives to render more specific and concrete (to operationalise, in brief) not only the key concept of legal pluralism, the *unity in diversity* formula which seems fundamental to the European Union since its very foundation, but also the key element in the constitutional dynamic of the Union, *the ever closer Union*. In Joerges' words:

“[European conflicts] seeks to conceptualise Europeanisation as a process, methodologically speaking, and a discovery procedure of practice in which law generates and supervises public power.”<sup>17</sup>

Thus, European conflicts law is a specific conception of how constitutional autarchy is to be overcome through the creation of a common constitutional field.<sup>18</sup> The point is not a fast-forwarded union, but the creation of the conditions under which reflexive adaptation can take place. The key objective is to unleash the inner transformation and Europeanisation of the Member States. European integration would be a process of *gentle* irritation, through which states would step-by-step transform themselves into open and co-operative states *motu proprio*.

Once integration is unleashed by the ratification of the founding Treaties of the Communities, national legal orders stop considering each other as far and distant islands, and start accepting their condition of being like the co-owners of the same constitutional plot in old Europe, and engage in a process of mutual understanding and comprehension. This is both a matter of re-calibrating norms so that they can organise inter-dependence and of creating common decision-making processes through which transnational standards can be agreed in common for genuinely transnational issues. While Joerges has insisted on these two dimensions in all his

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<sup>17</sup>Christian Joerges *et al.*, “Rethinking European Law’s Supremacy”, Working Paper 2005/12 of the Law Department, European University Institute, Florence, available at: <http://cadmus.eui.eu/dspace/bitstream/1814/3332/1/law05-12.pdf>, p. 25.

<sup>18</sup>An apt metaphor which I have borrowed from John Erik Fossum.

accounts of *deliberative supranationalism*,<sup>19</sup> we will see in Section 2 that the relation between the two is far from being an easy one.

Joerges' focus on the "processes" of the inner transformation of national constitutional states goes hand in hand with the de-emphasising of the *supranational* level as an autonomous level of government.

European conflicts law is fully focused on *transnational* phenomena. This implies that, while very much interested in institutional structures, it is concerned with their dynamicity and transformative capacity much more than with their institutional hardware. This accounts for the intense interest in *comitology*, where the supranational institutional structure acts as a meeting point or dialogic framework, although it lacks an autonomous (perhaps even a permanent) institutional structure.<sup>20</sup> Similarly, European conflicts law pays considerable attention to the European Court of Justice, although for a long time not so much attention has been paid to its institutional design or to the substantive implications of its jurisprudence as in the structural effects on the process of the Europeanisation of the Member States, in the ways in which the review of European constitutionality through preliminary judgments forced mutual recognition of normative standards and by doing so, forced the reflexive opening of national regulatory norms.<sup>21</sup>

This is not a fortuitous focus but the logical consequence of Joerges' deeply held view that the point of the European social practice of integration through law is to *discipline* nation states and ensure the proper configuration of national institutional structures and national legal orders so in order to achieve democracy both within *and* beyond borders, or, in prudential terms, to ensure integration within *and* across borders.

This much was already stated in the previous pages. What is worth noting now is that there is a huge affinity between both the normative insights and the empirical claims of Alan Milward and Christian Joerges (and Joseph Weiler, as already hinted in the first section).<sup>22</sup> In their views, European (legal) integration was never about creating a self-standing European constitutional order (the legal equivalent of "that thing called 'Brussels'"), but about *rescuing* national legal orders from their own suicidal proclivities. Or, if you will allow an agnostic to employ a Catholic comparison, Union law in European conflicts law plays a role somehow akin to that of the Pope in the Catholic Church, enjoying great authority and limited authority (*auctoritas*) only because each national church actually acknowledges it (as the Pope discovered to his dismay during the Protestant revolution).<sup>23</sup>

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<sup>19</sup>See Joerges, note 15 *supra*, p. 17.

<sup>20</sup>See references in note 18 *supra*.

<sup>21</sup>Christian Joerges, "On the legitimacy of Europeanising Private Law: Considerations on a Justice-Making Law for the EU Multi-level system", (2003) 7 *Electronic Journal of Comparative Law*, available at: <http://www.ejcl.org/ejcl/73/art73-3.html>.

<sup>22</sup>Alan Milward, *The European Rescue of the Nation-State*, (London: Routledge, 1992).

<sup>23</sup>Francisco Rubio Llorente, "Divide et obtempera: Una reflexión desde España sobre el modelo de convergencia de jurisdicciones en la protección de derechos", (2003) 67 *Revista Española de Derecho Constitucional*, pp.49-68.

### 1.2.2. Transnational decision-making processes

The two key decision-making processes in European conflicts are *transnational*: mutual recognition and comitology.

#### *i) Integration through mutual recognition*

Integration through mutual recognition implies the substitution of a centralised politically-led process of political harmonisation by a de-centralised politically-mediated process of reflexive adaptation.<sup>24</sup> The process of integration proceeds in two steps. There is a first and “negative” step in which the European constitutionality of a national norm is put into question. In the famous (and much praised by Joerges) ruling in *Cassis de Dijon*, the norm at issue was the German rule that established the minimum alcoholic content that a beverage had to have in order to be classified as “liquor” (25 per cent). Thus, Cassis de Dijon, a blackcurrant-based liqueur, which had an alcohol content of 15-20 per cent could not be labelled and retailed as “liquor” in Germany. The German rule was declared discriminatory because it had been formulated without taking legitimate interests across the border properly into account, in particular, those of the French producers who had for decades, if not centuries, been producing an excellent liqueur with a lower alcoholic content. This implied a legal proceduralisation of regulatory competition, enacted by the affirmation of economic freedoms as political rights.<sup>25</sup> This “negative” step does not, in itself, rule out a second “positive” step, in which the law-makers in each Member State re-configure the norm that has been declared unconstitutional in a European sense, with a view to re-establishing the old regulatory purpose in a manner which is *balanced* towards the interests that would be affected by that norm *across* borders. The negative step does not displace national law, but frames it, and puts it under “justificatory pressure”.<sup>26</sup>

Integration through mutual integration implied a *bouleversement* of normative integration.<sup>27</sup> The key role was no longer to be monopolised by national governments

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<sup>24</sup>See Joerges, note 25 *supra*.

<sup>25</sup>*Ibid.*, p. 7, although Joerges, in the case in question, is considering *Centros*. This “fundamental” turn of economic freedoms is, in Joerges’ view, normatively impeccable, a mere application of the famous co-originality of public and private autonomy in Joerges’ discursive theory of law (*ibid.*, p. 11).

<sup>26</sup>*Ibid.*, p. 9. An interpretation of *Viking* and *Laval* very much in Joerges’ spirit (although, as we will see, in contrast to the point of view that Joerges took in these two cases) in Loïc Azoulay, “The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization”, (2008) 45 *Common Market Law Review*, pp. 1335-1356, especially at 1355-6: “This would imply also that the Court accepts negotiation on a case-by-case basis, in the same way as it imposes a case by case form of reasoning on Member States which have to deal with transnational situations in social or educational matters. Such solutions would be – of necessity – complex. But, in the absence of social harmonization, this is the only way to maintain an equilibrium between the divergent requirements of the national social models and the uniform requirements of the internal market”. This may be a sensible way of proceeding, were it not for the fact that the structural capacity of the ECJ to deliver upon such a basis is highly questionable (can a Court ever do the kind of complex balancing exercise that Azoulay proposes?), and, above all, because it will imply renouncing a key and fundamental element of democratic self-government (or, to put it bluntly, distributive justice is a requirement of democratic legitimacy in procedural and substantive terms). If the price to be paid for upholding integration is a renunciation of the democratic *Sozialer Rechtsstaat*, something must be rotten in the “state of Brussels (and Luxembourg)”.

<sup>27</sup>As Joerges himself has noted, the practical consequences of *Cassis de Dijon* were very much influenced

in Council producing *positive* integrative norms (at a rather low speed), but by a Court of Justice of the European Communities eager to receive national preliminary questions, and by means of deciding upon them, foster the realisation of the single market (indeed, the new path through which the Union was to reach the ultimate goals of political and economic Union).<sup>28</sup> This shift is not to be regretted, but to be rationally celebrated,<sup>29</sup> in Joerges' view, because it combines the realisation of the core normative promise of integration with a new mode of politically-mediating *positive integration*. The latter role can *still* be played by national parliaments, re-engineering national policies in a way which is sufficiently cognisant and respectful of legitimate cross-border interests. It is because he sees the combination of judicial integration and national parliamentary re-regulation as feasible that Joerges has praised not only *Cassis de Dijon*, but also (and critically) *Centros*.<sup>30</sup> And it is perhaps because he does not give much of a chance to national re-regulation that he was less sympathetic towards *Überseering* than to *Centros*,<sup>31</sup> and why he has virulently opposed the jurisprudential *troika* of *Viking*, *Laval* and *Ruffert*.<sup>32</sup>

*ii) Integration through comitology*

In similar fashion, Joerges considers that the appropriate structure to legislate in a *conflicts' mode* is comitology, not the classical Community method or even co-decision. Here, what is at play is not only the sound instinct of the legal realist (the key normative piece is the one elaborated at the regulatory implementation stage, not lofty constitutional principles) but mainly the normative commitment to the public philosophy of European conflicts.

This is because what Joerges is vindicating is that the deep structure of comitology has normative promise, and we would do well to consider whether it does not provide a template upon the basis of which law-making could be re-shaped within the Community. Comitology creates the conditions under which law-making is structurally oriented towards deliberation, at the same time that the representative

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by the way in which the judgment was constructed by the Commission, following a Declaration put together by Commissioner Davignon and his advisor Mattera. See "Declaration of the Commission concerning the consequences of the judgment given by the European Court of Justice on 20 February 1979 ('Cassis de Dijon')", OJ C 256, of 30 October 1980, pp. 2 & 3. This is the first official re-statement of the *ratio decidendi* as comprising the principle of mutual recognition. See, also, Ronald Bieber, Renaud Dehousse, John Pinder & Joseph Weiler (eds), *One European Market? A Critical Analysis of the Commission's Internal Market Strategy*, (Baden-Baden: Nomos, 1988).

<sup>28</sup>On the implications of the shift from the common to the single market discourse, see Agustín José Menéndez, "When the market is political. The socio-economic constitution of the European Union between market-making and polity-making", in: Raúl Letelier & Agustín José Menéndez (eds), *The Sinews of Peace*, (Oslo: ARENA, RECON Report 10), available at: <http://www.reconproject.eu/main.php/RECONreport0910.pdf?fileitem=29736964>, pp. 39-62.

<sup>29</sup>For the many shortcomings, see Joerges, note 9 *supra*.

<sup>30</sup>Joerges, note 22 *supra*, p. 7: "constitutionalisation of the Europeanisation process through a law of justification beyond orthodox supranationalism and orthodox private international law."

<sup>31</sup>*Ibid.*, p. 13. Quite cunningly (even if hopelessly in the long run), Joerges claimed that what was relevant in *Überseering* was not its "general doctrinal framework" but the practical consequences of its *ratio decidendi*.

<sup>32</sup>See Joerges, note 9 *supra*, p. 358 *et seq.*, claiming that the actual problem is how the ECJ conceives of primacy, and its lack of understanding that primacy simply cannot be applied to *diagonal* conflicts. See Joerges & Rödl, note 16 *supra*.

character of the members of committees, tamed by the steering role of the Commission, reproduces the basic normative equation which should be demanded of Community norms.<sup>33</sup> This is why comitology is the template of “conflicts” law-making:

“[A]s long as the comitology process can be understood as the search for answers that the concerned polities can accept, it represents a conflict of laws regime - and the defenders of democratic governance need not be alarmed”<sup>34</sup>

### 1.3. Constitutional riddles

European conflicts law is a theory with the vocation of being applied to, and of solving, specific constitutional problems. Specifically, it seems to provide plausible solutions to the key normative, legal-dogmatic and sociological constitutional puzzles of European integration.

Firstly, it provides an original account of the legitimacy of European Community law. In Joerges’ view, the core normative value of Union law derives from its being the set of norms which organises the co-existence of national legal orders. Such organised co-existence remedies the democratic deficit inherent to a system of sovereign nation states (even of democratic sovereign nation states) by *preventing* the development of suicidal proclivities, namely, the same proclivities which resulted in totalitarianism in the post-war period. However, because the new legal order is merely a conflictual legal order, it does not need itself to be democratic.

Secondly, the confusion around the foundations, breadth and scope of the principle of the primacy of Community law over national constitutional law is much clarified by European conflicts by giving operational meaning to primacy. Instead of an automatic or unconditional primacy, Community law is to enjoy a conditional primacy. It should prevail in so far as, but only in so far as, primacy is necessary to organise the co-existence of national legal orders effectively. In typical Currie-an manner, primacy can be graduated by reference to the weight of the “regulatory interest” of each piece of legislation in each particular case (this seems to me a succinct account of both Joerges’ and Rödl’s understanding of a constitutional discipline of the relationship between the market and the labour constitutions after the *Viking troika*).<sup>35</sup>

Finally, conflicts theory holds promise as a means of stabilising the European political order. Indeed, a *transnational* reading of the European Union promises to *tame* the structural democratic deficit of the system of nation states while not impinging upon the core *democratic legitimacy* of the democratic nation state. Europeanisation through mutual recognition leaves the ultimate choice of the means by which to re-configure national norms in an inclusive manner open to each Member State. Finally, a law-making process which shared its representative and deliberative properties with comitology would recreate the conduits through which national democratic

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<sup>33</sup>See references in note 18 *supra*.

<sup>34</sup>Joerges, note 15 *supra*, p. 19.

<sup>35</sup>Joerges & Rödl, note 16 *supra*.

legitimacy could be transferred to the European level. It would *mend* the process of the derivation of legitimacy from the national to the supranational level.<sup>36</sup>

## 2. Critique

In this section I put forward four lines of criticism to Joerges' theory of conflicts. I claim (1) that the theory fails to make complete sense of European constitutional practice; (2) that the legitimacy grounds of European integration highlighted by European conflicts reveal themselves deluding when applied to actual European constitutional practice; indeed, European conflicts may end up unintentionally giving legitimacy cover to the governance turn in European integration; (3) that it provides an appealing reconstruction of the foundations of the structural principle of primacy of Community law over national law, but fails to draw all the relevant normative consequences; (4) that it does not offer a sound account of the actual sources of legitimacy and stability of Community law.

### 2.1. Is theory of conflicts sufficiently comprehensive of European constitutional practice?

The *emphasis* in Joerges' theory of conflicts law is the inner transformation of European constitutional states and legal orders as a result of accession to membership of the European Union. This highlights the transnational dimension of the process of integration, and rightly relativises the novelty of the institutional structure and the legal order of the Communities. One can read Joerges as reminding us that it is not only the case (and even not mainly the case) that the Member States are the masters of the Treaties, as it is these (Europeanised) national laws which *are* the core of Community law. Or to put it differently and more bluntly, that the real action is not in supranational pyrotechnics, but in the Europeanisation of national laws *from within*, as a result of the internalisation of a new reflexive constitutional identity.

But no matter how much the theory of conflicts is worthwhile, to the extent that it emphasises a dimension which is neglected in standard constitutional theories of integration, it can still be concluded that it offer a (still) partial account of the process of integration and of the European legal order. Because the theory of conflicts presents itself as a *complete theory* of European constitutional law, it downplays the genuinely federal dimension of integration. A dimension which, I would further claim, should be further developed if Joerges' vindication of the *Sozialer Rechtsstaat* is not to dissolve itself into powerless nostalgia. Let us consider this objection in some detail.

I have claimed elsewhere (and more recently with John Erik Fossum) that the signature of the founding Treaties of the Communities resulted in the constitution of both a supranational polity and of a supranational legal order.<sup>37</sup> This act was,

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<sup>36</sup>Christian Joerges, "Integration through conflicts law: On the defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation", in Rainer Nickel (ed), *Conflicts of Laws and Laws of Conflict in Europe and Beyond*, (Oslo: ARENA, Recon Project number 7), pp. 531-61.

<sup>37</sup>John Erik Fossum & Agustín José Menéndez, "The Constitution's Gift", (2005) 11 *European Law Journal*, pp. 380-410; Agustín José Menéndez, "The European Democratic Challenge", (2009) 15 *European Law*

however, very different from the typical constitutive acts of nation states. The European constitutional moment gave birth *merely* to the regulatory ideal of a common constitutional law, apart from dozens of specific common norms enshrined in the Treaties,<sup>38</sup> and to a blueprint of an institutional structure, which was still to be fleshed out and actually created. Contrary to a constitutional moment in a nation state, the normative and institutional hardware was simply not there in the European case: the normative and institutional space at the supranational level was rather empty. As a consequence, the first years of the process of European integration were marked by the transfer of national norms and national institutional structures and cultures to the European level *and* by processes of the Europeanisation of national norms and national institutional structures. This seemed to be confirmed by the original programme of integration, which was, on the one hand, geared towards the realisation of a quasi-federal Union, albeit on a very narrow sectorial basis (coal, steel, civil use of atomic energy) and by reference to Treaty norms which left administrative discretion to supranational institutions (thus the characterisation of the High Authority of the Coal and Steel Community and the Commission of the Euratom as supranational administrations). On the other hand, the programme of integration aimed at the completion of a customs union through the negative framing of national laws.

So the autonomous powers of the Union seemed simply to be administrative; and the legislative powers under the EEC Treaty fitted extremely well into/with Joerges' *transnational* constitutional theory, as they were intended to provide the negative framework within which national laws would transform themselves by becoming attentive to the requirements of integration in a common constitutional field, so to speak. That this *phase* of European integration should fit Joerges' theory very well can, perhaps, be proved by showing that the famous ruling in *Costa*<sup>39</sup> is, indeed, the most genuine example of a normatively-grounded process of mutual recognition, more so, in my view, than *Cassis de Dijon* or *Centros*. As is well-known, *Costa* was reconstructed by both the Italian Constitutional Court and the European Court of Justice as involving a conflict between a Treaty provision and a national (Italian) statute approved *after the entry into effect* of the Treaty of Rome. On the one hand, the Italian Constitutional Court was not keen to engage in the reflexive adaptation of its standard case law on relationships between national and international law, and

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*Journal*, pp. 277-308; John Erik Fossum & Agustín José Menéndez, *The Constitution's Gift. Elements of a constitutional theory for a democratic Europe*, forthcoming, Lanham: Rowman and Littlefield, 2011.

<sup>38</sup>Indeed, not many more if we are to count those which have been acknowledged as direct effect by the European Court of Justice. Henry Schermers & Denis F. Waelbroeck, *Judicial Protection in the European Union*, (The Hague: Kluwer, 2001), pp. 183-85, give a detailed account of the specific provisions of the Treaties to which the Court has acknowledged direct effect. Interestingly, only the core provisions on the four economic freedoms and on competition, plus the principles of non-discrimination upon the basis of nationality and upon gender, have been granted such direct effect. Once we realise that preliminary rulings are, indeed, the procedural means through which the Court of Justice reviews the European constitutionality of national norms, it becomes clear that the jurisprudence on which norms have direct effect determines the breadth and scope of the canon of constitutionality of Community law. While Rasmussen (wrongly) criticised the Court for "inventing" direct effect by going "beyond the textual stipulations" (something which was "revolting"), he missed the real issue, which is the grounding of the choice of some provisions and not others as having direct effect. Once the rule/principle distinction was abandoned in *Lütticke*, the Court should have provided a clear standard, which never did. See Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*, (Dordrecht: Martinus Nijhoff, 1986), p.11.

<sup>39</sup>Case 6/64, [1964] ECR 585.

concluded that regardless of the international liability that might result, according to national constitutional law, it was clear that the Italian statute should prevail over the conflicting Treaty provision. This was the obvious result of applying the *lex posterior derogat lex anterior* according to basic democratic principles.<sup>40</sup> On the other hand, the European Court of Justice<sup>41</sup> laid down, in its rulings, the foundations of the *supranational* principle of the primacy of Community law.<sup>42</sup> But it is worth noticing that what this principle solved in *Costa* was not so much a conflict opposing Community law and Italian constitutional law, but a conflict between the latter and the constitutional law of the other five Member States (whose Foreign Offices were probably fuming at the hubristic righteousness of the *Consulta* which risked imperilling the nascent integration process). So there was a clear *transnational* dimension to primacy in *Costa*, amenable to re-construction according to Joerges' lines: the setting of a supranational rule was a means of solving what was actually a *horizontal* conflict among national constitutional laws. Moreover, the ruling in *Costa* did not impinge on the policy discretion of the Italian state, but merely narrowed the range of the means to render such national policy goals effective, so as/in order to create the structural conditions under which integration through European constitutional law was possible. There was thus a negative stage in the ruling, but that negative stage left the door wide open to national re-configurations which would reconcile the democratically-decided policy goals and European integration (the "productive answers" which, in Joerges' terminology, are to be taken at national level).<sup>43</sup>

What the theory of conflicts does not account for is the progressive (and complex) affirmation of a *genuinely federal* dimension of European integration. What Joerges downplays and even brackets in his historical re-construction of European integration is the constitutive nature of positive and re-distributive policies in European integration *since* the very foundation of the Communities, as well as their development in earnest since the early 1960s with the launch of the Common Agricultural Policy (CAP), which, at the time it was approved, was a mass-welfare policy, given the levels of employment in the primary sector of the economy. Consider the following four considerations/reflections.

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<sup>40</sup>Judgment 14/64, *Costa*, of 24 February YEAR, available at: <http://www.cortecostituzionale.it/giurisprudenza/pronunce/schedaDec.asp?Comando=RIC&bVar=true&TrmD=costa&TrmDF=&TrmDD=&TrmM=&iPagEl=1&iPag=1>.

<sup>41</sup>*En passant*, it must be said that the case was concocted by Mr Costa, a flamboyant attorney from Milan, Italy, by refusing to pay a 10,000 lire (roughly 5 euro) electricity bill. As a shareholder of ENEL, he was interested in contesting the constitutionality of the nationalisation of most electricity generating companies in Italy. It is revealing of the spirit of the age that the nationalisation was decided by the ruling Christian-Democrats, not exactly the most avid readers of *Pravda*.

<sup>42</sup>Even if the *ratio decidendi* of the case was much narrower than what it has come to be assumed when re-constructing *ex post* the case law of the Court.

<sup>43</sup>Indeed, the original rendering of primacy, as in *Costa*, aimed at solving horizontal conflicts between national laws. In that sense, it is possible to claim with Joerges that primacy is just the shorthand of conflicts of law. See Joerges, note 15 *supra*, p. 18: "The authority of such answers need not be deduced from some principled supremacy of European law. European law should rather be understood as 'conflicts law'."



Firstly, the two “sectorial” Communities were geared towards the development of federal and re-distributive policies with their (limited) breadth and scope. It is sufficient to consider that coal and steel were industries with a heavy state presence (not only in terms of regulation, but also of ownership), that the Euratom Treaty was premised on the public property of fissile materials, and that the High Authority openly developed “social” policies to reconcile increased productivity with social integrity.

Secondly, since the Common Agricultural Policy was designed in 1962, and launched in earnest in 1967, the law and institutions of the European Communities entered a genuinely *federal stage*, which was confirmed in the long run by the first inklings of a common monetary, economic and tax policy (originally defended by the Commission as outgrowths of the Common Agricultural Policy in strict spill-overist rhetoric, first by Marjolin and then by Hallstein) and later on by the silent growth in competence through the “supplementary” competence clause enshrined in Article 235 TEC (later renumbered as 308 TEC).<sup>44</sup> In distributive terms, it is also important to bear in mind that, at the time it was launched, the Common Agricultural Policy was a massive income policy for (what is still) a sizeable part of the working force in some Member States. While results were mixed, it is hard to deny the nature of the policy.

Thirdly, the development of common policies resulted in the consolidation of the supranational identity of common institutions. The implementation of the Common Agricultural Policy led not only to the creation of *transnational* comitology structures, but also (and I would say first and foremost) to the transformation of the internal structure of the Council of Ministers, which added a *supranational* dimension to it by consolidating the Coreper and making the permanent representatives (who, at the end of the day, are just a breed of Eurocrats, even if they are part of the Council) the decisional centre of gravity for most issues (quantitatively, at least, and massive quantity always implies some quality).<sup>45</sup> This dynamic was accelerated by the direct election of the Members of the European Parliament, announced in the original Treaties, and implemented once the Union was granted autonomous tax powers

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<sup>44</sup>See G. Olmi, “The Agricultural Policy of the Community”, (1963-4) 1 *Common Market Law Review*, pp. 118-147; *idem*, “Common Organization of Agricultural Markets at the Stage of the Single Market”, (1967-8) 5 *Common Market Law Review*, pp. 359-408; J.H. Weber, “The Financing of the Common Agricultural Policy”, (1966-7) 4 *Common Market Law Review*, pp. 263-288; P. Baumann, “Common Organizations of the Market and National Law”, (1977) 14 *Common Market Law Review*, pp. 303-327. Th.W. Vogelaar, “The Approximation of the laws of the Member States under the Treaty of Rome”, (1975) 12 *Common Market Law Review*, pp. 211-230. The *Grosse koalition* of 1967 led to the Growth and Stability Law of 1967, which shifted political policy from Erhard’s *ordo-liberalism* to Schiller’s Keynesianism. Paradoxically, Schiller left the government in 1972 protesting against Brandt’s economic policy, to be succeeded by Helmut Schmidt, and to join forces with Erhard in supporting “market” economy against a “radical” departure. A peculiar contemporary perception, indeed. On the economic policy of Germany, see Jeremy Leaman, *The Political Economy of West Germany, 1945-85*, (Houndsmills: MacMillan, 1988) (on The Growth and Stability Law of 1967, see page 197 *et seq*; See Francis Snyder, “The use of legal acts in EC agricultural policy”, in: Gerd Winter (ed), *Sources and categories of European Union Law*, (Baden-Baden: Nomos, 1996), pp. 347-84. See Per Lachmann, “Some Danish Reflections on the use of Article 235 of the Rome Treaty”, (1981) 18 *Common Market Law Review*, pp. 447-61; Robert Schutze, “Dynamic Integration- Article 308 EC and Legislation ‘in the Course of the Operation of the Common Market’”, (2003) 23 *Oxford Journal of Legal Studies*, pp. 333-344.

<sup>45</sup>Emile Noel, “The Committee of Permanent Representatives”, (1967) 5 *Journal of Common Market Studies*, pp. 219-251. Fiona Hayes-Renshaw & Helen Wallace, *The Council of Ministers*, (London: MacMillan, 1997), pp. 70-100.

through the Treaty reforms in 1970 and 1975.<sup>46</sup> And this has been fully confirmed by the creation of a fully federal institutional structure, such as the System of European Central Banks, “crowned” by the European Central Bank (ECB), following the design and implementation of a particular form of monetary Union.<sup>47</sup>

Fourthly, the consolidation of the supranational identity of the European institutions has resulted in a supranational reading/interpretation of the principles of Community law. This dynamic was clearly at work in the case law of the Court, and would later become part of the constitutional identity of European law. Joerges has acknowledged that much in his critique of *Überseering* (although still in muted terms) and especially the *troika* of *Viking*, *Laval* and *Ruffert*. But it seems to me that, contrary to what Joerges has claimed, the real leading case in this regard is *Cassis de Dijon*. The practical implications of the said case were to re-calibrate the economic freedoms and turn them into an emancipated *positive* standard of constitutionality, a move which was consecrated when the line of jurisprudence in *Cassis* was extended to the other three economic freedoms.<sup>48</sup> While European conflicts rightly stresses that this transformation has transformed economic freedoms into fundamental political rights, it misses four massive structural implications of this re-calibration.

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<sup>46</sup>The Act on EU Parliament Elections of 1976, which implemented the provisions contained in Article 138.3 TEC, concerning the election of members of the European Parliament by direct suffrage. See the Act concerning the election of the representatives of the Parliament by direct universal suffrage, annexed to the Council Decision of 20 September 1976, OJ L 278, of 8.10.1976, pp. 5-11.

<sup>47</sup>David Marsh, *The Euro*, (New Haven CT-London: Yale University Press, 2009); Tommaso Padoa Schioppa, *The Euro and Its Central Bank, Getting United after the Union*, (Cambridge MA: The MIT Press, 2004); Kenneth Dyson (ed), *Euro at Ten, Europeanisation, Power and Convergence*, (Oxford: Oxford University Press, 2009). Otmar Issing, *The Birth of the Euro*, (Cambridge: Cambridge University Press, 2008); David Howarth & Peter Loedel, *The New European Leviathan?*, (Houndmills: Palgrave, 2003). The Monetary Union was so peculiar that the legal services of the Central Bank became intoxicated by the independence of the Bank and concluded that it was a fully separate institutional structure, or even an autonomous international organisation, to the point that the legal services of the Bank were to hold proceedings before the European Court of Justice stating that the European Central Bank was to be regarded as a fully independent international organisation. See Chiara Zilioli & Martin Selmayr, “The European Central Bank: An independent specialized organization of Community law”, (2000) 37 *Common Market Law Review*, pp. 591-643; and *idem*, *The Law of the European Central Bank*, (Oxford: Oxford University Press, 2001). This view is rebuffed by the European Court of Justice in C-11/00, *Olaf*, [2003] ECR I-7147. But see by the above-mentioned authors, “The Constitutional Status of the European Central Bank”, (2007) 44 *Common Market Law Review*, pp. 355-399, and “Recent developments in the Law of the European Central Bank”, in: Piet Eeckhout & Takis Tridimas (eds), 25 *Yearbook of European Law*, (Oxford: Oxford University Press, 2007), pp. 1-89.

<sup>48</sup>Key leading cases were Case C-76/90, *Säger*, [1991] ECR I-4221; Case C-55/94, *Gebhard*, [1995] ECR I-4165; Case C-415/93, *Bosman*, [1995] ECR I-4921; and after the entry into force of Directive 88/361 on free movement of capital, Case C-163/94, *Sanz de Lera*, [1995] ECR I-4821. On the literature, see Álvaro de Castro Oliveira, “Workers and Other Persons: Step by Step from Movement to Citizenship”, (2002) 39 *Common Market Law Review*, pp. 77-127; Vassilis Hatzopoulos & Thien Uyen Do, “The Case Law of the ECJ concerning the free provision of services: 2000-2005”, (2006) 43 *Common Market Law Review*, pp. 923-91; Eddy Wymeersch, “The Transfer of the Company’s Seat in EEC Law”, (2002) 40 *Common Market Law Review*, pp. 661-95; S. Mohamed, *European Community Law on the Free Movement of Capital*, (The Hague: Kluwer Law International, 1999); A. Landsmeer, “Movement of Capital and other Freedoms”, (2001) 28 *Legal Issues of Economic Integration*, pp. 57-69; Leo Flynn, “Coming of Age: The Free Movement of Capital Case Law”, (2002) 39 *Common Market Law Review*, pp. 773-805; Mads Andenas, Tilmann Gütt & Matthias Pannier, “Free Movement of Capital and National Company Law”, (2005) 16 *European Business Law Review*, pp. 757-86. An overall interpretation congenial to the one hinted at here can be found in Alexander Somek, *Individualism*, (Oxford: Oxford University Press, 2008).

Firstly, the re-calibration resulted in a re-definition of the concept of violation of Community law and of the substantive basis of the yardstick of European constitutionality. Breaches of economic freedoms were no longer limited to discriminatory normative patterns (which implied the anchoring of the European yardstick of constitutionality to the national one, because non-discrimination is a formal, not a substantive, principle) but were now to be extended to cover any “obstacle” to the realisation of the economic freedoms (something which implied a transcendental yardstick of European constitutionality, emancipated from national constitutional law, and mysteriously derived by the Court from the rather dry and concise literal tenor of the Treaties). As we will see in Section 2.1.4 of this critique, this *dis-anchoring* is at the core of the “legitimacy” crisis of the European Union, and calls for either a rolling back of integration to render the old constitution of discrimination sustainable, or a federal leap through democratic constitution-making.

Secondly, the re-calibration of economic freedoms has resulted in a massive growth of the horizontal effect of European constitutional principles. Areas of national law which had not been much Europeanised through supranational law-making (such as personal tax law) or which seemed clearly outside the scope of the Treaties (such as non-contributory pensions) were *absorbed* into European constitutional law, with national policy decisions being progressively subject to a review of their European constitutionality. This is why Joerges’ insistence on speaking about *diagonal conflicts*, on conflicts between European constitutional law and national law in areas where the competence is national simply misses the structural implications of *Cassis*, which indeed, do away with the idea of a constitutional space in which economic freedoms do not mediate the constitutional validity of any national legal norm. The idea of a *diagonal* conflict is either quaint and obsolete if one embraces *Cassis*, or else it constitutes an implicit vindication of the old understanding of economic freedoms as principles of non-discrimination.

Thirdly, the engine of integration shifted from the law-making process (precisely at the time at which that was becoming potentially democratic with the direct election of the Members of the European Parliament) to the constitutional adjudication process into which preliminary requests were progressively transformed into the path of review of the European constitutionality of national statutes. If one endorses *Cassis de Dijon* and *Centros*, one is endorsing not a process of juridification (as these are matters which are within the realm of the law anyway) as a process of judicialisation.

Finally, as the shape of economic freedoms as constitutional standards became progressively specific, the negative move in mutual recognition was harder to combine with the positive move of re-regulation, because the combined effect of European constitutional decisions by the European Court of Justice was to foreclose the realm of national legislative autonomy. *Centros* is, indeed, a poignant case. The “optimistic” interpretation put forward by Joerges seems to me rather naïve. The best illustration of how far the judgment re-enforced the structural power of capitalists and weakened the taxing and regulatory grip of the state as *longa manus* of the public interest is provided by the 400 per cent increase of the number of “shell” companies constituted in England after *Centros*, most of which were German.<sup>49</sup> It should be

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<sup>49</sup>The figures are taken from M. Becht, C. Mayer & F. Wagner, “Where do Firms Incorporate? Deregulation and the Cost of Entry”, (2008) 14 *Journal of Corporate Finance*, pp. 241-56.

added that the more the Court has developed its jurisprudence, the more it has foreclosed the actual realm of re-regulatory discretion on the side of the Member States. This is, in my view, fully illustrated by the tragic and rather foolish case law of the Court on personal taxation,<sup>50</sup> where the much maligned harmonisation has, to a large extent, progressed thanks to the iron fist of market adaptation accelerated by the ECJ. The price of substituting politically-led harmonisation by market-led harmonisation is always paid in the hard currency of (a lesser modicum) of distributive justice, in flat contradiction with the basic principles of the *Sozialer Rechtsstaat*.

In this section, I have claimed that the affirmation of a supranational institutional structure and of a supranational normative order is beyond the explanatory and re-constructive breadth and scope of the theory of European conflicts. This means that the theory is not a complete theory of European constitutional law, and that it does not sufficiently factor in the *federal* pressures on the “inner” Europeanisation processes which it describes. Joerges is torn here between his *critical* side, in which he has presciently recognised the political and social dimensions of integration, and his *constructive* side, which remains steadfastly transnational.<sup>51</sup> Indeed, this understanding of the actual federal dimension pervades the very constitutional narrative (wrong in my view!) of European integration that Joerges puts forward.<sup>52</sup> This is the deeper reason why *Viking*, *Laval* and *Ruffert* came as a shock to the theory of European conflicts,<sup>53</sup> and why Joerges has emphasised the normative and

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<sup>50</sup>See Agustín José Menéndez, “The Unencumbered European Taxpayer as the product of the transformation of personal taxes by the judicial empowerment of ‘market forces’”, in: Letelier & Menéndez note 29 *supra*, pp. 157-268.

<sup>51</sup>See criticism of ordo-liberals for not realising the wide realm of Union powers (Europeanisation of Private Law, 3; What is left?, section II) and the defence of social policy, of the need of a social dimension to European integration Joerges, note 15 *supra*, p. 9, & note 40; and Joerges & Rödl, note 16 *supra*.

<sup>52</sup>See, especially, Joerges, note 9 *supra*; Christian Joerges & Florian Rödl, “The ‘Social Market Economy’ as Europe’s Social Model?”, in: Lars Magnusson & Bo Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, (Brussels: PIE-Peter Lang, 2004), pp. 125-158; and Christian Joerges, “What is Left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *European Law Review*, pp. 461-489.

<sup>53</sup>Joerges and his co-author Rödl have made a radical U-turn in their assessment of the jurisprudence of the European Court of Justice. In 1997, Joerges boldly claimed that “What political scientists perceive as an ‘insulation’ of social regulation from distributive concerns must be appreciated as the outcome of a successful mediation, within the legal system, between two potentially conflicting concerns”, see his “Scientific expertise in social regulation and the European Court of Justice: legal frameworks for denationalised governance structures”, in: Christian Joerges, Karl-Heinz Ladeur & Ellen Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-making*, (Baden-Baden: Nomos, 1997). In 2009, Joerges & Rodl’s (note 16 *supra*, p. 19) assessment of the ECJ had been deeply altered by the *Viking*, *Laval* and *Ruffert* judgments: “It is sufficiently clear, however, that this jurisprudence is a step towards the ‘hard law’ of negative integration. What about the possibilities for a correction of this step through ‘social market economy’, ‘social rights’ and the soft methods of coordination? We have expressed our scepticism clearly enough. This is why we have to ask whether it is really in the long-term interest of the new Member States to dismantle the welfarism of their western and northern European neighbours. What would be the implications for their own long-term competitive advantage and their chances for similar developments?” On what concerns Rödl, still in 2006, he was very critical of the (prescient) Bercussonian line of simply exempting labour law from the constitutional pressure of review by reference to the economic freedoms and competition law. See his balanced eulogy of the case law of the ECJ in his piece “Constitutional integration of Labour Constitutions”, in: Erik Oddvar Eriksen, Christian Joerges & Florian Rödl (eds), *Law, Democracy and Solidarity in a Post-National Union*, (London: Routledge, 2008), pp.

prudential risks of these judgments, but without fully taking into account the extent to which the said judgments were mere developments of a constitutional dynamic that has been at work since the late 1970s. Indeed, from the perspective put forward here, *Viking*, *Laval* and *Ruffert* are but mere scribbles in the margin of *Cassis de Dijon*, not the *phenomenal* radical departure that Joerges has claimed. One could, indeed, say that *Viking* was on the cards since the Court decided *Cassis de Dijon*, and even more so, since it decided *Centros*.<sup>54</sup>

## 2.2. Does the theory of European conflicts provide a satisfactory account of the legitimacy foundations of community law?

But if an account of European constitutional practice should take both its *supranational* and its *federal* dimensions seriously, then one could question whether the theory of European conflicts provides a sufficiently complete account of the legitimacy basis of Community law. As argued in the first section of this paper, European conflicts law emphasises the *remedial* and *balsamic* properties of European law, the extent to which it disciplines national legal orders in a democracy-enhancing fashion. What I would like to focus on and criticise now is that this leads Joerges to conclude that the Union

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165-6. "To avoid any deregulatory pressure, labour law scholars have urged that labour regulation be taken out of the application of market freedoms and that collective bargaining should be taken out of the scope of competition law. But this would appear to be a step too far. Market freedoms do not just represent the interests of foreign corporations, and competition law does not just represent the interests of corporate competitors or an overall interest in efficiency. The conflict of market freedoms and competition law with national labour regulation must also be interpreted as a kind of mediation of the competition of labour constitutions. The capacity of foreign corporations to compete with products and services on domestic markets also represents a result of the functioning of a labour constitution, and it comes into conflict with the domestic labour constitution via the four freedoms and via competition law. Taking labour regulation out of the application of market freedoms or out of competition law would resolve a conflict of labour constitutions unfairly by granting full advantage to only one of them. This is why the line established by the European Court of Justice deserves approval in the light of our reasoning. It says, in the case of the market freedoms, that labour law might account for an impediment of a market freedom, but that it is valid if it stands the tests of *Keck* and of *Cassis de Dijon*.<sup>58</sup> These tests establish accommodations of the conflicting labour constitutions mediated by the legal conflict between individual market freedoms and national labour regulation. With regard to the *Cassis* test, the Court ruled that even the extension of mandatory national wage scales to foreign workers is upheld. Sure enough, the Court did not apply the conceptual idea of competing labour constitutions, not even for one side of the conflict, the national labour regulation of the host country. It did not put it in terms of the protection of the autonomy of a labour constitution, but instead chose to approach the case only in terms of social protection of workers. This led to the effect that, according to the Court, the level of protection of a foreign worker has to be compared with his level of protection at home. On the basis of reinterpreting the case in terms of conflicting labour constitutions, this seems questionable. The common good to be invoked would not be the social protection of workers but support for the domestic labour constitution against harmful competitive pressure; but even then a comparison of social standards misses the point. Moreover, for the institutions of a labour constitution which go beyond mere social protection – for example, the German model of codetermination – the Court's conceptual choice is inadequate. Thus, the reference point of justification must not be understood in terms of the protection of workers, but in terms of adequate support for the domestic labour constitution. In conclusion, the Court's jurisprudence on the Fundamental Freedoms aims to provide a restrained form of autonomy for national labour regulation; European law will, to a certain extent, which is defined by the *Keck* test and a refined *Cassis de Dijon* test, allow national labour constitutions to be supported by means of domestic regulation". After *Viking*, Rödl claims: "The Member States labour constitution shall thus remain both legally autonomous from the Constitution of the Common market and factually autonomous from its effects" in: "The Labour Constitution of the European Union", in: Letelier & Menéndez, note 29 *supra*, pp. 367-426, at 375.

<sup>54</sup>Menéndez, note 53 *supra*.

has no direct democratic legitimacy of its own, and that it is all the better for this reason.<sup>55</sup>

But if there is a genuinely *supranational* dimension to European constitutional law and to European institutional structures, the latter cannot be the case. The legitimacy equation of the Union cannot but be democratic, even if *mainly derivative*, and only *partially direct* (as, indeed, the German Constitutional Court rightly reminded us in its *Lisbon judgment*)<sup>56</sup> if the decisions of the Union affect European citizens in a direct and unmediated manner, as, indeed, they do. I have already argued that there is a genuinely federal dimension to European integration. If this premise is correct, then the thesis that I have just sustained follows. But allow me to me add a further illustration. Consider the interest rate cuts and increases decided by the European Central Bank, or the judgments of the ECJ on economic freedoms. They have massive and immediate effects on the lives of Europeans. They result in sizeable numbers of people losing their jobs or being employed again, enjoying a lower level of social rights protection or better health conditions, not unable to keep up the payments on their mortgage or gaining easier access to credit. But if this is so, the Union *cannot* but be democratically legitimated. It is because both the ECJ and the ECB take fundamental decisions in what, from a democratic constitutional perspective, seems a dubiously autistic process, that such decisions are bound to be extremely problematical.

Let me further add that law-making in European constitutional practice does not proceed solely through mutual recognition and comitology-inspired law-making processes. Here, there is also a major dissonance between what European conflicts law pre-supposes and what European constitutional practice leads to. For Joerges' account to suffice, one would need to *reverse* the level of integration in areas such as monetary policy and personal taxation. In operative terms, Joerges' legitimacy claims would be sufficient if monetary policy was subject to the Open Method of Coordination (OMC) and if the case law of the Court of Justice on personal taxation was issued as orientational guidelines which do not provide even an inkling of a judicially enforceable right to multinational companies (although this is not the case, because Joerges has rightly shown how cases such as *Centros* turned freedom of establishment into a fundamental political right, or, in my reading, a fundamental apolitical right). As long as we have very hard law on monetary and personal tax law produced in federal if dubiously democratic ways, European conflicts is missing a key component of European constitutional practice.

By denying the legitimacy implications of the genuinely federal dimension of European integration, Joerges may give the impression of hiding or covering the major legitimacy shortcomings of the present constitution of the European Union. This may find some confirmation in the extensive re-construction that Joerges undertook of comitology in the late 1990s. Sustaining that comitology was the model of democratic law-making for a supranational Union was, indeed, an ambivalent

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<sup>55</sup>See Andrew Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", (2002) 40 *Journal of Common Market Studies*, pp. 603-24.

<sup>56</sup>See judgment of the Federal Constitutional Court of 30 June 2009, available at: [http://www.bundesverfassungsgericht.de/en/decisions/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html). par. 262 and 267.

move. While comitology is a democratically superior procedure to produce regulatory instruments (especially when compared to the classical governmental alternative, in which a *fonctionnaire* writes in the silence of the night the *regulations* implementing statutes approved by Parliament), it is highly problematical if it is understood as an alternative law-making procedure. And there was some ambivalence in Joerges and Neyer's characterisation, which coloured their theory with "governance" shadows.<sup>57</sup>

At the risk of definitely overtaxing the patience of the reader, let me conclude this section by saying that the shortcomings of European conflicts law are painfully revealed by the present economic crisis. The degree to which the crisis has pushed the Union off balance has structural constitutional roots that the theory of European conflicts is not fully equipped to make sense of, because it rules out both the federal dimension of integration *and* its legitimacy implications. Besides the specific circumstances triggering this or that event, the underlying dynamic at work in the crisis is rather simple: the incoherent institutional and normative design of monetary Union. The imperfect monetary union brought about by the Treaty of Maastricht, fully de-coupled from fiscal and political union, was governed by a kind of transnational law and by the institutional arrangements, which the theory of European conflicts should find congenial. Instead of a centrally imposed fiscal policy, the Growth and Stability Pact established a series of benchmarks and left Member States the freedom to choose how to reach them. Common decisions were taken through a mixed breed in between comitology and the Open Method of Co-ordination, through Broad Policy Guidelines and intensely deliberative meetings within Ecofin, and the Members of Euroland, the Eurogroup. Notwithstanding all this, this transnational governance colouring of monetary Union has proven certified lunacy. Indeed, lacking federal taxing and spending powers, the Union seems to have entered a suicidal course to restore our particular breed of gold standard (the non-fiscal and apolitical euro) by means of a draconian return to pre-Keynesian economics. This transnational stage of monetary integration should be welcomed by European conflicts law, but has actually proven detrimental to the normative commitments of the theory.

### 2.3. Does the theory of conflicts get primacy right?

National constitutional courts have progressively internalised the primacy and direct effect of Community law, and are still struggling to set limits and counter-limits to such primacy. But in the absence of a clear foundation of both primacy and direct effect, any theory on limits to primacy is bound to be fuzzy.

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<sup>57</sup>See, for example, Joerges & Neyer, note 4 *supra*, p. 620: "Comitology is indicative of a reorientation of European regulation away from hierarchical policy formulation. The new emphasis is on the development of co-ordination capacities between the Commission and member state administrations with the aim of establishing a culture of inter-administrative partnership which relies on persuasion, argument and discursive processes rather than on command, control and strategic interaction. It cannot be the goal of a well-functioning relationship between the Commission and member states merely to control member states; instead, it is necessary to create conditions in which the organizations responsible for managing particular policies are able to meet emerging challenges." The governance colouring was heightened by an ambivalent reliance of Luhmannian and Teubnerian concepts and visions concerning the limits of law as a means of distributive justice and the outright distrust of steering through hierarchical law. An outright critique of governance as a post-democratic vision for the Union in my Agustín J. Menéndez, "Governance and Constitutionalism in the European Order", in: Patrick Birkinshaw & Mike Varney (eds), *The European Union Legal Order after Lisbon*, (Dordrecht: Kluwer Law International, 2010), pp. 65-90.

There is a very powerful intuition behind Joerges' plea for the conditional primacy of Union law. According to the theory of European conflicts law, Community law prevails over national law, but only in so far as primacy is necessary to organise the co-existence of national legal orders effectively. This gives clear operational content to primacy, and cuts through a confused constitutional practice. Thus, Joerges provides both a proper grounding (primacy is a tool of resolving conflicts) and a clear justification (there should be no primacy when there is no conflict to start with, something which extends to what Joerges labels as diagonal conflicts, in the terms already considered).

However, Joerges again plays down the *federal* dimension of European constitutional law. The constitutive act of the Union may give rise to a mere regulatory ideal (the ideal of a common constitutional law, of, in the jargon of the Court, the constitutional traditions common to the Member States) but this ideal only gets fleshed out and concretised as integration proceeds. Indeed, it is through the solving of *horizontal* conflicts between national constitutional law (the way in which I argued that we should re-construct *Costa*) that common *and federal* constitutional law takes shape. This is not a mere process of inner adaptation through reflexive transformation. Union law is more than a mere irritant: it is a supranationally imposed standard, even if such a standard is horizontally defined by reference to national constitutional laws. Indeed, the goals of political and legal integration mandated by national constitutions and realised through the Treaties could simply not have been realised to the extent that they have if primacy were a matter of reflexive adaptation. Quite to the contrary, the Court of Justice established in its best jurisprudence the common constitutional traditions in a *critical* comparative fashion. This implies leaving aside not only *statutory* national norms, but also *national constitutional norms*, if they should be found to be in breach of Community law, of the common constitutional traditions. Several cases<sup>58</sup> could be brought to the attention of the reader, but here it will suffice to consider *Commission v Luxembourg*.<sup>59</sup> The case concerned the conflict between the scope of the Community principle of non-discrimination upon the basis of nationality, specifically on what regarded employment as a civil servant, and Article 11 of the Luxembourgish constitution. While the latter norm reserved all kinds of public employment to nationals, European constitutional law had come to be interpreted as limiting the scope of this exception to equality among European nationals to positions involving the direct or indirect exercise of public powers. The Court affirmed that the principle of supremacy of Community law also applied to constitutional norms<sup>60</sup> and set aside the Luxembourgish norm. The *common* element in the common constitutional traditions was (rightly) understood as entailing more than *reflexive autonomous adaptation*. This is unavoidable if integration is tied to the progressive constitution of a supranational polity and legal order, if it is more than a mere process (which I have argued is the case, because we are far beyond the transnational stage on

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<sup>58</sup> Among others, see Case 106/77, *Simmenthal II*, [1978] ECR 629, §21; Case 222/84, *Johnston*, 1986 [ECR] 1651, §20; Case C-213/89, *Factortame I*, [1990] ECR I-2433, §§20-23; Case C-183/91, *Commission v Greece*, 1993 [ECR] I-3131, §17; Case C-129/00, *Commission v Italy*, Judgment of 9 December 2003, not yet reported, §32 and 41.

<sup>59</sup> Case C-473/93, 1996 [ECR] I-3207.

<sup>60</sup> See § 38 of the judgment.



what concerns the fleshing out of substantive policies). So Joerges goes a trifle too far when he argues that: “The ECJ is not a super-constitutional court equipped with the power - *en passant* - to reformulate the constitutional orders of the Member States within preliminary reference proceedings”.<sup>61</sup>

This claim contains a/the correct intuition (the ECJ should not act as a super-constitutional court in an unqualified manner); however, it flies in the face of constant constitutional practice, and, indeed, of the way in which key judgments in the theory of European conflicts (such as *Cassis de Dijon* and *Centros*) are better re-constructed in the light of the consequences that they have exerted upon European constitutional practice. Furthermore, under-estimating the federal dimension renders the theory of European conflicts law ill-prepared to deal with the *Viking* troika. The problem with this line of jurisprudence is not that they *forced* the adaptation of national standards in a vertical hierarchical fashion (something which is part and parcel of the fleshing out of Community law as I have just argued), but that this was done *in the absence of a genuine conflict among national constitutional standards*. Joerges seems to be of this view because he characterises this conflict as “diagonal”. But I have already shown why this characterisation fails to take the constitutional nature of Community law seriously (and endorses a “systemic” fragmentation of law, which Joerges can only endorse in a self-defeating fashion, given his forceful defence of the *Sozialer Rechtsstaat*).<sup>62</sup> When I say that there was no genuine constitutional conflict, I mean it in a different and deeper sense. Finnish law in *Viking* gave preference to the collective right of workers to engage in supranational boycotts of the right of the company to decide where to register itself (and as an ancillary, the freedom to decide where to invest capital). The Court of Justice reversed the ranking of principles. But, in doing so, this did not solve a conflict among divergent understandings of how the conflict had to be solved in national constitutional orders, but limited itself to imposing *a genuinely supranational* solution, fully emancipated from constitutional standards. Would there really be scores of national legal orders openly disagreeing with the solution embedded in Finnish law? Or, to the contrary, was Finnish law “supported” by the common constitutional law, while the ECJ was not? This is the critical normative problem. Joerges’ theory of European conflicts law rightly connects the legitimacy of a supranational solution to the normative need to have one common constitutional standard. But it fails to take both the federal character of this solution, and the corresponding *legitimacy limits* on which the European Court of Justice has to operate, seriously.

#### **2.4. Is the theory sufficiently attentive to the sources of stability of community law?**

Finally, Joerges’ theory of European conflicts law implies a fully “de-centralised” account of the remarkable stability and growth not only of Community law, but also of Community institutions. By emphasising the *internal* dimension of Europeanisation, the theory rightly reminds us of the extent to which integration

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<sup>61</sup>Joerges, note 38 *supra*, p. 560.

<sup>62</sup>On the tensions between the Luhmannian fractioning of the legal order into subsystems and social integration through democratic law, see my critical comments on Rödl’s labour constitution, very much inspired by Joerges, “Is the labour constitution normatively prior to the democratic constitution?”, in: Letelier & Menéndez, note 29 *supra*, pp. 519-529.

remains mediated by national laws and institutional structures, which provide a firm anchor to the Union and its legal order.

This intuition must, however, be somehow extended if one wishes also to account for the stability of the Union while taking its supranational dimension seriously into account. It was, indeed, because this dimension results from the transferring of national legal orders and also national institutional structures to the supranational level that European integration proceeded in a smooth and dynamic way during its first three decades (and, despite its legitimation crisis, Community law continues to comply with to a very great extent). And that very same intuition also accounts for the shape of the present legitimation crisis of the European Union. The more that reforms which are believed to increase the democratic legitimacy of the Union are undertaken, the less democratic the Union seems to be. How is it possible? This is to be explained by reference to the twin processes of supranational affirmation and the de-coupling of European and national constitutional law, in the terms I have described. It is further accounted for by the growing structural democratic deficit of the Union, by a pattern of full “European” constitutionalisation of national laws by reference to the economic freedoms without the recreation of political capacities at the supranational level. Indeed, what is problematical in *Viking* is not so much that the company enjoyed freedom of establishment and free movement of capital, as that labour law and tax law were so different in Finland and Estonia and companies could play on these differences. If Member States cannot buffer their socio-economic core norms in the absence of further harmonisation, then Community law structurally favours capital. Not because judges are neo-liberal, but because they have fostered a blind integrationist thrust which now allows them to claim to be the mouthpieces of the European constitution. However, I continue to insist that the consequences that we are suffering now are a distant echo of the dead mouse<sup>63</sup> of the Single European Act and the *Cassis de Dijon* jurisprudence.

### 3. Conclusion

In this paper, I have highlighted the outstanding contribution that Joerges’ theory of European conflicts has made to the understanding of European constitutional law, in particular, by providing key elements of a constitutional theory for a democratic European Union. In particular, Joerges has rightly emphasised the *inner* dimension of the reflexive adaptation of national legal orders to the process of European integration, and the *institutional* structures through which the development of Union law proceeds in a *transnational fashion*, namely, mutual normative recognition and regulatory implementation through comitology. This is especially remarkable because these areas used to be *terra* completely *incognita* to constitutional theories. Then, I offered a critique of the theory. It seems to me that it is not yet a complete constitutional theory of European integration because it does not engage sufficiently with the genuinely federal dimension of European legal and institutional integration. This accounts for the limits of the theory when it comes to account for the legitimacy

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<sup>63</sup>A reference to Spinelli’s famous dead mouse (lame duck in English) metaphor: Altiero Spinelli, Speeches in European Parliament, edited by Pierre Virgilio Dastoli, Bruxelles: Communists and Allies Group of the European Parliament, 1988, p. 239; Original version in Altiero Spinelli, Discorsi al Parlamento Europeo, edited by Pier Virgilio Dastoli, Bologna: Il Mulino, 1987, p. 369.

of the Union, of the primacy of Community laws over conflicting national laws, and of the stability of Community law (and very especially, the crisis of the said stability, which is a much more complex and much older phenomenon than Joerges claims). In addition, there is some risk that the mismatch between the assumptions of the theory and actual European constitutional practice may result in the theory playing an unwilling and unjustified legitimatory role concerning “governance” practices. However, it seems to me that the recent radically democratic turn in Joerges’ writings (especially reflected in his critique of *Viking*, *Laval* and *Ruffert*) renders why it has the potential to play a foundational role in the forging of a genuinely democratic constitutional theory of European integration crystal clear. For all these reasons, I take my leave of the reader in order to salute Christian Joerges as a founding father of the European Constitution!

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