Taking the law seriously while acknowledging its social embeddedness: an Actor-Network Theory approach of EU law

Julien BOIS

Postdoctoral Researcher

EU Legal Studies Institute

University of Liège

Acknowledgements:

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement n° 948473)

Taking the law seriously while acknowledging its social embeddedness: an Actor-Network Theory approach of EU law

The interdisciplinary debate in EU law is in full swing. The recent volumes edited by Nicola, Madsen and Vauchez on the one hand, and Bartl and Lawrence on the other, display a willingness to understand the effects of EU law by using theoretical and conceptual lenses coming from different disciplines in the social sciences, such as political science, anthropology and sociology (Madsen and al. 2022; Bartl and Lawrence 2022). The idea behind this interdisciplinary turn is that a black-letter or doctrinal approach no longer suffices to explain legislative and judicial developments in the EU. For example, the plague of socio-economic crises suffered in the 27 Member States led to innovative interpretations of the treaties, especially in the field of economic governance (Dawson and al. 2015; Dermine 2022; Tuori and Tuori 2014). Besides, the contemporary literature in political science pinpoints the potential contextual variables driving judicial behavior, such as the threat of override (Larsson and Naurin; 2016; Larsson 2019), the role played by the media (Blauberger and al. 2018) or public opinion (Harsch and Maksimov 2019). Kelsen's purity of law, a scientific approach turned common practice in continental Europe in the 21st century, is no longer the sole paradigm in legal scholarship.

At the same time, several scholars advocate caution when mobilizing contextual factors in order to explain legal interpretation. If recourse to alternative and cumulative explanation paths is welcome, an exclusive focus on actors and on their ideas, interests and strategies may overlook the 'inner' logic of the law. Indeed, if interpreting EU law implies some discretion and can be seen at times as being a political exercise (Dawson and al. 2013), the *acquis* itself bears a weight that cannot be overlooked when studying law in context (Joerges 1996; Bois and Dawson 2023). Legal scholars open to including social-scientific elements remain at times skeptical of the added value of mid-range theories that focus exclusively on actors, while leaving norms as an element of background (if not outright ignored). Put differently, legal scholars assume that norms matter, while empirical social-scientists, in the best but rarest of cases, include norms as a variable in a broader equation.

This difficulty stems from differing ontological and epistemological stakes separating normative legal scholarship from empirical social science (Bois and Van Cleynenbreugel

2021). If the normative study of laws on one side and the empirical study of lawyers seem to be parts of the same world, their academic reconciliation proves difficult in practice. This is clear when we analyze 2 major interdisciplinary currents, one coming out of legal scholarship (Critical Legal Studies or CLS) and one coming from political science (Empirical Legal Studies or ELS). CLS aims at providing a normative interpretation of the law based on broader social scientific paradigms, e.g. Marxism (Tushnet 1983). Without hiding the political activism behind the movement (Clark 1984), CLS scholars seek to denounce that the asymmetries of economic relations or political power drive legal interpretation, especially regarding judicial reasoning. If the theory is sound, the shortcoming lies in the lack of empirical engagement with the socio-economic reality invoked to justify the understanding of law (Hunt 2013). For example, the division of capital and labor is used as a justification for denouncing the inequalities that norms would allegedly generate, but it is more assumed rather than shown. This leads to a risk of over-generalization of legal interpretation in context, i.e. to a theoretical understanding not providing any leverage nor possibilities of falsification.

CLS relies on grand theories of social action that have progressively been left aside by empirical social scientists, the latter not finding any possible operationalization available to translate those in falsifiable terms. ELS takes the opposite stance, i.e. it seeks to ensure that the studies of law and lawyers in practice are subject to a careful research design allowing for testing several variables, and retaining those that are statistically significant[1]. This allows for testing whether the entry into force of a norm has an incidence on behavior or not[2]. If this approach is following the research design mantra found in causality-centered theories, it leaves legal scholars short of their original purpose, i.e. saying something about the interpretation of the law. ELS tests correlations between norms and behavior, without saying much about the reasons behind the adoption of norms or what they may mean in case of ambiguity. It simply (although it is a mighty task) tests for the consequences of norm adoption on social action.

As it stands, the interaction between legal scholarship and empirical research is generating as much frustration as it is showing promise. The articulation of disciplinary stakes has not found a proper solution yet, leaving scholars to either accept such shortcomings or reject them altogether. Perhaps the task may not find a suitable course. Legal scholarship mainly seeks to

[1] Epstein and King 2002; Epstein and Martin 2018. Both rely on the seminal research design book of King, Keohane and Verba 1994

[2] E.g. does the entry into force of the Miranda rights have an effect on the number of arrests in the United States? It does (see Epstein and King 2002)

provide forward-looking and alternative paths to the interpretation of norms. If actors matter, they are secondary objects of analysis since rules should theoretically determine their course of actions. Political scientists and sociologists have a look back and try to explain behavior with pre-existing elements. Norms are, in these cases, scope conditions that frame to a limited extent the subsequent behavior of actors, the latter being central in the study. In a nutshell, the purposes of both types of scholarships differ greatly. Why trying to reconcile both in this case?

The task at hand is great. The general acknowledgement that the content of norms is not enough to explain behavior but still retains weight does not seem to be supported by the tools provided in most disciplinary accounts. These accounts rely on unsaid but strong ontological assumptions driving designs and approaches. A genuine interdisciplinary account of law in context would thus need to use a paradigm of social action that deconstructs the very fundamentals of each discipline and/or each pre-existing social theory. Moreover, the enquiry would need to make equal room for the law itself and for the actors involved in applying it. This latter point is important. Most social action theories focus mostly if not exclusively on actors, these being either humans directly or the institutions populated by humans. Other elements such as environmental conditions, geography or norms are not central to causal explanations in these approaches. If these elements are included in the design, they are almost never given equal weight in the analysis.

Actor-Network Theory (ANT) shows great promise in order to fill this vacuum. This theory is not dominating in the literature, and has often remained confined to the niche of *Science and Technology Studies* (STS)[3]. However, its breadth and depth allows for a fruitful exportation of ANT to other fields of studies. The general approach in terms of behavior can be *translated* into other fields such as EU-lawmaking. ANT offers an original conceptual apparatus that allows for in-depth investigations into the making and undoing of social ties, the latter being forged and unmade with humans and non-humans. Moreover, the commitment to deconstructing science in action finds great equivalence with law and policy in action[4]. I will expose the basic tenets of ANT and translate those to the study of EU law, showing the promises of such an approach but also the pitfalls associated with the unpacking of "associations".

[3] Although it has been applied by scholars of different disciplines: see Michael 2016, pp-95-114

[4] Latour's 1988 book on the sociology of scientists will be of primary use here.

I) On ontologies and the study of law in context

Ontology refers to the vision of the world adopted by the researcher. Traditionally, social-scientific paradigms base their theories on a single ontology. For legal scholars, a recurrent ontology is that norms must matter if they are enacted following the processual rules of the polity rendering them binding. This is traditionally referred as 'validity' which, if we follow a Kelsenian logic, refers to the compatibility of a newly enacted norm with a superior norm in the hierarchy of rules. If we follow an ANT perspective instead, we should assume that there is a plurality of ontologies out there (Stengers 2018). Trying to establish or assume the existence of a single type of world does not do justice to the multiplicity of viewpoints and agencies. For example, a Kelsenian viewpoint on the place of law in society would be perfectly plausible but would have to be combined with other viewpoints that do not understand law as a hierarchy. To be more precise, the validity of a norm should not be the necessary and sole consequence of its adequation with a superior norm. A type of agency could be the acceptance of a norm because it is precise and emanates from an authority that is already recognized – or "blackboxed" in ANT's parlance – by several actors of the networks as a justified or suitable powerholder. The lawyer must here abandon preconceptions surrounding law and open herself to different understandings of it, just like the political scientist must give up on preconceptions about domination. Law may be central in the analysis, or may just left out even if one expects it to play a role. In other words, the researcher must "flatten" the world(Latour 2005) and open herself to what the empirics will offer. An important example is the bindingness of a norm. Lawyers would automatically seek the source of the act and attest if it was adopted according to the procedures of the polity granting an act the force of law or not. However, a norm may be considered binding by others even if it not endowed of such qualities. An example could be the recommendations addressed by the Commission or EU agencies to national administrations. The lawyer would immediately argue that such recommendations are not binding and may therefore be ignored if deemed relevant. But civil servants may believe that bindingness can be correlated to something else than the democratic locus of political power. The simple fact that an act comes from the Commission – a creature of the treaties – may lead them to assume the bindingness of the act. The language adopted in such recommendations, with the use of the modal verb "should" instead of "could", may incite the recipient of the act to believe in its mandatory application (Hubkova 2022). In other words, acts that would pertain to the category of "soft law" for legal scholars may be perceived as hard law by others, and the other way around is also a possibility.

Another central ontological tenet of ANT is that social action is not only driven by humans but also by other entities. That is why the founders of ANT prefer to speak of "actants" (Latour 1993), referring to any type of intervening being having an influence on social interaction. Actants can of course be humans, but these can also be microbes or scallops (Callon 1984). The important take is that anything can play a role as long as these entities either modify their behavior or make other actants change their course of action. That is why ANT has traditionally been associated with semiotics (Dondero 2018). One of the ideas behind this is that the social is not reserved forhuman interaction. Other beings such as baboons can perfectly establish a set of perennial relationships that qualify as "social" (Strum and Latour 1987). Another major point behind the association of actants is that non-humans may force humans to change their behavior. For example, a tsunami will cause major damage to the coast it hits and force humans to change location for some time. A virus like COVID-19 will lead some humans to isolate at home for a while until a vaccine is found or patience has been exhausted. Of course, the original move is – if one forces the analysis – reconnected to some human intervention. But that is not the key point made here. Even if entities have a human origin, objects may always escape the control originally intended for artefacts, either because of their intrinsic semiotic properties or because of a misuse by another actant[5].

The association between actants form a network that does not necessarily endure over time. In other words, networks are not indefinite and may break down after the disenrollment of some actants. Some associations are more durable than others though. The thickness of such associations can have several causes, such as an institution taking a physical form (e.g. the erection of the Berlaymont as the European Commission's headquarters) or because they follow procedures that crystallize the association as a social product, a product that can only be (fully) undone following the same procedures[6]. That is what the law does to society: it enshrines the willingness of state organs (these having the possibilities to *force* associations) to regulate a type of practice that brings together actants, independently of their willingness to do so.

Therefore, law seems to perform a double function following ANT's understanding of the social. First, it temporarily settles a *controversy* into a *black box*. The formal approval by authorities holding an asymmetrical power over actants shuts down opposing voices. For

[5] Without a note of sass, Latour said that instruments were never "idiotproof": Latour 1988

[6] Unless a major societal breakdown such as a revolution unmakes the entire foundations of the polity.

example, the adoption of a regulation enshrining fundamental safeguards against the potential abuse of personal data in the EU signals to the proponents of the free circulation of data such as Amazon or Google that their activity will be strictly monitored and controlled by administrative authorities empowered to impose sanctions in case of violation. The important thing to note here is that the adoption of a regulatory instrument is only temporary. Black boxes tend to be reopened over time, because of a dysfunction in the system, a renewed social context that was not foreseen by the act in question, or simply because associations (coalitions among actants) shift over time. That statement can seem particularly counterintuitive in the context of the EU, since several scholars insisted that rules in the EU legal system are difficult to change because of high thresholds needed to amend existing arrangements (Scharpf 1988). Yet the reopening of discussions about legal instruments, along with debates about interpretations of the Court of Justice of the European Union (CJEU), are a constant feature of the EU. Several legislative instruments are often fine-tuned by posterior directives, regulations or packages[7], and discussions about the meaning of the treaties regularly take place despite the last major overhaul of the constitutional framework occurred in 2007[8]. This reopening of the black box without erasing existing rules has an influence on the development not only of law itself but also of socio-political developments in the EU: changes are incremental and can hardly overcome *in toto* previous settlements[9].

This incremental evolution of social arrangements is punctuated by the second function generated by law in society: it gives rise to a material world. The substance regulated and the procedural means by which such regulation occurs recalibrate pre-existing associations. In terms of substance, the law either associates or dissociates actants. An association in that case could be the use of the "proper" labelling (e.g. nutriscore[10]) on food products in supermarkets, meaning that consumer protection and all the staff associatedwith its promotion joinfood safety

[7] For example, EU railway regulation started in 1991 and has been complemented by no less than 4 legislative packages from 2001 to 2016. Budgetary soundness was enshrined in Maastricht and was complemented by the Stability and Growth Pact, the 6-Pack and the 2-Pack

[8] Think of the entire debate about the legal foundations judicial independence and its "discovery" by the CJEU in art. 19 TEU: C-64/16, Associação Sindical dos Juízes Portugueses, 27 February 2018

[9] This is the position defended by Callon and Latour 1992 when replying to perhaps the most devastating critique brought to ANT by Collins and Yearly 1992 accusing the former of advocating an infinite regress when doing empirical work because of the impossibility of finding a starting point in an enquiry in a world always redefined by the sociologists of associations. As Latour and Callon reply, there is no infinite regress in applying ANT because actants use pre-existing black boxes to guide their actions, arising in our case out of pre-existing EU rules.

[10] Or attempts do so in the EU case: see Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers

agents in the attempt to establish an harmonized food market. In terms of procedural means, the law establishes bodies and staff in charge of monitoring the implementation of substantial rules. These means do not necessarily generate the creation of a new state or EU organ, as it can simply target pre-existing bodies as addressees. But these will at least generate internal changes in these institutions, not least in terms of resources, but also regarding their prerogatives in terms of enforcement and monitoring, thereby enhancing or decreasing their opportunities of forging new associations. Law's materiality takes a physical shape: Latour's description of the lengthy case files encapsulating the work of the Council of State clearly attests this (Latour 2009). But this materiality goes far beyond what lawyers generate themselves: law gives rise to several materials that shape behavior, such as roads, vaccines or construction permits that will change the landscape of the city (McGee 2014).

The temporary settlement of controversies, the empowerment of some actants over others and the changing landscape of the material world are thus the key components of an approach of law following ANT. This taxonomy could not further be simplified, however. The settlement of controversies could last days just like it could last decades. The empowerment of actants can be strengthened or weakened by subsequent practices or changes in the world. Law's ontological properties following an ANT perspective describea process in flux rather than a fixed state, examples of which could be "law is a hierarchy" or "law is always essentialized by sanctions". The diversity of social situations cannot allow here for a bold statement about law's properties and its impact on society.

II) Knowledge production about EU law following ANT

The acceptance of diverse ontologies seems to render the possibility of having a social-scientific enquiry difficult. A fixed world vision seems to be the glue or the cornerstone needed to produce knowledge. But if the world is not already defined, but on the contrary in constant need of redefinition (in other words, if the world needs to be "flattened" according to Latour), how can one say anything meaningful about the evolution of behavior of actors ? The "epistemological chicken" controversy pitting Callon and Latour against Collins and Yearley was precisely about this. What could be the starting point of an enquiry that cannot have any pre-existing social anchor? The partial answer given by Callon and Latour is nonetheless useful: actants follow pre-established black boxesand must be studied when they denounce the functioning of said black boxes. In other words, the social scientist must not substitute her own

vision of the world but must retrace the world vision(s) of the actors under study in order to account for the series of objective associations that bind together actants following their respective (and thus subjective) social realities.

A) ANT, non-assumptions and "agnosticism"

This approach, which follows the principles of ethnomethodology developed by Garfinkel (1967), proves particularly fruitful if one cannot reconcile social developments with pre-established paradigms. Theories of social action generate assumptions about the behavior of humans (other social theories ignore the role of non-humans), which cannot always be met empirically. The diversity of social phenomena, the proper historical consistency of events (historicity) and the specificities attached to each biological and material settingmean that social phenomena, unlike chemistry for example, can never be reproduced to the identical. This lack of perfect replication means that the researcher must make a trade-off: either she chooses to stick to the specificities of the case(s) under study to provide a *deterministic* account of the displayed similarities, or she attempts to isolate in the case(s) under study the elements susceptible of providing a plausible, generalizable and *probabilistic* assessment of *all* social situations presenting a theoretical likeliness. The issue is one of generalization: deterministic accounts will provide solid descriptions and analyses of the retained cases, but cannot truly offer tools for generalization, whereas probabilistic accounts mostly focus on the generalizability of results but could lose grasp of the specificities of the cases that could play a potentially strong (causal) role in behavior.

For ANT forefathers, the only reasonable choice was clear: a humble account of cases is the only way to say something meaningful about the social. An account based on strong assumptions would necessarily lead the researcher (even the most informed ones like Weber) to arbitrarily select and exclude elements of the analysis. This approach cannot for Latour and Callon say what reality is about, because the choices of the social scientist necessarily modifiy the reality that is to be explained, leading to an artificial situation that falls short of the original goal. This artificiality is also conceptual. Other social theories would rely on concepts such as "domination", "legitimacy" or "field" that would already be too loaded with spontaneous sociological directions and therefore blur the reasoning from the very beginning. The only possible way of retracing associations is therefore to strictly follow the actants in their development. Retracing also means here avoiding the substitution of the language used by actants by other concepts: the researcher must embrace the indigenous vocabulary employed

by the humans and non-humans under study and make it their own. This is particularly important for legal scholars. Refraining from using your own conceptual language and let the actants speak for themselves would be what Callon called "agnosticism" in his seminal piece of 1984.

Retracing the social however does not mean that the social does not allow for agencies to be expressed, objects to follow their own course of action and various strategies to played. The stance described above refers to a rigorous approach in describing events the way they happened, and does not refer to assumptions about behavior based on pre-existing social trajectories. This latter point was the greatest divide between ANT and Bourdieu's field theory. Latour thought that Bourdieu's critical sociology could not leave any space for agency to be played out. Past trajectories play a role in social developments (Latour even admitted that "habitus" was a useful concept), but do not necessarily exclude any other considerations such as ideas, interests or strategies. In a nutshell, associations happen for a set of reasons that cannot be probabilistic (things happen or they don't, likelihoods cannot be observed but simply inferred), but these are not however subjected to anything specific that could plausible be presumed. ANT's strength in that regard is that it helps debunking false but accepted spontaneous sociology.

B) ANT and the absence of normativity

Retracing associations requires more abstention than involvement from the social scientist. ANT does not allow a substitution of concepts but rather embraces the indigenous language of actants. Most importantly, it refrains from providing an interpretation that would go beyond the mere description of action. Axiological neutrality goes even a step further than what Weber envisaged. Not only are value judgements prohibited, but potentially any interpretation that would be deducted from the analysis of controversies should also be excluded.

ANT is therefore at odds with normative approaches in the social sciences. Normative approaches are traditionally developed by political theorists and legal scholars, and aim at proposing forward-looking solutions. Political theorists aim at unpacking the legitimacy of political power in the EU for example, and propose institutional arrangements that advocate further integration (Innerarity 2018; Spector 2021) or a retreat towards a more confederal organization (Bellamy 2019). Even if empirics play a role in their analysis, the main aim of normative scholars is to offer accounts for a renewed understanding of the world. ANT on the other hand displays a strong empirical commitment to social analysis, like the ones usually

found in political science and sociology. The purpose of empirical approaches is to explain why or how things came out to be, either by proposing a causal explanation or by simply describing the course of events. The explanations are not (necessarily) accompanied by a normative approach for the future or a change in present practice.

There is thus an incompatibility of objectives between black-latter doctrinal scholarship and empirical social science, and especially ANT. These may raise similar questions about power, domination and society in general, but the type of knowledge sought greatly varies. That point is of particular importance when studying the impact of law on society if choosing ANT. ANT researchers will assess law differently than legal scholars. The latter will formulate one or several counterfactual approaches (read non-empirical) to the meaning of norms, whereas the former will investigate which meaning actually won in practice. These are 2 valid and accepted ways of producing knowledge, but these can hardly be combined in a single framework. That conciliation between legal scholarship and ANT (or STS more broadly) has been attempted in the past, but fell short of satisfying the strong epistemological commitment of ANT. Several legal scholars professed their attraction to the sociology of translation, arguing that a focus on the technicalities (Riles 2005) and the materiality (McGee 2015) of the law could be an eye-opener when black-letter scholarship cannot shed light on judicial developments[11].

But this opening was not without critique, one that is understandable if adopting a normative stance which does not pay tribute to ANT's axiological neutrality. Criticism especially focused on the "apolitical" essence of ANT, suggesting that the initial promise of unpacking the socio-economic struggles behind scientific constructs was diluted by a lack of engagement with the field. Suggestions for post-ANT approaches suggested to compensate this deficit by associating ANT with more critical lines of thought such as CLS or the 'duty of care' (Cloatre 2018). Moreover, these scholars tend to associate ANT with the entire bibliography of its most prolific author Bruno Latour, quoting extensively his writings about law. But Latour has a diversified intellectual trajectory, one that is not always associated with the sociology of translation. One may even argue that Latour's work on law and lawyers was for a large part outside the scope of ANT. The famous book *The Making of Law* is a great anthropological study of the French Council of State in the late 1990s, but it is not, as noted by Audren and Moreau de Bellaing, a sociological account of law (Audren and Moreau de Bellaing 2013). The focus on a very specific institution (the details of the profiles of the various counselors by Latour even shows,

[11] See McGee 2018

comparatively, how atypical the Conseil d'Etat is in the wider realm of courts) and on the adjudication of administrative cases is probably the most complete to date about practice in French administrative justice[12], but does not aim at generalizing its accounts about lawmaking in the other branches of government or in other spaces. Unlike *Science in Action* that gives the reader a clear path towards studying the doings and interactions of scientists with other actants, the strength and weakness of *The Making of Law* lies in the specificity of the case under study.

Another book traditionally cited to refer to Latour's sociological work is *An Inquiry into Modes of Existence*[13] (AIME), where the author argues that law is a specific mode of regulation in (non)modern societies that conflicts with others, not least with science. More importantly, Latour advocates in AIME a departure from ANT. The mode of existence is actually a (philosophical) substitution to the (sociological) association. The careful and tedious commitment to following actants is replaced by a more loose network that is still meant to have an empirical grasp, but more importantly in AIME to provide philosophical foundations to rethink the ways by which the Moderns are and can behave in society.

Latour's work on law has therefore mostly been anthropological and philosophical. It has kept a few ties with the sociology of translation (the principle of free association is retained in AIME), but it has never been subject to the neat epistemological path developed by Callon in "Some Elements of a Sociology of Translation" or by himself in *Science in Action* or *Reassembling the Social*. The definitive picture left by Latour in AIME about [LAW] is illustrative in that regard, since it advocates that law has its own (almost systemic and autopoietic) logic that can hardly be coupled with other modes such as science and technology. But this last point had been deconstructed by several STS scholars, especially Sheila Jasanoff who displayed how science and law were co-producing a social reality in generating categories of thought and regulation. Judges and policymakers are regularly confronted with findings of science in their respective activities (forensics, valid testimonies of experts before courts, neutral language of science in regulatory choices, etc. see Jasanoff 1990 and 1995), and law as defined above constitutes possibilities and brakes in the search for scientific progress through time and space[14]. The EU is theoretically exemplary in that regard, since it regulates market "objects" that are framed for a large part by a community of regulatory scientists (Laurent

[12] See Colemans 2014 for a similar approach to the Belgian Council of State

[13] Latour 2018

[14] Think of Noah Gordon's novel *The Physician* (1986), where the main character attempts to understand the logics of appendicitis (unknown until then) on dead bodies, a practice prohibited in the 11th century in Isfahan (Iran). On law's enabling or braking trend regarding science, see Jasanoff 2013 and the large bibliography cited.

2022), which are then implemented and dissected by other scientists, e.g. in standardization committees (Lezaun 2012; see more below).

C) Producing knowledge about law without normativity: an impossible task?

Can there be a non-normative account of norms? Several sociologists that provided the most detailed account of law in practice often focused on the actors – the lawyers – rather than on the instrument justifying their authority. The application of field theory led Bourdieu to assess the dynamics of the legal field from an internal perspective (which like any other field is a terrain of struggle for the most central positions available) and vis-à-vis other fields (where the legal field gains autonomy by adopting a specified language inaccessible to most while imposing it to the rest of society as the path to follow) (Bourdieu 1987). The derivatives of field theory in EU studies has proved fruitful in describing the leading role of legal experts in enhancing integration (Vauchez 2015; Vauchez and al. 2022). The focus on the profiles and trajectories of agents has in establishing a dialogue with some legal scholars, who see in Bourdieusian approaches a way to expand their knowledge about EU law without giving up their credentials as doctrinal interpreters (Vauchez and de Witte 2013; Schepel and Wesseling 1997). This once "renewed research agenda" (Vauchez 2008) has established itself as a niche in EU studies, and been expanded far beyond the legal field (Kauppi and Madsen 2013; Georgakakis and Rowell 2013). This inclusion of social theory into the study of adjudication in the EU has brought a different perspective than the one developed in political science: less focused on causality, these political sociologists have rather followed an inductive approach and followed the actors that made legal integration a reality. They stuck close to the practices of the actors under study, in a way that the transcription of events (e.g. the debates between *Van Gend en Loos* and *Costa*) generated a positive appeal to legal scholars who heard reflections about their own ways of interpretation[15].

This sociological approach allows for an immersion in the world of lawyers by highlighting their daily and nitty-gritty habits, without however forgetting to unpack the social dynamics surrounding legal interpretation. It shows that law is an object appropriated, substantiated and contested by actors. In other words, law enables and limits agencies. The emphasis on the duality between enabling and limits is crucial and follows from an epistemological openness towards the unexpected. If these sociologists have a deterministic ontology, they also adopt a probabilistic epistemology. For example, field theory is about placing the various actors in a

[15] In the EU context, see the collective and interdisciplinary work led by Vauchez and de Witte 2013

field according to their various types of capital (Bourdieu and Christin 1990), these actors are then free to act according to their free will. The placement of actors in the field simply generate assumptions about behavior (actors closely associated with one other in the visual depiction of the field are more *likely* to advocate the same thing), something which can however be debunked in practice. ANT seems to offer even more epistemological probabilism since it has even fewer postulates than Bourdieu's critical sociology.

Epistemological openness allows for a production of knowledge that is unburdened by overly strong assumptions about law. Even more importantly, it allows for an approach of the same object – law – that could potentially lead to several outcomes, the extremes being compliance and disregard of rules. In other words, it avoids a tropism that would lead to assume that norms always matter or on the contrary that they play a marginal if not inexistent role in politics.

ANT allows for such an opening and for variation across policy fields. It does not assume that rules necessarily play a role, nor does it reject the possibility of anomie. The inclusion of non-humans in the analysis opens up even more possibilities than found in other social theories. Law creates a material world that changes the landscape of our world: buildings are created to accommodate institutions, new foodstuffs emerge or are prohibited on the market, train tracks allow for a connection of previously unbound spaces, etc. Law can thus take many *observable* forms, that go beyond the principles and the values discussed in doctrine. Law here leaves textbooks and courtrooms to take a physical shape that touches not only legal experts but every actant out there, ranging from birds, scallops, GMO crops and of course humans. The enabling possibility lies in the connection that is missed in black-letter scholarship between principle and reality, the latter allowing the social scientist to understand why a normative commitment can or cannot be met in practice. Other social theories will mobilize behavioral arguments to explain social action, and rely on concepts related to human strategies and ideas. ANT opens up other causal paths related to the materiality of non-human actants and their impact on regulation and adjudication. The creations or "monsters" (Law 1991) may not behave or be used the way their creators originally intended it[16]. The instruments built for democratic political purposes may be eventually prove to be major disruptors of polities once their

[16] Think of the Mediator scandal in France: the Mediator was a medicine originally intended to cure diabetes but was used by a part of the population for the purposes of reducing their food consumption. The overconsumption of Mediator led several customers (not necessarily patients) to suffer cardio-vascular diseases leading at times to death.

weaknesses are displayed[17]. Biological non-humans clearly display a type of agency that clearly impacts society, with Callon's remarkable case about scallops coming to mind (Callon 1984). Mechanical non-humans also display a type of agency in the way they can overstretch their original use and open new controversies about their use. That is, as we will see, a typical feature of EU law and politics.

This epistemological openness may however also prove to be a great weakness. Just like ANT may fall in an ontological trap by not defining what the social may be about, it may also fall in an epistemological trap since it constantly redefines its ways of producing knowledge about an unstable society. The focus on associations as they happened without possible recourse to pre-established social paradigms makes it a task of constant regeneration, and does not allow for a single or at least somehow unified conceptual apparatus that could lead to some consistency overall. As noted by Law in the early 20th century (meaning after the various challenges opposed to ANT), a single case study following ANT's precepts hardly allows to say something meaningful about the social. While retaining the commitment of following the actors throughout their peripeties, he argued that a combination of several inductive case studies could be conducive of cementing ANT as a valid social theory (Law 2004).

III) Designing research with ANT: the theoretical and empirical relevance of STS for studying lawmaking in the EU

The description of ANT thus far may seem quite irritating to some. The ontological and epistemological stakes described above seem to display more brakes than possibilities for performing social-scientific research. Should these radical tenets of the approach be abandoned, as hinted by a group gathering the leading experts of ANT in the late 20th century, and lead to think of a time "after-ANT" (Law and Hassard 1999)? Should the overall approach be abandoned in favor of "modes of existence" or any other concept that would characterize social evolutions? ANT has become a minority in the field of STS and the social sciences more broadly, rarely cited in social theory handbooks. But it has nonetheless had an impact that cannot be understated. ANT thinkers were at the forefront of STS, and havehad influences beyond the realm of sociology. The recent trend that invites to think 'near' rather than 'after' (Blok, Farias and Roberts 2019) ANT is perhaps a temptation to cherry-pick the various strands

[17] The single currency established between economically heterogenous Member States, which was once the greatest promise of European integration, almost proved to be its undoing during the sovereign debt crisis.

of the approach that suit the social scientist's purposes without having to bear the tedious stakes described above is perhaps too easy. But the difficulty of reassembling the social following Latour's textbook warrants this selective choice. Thinking near ANT suggests that some tenets of the approach must be rethought, without however seeking to betray its fundamentals. For example, the charge of 'apoliticism' may be outweighed by the necessity to stick to empirics. ANT does not bar engagement with social and political issues, it simply invites us to be patient and provide such a judgment afterwards.

This section will attempt to stay near ANT by developing accounts on theoretical promises developed by pioneers of the approach, and try to apply those to the specifications of the EU socio-legal realm. Even if Callon, Law and Latour did not necessarily view those as such, the concepts forged to describe the behavior of actants ('enrolment', 'interessement', 'obligatory passage points', etc.) could be subject to verification and thus falsification found in other research designs. Originally developed at length by Latour about the doings of scientists in society, this conceptual apparatus may, as noted by Jasanoff, be easily applied to regulators and lawinterpreters in society. This section will thus be at odds with Latour's argument suggesting that law and science are governed by very different logics, and on the contrary will try to fit the approach to the legal field. Latour's view of law was that it is almost always confined – which is also a feature of legal doctrinal scholarship – to the walls of a courtroom. But as argued earlier, law has a "common place" (Ewick and Silbey 1998) for every actant in society, not least with policymakers that deal with scientific discoveries every day. The strategies of interdependent scientists described by Latour serveseveral purposes: gain funding, win battles about scientific 'progress', and have discoveries accepted by the rest of society. This acceptance is perhaps the last link missing in *Science in Action* in order to reconnect the sciences with democracy: having discoveries accepted (e.g., surrogate motherhood) or rejected (cloning) cannot be better identified than if enshrined in legal texts.

A) The theoretical relevance of ANT for the EU: polity-building in a market-making setting

ANT and the STS more generally seem particularly suited to describe (at least partially) the specificities of a supranational organization that exercises domination beyond the state without possessing the coercive means of a state. The EU is one of if not the only polity in history established throughnon-violent means. It is the product of a voluntary agreement between other polities (Member states) that retain the ultimate political power to rethink, dilute and perhaps

withdraw from the EU. The established network at the supranational level is therefore in a much more precarious position than national states possessing coercive means to uphold their authority: the EU must convince its constitutive and sovereign parts of its prerogative to rule. The association binding the EU and its Member States is an unbalanced one where the former must convince the latter that it fulfills its purposes, either by sticking closely to the terms of the initial arrangement or by convincing states that its entrepreneurship in terms of integration is justified. This focus on persuasion has been the most cited part of the ANT conceptual framework: the process of *translation* in ANT precisely refers to the dynamics allowing one actant to enroll another. More specifically, the sociology of translation studied how scientists tried to persuade other audiences of the necessity of changing a course of action, trying to make their scientific findings a mandatory account on technology in the world (*obligatory passage point*), and therefore leading to a change of practices by market players and regulators.

B) EU officials and laboratory scientists: one of a kind?

The famous case of the scientists failing to persuade scallop fishermen, local authorities and the scallops themselves could easily be replicated to the study of the Eurocracy trying to enroll the EU legislator (therefore including national executives) in advancing its agenda. Even if the main priorities of the polity are set by the European Council, the Commission is entrusted with the concrete drafting of regulations and directives, and associates to the process not only decision-makers but also all interested stakeholders, not least interest groups. It therefore receives a wide quantity of inputs of various kinds, must take some of them on board while keeping its objectives intact, and tries to ensure that the original draft is not completely diluted by the legislator. Commission officials are thus similar to the scientist trying to persuade the rest of the scientific community of the soundness of its results: they must document the ways by which they came to a decision, and base their argument not only on the legal basis found in the treaties but also by displaying the *scientific* evidence it used in that regard. The Commission must indeed make an impact assessment of the foreseen legal act, consult with civil society via questionnaires and public consultations, and provide a summary of the entirety of the results. The methods, data and indicators are all yardsticks allowing the public to accept or reject the soundness of the Commission's proposal. Drafting laws in the EU is almost no different than preparing a codebook in the hard and social sciences allowing others to attest, via a potential replication of the experiment, the validity of the evidence at play. This translation sometimes fails: just like the failed cases of the scallops and the electric cars exposed by Callon, a seemingly scientifically and technologically neutral proposal presented by the Commission

may be criticized by others for failing to capture the reality or displaying only a few alternatives among others. This criticism can be forged on the substance of the act (for example, the result displayed a clear policy choice rather than a neutral decision, e.g. in the liberalization of the energy market: Torriti 2010) or on procedural grounds (fair failing to disclose the processes by which it concluded an impact assessment one way or the other, e.g. regarding the revision of the REACH directive[18]).

To what extent does the comparison between the EU bureaucracy and laboratory scientists hold? Their activities are very much alike. The EU executive is not following a clear-cut political agenda along the Left-Right political axis. It is rather in the search for a compromise between all interested parties. Such compromise is not meant (or at least is not sold as) to be a choice among divisive policies, but rather an encompassing project serving the general interest of the EU citizenry, irrespective of economic, political and social preferences. The scientific-like language and method employed by the Commission in the early phase of the legislative process is precisely meant to shield EU officials from criticism of partiality. This type of policymaking is based on "expertise" (Robert 2003) and claims at providing not one solution among others but *the only* solution available to solve a vacuum in the world. The bureaucrat is therefore much closer to scientist than to a politician.

The same goes for the EU legislator. In the Council, legislative proposals are first discussed by expert groups (the "preparatory bodies")[19]. These experts are national civil servants sent to the Council for their sectoral expertise. An agreement is often reached at this stage of the process, i.e. before it reaches the political levels of the institution (the Committee of Permanent Representatives and of course the official ministers' encounters). Even the Parliament could be labelled as an expert institution: the sociology of the only elected representatives in the EU shows that many could also be qualified as experts due to their longevity in the institution and their scholar and professional capital (Beauvallet at Michon 2012). The majority of expert groups and civil society organizations try to influence the bureaucratic process by delivering position papers indicating thresholds, indicators, ranges (all sort of quantifiable data in sum) fitting the evidence-based style of bureaucratic drafting of policy instruments (Laurens 2017). Position papers using values and principles as guiding modes of action find a quicker way to the bin than in the summary of public consultations. In sum, following the accounts developed

[18] EU Ombudsman criticises Commission failure to disclose full REACH revision impact assessment | Corporate Europe Observatory

[19] See the full list at: pdf (europa.eu)

in the Field of Eurocracy, the entire rulemaking apparatus of the EU bubble is more of an expert, scientific-like bubble than it is a politically polarized body.

C) Market-based policy-making: the rise of "technoregulation"

Why is the EU bubble looking so much more than a community of scientists? This is where the law of the EU (and therefore the fundamental polity-cal priorities of the organization) gives us a straightforward answer: the EU is first and foremost a regulated market. The EU has indeed integrated several former "core state powers" (Genschel and Jachtenfuchs 2014) that raise redistributive issues and socio-political sensibilities, and have led to major controversies over the last 15 years. But it has historically focused on the Common, Single and Internal market. Unlike core state powers, market-making policies seem at first glance to enhance the common interest by providing a wider array of options to the (consuming) citizen without *a priori* raising redistributive and polarizing issues (Genschel and Jachtenfuchs 2018). Market policies are thus not necessarily subject to the politicization found in other areas of policymaking, which are on their hand subject to salience, expansion and polarization (De Wilde and al. 2016). In other words, they do not normally attract (unless subject to controversies, see more below) a public eye. The market and its byproducts are largely delegated to non-majoritarian bodies, be it at EU or Member State level (Majone 1994; 2005). Market-making would be the realm of expertise, absent of public sight for the most part. The legitimacy of this type of decision-making would lie in the sound "outputs" provided by the polity, rather than on the express consent and control of the electorate (Scharpf 1988; 2006).

The design and the functioning of the market are thus confined to the realm of bureaucracy, with a subsequent approval of (also expert, see above) legislative bodies. The changes of properties of EU technocrats over time tend to show how the EU executive has become less a market-making than a market-running body. The market had to be built in the early years of the European Economic Community, requiring institutional engineering. Lawyers thus vastly populated all EU institutions, helping in building a common "integration-through-law" culture displayed by the partnership of the Commission (and the proactivity of its legal service, with eminent actors such as Michel Gaudet) and the Court of Justice (Vauchez 2015). This cooperation of lawyers helped in building the Common Market, starting with the free movement of goods that was fully launched after *Cassis* (Alter and Meunier 1994). Once the Four Freedoms were firmly established as part of the legal order, lawyers were progressively replaced as the ultra-majoritarian group by economists (Goergakakis and de Lasalle 2013).

This seemingly irrelevant bit of information is actually saying a lot about the passage from a market-making to a market-running organization. Lawyers make the market, economists make it functional. This even shows in the practice of EU law over time by officials, especially in the cornerstone of the Common Market: competition policy. The strict control of concentration following a set of pre-established procedural criteria was progressively substituted by an economic approach to competition policy. Rules, practices and profiles feed into one another.

The trend kept going with the expansion of the market into more technical areas, i.e. one where rule-makers and market-runners no longer suffice as experts. The labelling of foodstuffs, the interoperability of railways, the digitalization of the economy and others displayed a need for the EU administration to turn to a new class of legitimate rule makers in the 21st centuries: engineers. This need is especially potent regarding controversies surrounding modern goods that may cause harm to human health or the environment, e.g. pesticides or medicines. The question about the market is no longer *whether* goods can circulate freely across borders, but *which types* of good are to be allowed to be legally marketed. It requires first decomposing the substance of products and second determining thresholds above or under which some substances are allowed or banned. This task cannot be performed in the Berlaymont, but requires sites designed for such experiments: *laboratories*. ANT accounts displayed the actions of scientific entrepreneurs such as Pasteur in France (Latour 1993) trying to enroll others beyond their laboratories. But the reverse movement – politics going to the lab – is something that is rarely described[20]. The need for engineering and certification of products led the Commission to rely on external bodies such as civil society groups (in expert groups or via lobbying) or standardization bodies such as the European Committee for Standardization (CEN) to provide the missing data allowing an effective possibility of enforcement[21]. Civil society organizations with the means to do so also adapted to the engineering turn in EU politics: a massive organization such as CEFIC (European industrial federation for chemical products) already hired several scientists and engineers to test the propositions sought by the Commission to answer to public consultations with precise, accurate and at least in appearance undeniable results (Laurens 2015).

Yet reliance on external staff comes at a cost, or rather costs. The financial burden is obvious. But the risk of bias of studies, especially coming from the private sector with vested interests,

[20] See however Lezaun 2012

[21] See the website of the European Committee of Standardization: About CEN - CEN-CENELEC (cencenelec.eu)

led to further institutional and sociological changes within the EU bureaucracy. The first move was an extension of the bureaucracy to newly created bodies: EU agencies. These were founded in order to increase the sectoral expertise of the Commission in (not only but mostly) technically needy areas, e.g. market securities, chemical products, food safety, etc. This is somehow accompanied by changes in the composition of the Commission staff itself, although this change is more difficult to assess since it is presently happening. Just like Latour's scientists that are crossing the border of technology by incenting their own tools (leading to the concept of "technoscience": Latour 1987), the EU bureaucracy is producing its own technological "objects" relying on the (increasingly self-researched) progress of science. Technoscience also leads in the EU to *techno-regulation* (Molitorisová and al. 2022).

D) Deconstructing the European Leviathan: cross-level governance, translation centers and multipositionality in EU policy-making

If we follow techno-regulators in a pure ANT fashion, we are supposed to trace their movements in society and see the enrolment attempts of others in their quest to frame regulations at the European level. The social scientist must therefore open the institutional black boxes stabilized over time by the EU polity, especially concerning the three main bodies concerned with the adoption of regulation: the Commission, the Parliament and the Council. It is within these thick black boxes crystallized by the various buildings found in the European quarters in Brussels that techno-regulators exercise their craft. Having a look inside reveals something described long ago about the Leviathan by Callon and Latour (Callon and Latour 2015): the "macro-actors" such as EU institutions are nothing more than "micro-actors" such as techno-regulators that have generated asymmetries compared to other actants. They have rendered to reversible seemingly irreversible by becoming *obligatory passage points* (OPP) in the assemblage. Techno-regulators from the EU bureaucracy are resourced to provide that task, experts from the outside become OPP by sitting on high-level expert groups, national techno-regulators become OPP by becoming regular envoys of their Member State administration.

The "translation centers" of policy-making reveal that techno-regulators are characterized by their multipositionality. The first is sociological and already explained above: there are a multitude of profiles involved in the process. Elected officials, EU and national bureaucrats, private sector experts, etc. The second type of multipositionality refers to the intertwinement of EU and national officials. The Commission is populated by Seconded National Experts (Trondal 2006); Council working groups are composed by national servants (Hayes-Renshaw

and Wallace 2006); EU agency boards are populated by national officials from independent administrative authorities (Kutsal Yesilkagit & Jacint Jordana 2022). In other words, policy-making in the EU seems less characterized by a struggle of various levels of governance each vying for their own interests than it is designed by *coproduction* between officials from these various levels. Cross-level governance seems to be a more fitting term than the famous multi-governance framework developed in the late 1990s to explore the macro-interactions between the EU, states and regions (Hooghe and Marks 2001). It refers to a type of policy-making where institutional belonging matters little compared to the shared ambition of regulating objects that are common to all in the EU polity. It allows us to rethink and nuance the traditional "competence creep" (Garben 2019) theory suggesting that EU encroaches upon the prerogatives of the Member States. If it keeps making sense from a macro-legal perspective (see more below), the opening of institutional black boxes displays that the bodies seemingly losing from such an encroachment are actually pro-active actants in the process.

E) Expanding law's ambit: beyond interpretation and the courtroom

We have thus far followed the actors at the heart of techno-regulation in Europe, in such a way that this paper may look like an plea for ANT disciples to study EU studies more than it for EU studies scholars to use ANT as a social theory. This section will try to rectify this imbalance, especially regarding the study of law and regulation in the EU. ANT prevents the social scientist from choosing a starting point to the social: we must follow our actants as they are. For the law, it means that rules can emanate from several bodies in the EU. Traditionally, EU legal scholars seek in the case law of the CJEU what the law entails. As the seemingly ultimate interpreter of the treaties, and favored by its privileged institutional position in the EU legal framework that heavily shifts the legal interpretation prerogative from the legislative branch to the judiciary (Scharpf 2006), the Court has been the main focus of EU legal scholarship. Therefore, a legal scholar will often map the case law of the Court over time to unpack what the law says. Besides, the Court would fulfill this function by filling incomplete legislative contacts or constitutional vacuums left open by the legislator or the constituent power (Lenaerts 2013). Case law would thus contain the most prolific and comprehensive account of the law, and thus start as the basis of discussion for (positivist) legal scholarship.

ANT advocates a different type of understanding, closer to a sociological approach considering Pound's "law in action", Ehrlich's "living law" or Ewick and Silbey's "common place of law": the law has many spots in society, and tracing it (by following controversies, see below)

requires an openness about its form and location. Sometimes, the CJEU is itself starting the controversy. For example, the rise of the common market of goods clearly followed from the principle of (forced) mutual recognition of standards for lawfully marketed goods in any Member State[22], which followed the judicial controversy about the circulation of liquor across Member States. *Cassis* started a trend subsequently picked up by the Commission in its Commission in 1980 and achieved in the Single European Act. The various socio-legal studies that looked at mutual recognition all seem correct to take Cassis as their point of departure (Alter and Meunier 1994). This habit(us) of looking at judicial outputs seems to make sense when studying political developments in the EU in the 20th and early 21st centuries. The Court bypassed several political gridlocks and helped build (along with lawyers of other institutions, see above) the market at a time when legislative outputs were scarce.

The contemporary situation is different. The "Semi-Permanent treaty revision process" (De Witte 2002) that characterized European integration since Maastricht has led to a consolidated treaty framework that covers extensively each area of policy-making included in the treaty, not least by codifying at constitutional level a lot of the case law of the Court. The precise language of the Lisbon Treaty particularly enables the Commission and the legislature to complete the Single Market, meaning that most legal outputs come from the EU executive and legislative branches of the polity. It has removed potential constitutional and legislative vacuums that were historically filled by the Court. Therefore, the period that could have been described as a retreat of the Court from activism (Saurugger and Terpan 2017) also corresponds to a period of legislative enabling, meaning that "adversarial legalism" (Kelemen 2011) was no longer the sole modus operandum for integration. While the Free Movement of Goods was purely a judicial creation that hardly needed specific legislation[23], the Free Movement of Services has a dedicated legislative instrument[24] that accompanies art. 56 TFEU. The Free movement of persons generated a huge amount of case-law in the 20th century in the areas EU citizenship

[22] Case 120/78 REWE-Zentral ('Cassis de Dijon'), 20 February 1979

[23] Case 8/74 Dassonville 11 July 1974; Case 267/91 and Case 268/91 Keck and Mithouard, 24 November 1993

[24] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services directive)

regime[25], freedom of establishment[26] or cross-border healthcare[27] all received codification and specification[28]. The case-law on non-discrimination[29] also received ample legislative and constitutional treatment, not least with the entry into force of the Charter of Fundamental Rights[30]. Even the most uncontested area of EU law – competition law and state aid – received further clarification in order to help national competition authorities in ensuring compliance with art. 101 and 102 TFEU[31]. And when the legislator did not cover every aspect of the policy in question, the Commission specifies the legislator's intent via "communications"[32].

This legislative enabling has also been accompanied by a strengthened enforcement on the ground. EU law has empowered several independent administrative bodies at the national level to ensure compliance with EU rules. These national regulators, which are also co-producers of EU norms (see above), have tremendous investigative and sanctioning capacities. The

[25] C-85/96, Martínez Sala, 12 May 1998; C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (*Grzelczyk*), 20 September 2001; C-413/99, Baumbast and R v Secretary of State for the Home Department (*Baumbast*), 17 September 2002; C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep (*Förster*), 18 November 2008

[26] C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, 18 December 2007

[27] Cases C-120/95 and C-158/96 Nicolas Decker v Caisse de Maladie des Employés Privés and Raymond Kohll v Union des Caisses de Maladie, 28 April 1998

[28] For citizenship, see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Citizenship Directive); For cross-border healthcare, see Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare; for freedom of establishment, see Services directive and Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Posted Workers Directive); regarding circulation across borders (including for non-EU nationals), see Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive)

[29] E.g. C 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, 8 April 1976; C 262/88, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, 71 May 1990 ; C 144/04, Werner Mangold v Rüdiger Helm, 22 November 2005; C-555/7, Seda Kücükdeveci contre Swedex GmbH & Co. KG, 19 January 2010; C-423/04, Sarah Margaret Richards v Secretary of State for Work and Pensions, 27 April 2006

[30] See also Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive).

[31] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Art. 101 and 102 TFEU); Directive 2019/1

[32] E.g. Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (competition law); COM/2009/0313 or Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

enforcement vacuum that was partially filled with the procedures attached to art. 258 and 260 TFEU has substantially been toughened by the creation of new EU law watchdogs.

The living law of the EU has several loci, one of which (but no longer the only) is the CJEU. The latter comes at the very end of an assemblage that has grown tremendously bigger than in the 20th century. Besides, several controversies surrounding the interpretation of the acquis have already been settled by the judiciary. This means that cases making their way to Kirchberg have already been subject to various handlings of the involved stakeholders in EU cross-level governance. The references and infraction proceedings[33] therefore only concern cases that could not settled by the others. These are unsurprisingly related to the socio-economic crises described above, in cases where the smooth functioning of the law-making process could not provide a sufficient answer. That probably and partially explains the recent description of the politicization of the activities of the CJEU (Blauberger and Martinsen 2020).

Tracing the law when sticking close to ANT means forgetting the traditional impetus of plunging into judicial developments, but rather to follow signs and sites where law is invoked. Such an invocation in regular practice also means decentering the look from the European level (once a norm is adopted) and see where it takes life and perhaps causes some disagreement. Lasting controversies surrounding interpretation may make their way to the CJEU, but some will already be settled by national authorities empowered to make EU law a reality. The controversies surrounding various market objects will find their way to local bodies first, and perhaps slowly making their way up to the Commission and the Court. Besides, these national bodies cooperate within dedicated EU circles such as European Administrative Networks, where an agreement can be forged. Therefore, EU-empowered administrative authorities are much more likely to give life to EU law than any EU institution. Only unsettled controversies, i.e. those which are being spotted (which is never a guarantee) and displaying different understandings, will go to EU courts.

F) General theory of law: the EU's fundamental norm

ANT may perhaps bring even more interest to legal scholars. It can help us identify, after several case studies (see more below), the fundamental tenets of the political and legal order of the Union. A general theory of law allows for a reconciliation of law and society, even for legal positivist scholars like Kelsen (Kelsen 1961) or Hart (Hart 1961), since the fundamental

[33] I exclude here direct actions, which are logically automatically settled by the Court

norm of any legal order would ultimately rest upon core societal features corresponding to ethics or morale. These theories study Western post-WWII states and therefore would implicitly rely on democracy and human rights as the cement gluing the legal order together. Human rights often figure in prominent positions in modern constitutions. Democracy is often not mentioned as such[34], but its key features such as free and fair elections, pluralism and separation of powers are also present.

More generally, thinking in terms of a general approach to law means assessing the self-standing validity of law as such or if it must rely on external steadying factors. This theoretical debate has traditionally occurred on the normative side of the social sciences. Empirical attempts of providing a comprehensive account of law are inexistent, and probably for good reason: modern mid-range theories strayed away from grand theories in order to stick closer to data. That implies a trade-off in terms of generalization to broad encompassing objects such as the law itself.

As an empirical if not empiricist approach, ANT is *prima facie* not providing the tools to join the debate launched by Kelsen and others. But a combination of case-studies (like advocated by Law [no pun intended]: Law 2004) may highlight some recurring features that are quite telling about the foundations of the legal order, rather than assuming their existence. Such an assumption leads scholars to unquestionably project the fundamental norm of Member states described above. A seminal statement of this trend can be found in Opinion 2/13 rendered by the CJEU and rejecting an immediate accession to the European Convention of Human Rights:

> " *This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.*
>
> *Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties),*

[34] The German *Grundgesetz* being a notable exception.

respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU […]"[35]

Indeed, art. 2 TEU lists the various constitutional commitments made at Member state level in terms of fundamental rights and democracy. This constitutional statement does not necessarily mean that these considerations find an echo in practice. On the contrary, there are reasons to challenge this shared commitment between the EU and its Member states[36]. First, the EU has its own understanding of fundamental rights, i.e. one that may not challenge the primacy of EU law, even in cases where fundamental rights protection is greater in Member States than in the EU[37], and therefore one that allegedly cannot abide by the ECHR. Fundamental rights may prove divisive, especially regarding economic and social rights. For example, austerity measures demanded by the troika during the debt crisis led the European Committee of Social Rights to acknowledge a sincere disregard for social rights, whereas the same measures were deemed perfectly compatible by the Commission and the CJEU with the Charter of Fundamental rights[38]. When it comes to democracy, the dissonance with practice could not seem to be clearer. The statement of a "democratic deficit" by the Young European Federalists in 1977 has only grown in importance since then. Structurally, the inclusion of more competences at Union level has created a wider gap between citizens and their governing bodies: if there was already a distance between them and national administrations, this conferral to EU bodies perceived as more obscure and non-politicized organization has widened this gap (Dahl 1994). Some may even see the Union as disregarding democracy altogether. The Lisbon treaty crystallized a further conferral of competences that were initially rejected by the citizens of the Netherlands and France in 2005. The EU may be described as an alternative way for national politicians to bypass domestic and democratic constraints at home by establishing a supranational "government by committee" ruling without citizen input[39]. Even the very fundamental principle of the rule of law, assumed to be shared among all Member States considering that fundamental rights are enshrined in all national constitutions[40]

[35] Opinion 2/13 of 18 December 2014, §168 and 169

[36] See Chalmers, Davies and Monti 2019 concurring

[37] C 399/11, Stefano Melloni v Ministerio Fiscal, 26 February 2013

[38] E.g.C-64/16, Associação Sindical dos Juízes Portugueses; ; C 8/15 to 10/15, Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB) , 20 September 2016

[39] Bickerton 2012. This proved particularly acute during the debt crisis, when national parliaments were excluded from the resolution of the crisis.

[40] C-11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Internationale Handelsgesellschaft), 17 December 1970

and in the ECHR[41], are generating some dissensus among Member States, especially regarding judicial independence[42].

The previous section was not meant to provide an abundant critique of European integration since the signature of the Rome Treaty. It was rather meant to highlight that the assumed fundamental principles and norms of a polity may not be fully echoed in practice. The Union actually seems to be at a crossroads when it comes to the definition of its *Grundnorm*. This is where ANT can provide help. In combining several case studies and by "snowballing outwards" (Beach and Pedersen 2018) (i.e. abstracting the commonalities across cases), one may perhaps underpin the pattern(s) that characterize law and policy-making in the Union. A general trend that seems to pop up across a vast majority of policy areas is the ordoliberal market dynamic of the Union. The EU regulates objects that are meant to be subject to open competition across borders. It provides regulatory solutions for the opening of networked economies to competition, whereas utilities were historically under state monopoly. Even areas that seemed to bypass the market logic such as citizenship seem to be caught up by the market logic. The creation of EU citizenship was quickly finetuned by the Citizenship Directive that allows residence in another country for workers and students, while withholding the obligation of providing social benefits to non-economically active residents for a period equivalent to the one needed for obtaining permanent residence (in other words, becoming as close as possible to a national of the state of residence), i.e. 5 years. Even attempts to bypass the cross-border market logic[43] were soon contained as exceptions[44]. When considerations of the market and considerations of core social rights are balanced against one another, the former primes over the latter[45]. The market seems to be the core fundamental around which other considerations such as fundamental rights simply gravitate. The pretentions enshrined in art. 2 TEU may be present – and they often are, not least in the case-law of the CJEU – but can hardly be considered as constituting (empirically) the cornerstones of the EU polity.

[41] C-4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, 14 May 1974

[42] K 3/21 Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, 7 October 2021

[43] E.g. C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (*Zambrano*), 8 March 2011

[44] C-434/09, Shirley McCarthy v Secretary of State for the Home Department, 5 May 2011

[45] C-341/05, Laval un Partneri (*Laval*), 18 December 2007; C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (*Viking*), 11 December 2007; C-346/06, Dirk Rüffert v Land Niedersachsen (*Rüffert*), 3 April 2008; C-319/06, Commission of the European Communities v Grand Duchy of Luxemburg (*Luxemburg*), 19 June 2008

G) Designing enquiries: controversies over legal interpretations in the EU

ANT or thinking near ANT allows for a lot of theoretical potential and even more for fruitful case studies. The problem perhaps, as highlighted above, is the point of departure when designing research. Can there be any proper starting point in world that needs to be scientifically flattened every time? The answer given by the founders of the approach is actually rather convincing. A social-scientific enquiry should depart from "controversies". These are events where and when actants saliently mobilize against a pre-established status-quo. In Callon's seminal example, the controversy starts with the lowering of scallops' reserves in the bay of Saint-Brieuc, leading scientists to attempt to enroll local officials and farmers in their quest to preserve sufficient (consumption) levels of scallops in the region. This design regarding strategies seems efficient in several regards. The first is that actants engage in social interaction. The social here becomes visible: *Electricté de France* tries to get the government on its side, natural scientists present their findings to politicians and farmers on scallops' (temporary) preservation, etc. The social is not assumed when unwrapping controversies, but it is made during attempts at settling controversies.

The second advantage is that actants re-open black boxes during controversies, i.e. the previous assemblages that are no longer impervious to change. Such a strategy could easily be applied to the field of EU law. Black-boxing through law is only temporary as it opens up new social paths in the objects-regulating EU polity. Norms must first be applied by scientists performing the "pragmatic sanction of materials" (Lezaun 2012) and thus giving law its material content, then be subject to the market where the understanding of the regulated object is subject to differing understandings. This is clearly the case when the Commission launches infringement proceedings for incorrect application of EU law, which may result from not only a lack of transposition but also for a different understanding about the content of norms. The case of directives is particularly illustrative in that regard: it harmonizes the substance of policies but leaves freedom to national administrations in implementing those. This analytically neat but empirically partial distinction leads to discrepancies in implementation. The case of networked economies remains illustrative in that regard: national administrations are tasked with the liberalization of sectors that used to be under state monopoly for decades, i.e. where the state performed the activity. Liberalization without suppression of state-subsidized companies leads some to acknowledge a bias of administrations towards the incumbent energy, aviation or rail companies for example. Moreover, the different varieties of capitalism in the Union will also impact implementation in ways defying the 'one-size-fits-all' logic of European regulation.

Another element of partial implementation will be related to the pre-existing infrastructure and more generally the material conditions on the ground. The import of one technology to another space may not necessarily be reproduced to the identical, and sometimes the transfusion will fail (Akrich 2006; Callon 1984). In a word, policies drafted in the administrative nucleus of the polity may be "dashed" in the periphery (Pressman and Wildavsky 1979).

Controversies surrounding norm interpretation are likely to arise in a wide polity like the EU, which is illustrated by the business of its higher Court that has nowadays one of the biggest dockets in the world (Alter 2014). Most cases coming before the CJEU arise via the preliminary ruling procedure, i.e. when national judges have doubts regarding the compatibility of national practices with EU rules. This hesitation of the national judge clearly exemplifies the existence of a controversy, i.e. a lack of a shared understanding among actants about the precise and socially accepted conduct to be followed. The controversiality is easy to spot and theorize when it is adjudicated before courts. However, most instances of controversial applications of EU law will be settled at earlier stages among parties, by national administrations or judges. The length of proceedings seems to be a valid indicator of the vivacity of a controversy: the longer it takes and the more actants involved, the tougher it is to resolve. Infringements proceedings, especially those based on art. 260 TFEU, display a persisting disagreement among EU and national officials taking years to be resolved.

More importantly, the involvement of the alleged ultimate adjudicator of the polity does not mean that controversies are settled and black-boxed. Even if that is often the case considering that most CJEU rulings are followed by national courts in preliminary referrals (Nyikos 2003), the controversy may last if CJEU rulings are disregarded or outright rejected, like it happened in the context of the interpretation of the ECB's mandate or judicial independence[46]. Following a controversy therefore means freeing itself from pre-established conceptions arising out of the institutional order, leading to dubious statements such as "the CJEU settled doubts about the interpretation of EU law". The social scientist must acknowledge the possibility that legal controversies have several resolution mechanisms, without overemphasizing the weight of EU institutions in that regard.

[46] BVerG, 2 BvR 859/15, 5 May 2020); K-3/21; Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A., 6 December 2016, in response to C-441/14, Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen (*Ajos*), 16 April 2016; Pl. ÚS 5/12, Slovak Pensions XVII, 31 January 2012, following C-399/09, Marie Landtová v Česká správa socialního zabezpečení (*Landtová*), 22 June 2011

The theoretical weakness about controversies resides in the inability or at least difficulty in explaining continuity in society. Controversies display anomalies in the system. The smooth functioning of the latter will remain out of the radar of ANT scholars, something that Latour acknowledged when he described most social ties as passive "intermediaries" rather active "mediators" than establish new social ties (Latour 2005). The pre-existing stability is of course partially unveiled in order to understand the subsequent breakdown of black-boxes, allowing for a grasp of the reasons leading to the doing of new ties or the undoing of previous ones. But the reasons that led to the stability of assemblages through time remains beyond our grasp if we choose controversies as the object of study. This means that ANT proves theoretically fruitful when studying critical junctures, but the same cannot be said about normal or long-lasting configurations. ANT theories are about doing and undoing, but cannot help us understand much between these 2 extremes. That is why it is particularly suited for studying contemporary European integration, which is characterized by a chronic instability and frequent changes to its policy orientation.

IV) On methods: beyond ethnography

The demanding epistemological stakes developed above have strong consequences when it comes to methodology. Since ANT is an exclusively inductive approach, quantitative methods relying on a set of pre-established hypotheses are automatically excluded. Among qualitative methods, the choice of ANT forefathers was rather clear: ethnography was the sole modus operandum. Ethnography is an interpretive methodology that requires little if no pre-established knowledge of the situation observed or screened by the researcher (Gerring 2012). More importantly, it is impervious to the pre-established conception of social scientists, who just bear to describe events. Garfinkel argued that this method was leading to an understanding of the pre-existing social order: the quality of interaction, the seating around the table, the order of speakers, etc., were all reflecting a pre-existing among participants and their relative importance in the configuration.

Ethnography thus presents promises when studying controversies about law: its content and potential interpretations are debated in for a such as courtrooms, where the spokespersons of

each party and judges are all gathered in a single arena. Hearings before courts represent "trials of strength" in every sense of the concept, as enrolment attempts clash with one another[47].

Yet ethnography presents its own sets of challenges. The first goes back to the design of the research: the researcher must know where to look in order to find answers. Pure induction cannot exist, and a set of anticipations – even if not framed as hypotheses to be validated or rejected – must be framed. The second shortcoming relates to historicity: observed events will obviously say something about the social (and the place of law within it), but they will also bear their unique historical brand. Participants change, the agenda changes, locations change, presidencies change, mood and fatigue levels change, etc. Generalization may only come about after different observations of the same phenomenon (such as Latour's work on the Conseil d'Etat). But this leads to a third shortcoming: the over-specificity of the observed phenomenon. Latour's Making of Law is exemplary in that regard. His in-depth study of the Supreme Administrative Court of France is the most detailed and compelling account of the inner workings of this court, but its representativity vis-à-vis other courts and lawmaking in general is yet to be found. The *Making of Law* cannot help us understandto what extent the Conseil is akin or on the contrary different to other adjudicating bodies. The ethnography employed in this study may perhaps allow for diachronic comparisons of the same body, but not for synchronic comparisons across other areas and spaces.

Second, even if one identifies the proper arena to be observed, access is everything but granted. That is particularly the case for lawmaking arenas. Several legislative texts are adopted behind closed doors such as the Council's or comitology's. Deliberations at the CJEU are not accessible to the public. Studying dynamic lawmaking requires means that ethnography cannot necessarily provide.

To what extent can ANT's classic methodology be finetuned in order to stick as close as possible to the approach while delivering knowledge about legal production and legal interpretation? Thinking near ANT proves fruitful once more. The approach is about stressing the interactive dynamics of actants. When access is barred, other traces of meetings may be available. Besides, actants participating in lawmaking arenas may also be accessible after such encounters and relate their story about what happened. They also leave identifiable traces that

[47] For an example about the sovereign debt crisis, see Haagensen 2020

played a role in the process. Let's explore each in turn before stressing what classic doctrinal scholarship could use as a finetuned methodology.

A) Traces of trials of strength: minutes and consultations

Lawmaking and law enforcement are debated and adopted in arenas that do not always grant access to externals. If debates in the EP are televised, those of the Council and of the Commission are behind closed doors. Meetings between various stakeholders during expert and comitology are also not accessible. But various bodies publish the minutes of their meetings. More or less detailed, these relate the agenda and content of discussions. Even if these texts cannot convey the same type of information than direct observation, they will nonetheless display content that could be analyzed according to Garfinkel's ethnomethodology. First, indications of the participants is already conveying information. A CV search of the actants present in the room is already giving a sense of pre-existing social dynamics. Second, the order of participations conveyed in the minutes indicates the attempt at leading such encounters. Are speeches shared equally among participants, or are some more active than others? For example, a look at the minutes of the meetings of the European Network of Regulatory Rail Bodies shows that civil servants from DG MOVE take the lead in the discussions and expose their priorities for the future, whereas representatives of national rail regulators remain silent for the most part[48]. This silence from national representatives is more puzzling: they may either be fully convinced of the Commission's speech or on the contrary lack a willingness to cooperate with EU officials[49]. On the contrary, minutes of ECN meetings show a more proactive discussion among participants, where subjects are deeply discussed by various participants[50]. For a legal scholar, the content of such minutes will indicate the hesitations surrounding the interpretation of norms. Having a look at the voice of the enforcers and lawmakers allows for understanding the reasons behind law's life or death on the ground. Such considerations may related to a lack of willingness at complying, others related to a material impossibility of doing so. The doubts, hesitations and objections raised during such debates will potentially lead to the reopening of black boxes described above, much before these are raised before the CJEU.

[48] See the list of encounters at: European Network of Rail Regulatory Bodies (ENRRB) - European Commission (europa.eu)

[49] This puzzle leads to a need for a triangulation of sources. See below.

[50] Documents - European Commission (europa.eu)

Nowadays, interactions do not have to be occurring with the physical participation of stakeholders. Digital meetings occur frequently since lockdown, and several procedures happen almost exclusively in writing. Such is the case of public consultations by the Commission[51]. The latter must launch a public consultation before presenting a first draft of a legislative act and must carry out another consultation on this draft. That allows any interested party – mostly Brussels-based interest groups (Laurens 2015) – to submit observations to the lawmaking process. This process is already quite indicative regarding the salience or not of a controversy. The amount of feedbacks and the pedigree of the stakeholders is already telling much about the assemblage that will be formed by the upcoming legislation. Besides, the content of feedback not only tries to influence the drafting of the text, but also indicates which doubts may arise as a result of the new piece of legislation. The variety of interests represented may display the core considerations of the market balanced with social concerns gravitating around the object to be regulated, some of which were not perceived by EU officials and may lead to controversies in the future. They show the supporters and the opponents to a project, and some of these players will be found in the implementation and/or contestation of the norm at an ulterior stage. The Commission's summary of feedbacks finally illustrates which arguments were retained in the proposal and those which were (at least temporarily) excluded from it.

Following these traces without substituting the language used by stakeholders (a core ethnomethodological principle) at various instances of the policy process (from the initial consultation to adjudication) allows for the inclusion of a temporal dimension that ethnography may hardly capture. Of course, the direct observation of a critical juncture over a short time span will provide more insights than the archival work advocated here. When it comes to study the EU policy process – characterized by its snail pace – this method allows us to retrace conflicting viewpoints that gave rise to a controversy while closely sticking to empirics.

B) Missing data: between open and semi-structured interviews

Archival work is a tedious work, requiring a deep immersion into a field. And it might not yet be enough to understand why controversies occurred and which societal changes these brought to the world. Minutes and consultations are neat texts that purposely do not convey the deepest

[51] See the list of initiatives at: Published initiatives (europa.eu)

aspirations and toughest frustrations of the involved participants. They only display a partial account of what happened. If this material is not enough, a triangulation of other sources might be needed. If the controversy is ongoing, recourse to ethnography is obviously an option. If it is over however, and that the social scientist wants to have a look back, another method is required.

After spotting the actants that tried to enroll others in the archival work, and there remain doubts as to what happened during the controversy, the simplest way to collect the missing links is to consult with them directly. Interviews with stakeholders imply a trade-off. The researcher wants to know what happened. However, the framing of questions cannot be overly circumscribed, since the latter may bias the response in a way that does not render justice to history, and perhaps even to the perceptions of the interviewee herself. In order to avoid such a bias, two conditions must be met. The first is an (light) interview guide that stays close to the controversy. This condition is important in order to resituate the interviewee in a situation that occurred in the past and may therefore have been slightly forgotten. A recollection of established facts will reactivate dormant memories and allow for an accurate reconstitution of events. This means that interview questions should as close to facts as possible, and that more general questions about the understanding of a norm or the development of policy should be accompanied by considerations about facts (e.g. anecdotes). ANT purists care little about perceptions and rather focus things as they happened.

After this clear framing of the interview with the actant, the second condition is a subsequent behavior that is at odds with the first condition. Once the stage is set, the interviewee should be as free as possible to express her opinion about the controversy. Some answers may be a simple Yes or No, others could lead to a 30-minute explanation. It is not the role of the researcher to presume the length of a response. The idea is one of "ethnographic interview" (Beaud 1996). It consists in situating the interviewee on her context without constraining her with questions that presume a response, or even worse would serve a further quantifiable logic of accumulating similar responses across interviews. Such an approach would lead us back to deduction and therefore not render justice to the facts following ANT. This means that the adoption of an interview guide must be as light as possible. The purpose of an interview guide goes back to the quantifiable logic of collecting data on a sample of the population. It is more than understandable in scientific terms, but the semi-direction cannot be overly constraining so as to skew the results. The difficult equilibrium consists in collecting the interviewee's personal experience and to connect it back to a broader social pattern.

Two strategies are thus possible. The first consists in letting the interviewee 'roll' after the original framing of the controversy. The interviewee gets the opportunity to express as much as they want their views on the subject matter, encouraged in that regard by the researcher with follow-up questions about things expressed by the interviewee (and therefore not following a pre-established guide). This allows for the purest reflection of the perceptions of the actant without a researcher's exaggerated bias and follows the logic of the thick description of ANT. The issue comes at the time of coding, when the researcher attempts to abstract the commonalities across interviews. The varying length of responses, of language used and of emotions expressed may bar a genuine abstraction of patterns. It requires in any case a tedious coding process which may be always be contested eventually. This criticism may softened however, considering that the identified actants often share similarities due to their professional occupations and policy preoccupations. In a similar domain, actants often share an indigenous language (the passive intermediaries of Latour that stabilized assemblages over time) that will regularly pop up. For example, rail officials will mention things such as "one-stop shops" (a centralized point of contact for infrastructure managers in establishing transnational freight corridors) or "TSIs" (the acronym is here being kept on purpose, and refers to technical specifications for interoperability, i.e. the guidelines established to make international rail traffic as smooth as possible, most notably via the partially implemented "ERTMS" [European Rail Traffic Management System]). Prudential financial supervisors will refer to "Joint Supervisory Teams" (referring to teams of supervisors from one Member State performing supervision in another country) or "less significant institutions" (i.e. banks not meeting the thresholds for direct supervision by the ECB). This common language will become the pattern to follow for the researcher, which may not at any point substitute its own conceptual apparatus to the language of actants.

The second strategy consists in having a more classic semi-structure. The prohibition of conceptual substitution still applies, but the researcher may limit the time of response of the interviewee in favor of asking questions at the heart of the controversy. The disadvantages are clear: the researcher leads the process, and may overlook bits of information that may have been naturally expressed by the interviewee. The upside is clearly related to time constraints and easier coding. It allows for a greater number of interviews (which is time-enhancing especially in case of long-distance travelling) and allows for an easier processing of the information. This second strategy may seem weaker than the first one on pure methodological grounds, and probably for good reason. Both types are still valid considering that interviewees

are very different from one another. Some are naturally talkative and expressive, others are more reserved and in need of relaunches during the interview.

C) What about black-letter legal scholarship?

The described methodology focused on actants may seem awkward for a legal scholar willing to understand the possible interpretation(s) of rules. There seems however to be some upside in adopting at least some of the insights developed in this methodology section.

The first relates to doubts arising out of counter-factuality. Case notes are about the interpretation of norms by a Court, and whether these fit pre-established paths found in case law. In the EU legal order, these often relate to teleology, but sometimes refer to other paradigms of interpretations such as originalism or consequentialism (Beck 2013; Conway 2012). If relations to pre-existing paradigms are often doable, there are sometimes cases where it is difficult to establish this connection. *Zambrano* is a clear example here. The facts are clear: there was no cross-border element, which should not have activated the provisions related to EU citizenship. Yet judges decided to activate EU citizenship law in order to protect the "essence of fundamental rights" of Zambrano's children, and therefore prevent the expulsion of the Zambrano family to Columbia. In a very similar case – *McCarthy* – the outcome led to the expulsion of the third-country national to Jamaica. How can one explain the difference of outcome between these two cases? The legal bases were the same (art. 21 TEU and the Citizenship Directive) but the outcomes are at odds with one another? This seems to mean that classic legal reasoning may be reached its limit. If extra-legal considerations came into play – such as the "deservingness" of litigants (Davies 2018) – the use of the empirical methodology described above is warranted. If the judicial resolution of a case seems to be more the result of judges being shocked by the cold-heartedness of national civil servants than of applying rules, this hypothesis – about a judicial case that is of interest to lawyers in order to understand the state of the law – may be more easily verified by an empirical assessment than by a counterfactual reasoning. The point here is not to advocate the end of doctrine. Most cases can be explained by the solid foundations of legal reasoning. Some of them however – especially those raising charges of activism – deserve a more comprehensive explanation going beyond the wording found in judgements.

The second advantage resides in opening up the sources of inspiration when it comes to the understanding of the law. The framing of norms goes beyond the content of rules and case-law. These are adopted following a long and tedious process of re-drafting and dilution. EU

regulations and directives constitute at times incomplete legislative contracts that need further resolution through practice or adjudication. Koen Lenaerts argued that some of these gaps were voluntarily left open by the legislator and were thus welcoming a judicial resolution (Lenaerts 2013). A look into the archives of the legislative process allows for an assertion of the truth of that statement or not. If the debates in the EP or Council display such a willingness of letting the judge settling the controversy, the activism of the CJEU that has been criticized for a long time (Horsley 2018) could be justified on these grounds. If on the contrary these traces display that the legislator found an understanding about the meaning of a provision and that these are in adequation with the constitutional texts of the polity, a call for an increased deference to the legislator may be warranted. In other words, an empirical methodology may also be used in order to frame a normative argument about judicial behavior. This move to empirics may help in dissociating academia from practice, i.e. to reestablish a line that has historically been blurred throughout decades of integration-through-law.

V) Conclusion: law, modernity and social-scientific enquiry of law in the EU polity

This paper has argued that Actor-Network Theory provides tools for rethinking the understanding of EU law in its contemporary context. It first invited the reader to rethink the fundamental assumptions about the European legal order, and advocated that law is the subject of various understandings among citizens. Law is seen here as having several ontologies, which could be Kelsenian, Hartian or otherwise. More importantly, ontologies co-exist as actants have different viewpoints about the validity of norms, which may collide with one another. That is particularly important for a multi-state, non-state polity where the locus of political power is not firmly located either in states or in the EU.

Producing knowledge about the European legal order therefore requires an epistemological approach according to which the place of law may change through time, space and actant. It means that normative assumptions must be set aside in favor of a rather naïve but fruitful openness towards the unexpected. For example, a recommendation may very well be considered binding by civil servants (Hubkova 2023) while a valid norm following a Kelsenian logic may simply be disregarded as invalid by some. Studying law with ANT means to stick close to its application while remaining as neutral as possible about its development.

The epistemological and ontological takes of ANT have been heavily criticized as being overly demanding, apolitical and after all unable to explain much of the developments of the social.

Nonetheless, the principles of agnosticism, generalized symmetry and free association have gained traction in STS and in the social sciences more broadly. They have helped us rethink the role of objects in shaping human interaction. This inclusion of non-humans is most probably the most important argument for the social sciences. Non-humans are either biological beings that adapt over time to their environment and constrain behavior, as illustrated by COVID. Non-biological beings also shape behavior. These are creations of humans that rely on their tools to further change their environment. This eventually generates a dependence and sometimes a lack of understanding about instruments that also affect social interactions. The debates surrounding artificial intelligence, and more precisely the developments of "Frankenstein effect" regarding algorithms[52], precisely fit that category. The role of objects, and technology in particular, is fundamental in our contemporary societies. It shifts the dynamics of power from a society ruled exclusively by elected officials and bureaucrats to a society where engineers (and those smart enough to hire them) share an important part of domination. That phenomenon is not new – Crozier already established it in the 1960's about tobacco production (Crozier 1963) - but it is particularly acute in the 21st century.

Such an approach seems particularly suited for studying contemporary European integration. The EU remains after all an ordoliberal market. Its governing bodies, aside from a few exceptions such as the Common Foreign and Security Policy, are drafting the rules and standards of objects aimed at circulating across borders. Its regulations bypass the simple legislative process and specify the most technical standards associated with the composition and consumption of products. This leads the executive to hire engineers or delegate specifications to certification bodies or agencies. This development of the market is not without incidence on the governance model promoted by the EU. Lacking or scarce with input legitimacy, the Union relies extensively on its expertise to produce sound outputs for citizens. It leads to a choice for technocratic engineering not only within the Union itself, but also in Member States where technocratic independent administrative authorities are empowered by Union law to achieve the treaties' purposes. These processes of black-boxing democratic goods are not new and were already described by Latour at the turn of the 21st century (Latour 2004 [1999]). The contemporary development of European objects simply confirms that trend (Laurent 2022).

[52] See e.g. "Artificial Intelligence: How to Overcome the "Frankenstein Effect" | IE Insights", 17 June 2020

ANT is a source of theoretical inspiration as much as it is a social theory. The discussions surrounding the approach display a trend of thinking 'near' of 'after' ANT. The whole package has led to a burdensome approach that led to its original creators to doubt its ability as a dominant paradigm. But its insights remain unique to some extent and deserve some application to other fields, which was for example done in the recent *Routledge Handbook on Actor-Network Theory*. The similarities between science and law are quite remarkable in that regard, and particularly much more than Latour acknowledged. Both scientists and lawmakers spend time in drafting countless texts sent to others and modified or contested over time (Latour and Woolgar 1979). Their findings undergo trials of strength that generate new associations and destruct previous ones. The various enrolment attempts, leading some to become obligatory passage points after a successful 'interessement' and problematization, are similar across both fields. In sum, it is possible to study law in action the same way Latour studied *Science in Action*. An adjustment from a pure ethnographic approach to a mixed-methods design involving interviews and archival work allows for a near-ANT approach that does not betray the fundamentals of the original approach while allowing for flexibility in the generation of data.

Bibliography

Akrich M. (2006) *La description des objets techniques* In : *Sociologie de la traduction : Textes fondateurs*, Paris: Presses des Mines

Alter K. (2014) *The New Terrain of International Law. Courts, Politics, Rights*, Princeton University Press

Alter K. and Meunier-Aitsahalia S. (1994) "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision", *Comparative Political Studies*, *26*(4): 535-561

Audren F. and Moreau de Bellaing C. (2013) "Bruno Latour's Legal Anthropology", in Benakar R. and Travers M. (eds) *Law and Social Theory*, Bloomsbury Publishing

Bartl M. and Lawrence J. (eds) (2022) *The Politics of European Legal Research. Behind the Method*, Edward Elgar

Beach D. and Pedersen R. (2018*) Process-Tracing Methods. Foundations and Guidelines*, University of Michigan Press, 2nd ed.

Beaud S. (1996) « L'usage de l'entretien en sciences sociales. Plaidoyer pour l'« entretien ethnographique »", *Politix*, 35(3): 226-257

Beauvallet W. and Michon S. (2012) "Des eurodéputés « experts » ? Sociologie d'une illusion bien fondée", *Cultures & Conflits*, 85-86(1-2): 123-138.

Beck, G. (2013), *The Legal Reasoning of the Court of Justice of the EU*, Oxford: Hart

Bellamy R. (2019) *A Republican Europe of States. Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, Cambridge University Press

Bickerton C. (2012) *European Integration: From Nation-States to Member States*, Oxford: Oxford University Press

Blauberger M. and al. (2018) "ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence", *Journal of European Public Policy*, 25(10): 1422-41

Blauberger M. and Martinsen D. (2020) "The Court of Justice in Times of Politicisation: 'Law as a Mask and Shield' Revisited", *Journal of European Public Policy*, 27(3): 382-99

Blok, A., Farias, I., & Roberts, C. (Eds.). (2019). *The Routledge Companion to Actor-Network Theory* (1st ed.). Routledge

Bois J. and Dawson M. (2023) "Towards a Plausible Theory of Judicialization in the European Union", *Journal of European Integration*, 45(5): 823-842

Bois, J. and Van Cleynenbreugel, P. (2021) "National Institutional Autonomy and EU law: time to reframe the stakes of interdisciplinary scholarship?", *ORBi-University of Liège*. https://orbi.uliege.be/handle/2268/267921.https://hdl.handle.net/2268/267921

Bourdieu P. (1987) “The Force of Law: Toward a Sociology of the Juridical Field”, *Hastings Law Journal*, 38: 805-853

Bourdieu P. and Rosine C. (1990) “La construction du marché. Le champ administratif et la production de la "politique du logement"”, *Actes de la recherche en sciences sociales*, 81-82(1-2): 65-85.

Callon M. (1984) “Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay”, *The Sociological Review*, 32(1): 196-233

Callon M. and Latour B. (2015) “Unscrewing the big Leviathan: how actors macro-structure reality and how sociologists help them to do so”, In K. Knorr et A. Cicourel (eds) *Advances in Social Theory and Methodology*, London: Routledge and Kegan Paul, 277-303

Callon M. and Latour B. (1992) "Don't Throw the Baby Out with the Bath School! A Reply to Collins and Yearley", in Pickering A. (ed.), *Science as Practice and Culture*, Chicago: University of Chicago Press, 343-368. https://doi.org/10.7208/9780226668208-013

Chalmers D. and al. (2019) *European Union Law*, Cambridge University Press, 4th ed.

Clark G. (1984) “A Conversation with Duncan Kennedy”, *The Suffolk University Law School Journal*, 2:56

Cloatre E. (2018) “Law and ANT (and its Kin): Possibilities, Challenges, and Ways Forward”, *Journal of Law and Society*, 45: 646-663. https://doi.org/10.1111/jols.12133

Colemans J. (2014) *L'ordinaire du contentieux administratif : Analyse du processus décisionnel au Conseil d'Etat belge francophone*, Thèse de doctorat, Université de Liège, 2014: https://hdl.handle.net/2268/164237

Collins H. and Yearley S. (1992) "10. Epistemological Chicken". *Science as Practice and Culture*, in Pickering A. (ed.),*Science as Practice and Culture*, Chicago: University of Chicago Press, 301-326. https://doi.org/10.7208/9780226668208-011

Conway G. (2012) *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press

Crozier M. (1963) *Le Phénomène bureaucratique*, Seuil

Dahl R. (1994) “A Democratic Dilemma: System Effectiveness versus Citizen Participation”, *Political Science Quarterly*, 109(1): 23-34

Davies G. (2018) “Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication”, *Journal of European Public Policy*, 25(10): 1442-60

Dawson M. and al. (2013) *Judicial Activism at the European Court of Justice*, Edward Elgar

Dawson M., Enderlein H. and Joerges C. (eds) (2015) *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation*, Oxford University Press

Dermine P. (2022) *The New Economic Governance of the Eurozone. A Rule of Law Analysis*, Cambridge University Press

de Wilde P. and al. (2016) "Introduction: the differentiated politicisation of European governance", *West European Politics*, 39(1): 3-22

de Witte B. (2002) "The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process", in Beaumont P. and al. (eds) *Convergence and Divergence in European Public Law*, Hart Publishing

Dondero M. (2018) "Bruno Latour et la sémiotique de l'énonciation: fondements et évolutions": https://doi.org/10.5840/symposium20182213

Epstein L. and King G. (2002) "The Rules of Inference." *The University of Chicago Law Review*, 69(1): 1–133

Ewick P. and Silbey S. (1998) *The Common Place of Law. Stories from Everyday Life*, University of Chicago Press

Garben, S. (2019) "Competence Creep Revisited", *Journal of Common Market Studies*, 57: 205–222

Garfinkel H. (1967)., *Studies in Ethnomethodology*, Englewood Cliffs, NJ: Prentice-Hall.

Genschel and M. Jachtenfuchs (2014) (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press

Genschel P. and Jachtenfuchs M. (2018) "From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory", *Journal of Common Market Studies*, 56(1), 178-96

Georgakakis D. and Rowell J. (2013) *The Field of Eurocracy. Mapping EU Actors and Professionals*, Palgrave Macmillan

Gerring J. (2012) *Social Science Methodology. A Unified Framework, Cambridge University Press*, 2nd edition

Haagensen N. (2020) *European Legal Networks in Crisis: The Legal Construction of Economic Policy*, PhD thesis, Université Libre de Bruxelles

Harsch M. and Maksimov V. (2019) "International Courts and Public Opinion: Explaining the CJEU's Role in Protecting Terror Suspects' Rights", *Journal of Common Market Studies*, 57(5): 1091–1110

Hart H. (1961) *The Concept of Law*, Clarendon Law Series, Oxford University Press

Hooghe L. and Marks G. (2001) "Types of Multi-Level Governance", *European Integration online Papers (EIoP), 5(11)*

Hayes-Renshaw F. and Wallace H. (2006) *The Council of Ministers*, Palgrave

Horsley T. (2018) *The Court of Justice of the European Union as an Institutional Actor. Judicial Law-Making and its Limits*, Cambridge: Cambridge University Press

Hubkova P. (2023) “Limiting or Empowering? Soft Rulemaking of the European Supervisory Authorities and Its Impact on National Administrative Authorities”, *Revue de la Faculté de droit de l'Université de Liège*, 2/2023: 247-266

Hunt A. (1986) “The Theory of Critical Legal Studies”, *Oxford Journal of Legal Studies*, 6(1): 1–45

Innerarity D. (2018) *The democracy in Europe*, Palgrave-Macmillan

Jasanoff, S. (1990) *The Fifth Branch: Science Advisers as Policymakers*, Harvard Univ Press.

Jasanoff S. (1995) *Science at the Bar. Law, Science, and Technology in America*, Harvard University Press

Jasanoff S. (2013) *Le droit et la science en action*, Dalloz

Joerges C. (1996) “Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration”, *European Law Journal*, 2(2), 105-135

Kauppi N. and Madsen M. (eds) (2013) *Transnational Power Elites. The New Professionals of Governance, Law and Security*, Routledge

Kelemen D. (2011) *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Harvard University Press

Kelsen H. (1967) *Pure Theory of Law*, Berkeley: University of California Press

King G. and al. (1994) *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton University Press

Larsson O. and Naurin D. (2016) “Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU”, *International Organization*, 70(2), 377-408

Latour B. (1988) *Science in Action. How to Follow Scientists and Engineers through Society*, Harvard University Press

Latour B. (1993) *The Pasteurization of France*, Harvard University Press

Latour B. (2004) *Politics of Nature. How to Bring the Sciences into Democracy*, Harvard University Press

Latour B. (2005) *Reassembling the Social – An Introduction to Actor-Network-Theory*, Oxford University Press

Latour B. (2009) *The Making of Law. An Ethnography of the Conseil d’Etat*, Polity Press

Latour B. (2018 [2013]) *An Inquiry into Modes of Existence. An Anthropology of the Moderns*, Harvard University Press

Latour B. and Woolgar S. (1979) *Laboratory Life: The Construction of Scientific Facts*, Princeton University Press

Laurens S. (2017) *Lobbyists and Bureaucrats in Brussels. Capitalism′s Brokers*, Routledge

Laurent B. (2022) *European Objects: The Troubled Dreams of Harmonization*, MIT Press

Law J. (eds) (1991) *A Sociology of Monsters. Essays on Power, Technology and Domination*, Routledge

Law J. (2004) *After Method. Mess in Social Science Research*, Routledge

Law J. and Hassard J. (eds) (1999) *Actor Network Theory and After*, Wiley-Blackwell.

Lenaerts K. (2013) "How the ECJ Thinks: A Study on Judicial Legitimacy", *Fordham International Law Journal*, 36(5): 1302-71

Lezaun J. (2012) "The Pragmatic Sanction of Materials: Notes for an Ethnography of Legal Substances", *Journal of Law and Society*, 39: 20-38.

Madsen M., Nicola F. and Vauchez A. (eds) (2022) *Researching the European Court of Justice. Methodological Shifts and Law's Embeddedness,* Cambridge University Press

Majone G. (1994) "The rise of the regulatory state in Europe", *West European Politics*, 17(3): 77-101

Majone G. (2005) *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press

McGee K. (2014) *Bruno Latour. The Normativity of Networks,* Routledge

McGee K. (eds) (2018) *Latour and the Passage of Law*, Cambridge University Press

Michael M. (2016) *Actor-Network Theory: Trials, Trails and Translations*, Sage Publishing Ltd

Molitorisová A. and al. (2022) "Techno-regulation: technological collaboration between EU administrations", *Law, Innovation and Technology*, 14(2): 421-446

Nyikos S. (2003) "The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment", *European Union Politics*, 4(4), 397-419

Pressman J. and Wildavsky A. (1979) *Implementation. How Great Expectations in Washington Are Dashed in Oakland; Or, Why It's Amazing that Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation*, University of California Press

Riles A. (2005) "A New Agenda for the Cultural Study of Law: Taking on the Technicalities", *Cornell Law Faculty Publications*, Paper 782

Robert C. (2003) "L'expertise comme mode d'administration communautaire : entre logiques technocratiques et stratégies d'alliance", *Politique européenne,* 11(3): 57-78.

Saurugger S. and Terpan F. (2017) *The Court of Justice of the European Union and the Politics of Law*, Palgrave Macmillan

Scharpf F. (1988) “The Joint-Decision Trap: Lessons From German Federalism And European Integration”, *Public Administration*, 66(3), 239-78

Scharpf F. (2006) “The Joint-Decision Trap Revisited”, *Journal of Common Market Studies*, 44(4), 845-864

Schepel H. and Wesseling R. (1997) “The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe”, *European Law Journal*, 3: 165-188

Spector C. (2021) *No démos ? Souveraineté et démocratie à l'épreuve de l'Europe*, Le Seuil

Stengers, Isabelle (2018) "The Challenge Of Ontological Politics", in Marisol de la Cadena and Mario Blaser (eds) *A World of Many Worlds*, , New York, USA: Duke University Press, 83-111.

Strum S. and Latour B. (1987). “Redefining the social link: from baboons to humans”. *Social Science Information*, 26(4): 783-802. https://doi.org/10.1177/053901887026004004

Torriti J. (2010) “Impact Assessment and the Liberalization of the EU Energy Markets: Evidence-Based Policy-Making or Policy-Based Evidence-Making?”, *Journal of Common Market Studies*, 48: 1065-1081

Trondal J. (2006) “Governing at the frontier of the European commission: The case of seconded national officials”, *West European Politics*, 29(1): 147-160

Tuori K. and Tuori K. (2014) *The Eurozone Crisis. A Constitutional Perspective*, Cambridge University Press

Tushnet M. (1983) “Following the Rules Laid down: A Critique of Interpretivism and Neutral Principles”, *Harvard Law Review*, 96(4): 781-827

Vauchez A. (2008) “The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)”, *International Political Sociology*, 2(2): 128–144

Vauchez A. (2015) *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity*, Cambridge University Press

Vauchez A. and de Witte B. (eds) (2013) *Lawyering Europe. European Law As a Transnational Social Field*, Hart Publishing

- Georgakakis D. and de Lassalle M., "Where Have all the Lawyers Gone? Structure and Transformations of Top European Commission Officials’ Legal Training", 137-52

Yesilkagit K. and Jordana J. (2022) “Entangled agencies and embedded preferences: National Regulatory Agencies in multi-level European governance”, *Journal of European Public Policy*, 29(10): 1677-1697