Presentation of

the 4th Edition of *European Economic Law:* Introduction

by

Alberto Santa Maria

Thankyous and memories.

I wish to thank Takis and Andrea for having invited me at the launch, in London and in what a prestigious place, of the last edition, the fourth, of my book. Many thanks to Dr. Andriani for her participation to the Panel.

I am honored to have Sir. Francis Jacobs whom I always admired as Advocate General at the Court of Justice of European Union.

I am delighted to be here and I also confess to be a little bit moved. I cannot but remember when some time ago, after my graduation at the school of law of the State University of Milan, being then "voluntary" lecturer to the chair of International law of Prof. Piero Ziccardi, I spent in London quite a year of my life. It was 1964, the era of Beatles, and I was 23.

Admitted to attend the library of the Institute of Advanced Legal Studies of the University of London, in Russell Square, I was allowed to occupy a small room, with a very small desk but reserved only to my own use, where I regularly studied, researched and drafted my first article related to the diplomatic protection of companies and shareholders.

This article appeared on Rivista delle Società one year later.

A few introductory words.

The legal framework of the EU creates a new dimension of law which lies between international law and domestic laws of Member States.

Its primary legal basis consists in international treaties – from the Treaties of Rome, dated back to March 25, 1957, which established both the EEC and the Euratom (or even from the Treaty of Paris of April 18, 1951 founding the Communauté européenne du charbon et de l'acier - CECA), to the current TEU and TFEU.

Between the founding treaty of the EEC and the current ones, several other international agreements (Single Act of 1986, Maastricht of 1992, Nice of 2001 and Lisbon of 2007 as well as the various adhesion treaties), bearing over time substantial evolutionary amendments, have strengthened the *associational value* which is the essential feature of all the European treaties. And so, in a subjective perspective, from the original 6, the Member States have become 28 (and unfortunately will likely be 27 after Brexit, in the short term); *and ratione materiae* it has

been an increasingly significant extension to new subject matters that have marked the transition from the initial "European Economic Community", with its Common Market, originally, in concrete, not much more than a custom union, to the "European Community" and then to the current "European Union".

So – as the Court of Justice expressly underlines in its judgement of December 10, 2018, in the case *Andy Wightman and others* v. *Secretary of State for Exiting the European Union,* at Para. 44 – *unlikely ordinary international treaties, the founding Treaties, which constitute the basic constitutional charter of the EU – using the clear words of the Court – established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals*.

This new dimension of law – please note – has in substance come to exist after the end of the transitionary period and occurred mainly after the Treaty of adhesion of January 22, 1972 which has marked the entrance of the United Kingdom, of the Kingdom of Denmark and of the Republic of Ireland in the Community.

The '70s have marked the stepping stones of the miraculous progressive growth of Community law also due to the strong input received from the inside (the judgements by the Court of Justice on *Rayners* and *van Binsbergen*, for instance, are of 1974 and the one on *Simmental* of 1978).

It is therefore crystal clear that the UK has participated to the whole growth of the EU and of its law. Moreover, it can be easily recognized that the United Kingdom has actively contributed to the development of the EU and its law, not only through the authority of its presence, but also and foremost with its concrete and high contribution in terms of human capital at all levels of the European administration which role has been maintained also when, with the introduction of the euro and the opt-out of the United Kingdom, something has undoubtedly changed.

On the basis of primary rules of EU law established by such Treaties, thousands and thousands of provisions pertaining to the so-called secondary law have been introduced through unitary legislative mechanisms with the aim, from the one hand, to complete and implement primary rules and, on the other hand, mainly through regulations and/or harmonization directives, to act as glue between the legal orders of the Member States.

Nowadays in the EU legal order there are common rules which invest the broadest areas of law, from civil to criminal, regulatory, insurance, banking and even tax law. It is enough

mentioning, by way of example, the European regulations on family law and on inheritances *mortis causa*.

Alongside the rules, are the fundamental principles of European law that have been developed in time by the European Courts and today are mainly recognized by Article 6, Para. 1 and Para. 3 of T.E.U.: the former recalling the Charter of Fundamental Rights (Nice) of 2000 as adjourned on 2007 and the latter the ones guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 as well as the principles resulting from the constitutional traditions common to the Member States.

The unity of such *a new legal order* – as defined by the Court – is strengthened and protected by the jurisdictional function exercised by the EU Courts (and mainly by the Court of Justice) in order both to assure the enforcement of EU rules and principles and also to guarantee their uniform interpretation.

As clearly stated by the Court, sticking to the precise wording of Para. 45 of the recent judgement already cited, on *Wightman*, quote: " *EU law is characterized by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other*." Unquote. (See judgment of Court of Justice of 10 December 2018, *Andy Wightman*, above listed, para 45, which also reports to judgement of 6 March 2018, *Achmea* C. 284/16, para 33 and the case-law cited therein).

It follows that this new legal order addresses all European citizens (and sometimes natural and legal persons, domiciled or established within the territory of the Union).

In the "internal" or "single" market and in accordance with the general principle of an open market economy with free competition, all these people and entities directly benefit from the four fundamental freedoms, which represent the founding cornerstones of the EU legal framework.

Such EU legal order, therefore, for the number of sectors it regulates and for the quantity of legal rules addressed to the Member States as well as to their nationals, has a capillary extension, which is largely greater to that of any other legal order of any federal state.

As per EU's relationship with third States, let me recall that the Union itself, especially through its dual government body, the Commission and the Council (the latter, in its various

compositions), directly carries out relevant acts, addresses and is addressee of political declarations, as any common subject of international law.

It is worth stressing that the EU has autonomously entered into "special" treaties, such as the one with EFTA countries and other association treaties with various non-European States.

From the signature of the Marrakech Agreements (1994), the EU itself is a member of and is actively participating in GATT/WTO in which the EU exercises, on an exclusive and unitary basis, the member's functions.

Let me underline that, through internal delegations within the European order, the concrete exercise of trade policy is attributed, quite in full, to the Commission, which, in its nature, is the most "European" body of the executive.

In addition to that, GATT rules on trade defense instruments, on dumping and subsidies are replicated in European law by means of regulations, thus allowing European (and also non-European) enterprises, recognized to have a valid "interest", to benefit from any direct form of defence, first before the Commission and then the European courts which, in the matters of international trade law, have removed exclusive jurisdiction from national courts of EU Member States.

Again, more recently, the EU has entered into significant bilateral trade agreements (respectively with Singapore, Japan and lastly with Canada, with the same scheme and similar prerogatives.

The monetary policy – let me add – belongs in principle to the EU and for the 19 Member States of the eurozone, the single currency has legal-tender status (since 2002 in substitution of each and any domestic currency) and, nowadays, the euro is one of the most widely used currency in the contexts of world trade and financial relations.

Considering the above prerequisites, it is easy to see *how very far the EU is from a typical international organization established by an international treaty*.

Anyway, already at present, and provided that the formulas and stereotypes which apply to outdated models are still of value in today's international order, if only we comply with the customary *principle of effectiveness of the international law*, we may easily recognize that quite all the prerequisites which distinguish the existence of the State are present. As a matter of fact, please, take into account: (i) the high degree of *sovereignty* (also intending this word in the sense of "powers") taken out from the hands of Member States in favor of the EU, (ii) that of such a sovereignty is exercised within the boundaries of the large *territory of the single market* over a widely *population* of more or less than 500 million (including or not the United

Kingdom), (iii) also that the majority of such population has shared for decades the associational life and the rules, of a countless number, issued by the EU institutions; and, last but not least, (iv) the presence in this picture of the CJEU protecting the European rule of law and having compulsory jurisdiction on Member States, EU Institutions and on national people; such a Court is functioning like a true federal court, even with wider scope and competence.

Well, in light of all such considerations, whilst the EU still lacks of a common foreign policy (and of a common defense), let me conclude that the *special subjective position,* occupied today by the EU in the international order should it not be definitively identified as a State, is anyhow very close to that notion.

And then, on the basis of that same *principle of effectiveness* that attributed to the EU, [as a general rule and save for minor profiles of joint competence with the Member States (see: Opinion 2/15 by the Court of May 16, 2015 on the Free Trade Agreement with the Republic of Singapore)] the direct and unified management, in the interest and on behalf of all of its Member States, of the international trade relations, i.e. of the ones concerning the "*real economy*", I wonder whether, towards the 19 States adopting euro as their common currency, it still makes sense (but it is likely neither reasonable for the Member States out of eurozone and even for rest of the world) that the EU itself should not be member and sit, with a direct and autonomous participation, in the IMF and, at least and straight off, that the 19 States of the eurozone should not be grouped in the same, single constituency.

The access of the EU *optimo iure* to this international organization could be a good opportunity, on the one hand, to profitably rethink the outdated Bretton Woods Agreements, not only in their few rules on exchange rates (today, they only discourage rather than prohibit the competitive devaluations of exchange rates), but also adapting them to today's economic reality and, on the other hand, for the countries of the eurozone to try altogether to correct the institutional defects of the single currency, widely highlighted in the book.

If, indeed, from the stand point of international law, the EU is "as is", nearly a State, Europe is still to be reformed from the inside, clearly appearing that it is losing its lifeblood. What still lacks is essentially a common political vision in which the European people can trust beyond domestic interests or presumed as such.

Would the European people maintain their focal role in the globalization era, it needs a strong push forward. This is the spirit with which we welcome the combined Franco-German proposal for a two-year open conference on the future of Europe, contained in a Franco-German *non-paper* (i.e. discussion paper) dated November 25, 2019. According to the declared goals of such a proposal:

Quote "*The Conference should address all issues at stake to guide the future of Europe with a view to making the EU more united and sovereign - such as Europe's role in the world and its security/defence, neighborhood, digitalisation, climate change, migration, fight against inequalities, our "social market economy" model (…), the rule of law and European values*". Unquote

It is an ambitious program but, among the several subject matters, it is easy to recognize areas where Member States cannot act unilaterally and that demand European solutions. As it has been wittily observed, "where there are genuine concerns and genuine problems, they are far from insoluble".

In this new not easy path, we will strongly miss the United Kingdom mainly because of its authority to strike a balance between what could be sometimes divergent interests of other Member States.

Having said this, I will now pay all my attention to the criticisms of my eminent colleagues on my book.

Many thanks again for having invited me to be here.

Alberto Santa Maria