

**Delaney and the Motor Vehicle Insurance Directives :  
lessons for the teaching of EU law**

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## ***Delaney* and the Motor Vehicle Insurance Directives: Lessons for the Teaching of EU Law**

### **Abstract**

A recent series of cases relating to the EU motor vehicle insurance directives and their application in the UK makes for interesting reading. It is in the UK's negligent transposition, and a lack of knowledge and awareness by lawyers and judges in the cases of the interaction between domestic and EU law, which compounds the negative effects. The issues raised in *Delaney v Pickett* [2011] and *Delaney v Secretary of State* [2014] generate concern not just as to the implications they have to the application of EU law principles, but have resonance with the way in which EU law is taught in many universities. In this article we suggest that reconsidering the method and purpose of EU teaching may better serve the EU-lawyers needed for the future.

### **Introduction**

Perhaps it is time to rethink the way we teach EU law in Higher Education?<sup>1</sup> Our graduates who become lawyers (and judges) often do not use EU law effectively. The understanding, correct identification and application of EU law continues to be an essential weapon in the lawyer's arsenal,<sup>2</sup> to serve their client's interests but also with the broader and more significant function of ensuring national law is compliant

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<sup>1</sup> A referendum on continued membership of the EU (commonly referred to as Brexit) will be held on 23 June 2016. The outcome of the referendum may have repercussions for EU laws and their effect on the UK legal system, the teaching of EU law at University, and the implications for the cases referred to in this article. However, it should be remembered that whilst Art. 50 of the Treaty on the Functioning of the European Union provides for an exit mechanism for Member States that wish to withdraw from the EU, even on the basis of a 'yes' to withdrawing vote, it will take several years for the exit to be effective (and hence the applicable laws here, and the lawyers who will be involved, will be affected for several years into the future). Further, future agreements will likely lead to the government latterly agreeing to an ongoing relationship with the EU, on the basis of a free trade agreement. Therefore, EU law and its impact on legal education is likely to remain relevant in some form for the foreseeable future.

<sup>2</sup> Historically, and before the study of EU Law was a formal requirement of the Qualifying Law Degree, UK lawyers had significant gaps in their knowledge (two-thirds of respondents admitting their knowledge to be inadequate). Indeed, the EU Commission's research demonstrated that only 33% of lawyers in the member states used EU Law in their practice, and in several instances, lawyers were being sued for professional negligence by their clients for damages incurred as a result of this gap in knowledge and understanding (see The Law Society Gazette 'A Costly Knowledge Gap -- Lawyers in the European Union Know so Little EU Law They are Being Sued by Clients for Professional Negligence' April 1995. <http://www.lawgazette.co.uk/news/a-costly-knowledge-gap-lawyers-in-the-european-union-know-so-little-eu-law-they-are-being-sued-by-clients-for-professional-negligence/19936.fullarticle>: [last accessed 18 April 2016]. The Lord Chancellor's Advisory Committee Report on Legal Education and Conduct 'First Report on Legal Education and Training' April 1996 highlighted this deficiency in the education of future lawyers, but concerns continue in 2015 with the Young Legal Aid Lawyers organisation reporting that the SRA's current Statement of Knowledge does not provide adequate detail for lawyers. EU Law, for instance, is included under the general heading 'Constitutional law and EU law' along with public and administrative law, discrimination and the Human Rights Act (Response of Young Legal Aid Lawyers to SRA Consultation: "Training for Tomorrow - A Competence State for Solicitors" January 2015: <http://www.younglegalaidlawyers.org/sites/default/files/YLAL%20SRA%20response%20competence%20.pdf>) [last accessed 18 April 2016].

with EU obligations. We as tutors should carefully consider how we ensure that the next generation of lawyers can take up the mantle of being advocates, but also scholars who use their research training and knowledge of how laws interrelate and overlap. Using just one example<sup>3</sup> (motor vehicle insurance law), it appears that all too frequently lawyers accept, on face value, laws as enacted domestically without consideration of their place in the supranational hierarchy of the UK's dual constitution. This article is presented as a discussion piece to demonstrate the effects that often misguided teaching of EU law has for groups of the most vulnerable people who seek legal help, but which also has implications for the ability to hold the government to account.

The Europeanisation of law, legal practice and legal education is not a new phenomenon in this jurisdiction or beyond.<sup>4</sup> Whereas traditionally the concept of Europeanisation has focused on educating the next generation of lawyers to think supranationally,<sup>5</sup> here we are commenting on the ability for the UK law graduate and future lawyer to be able to critique domestic implementing legislation. The aim is to produce lawyers with an awareness of the construction of EU parent laws and who can identify the correct implementation of national law. Where this is not the case, they will be sufficiently competent in accessing the enforcement mechanisms at domestic and the EU levels. Armed with this knowledge, the lawyer will be able to provide his/her client with the most appropriate legal advice and to be in a position to provide robust argument where needed. However, some similarity does exist with previous studies regarding producing European law graduates.<sup>6</sup> It is agreed that legal education in EU law does require reorientation towards a European law focus, necessitating comparative legal perspectives<sup>7</sup> and critical analysis and application. Given the pervasive nature of EU law, such an approach, we argue, would significantly benefit students in the discrete modules studied which are affected by EU law. Much more significantly, it would arm future lawyers with a mindset of being

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<sup>3</sup> Many other examples could have been provided however. For instance, in employment law the protection and preservation of transferring workers' rights as required in the Acquired Rights Directive (ARD - Directive 98/50/EC [1998] OJ L201/88) was incorrectly transposed in the Transfer of Undertakings (Protection of Employment) Regulations 1981 by excluding the provision of the Regulations to non-commercial undertakings. The rectification of this transposition deficit did not occur until 1994, and in *Bradley, Ball and others v Secretary of State for Employment* (1997, unreported) it was confirmed that government Ministers had been advised on numerous occasions of the breach, and despite the advice, it intentionally excluded the category of workers engaged in the public sector. Delays in transposition are also not uncommon. Amending legislation to the original ARD was due to be transposed by 2001, but the UK did not comply until five years after this deadline (The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No.246)). Lawyers/interested parties need awareness to review the EU parent law in the first instance to identify such breaches at as early a stage as possible.

<sup>4</sup> Starting in EU law following Case C-26/62 *Van Gend En Loos v Administratie der Belastingen* [1963] ECR 1, R-26/62, and reported in academic debate in texts such as T. Watkin, *The Europeanisation of Law*, (1998) London: UKNCCL.

<sup>5</sup> This being the 'dominant orthodoxy of Community law.' See C. Joerges, 'The Market Without the State? States Without a Market? Two Essays on the Law of the European Economy' (1996) *European Law Journal* 2(2) p. 110.

<sup>6</sup> See N. Kornet, Maastricht European Private Law Institute Working Paper No. 2011/17 '*Building A European-Oriented Law Curriculum*' (2011):

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1806916](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1806916) [last accessed 18 April 2016].

<sup>7</sup> B. Fauvarque-Cosson, '*The Rise of Comparative Law: A Challenge for Legal Education in Europe*'

7<sup>th</sup> Walter van Gerven Lecture: <http://www.iuscommune.eu/html/pdf/wvg/wvg7.pdf> [last accessed 18 April 2016].

sceptical of domestic transposing legislation. They would be ready to refer directly to EU parent laws to identify inconsistencies in transposition and to readily critique domestic and EU level enforcement mechanisms<sup>8</sup> as a matter of course. As such, dedicated study of European public and European private laws should form a significant feature in any delivery of the subject, along with the practical application of EU law (going beyond theory and principles).

## EU law across the curriculum

Evidently students at UK academic institutions will focus their studies on national law to satisfy (for as long as this holds true) professional body requirements. Yet despite this legitimate goal, lawyers will find it increasingly difficult to be isolated in a national paradigm. Much legislative action and commerce is being conducted within the EU and subject to EU laws, not to mention the globalisation of legal practice.<sup>9</sup> Students have to possess an awareness of alternative legal systems, an appreciation of concepts and legal institutions, whilst also being able to critique these effectively. Comparative approaches to the study of law is essential at the academic stage<sup>10</sup> of the students' education because without it, the muscle-memory of analysing law, of questioning the source law with the transposing national legislation may never be fully developed. This is important, particularly where governments exhibit a scepticism to aspects of EU law-making and jurisprudence.<sup>11</sup>

Our suggestion here is not that students study each of the legal systems of the 28 member states. Rather the aim would be for the students to have knowledge of how the EU operates at a supranational level, to be able to confidently argue for national law to be interpreted according to the spirit of the EU parent, and for the students to leave their undergraduate studies with a practical appreciation of this system. Training through clinical suites,<sup>12</sup> problem-based learning approaches<sup>13</sup> and inquiry/active-learning where students have to work out questions to be asked in order to determine an outline to a legal scenario would engage them to think around the issues in the first instance.<sup>14</sup> Such teaching exists at law schools,<sup>15</sup> but this is far

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<sup>8</sup> For a theoretical exposition of enforcement mechanisms see J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) *International Organization* 56(3) p. 609.

<sup>9</sup> Which is not a new phenomenon – see K. Ross, 'Globalisation of Legal Practice' (1990) *Singapore Academy of Law Journal* 2(2) p. 190.

<sup>10</sup> See the commentary offered in A. W. Heringa, 'Towards a European Law School! A Proposal for a Competitive, Diversified Model of Transnational Co-Operation', in M. Faure, J. Smits, and H. Schneider (eds.), *Towards a European ius Commune in Legal Education and Legal Research*, (2002) Intersentia, Antwerp, p. 3, 8.

<sup>11</sup> G. Drewry, 'The Jurisprudence of British Euroscepticism: A Strange Banquet of Fish and Vegetables' (2007) *Utrecht Law Review*: <http://www.utrechtlawreview.org/> 3(2) (December).

<sup>12</sup> In relation to a critical analysis of mechanisms used in building pedagogical bridges between theory and practice see C. Menkel-Meadow, 'The Legacy of Clinical Education: Theories about Lawyering' (1980) *Cleveland State Law Review* 29 p. 555.

<sup>13</sup> K. H. Hirokawa, 'Critical Enculturation: Using Problems to Teach Law' (2009) *Drexel Law Review*, 2(1), p. 1; Albany Law School Research Paper No. 31 of 2009-2010: <http://ssrn.com/abstract=1550172> [last accessed 18 April 2016].

<sup>14</sup> See R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann, and R. Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (2008) Oxford: Oxford University Press.

<sup>15</sup> For example, York Law School, Nottingham Law School and the University of Sheffield use problem-based / inquiry-led methods.

from being universally adopted. A greater clinical<sup>16</sup> approach to teaching EU law may also reduce the 'ivory tower' perception of detached Universities with few links to the real world (here it is real people with legal needs). Witnessing the effects on a third party victim of a road traffic accident (physical, emotional and financial) who is being denied access to a compensation fund may encourage in the student advisor personal reflection and desire to research the area. This would include identifying any available tools (the suite of domestic enforcement mechanisms available), and may instil the desire to challenge the national laws where the EU parent appears to provide a contrary view. Even if the students in such an exercise are ultimately unsuccessful, they will have gained a learning experience much richer than preparing a written or oral answer to a theoretical or problem-based question from a module/unit handbook. Indeed, Robert Kuehn<sup>17</sup> identifies that US employers are demanding students have undergone some form of practical, clinical education rather than following a simulated or doctrinal model. The advantages from clinical education programmes are subject to provisos (including) the University 'buy-in' to the programme, adequate staffing and resourcing, appropriate levels of guidance, supervision and instruction for the students, and an effective balance between the educational benefits to the students versus providing a legal service to the public,<sup>18</sup> and so on.<sup>19</sup> Of course, many universities include clinical legal education as part of their offer,<sup>20</sup> but few focus directly (if at all)<sup>21</sup> on EU issues (and we are unaware of any that provide advice on enforcement of EU laws). This is presented as an observation, not a criticism, and further research on the viability of clinics to offer legal advice in this area is needed.

There may be benefits in directing students away from resolving problems according to a set of rules established nationally, and instead to being exposed, from the outset of their legal studies, to the Court of Justice of the European Union (CJEU)'s teleological approach to law-making. This may encourage the students to undertake detailed research into the meaning of words used in transposition, to proactively identify legal arguments for issues yet to appear at the CJEU, or how such arguments may be presented to a domestic judge. This would be to enliven our future lawyers with an interest in EU law. Developing the complexity of problem-based learning exercises would be essential to ensure students can address the issues with confidence. The end result of students being capable EU-lawyers with the intellectual and practical skills to give effect to them could be a significant boost

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<sup>16</sup> There is wealth of literature relating to the benefits that clinical legal education brings. As examples see: W. Rees, 'Clinical Legal Education: An Analysis of the University of Kent Model' (1975) *Law Teacher*, 9 p. 125; R. Grimes, 'Reflections on Clinical Legal Education' (1995) *Law Teacher*, 29 p. 169; J. Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) *Law Teacher*, 30 p. 288; J. Webb, 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education' (1998) *Journal of Law and Society*, 25 p. 134; J. Marson, A. Wilson, and M. Van Hoorebeek, 'The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective' (2005) *International Journal of Clinical Legal Education*, 7 p. 29.

<sup>17</sup> R. Kuehn, (2014) 'Pricing Clinical Legal Education' *Denver University Law Review*, 92(1), p. 5.

<sup>18</sup> Evidently, teaching of the law is not the entirety of a university law school's mission R. Brownsword, 'Where Are All the Law Schools Going?' (1996) *Law Teacher*, 30 p. 17.

<sup>19</sup> See K. Kerrigan, and P. Plowden, (1996) 'Who Benefits? - Case Management And Clinical Legal Education' *Law Teacher*, 30 p. 315.

<sup>20</sup> See O. Drummond, and G. McKeever, (2015) *Access to Justice through University Law Clinics*. Ulster University Law Clinics.

<sup>21</sup> *Ibid* p. 17.

to their employability, and would certainly add to their engagement with the fascinating subject of contentious law and legal argument.

We also offer the suggestion that there may be advantages in the delivery of EU Law in the first year of the students' study. It may be considered that such an approach would cause problems for many students, cause confusion rather than teaching domestic law first, then offering some comparative law when they have understood the basics. This traditional view may be challenged when considering Rakoff and Minow<sup>22</sup> who argue:

... the template for legal thinking established in the first year of law school has real staying power... the greater fear is that, if we do not make the effort to challenge students..., students will learn to think of the legal system as only so many rooms, so many pieces of furniture, that they can never reorder.<sup>23</sup>

Indeed, some university law schools are teaching EU law in the first year of study, and are developing creative ways for its delivery and assessment. Any tangible benefits experienced from using these methods should be disseminated so they may be evaluated and considered for adoption more broadly.

#### *Current approaches to teaching EU law*

The study of EU law<sup>24</sup> as a discrete subject<sup>25</sup> in many universities in the UK follows a similar path. The institutions and sources of law are studied. Issues of primacy/supremacy, the preliminary reference procedure and enforcement mechanisms are covered. Finally, the module is completed with some substantive law issues being taught,<sup>26</sup> such as the internal market - free movement (goods / services / workers / capital), competition laws and/or equality / foreign policy.

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<sup>22</sup> T. D. Rakoff, and M. Minow, (2007) 'A Case for Another Case Method' *Vanderbilt Law Review* 60 p. 597.

<sup>23</sup> p. 607.

<sup>24</sup> We acknowledge that EU law is often an existing feature in modules encompassing an English legal system component and which forms part of the first year of undergraduate study. However, the necessary detailed instruction required for students to appreciate the effect of EU law and its impact on constitutional, procedural and substantive areas of domestic law may be lacking. Exposure to topics including the history of the EU, its institutions and sources of law, and primacy/supremacy is essential for students to achieve an understanding of EU law (as aspects typically covered in such modules). However, in isolation they are not sufficient. EU law as a discrete module, which covers a more complete range of issues, and whose principles are subsequently embodied into substantive modules, may better achieve the aims we are advocating.

<sup>25</sup> There are, of course, many examples where domestic law is influenced, admittedly to varying degrees, by laws established by the EU and through the judicial activism of the CJEU. Company law, consumer law, employment law, family law, immigration, intellectual property etc are all areas where the domestic lawyer must now be a European lawyer if he or she is to be fully aware of developments and the nuances of the interaction between both sources of obligations (for discussion see D. M. Curtin, J. Smits, A. Klip and J. McCahery, *European Integration and Law* (2006) Antwerp: Intersentia).

<sup>26</sup> For a detailed analysis of the teaching of EU law as a discrete subject, and its limited use as part of broader study in other modules, see R. Ball, and C. Dadomo, *UKCLE Law Subject Survey: European Union Law* (2010) Project Report, Unpublished: <http://eprints.uwe.ac.uk/14747/2/Report.pdf> [last accessed 18 April 2016]. This is the most recent, comprehensive, study of the teaching of EU across universities in the UK.

Methods of assessment similarly often follow a conservative approach<sup>27</sup> which would be helped if we were to think about:

... whether the exams and essays we set measure the things we wish students to learn – the ability to think creatively about social implications of aspects of EU Law, to reflect on the impact of topical developments, and to spot the back up legal argument.<sup>28</sup>

It is natural that both the administrative and substantive laws are included in the syllabus, but in many instances the actual use and investigation of how to critically apply EU law to inform and analyse domestic law on any detailed and discrete topic is overlooked. This is not to say that, for instance, competition laws are not studied - indeed most law graduates will be aware of Arts 101 and 102 of the Treaty on the Functioning of the European Union and how they are applied when anticompetitive behaviour crosses international borders. Nor are we suggesting that module leaders of topics such as employment, company or consumer law (as examples) would not relate important linkages between national law and EU source law. The point we make is that it is in the use of EU law, prior to national law, that students gain the clearest insight into the interplay between the systems and identify national, transposing law as that which has to be assessed in light of the primary EU law. They also begin to address legal issues from the EU source law as the starting point before the comparative national law is viewed (and where limited in its scope or incorrect in relation to the EU law, appropriate strategies can be applied). Our concern is that often teaching EU law, even when studying the fundamental freedoms is doing just that – studying EU law. It is presented as being different, separate and another tier of law which is unlike domestic law. Is it any wonder that students, having survived the EU Law module and its compulsory inclusion in a qualifying law degree (QLD) programme, revert to the safety of domestic law when choosing to practise or when providing advice to clients? Any concern with an EU dimension to the issue at stake can be raised in a higher court or by experts in EU law. What we need to embrace is how EU law affects individuals / corporations in a practical way and how EU law should be seen as the source to be considered in the first instance, with the domestic law introduced thereafter which must achieve what the EU parent law intended. Armed with the knowledge of the true significance of *Marleasing*<sup>29</sup> and *Pfeiffer*,<sup>30</sup> the EU law student is issued with powerful weapons. They will have awareness of compelling arguments presented to a first instance or appeal court regarding the primacy of EU law and the purposive interpretation to be provided in the case of inconsistencies. With *Factortame*,<sup>31</sup> *Francovich*<sup>32</sup> and, more recently, *Delaney*,<sup>33</sup> students (and future lawyers) possess the knowledge of successful claims, and their rationale, and consequently we tutors can develop the confidence of lawyers to hold the State liable when in breach.

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<sup>27</sup> *ibid.*

<sup>28</sup> C. O'Brien, 'European Union Law' in C. Hunter, *Integrating Socio-Legal Studies into the Law Curriculum*, (2012) Palgrave Macmillan p. 187.

<sup>29</sup> Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4315.

<sup>30</sup> Case C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835.

<sup>31</sup> *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603, [1990] UKHL 13.

<sup>32</sup> *Francovich, Bonifaci and Others v Italy* [1991] ECR I-5357.

<sup>33</sup> *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB).

## *Issues with continuing EU education following graduation – not just a UK problem*

At present, in the absence of undergraduate (academic stage) teaching of EU law in a comparative, pragmatic and practical manner, clients' rights are subrogated and the State's breach of its EU obligations continues unresolved. This is exacerbated by the fact that across the EU, many law schools do not teach EU law as a discrete topic as part of their vocational studies, nor do their professional bodies require them to do so. As of 2013, of the 28 member states in the EU only 13 provided bespoke EU law training at the vocational stage and of those that did include the study of EU law, this was predominated by an academic-centric perspective.<sup>34</sup> As law academics it is probably correct to assert (we hope) that we enjoy the academic nature of our roles, critiquing and commenting on jurisprudential matters and predicting future issues and the outcomes of judgments expected from EU and domestic institutions. However, law students in these law schools in the 13 member states providing such instruction did not receive any practical training. A theoretical perspective is important, and we fully argue that lawyers who can think like an EU-lawyer and who possess a critical mind to develop the law and legal argument are essential to our profession. However, without knowing how the law is used in practice, how arguments regarding the direct effect of an EU law are successfully presented in national courts, or what to do in the event that a national judge lacks an appreciation of the application of the EU law being referred to, the law is stifled, the client does not obtain the correct legal representation, and the lawyer (and judge) are failing in their professional duties. Our lawyers will shape the future of the EU and its application nationally. They can give access to its rights or be complicit in its denial, they can develop its transparency or continue in its obfuscation, and they can assist in holding the State to account or leave the matter to the EU Commission (with the substantial practical and political problems inherent in the EU-level of enforcement).<sup>35</sup>

Returning to the scope of EU teaching in the UK, adopting an EU-centric approach to instruction will provide students with a better knowledge of the EU and its rights<sup>36</sup> - perhaps a laudable aim given the number of law graduates who do not proceed into the profession (although of course instilling increased knowledge is not necessarily the intended purpose when part of the QLD). It will impact on the knowledge and skills of national lawyers, enabling them to be familiar with key terminology and to identify when 'run-of-the-mill' enquiries concerning an element of EU law are made. It will, however, remain the remit of the highly specialized EU lawyers to take on the nuanced issues and successfully argue the points to a court's satisfaction. Given that it often takes these first-instance lawyers to make the referrals to the specialists

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<sup>34</sup> EIPA 'Training Lawyers in EU Law 2013-14' (2014): [http://training-lawyers.eipa.eu/files/repository/20140528110103\\_OREIP13A-1301-I01\\_TrainingLawyersInEULaw\\_v2\\_0\\_en\\_\(2\).pdf](http://training-lawyers.eipa.eu/files/repository/20140528110103_OREIP13A-1301-I01_TrainingLawyersInEULaw_v2_0_en_(2).pdf) [last accessed 18 April 2016].

<sup>35</sup> See C. B. Jensen, (2007) 'Implementing Europe: A Question of Oversight' 8 *European Union Politics* 8 p. 451.

<sup>36</sup> This is a worthy cause in itself given that in the EU Barometer Survey 43% of respondents commented that they did not consider themselves well informed of their EU rights and 20% responded that they did not feel informed at all (Flash Eurobarometer 365 'European Union Citizenship' (2013) Conducted by TNS Opinion & Social at the request of the European Commission, Directorate-General Justice at p. 21: [http://ec.europa.eu/public\\_opinion/flash/fl\\_365\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_365_en.pdf)) [last accessed 18 April 2016].



when that expertise is needed, it also falls on them to be in a position to identify when such referral is necessary.

### **How should we teach EU Law? Areas for further thought**

Students need not only to learn about EU laws and to be able to recite key passages or to reproduce key case authorities by rote. Rather, they should learn to think like an EU lawyer, focusing on method and not necessarily on a restrictive approach to subject matter, as a means of enabling them to go beyond the study of domestic law and towards developing an approach to answer legal problems based on comparative (and sometimes conflicting) legal norms.<sup>37</sup> The EU Law teaching should not simply identify areas of commonality between legal systems within the EU, but rather should identify and celebrate the differences between the legal systems of member states and the EU treaties and judicial pronouncements.<sup>38</sup> Differences in approach are indeed the intended purpose of much EU legislation (hence the broader use of directives over regulations), but this must be within the boundaries of the EU *acquis* of the law and never at the expense of individuals' rights. This requires training students and in helping them to develop their critical and practical skills.

Beyond the practical skills and training lacking<sup>39</sup> at the academic stage, critical development of the students may be improved by issuing students with a domestic piece of EU legislation. They are told to research and formulate advice based on a problem scenario, and then provided with (or asked to find) national transposing law and asked to identify any differences / nuances between the two. Here the students would naturally seek information from the primary EU law, they would be introduced to a new (national) source of information on the same topic but perhaps worded differently or with differing provisions. They can be asked to draw up possible problem areas or points of contention, then finally asked to discuss this (preferably with case examples of the arguments presented by the lawyers and the success and failures of each). Some form of doctrinal manipulation may be added for good measure. The exploration of history, systems, functions and content has value in academia where the educational development of students in a form which readily lends itself to summative assessment and grading has value and offers certainty. But that same methodology may be damaging where it is at the expense of core issues relating to the critical analysis, textual examination and jurisprudential positioning necessary to view both domestic and EU laws as two sides of the same coin - with appraisal and examination of each required before a value may be attributed to their worth. EU law is very much horizontally structured with its laws discoverable not just in its texts but also in its practice and the legal realism which embodies the EU institutions. Perhaps a movement away from unarticulated formalism (where we provide the students with rules they are expected to learn) to political realism (where

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<sup>37</sup> A. Bernabe-Riefkohl, 'Tomorrow's Law Schools: Globalization and Legal Education', *San Diego Law Review* 32 (1995) p. 137, 149.

<sup>38</sup> P. Legrand, 'The Same and the Different', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003) Cambridge, Cambridge University Press.

<sup>39</sup> In relation to the judiciary see K. J. Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) *International Organization* 54 p. 489; J. Bell, *Judiciaries within Europe: A Comparative Review*, (2006) Cambridge: Cambridge University Press; and A. F. Tatham, 'The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary' (2012) *European Law Journal* 18(4) p. 577.

we explain the problems that exists with non-compliant member states and how they behave, especially when accountability is lacking) would assist the students better in developing a consciousness of what to expect with domestic transposition of EU law. It may instil a cynicism which would better serve their clients and the development of consistent and accurate harmonisation of the law.

It is of course easy to criticise others and indeed at our own institutions EU Law is taught according to the traditional method. We are making the above suggestion<sup>40</sup> about changing the focus of teaching EU law due to the problems witnessed with the lack of timely development of domestic law when this is in breach of EU law, and this frequently adversely affects vulnerable individuals. The case law examples and the use of the MIB Agreements are included in the following sections of the paper precisely on this basis. We can think of few more vulnerable people than those who are injured as a result of road traffic accidents caused by negligent, uninsured drivers, often sustaining life threatening or life changing injuries, and who are in need of compensation to cope with the aftermath. They are dependent upon knowledgeable lawyers to advocate on their behalf and to use the domestic and EU laws where available to ensure the appropriate remedies are awarded. Given the historic misunderstanding and misapplication of UK law,<sup>41</sup> we can only estimate the (probably) several hundreds / thousands of people who have been denied rights and compensation, available to them at EU law. This may be compounded by the claimant's lawyers failing to critique the domestic transposing laws, refer to parent EU laws in the cases, or because they lacked the confidence / skills to argue for a teleological interpretation of EU law or issue proceedings against the State when it is in breach.

### **The motor vehicle insurance laws in the UK and EU - an overview**

Let us use motor vehicle insurance law as a vehicle (excuse the play on words) to demonstrate the consequences of a lack of knowledge and/or initiative on the part of lawyers. It also raises the imperative for students to be provided with the instruction and skills necessary to analyse domestic and EU rules in this area.

At an EU level various directives were enacted to harmonise the rules relating to motor vehicle insurance. These supported the free movement principles by removing boarder checks. The directives, established from 1972 to the most recent incarnation in 2009, are collectively known as the Motor Vehicle Insurance Directives (MVID).<sup>42</sup> Beyond facilitating the free movement of goods and people, the MVID expanded in range to offer protection to third party victims of motor vehicle accidents through a system of compensation. This was effective either through the negligent driver's insurers, or through a guarantee fund established in the member states. In the UK this responsibility led to the Motor Insurers' Bureau (MIB) entering into agreements with the Secretary of State for Transport to fulfil this role.

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<sup>40</sup> And we emphasise that this is suggestive rather than any attempt to be prescriptive. The dangers of the latter and of a single method of teaching are addressed in R. Johnstone 'Flexible Law Teaching for the Late 1990's' (1996) 3(1) ALTA Newsletter 1.

<sup>41</sup> We use the term 'UK law' to denote the relationship with EU law and its application to the UK as a member state – rather than suggesting the UK has a single source of law.

<sup>42</sup> 1<sup>st</sup> Motor Vehicle Directive 72/166/EEC; 2<sup>nd</sup> Directive 84/5/EEC; 3<sup>rd</sup> Directive 90/232/EEC; 4<sup>th</sup> Directive 2000/26/EC; 5<sup>th</sup> Directive 2005/14/EC; and the 6<sup>th</sup> Directive 2009/103/EC.

The MIB draft the agreements (one exists for the victims of uninsured drivers (the Uninsured Drivers' Agreement (UDA) and another for the victims of untraced drivers (the Untraced Drivers' Agreement (UtDA)) which are then concluded by the Secretary of State. Given that the MVID is the parent law and the UDA and UtDA, along with the Road Traffic Act 1988 (RTA88), are the transposing / implementing measures in the UK, the MVID establish minimum standards for the member states. This has significance for the cases raised in this article as the MVID establish strict rules relating to where the guarantee fund bodies may exclude their liability as the 'insurer of last resort.'

Before we present the example materials it is worth briefly outlining why we chose this area of law. Motor vehicle insurance laws affect many people. Given the nature of road traffic accidents, the numbers of incidents each year<sup>43</sup> and that personal injury lawyers will often find themselves dealing with such disputes, one would believe that a comprehensive knowledge of the law would be commonplace amongst those providing advice and advocating in domestic courts. The reality, however, appears to be different. There seems to be a significant deficit in either the lawyers' knowledge of the domestic law and the EU parent directives, or their general lack of confidence in arguing differences in domestic and EU laws.

The use of a single case as evidence for arguing that the teaching of EU law in the curriculum of universities in the UK is not as extensive or all encompassing as necessary, is for illustrative purposes. Numerous such examples exist in all jurisdictions, but the underlying thrust of the argument presented here is that lawyers very often do not use the EU law as the primary source. Instead, they concentrate on national implementing provisions. The evidence from motor vehicle insurance law, and demonstrated in numerous cases also referred to in this article, is the acceptance by legal professionals of the national law at face value. This is problematic and led, for a period of 24 years, of the law being incorrectly applied, until remedied in the case of Mr. Delaney. To reiterate, this is not an isolated incident. However, even if that was so, it is sufficient to raise questions as to the efficacy of the instruction and engagement with EU law provided to students at undergraduate level. Further, this issue appears to continue at the training level and during the professional development of lawyers when in practice.

There are evidently many areas where a genuine misunderstanding may be present between EU law and the national implementing measure. Inconsistencies exist

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<sup>43</sup> Comparison data available from the Driver and Vehicle Licensing Agency and the Motor Insurance Database estimate that approximately 2 million uninsured vehicles are in use in the UK ([http://webarchive.nationalarchives.gov.uk/20090318085633/direct.gov.uk/en/Motoring/OwningAVehicle/Motorinsurance/DG\\_067639](http://webarchive.nationalarchives.gov.uk/20090318085633/direct.gov.uk/en/Motoring/OwningAVehicle/Motorinsurance/DG_067639) [last accessed 18 April 2016]). Further, the Institute of Advanced Motorists' data established that young drivers (aged 25-35) were the most likely to be driving without insurance and that 226,803 people who were prosecuted for driving offences lacked the required minimum motor insurance. Statistically, uninsured drivers are more likely to be involved in fatal road traffic accidents (an average of 130 people per year - (<http://www.iam.org.uk/component/content/article?id=20326> [last accessed 18 April 2016]), and such figures are not isolated to the UK (research from New Zealand identified that, controlling for age, gender and educational attainment, uninsured drivers had a five-fold chance of suffering a motor-related injury (S. Blows, R.Q. Ivers, J. Connor, S. Ameratunga, and R. Norton, 'Car Insurance and the Risk of Car Crash Injury' (2003) *Accident Analysis and Prevention* 35 p. 987).

between member states in their transposition of some directives and there are also instances of opaque drafting. It is widely accepted that member state should not be held liable or considered to be unlawfully in breach of their obligations for an incorrect transposition in these circumstances. The example of motor insurance law does not fall into any of these categories. In none of the instances outlined below was the EU law and its scope in question and the national judiciary was unable to mount a viable argument that there was a legitimate defence to the present and continuing breach of EU law.

### ***Delaney* and the absence of appropriate legal argument**

Our use of *Delaney* is to highlight significant breaches of EU law in the UK and how this was exacerbated through lawyers (and judges) deficient in the knowledge of EU law (a consequence of the education and training to which they have been exposed).

The facts of *Delaney*<sup>44</sup> are quite well known (being the subject of extensive and negative media scrutiny due to the nature of the issue) and so will be dealt with briefly here. Delaney was a front seat passenger in a Mercedes car driven by Shane Pickett. On 25 November 2006 the car was involved in a collision with a people carrier which caused Delaney life threatening injuries. He survived, however, when treated at the scene of the accident, Delaney was found to have on his possession a (large) quantity of cannabis and a smaller quantity was discovered on Pickett. Latterly, Pickett accepted that the accident was his fault and the drugs belonged to him, not Delaney. Due to there being some 274g of cannabis found between the occupants, and the offence of dangerous driving, Pickett received a 10-month custodial sentence.

Delaney sought to recover damages for the injuries he suffered in the accident and brought his claim against Pickett, as the driver at fault, and Tradewise (the insurers of the Mercedes) were joined as an interested party. In addition to his admission of the ownership of the drugs found, Pickett had a self-confessed drug dependency, he was a diabetic<sup>45</sup> and he was also subject to a medical diagnosis for depression - facts which were not passed on to Tradewise when issuing the insurance policy. These facts were of significant benefit to the insurer. Under the RTA88 s. 152, a motor insurance policy may be avoided by the insurer on the basis of the non-disclosure / false representation of a material fact. Tradewise applied to the court for a declaration that the policy was void under s. 152 and on 4 March 2009 the order was granted. Further, following proceedings initiated by Delaney on 23 April 2009, Gregory J held, on public policy grounds, Pickett was not liable to compensate Delaney for his injuries (nor consequently was Tradewise). Gregory J continued that even had Pickett been so liable, liability would have been avoided because of cl 6(1)(e)(iii) of the UDA 1999 which excludes the MIB from liability where a 'crime exemption' applies.

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<sup>44</sup> *Delaney v Pickett* [2011] EWCA Civ 1532.

<sup>45</sup> An estimated 3.9 million people in the UK have diabetes. Of those who have driving licences, it would be interesting to identify how many have informed their insurers of their condition when insuring their vehicle (Diabetes UK (2015) 'Diabetes: Facts and Stats' May: <https://www.diabetes.org.uk/Documents/Position%20statements/Facts%20and%20stats%20June%202015.pdf> [last accessed 18 April 2016]).

### *Incorrect application / lack of knowledge*

Delaney's first instance case, and indeed that in the Court of Appeal, proceeded on the basis that Pickett was an uninsured driver for the purposes of the MIB Agreement and further that cl 6(1)(e)(iii) was a valid exclusion to liability. Both propositions are incompatible with EU law. The errors contained in the decisions were highlighted in Delaney's later cases<sup>46</sup> for damages against the state for breach of EU law where Jay J<sup>47</sup> said, as of 1990, the EU law in these areas was fully evolved.

First, and perhaps the most concerning aspect of the jurisprudence applied in *Delaney*,<sup>48</sup> was that none of the lawyers had referred to the crime exemption clause in UDA 1999 and its incompatibility with the MVID. The 'crime exemption'<sup>49</sup> applies, according to the UDA 1999, in respect of a claim:

...by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that... (iii) the vehicle was being used in the course or furtherance of a crime...'

The MVID incorporates permitted derogations<sup>50</sup> from the obligation of ensuring compulsory insurance of vehicles, whilst also expressing a (non-exhaustive)<sup>51</sup> list of possible exclusions which would be held as void against third parties.<sup>52</sup> Essentially, the MVID permit the exclusion from compulsory insurance of vehicles in only one respect - the victim was a passenger who allowed himself to be carried in the vehicle in the knowledge that it was stolen. No other exclusion is permitted to this category of victim and any attempt to exceed the scope of this article is a breach of EU law. Authority for this interpretation of the MVID was provided by the CJEU in *Ruiz Bernaldez*.<sup>53</sup> In a judgment delivered by Ward LJ, the Court of Appeal concluded that the use of a finite list in RTA88 s.148(2)<sup>54</sup> (as the transposing measure of the possible exclusions of liability) was, by implication, instructive that all contractual exclusion clauses outside of this list were permissible. Further, Ward LJ purported to rely on an interpretation that the CJEU's decision in *Bernaldez* did not enjoy general application. This was an unusual decision when considered in light of *Bernaldez*.<sup>55</sup>

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<sup>46</sup> *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB) and *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.

<sup>47</sup> *Supra* n 34.

<sup>48</sup> *Supra* n 45.

<sup>49</sup> An exclusion clause removed from the updated UDA 2015 Agreement in response to the *Delaney* judgments.

<sup>50</sup> Art.5.

<sup>51</sup> Case C-129/94 *Rafael Ruiz Bernaldez* [1996] ECR I-1829. Here, the CJEU purposively interpreted the list of void exclusions (in Art.2(1) of the Second MVID (now Art.13(1) of the Sixth MVID)) as being illustrative and thereby extending the scope of the civil liability insurance requirement in Art.3(1) of the First MVID.

<sup>52</sup> Art.13 Directive 2009/103/EC.

<sup>53</sup> *Bernaldez* n 52.

<sup>54</sup> A list of exclusions from insurance policies which would not be valid – e.g. to do with the vehicle's condition, the weight it carries, its horsepower etc.

<sup>55</sup> *Bernaldez* n 52.

given that even a cursory review of the jurisprudence of *Correia Ferreira v Companhia de Seguros Mundial Confiança SA*,<sup>56</sup> *Candolin v Vahinkovakuutusosakeyhtio Pohjola*,<sup>57</sup> *Farrell v Whitty*,<sup>58</sup> and *Churchill v Wilkinson and Tracey Evans*<sup>59</sup> demonstrates the CJEU's consistent interpretation of permissible exclusions of liability consistently within the strict reasoning of *Bernaldez*.<sup>60</sup> Indeed, in *Candolin* the CJEU commented on its previous interpretation where it held '[the MVID]... precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third-party victims of an accident caused by the insured vehicle.'<sup>61</sup> To further compound this error, the Court of Appeal in *Churchill*<sup>62</sup> had, 18 months previously, referred the matter of permitted exclusions of a third party victim to the CJEU<sup>63</sup> and had already received guidance in accordance with *Bernaldez*.<sup>64</sup>

The judges focused on the MVID and as there was no similar provision within those directives and the exclusion provided in cl 6(1)(e), they inferred that the exclusion nationally must be valid. Further, as the lawyers in the case had not raised the issues relating to the compatibility with the MVID, the judges decided not to consider the matter. It is difficult to identify whether the Court of Appeal, in ignoring the case law and references to the CJEU, was negligent, misunderstood its obligation to follow CJEU rulings, or did not consider that RTA88 ss. 148(2) and 152 or cl 6(1)(e) was subject to a consistent interpretation in accordance with the MVID. Latterly, the Court of Appeal agreed that the MIB Agreement was in breach of EU law, a fact known to the government for several years previously, in the separate case by *Delaney* against the Secretary of State under a state liability action.<sup>65</sup> This breach was not remedied until the most recent MIB Agreement was (hastily) concluded in July 2015.

### *Inclusion of the MIB in proceedings*

The MIB, as the guarantee fund and insurer of last resort, is required to take the place of the insurer where a driver who caused the accident leading to the claim did not have insurance cover. This lack of appreciation of the role of the MIB and where and when it is invoked was evident in *Delaney*. At the time of the incident the vehicle used by Pickett was subject to a third party motor insurance policy and the MIB Agreement is *only* applicable where no insurance cover is provided. The insurer had a legal obligation to satisfy claims based on the policy (as the statutorily-guaranteed insurer) and as such the crime exemption clause contained in the MIB's UDA 1999

<sup>56</sup> Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711.

<sup>57</sup> Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtio Pohjola and Jarno Ruokoranta* [2005] ECR I-5745.

<sup>58</sup> *Elaine Farrell v Alan Whitty* (C-356/05) [2007] ECR I-3067.

<sup>59</sup> Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000.

<sup>60</sup> None of these cases were referred to in the judgment.

<sup>61</sup> at [18].

<sup>62</sup> *Churchill Insurance v Wilkinson; Evans v Equity & Secretary of State for Transport* [2012] EWCA Civ 1166.

<sup>63</sup> *Supra* n 60.

<sup>64</sup> *Bernaldez* n 52.

<sup>65</sup> *Supra* n 47.

would not have been effective at any point in the proceedings. Again, on this point, the lawyers involved in the initial *Delaney* case, nor the judge, thought it appropriate or applicable to raise this issue.

### *Constructive knowledge*

To add to the problems in *Delaney*, the wording of the crime exemption was not challenged as being incompatible with the MVID. The use of the words ‘knew or *ought to have known* ...’ introduced a constructive knowledge criterion to be applied to the claimant which, since *White v White*<sup>66</sup> resulted in the italicised words being ignored. Despite the removal of the offending ‘crime exemption’ clause in the UDA 1999, cll 7 and 8 of the (new) UDA 2015 continue this phraseology and will likely be subject to challenge at some future date. The correct test to be applied remains of ‘provable’ knowledge (according to EU rules), not constructive knowledge (the UK’s implementing measure).

### **Training received by the judiciary – a lack of appropriate legal education?**

The *Delaney v Pickett* cases do demonstrate poor decision-making and limited use and reference to superior EU case law. This raises issues about the training received by judges on matters to do with EU law and its application, although ‘... a number of studies show that national judges experience difficulties in exercising EU competences due to their lack of knowledge in the field of EU law’.<sup>67</sup> Indeed, following *Delaney*’s original case and its dismissal of an appeal, in 2011, by the Court of Appeal, the Supreme Court refused permission for further appeal on the basis that *Delaney*’s application failed to ‘... raise an arguable point of law of general public importance which ought to be considered by the Supreme Court in the light of the judge’s findings of fact with which this Court cannot interfere and the plain wording of clause 6(1)(e) of the Agreement’.<sup>68</sup>

Domestic judges are expected to play a crucial role in the advancement and protection of EU rights, having a knowledge of the substantive laws and procedural obligations. In so doing they act as decentralised EU judges<sup>69</sup> by researching the relevant EU primary and secondary laws. They should have an awareness of the case law of the CJEU, where precedents are already established, and where points of law would be *acte clair*.<sup>70</sup> They need to know when to use the preliminary reference procedure (cooperating with the CJEU), and to have an understanding of the need for a consistent interpretation of domestic laws through *Marleasing*<sup>71</sup> and *Pfeiffer*.<sup>72</sup> Further, when to disapply inconsistent domestic laws (via *Factortame*)<sup>73</sup>

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<sup>66</sup> *White v White* [2001] UKHL 9.

<sup>67</sup> J. A. Mayoral, U. Jaremba, and T. Nowak, ‘Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges’ Assessment Regarding EU Law Knowledge’ (2014) *Journal of European Public Policy*, 21(8), p. 1120, 1120.

<sup>68</sup> See <https://www.supremecourt.uk/docs/PTA-1205.pdf> [last accessed 14 September 2015].

<sup>69</sup> U. Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System*, (2014) Leiden-Boston: Martinus Nijhoff Publishers.

<sup>70</sup> On the basis of a case being subject to *acte clair*, the CJEU may simply issue a reasoned order to the member state and the judge is referred to the pertinent, earlier, judgment (Art. 99 of the Rules of Procedure of the Court of Justice).

<sup>71</sup> *Supra* n 30.

<sup>72</sup> *Supra* n 31.



and to apply the principles of equivalence and effectiveness (via *Mangold*),<sup>74</sup> whilst recognising that the claimant may be entitled to be compensated for damages incurred due to the State's breach of EU law (via *Francovich*)<sup>75</sup> are essential skills. All too often, members of the judiciary seemingly lack knowledge of the law to be able to fulfil this role<sup>76</sup> nor do they possess adequate information to apply these laws effectively.<sup>77</sup>

Mayoral et al's (2014) research into the efficacy of the judiciary in applying EU law focused on factors including the age of the judges, their educational and judicial training and their practical experience with the application of the law. Albeit that this research involves self-assessment by the respondents, and the various caveats regarding issues of truth and self-awareness are included, it does offer greater information than that which would likely be obtained by an external evaluator. The responses received pointed to candid answers about the judges' own understanding of their lack of awareness or 'incompetence.'<sup>78</sup> Previous studies had investigated whether younger lawyers, familiar with studying EU law as part of their university education, had fewer difficulties in the application of EU law and its principles.<sup>79</sup> Other studies have found that a judge's reputation has a strong influence on his or her performance, and as EU law will form part of the cases heard in court, and given necessity here for timely, legally correct knowledge and application of the law, older judges may have an increased incentive to ensure they are sufficiently aware of

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<sup>73</sup> *Supra* n 32.

<sup>74</sup> Case C-144/04 *Mangold v Rudiger Helm* [2006] All ER (EC) 383.

<sup>75</sup> *Supra* n 33.

<sup>76</sup> See European Parliament and Academy of European Law (2011) 'Study on judicial training in the European Union member states', EP Studies. Resolution of 14 March 2012: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0079+0+DOC+XML+V0//EN> [last accessed 18 April 2016]; U. Jaremba, 'At the Crossroads of National and European Union Law. National Judges in a Multi-Level Legal Order – Legal and Empirical Perspective' (2013) *Erasmus Law Review* p. 191: [http://www.elevenjournals.com/tijdschrift/ELR/2013/3\\_4/ELR-D-13-00006](http://www.elevenjournals.com/tijdschrift/ELR/2013/3_4/ELR-D-13-00006) [last accessed 18 April 2016]; 199; U. Jaremba, and T. Nowak, 'The Role of EU Legal Education and Training in the Functioning of National Courts as Decentralized EU Courts. An Empirical Investigation into the Polish and German Civil Judiciary', in V. Cattelan (ed.), *Integration Through Legal Education? The Role of EU Legal Studies in Shaping the EU*, Bologna: Societa editrice il Mulino, (2012) p. 111; T. Nowak, F. Amtenbrink, M. L. M. Hertogh, and M. H. Wissink, *National Judges as European Union Judges*, (2011) Den Haag/Portland: Eleven International Publishing.

<sup>77</sup> M. Bobek, 'A New Legal Order or a Non-Existent One? Some Early Experiences in the Application of EU law in Central Europe' (2006) *Croatian Yearbook of European Law and Policy* 2 p. 265; M. Bobek, 'On the Application of European Law in (not only) the Courts of the New Member States: "Don't do as I Say"?' in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies 2007 – 2008*, (2008) Oxford: Hart Publishing, p. 1; Z. Kuhn, 'The Application of European Law in the New Member States: Several (Early) Predictions' (2005) *German Law Journal* 6(3) p. 563; S. Prechal, R. H. van Ooik, J. H. Jans, and K. J. Mortelmans, *Europeanisation of the Law: Consequences for the Dutch Judiciary*, (2005) The Hague: Raad voor de Rechtspraak; A. F. Tatham, 'The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary', (2012) *European Law Journal* 18(4) p. 577.

<sup>78</sup> p.1122.

<sup>79</sup> Bobek, *supra* n. 71 at 295; A. Bullen, 'Norway', in C. Brokelind (ed.), *Towards a Homogeneous EC Direct Tax Law*, Netherlands: IBFD 2007, p. 261, 302–3; L. Conant, 'European Judicial Review and National Institutional Change', in A.P. Cortell and S. Peterson (eds), *International Relations, Domestic Politics, and Institutional Change*, (2003) Oxford: Lexington Books, p. 27, 52; F. Le Bail, Speech on 'Conference on judicial training', 10 April 2013: [http://ec.europa.eu/justice/criminal/files/francoise\\_le\\_bail\\_en.pdf](http://ec.europa.eu/justice/criminal/files/francoise_le_bail_en.pdf) [last accessed 18 April 2016].



current practice.<sup>80</sup> It is also imperative that judges receive the appropriate training and guidance of EU law principles as part of their university education. This can establish itself as one of the most significant features in developing the skills and competences needed by the judiciary.<sup>81</sup>

It is also an interesting finding that Mayoral et al (2014) discovered social networks<sup>82</sup> positively influence the judges' knowledge of EU law.<sup>83</sup> 'This finding emphasizes the relevance of EU transnational/cross-border networks and personal contacts and discussion with foreign colleagues that seems to facilitate judges' learning processes.'<sup>84</sup> Their research also concluded that continuous judicial training in EU law and working on cases with an EU dimension improved their sense of its relevance and importance, ultimately leading them to report that they were more knowledgeable about EU law as a consequence.<sup>85</sup> It was further worth noting that the judges in Poland considered themselves more knowledgeable of EU law than did the respondents in Germany. Poland, a member state from 2004 compared with (West) Germany, a founding member state, required its judges to undergo intensive training and education regarding EU laws in preparation for that state's entry. This was primarily based on 'foundation' issues, but which had profound and positive effects on the judiciary's use and familiarity with giving effect to EU laws domestically. This approach to training appears to be significantly more robust than establishing a system of competences with which lawyers have to apply. It also points to the positive effect that practical training has on lawyers – an approach which would lend itself to undergraduate law students.

There are many other breaches of the MVID in domestic law, and these are perpetuated on a daily basis through application of national law which is in breach of EU law.<sup>86</sup> If lawyers and judges are not familiar with EU law in this area or where the issue is not at least raised in the case, claimants are being denied justice. The EU Commission has complete discretion as to whether it pursues infringement proceedings against a member state and, for whatever reason, despite information as to the breaches being provided in extensive form to it, it chooses not to pursue the matter. This only serves to emphasise the necessity of having competent EU lawyers in the UK to protect legal rights which are breached through governmental abrogation and the EU Commission's obduracy.

## Conclusions

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<sup>80</sup> M. R. Schneider, 'Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal' (2005) *European Journal of Law and Economics*, 20, p. 127.

<sup>81</sup> J. M. Smits, 'European Legal Education, or: How to Prepare Students for Global Citizenship?' (2010) *Maastricht European Private Law Institute Working Paper No. 2011/02*.

<sup>82</sup> See also M. Claes, and M. De Visser, 'Courts United? On European Judicial Networks', in A. Vauchez and B. De Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field*, (2013) Oxford: Hart Publishing, p. 75; and R. Cowan and N. Jonard, 'Network Structure and the Diffusion of Knowledge' (2004) *Journal of Economic Dynamics and Control* 28(8) p. 1557.

<sup>83</sup> See also E. Lazega, 'Mapping Judicial Dialogue Across National Borders: An Exploratory Network Study of Learning from Lobbying Among European Intellectual Property Judges', (2012) *Utrecht Law Review* 8(2) p. 115.

<sup>84</sup> at p. 1131.

<sup>85</sup> at pp. 1131-34.

<sup>86</sup> J. Marson, K. Ferris, and A. Nicholson, 'Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives', (2016) *Journal of Business Law* (in press).

This article has highlighted limitations in current approaches to teaching EU law in many universities in England. That this continues is often because the modules / units where EU law is delivered tend to subscribe to a pre-established syllabus. Any substantive aspect of EU law within a particular area of competence is left to the module where that subject is delivered (and presumably it is for that teaching team to determine how much time is devoted to the nuances and critique of the sources of law). This approach can lead to the current situation, observable in motor vehicle insurance law, where inconsistencies in national law are frequently and inadequately dealt with by lawyers<sup>87</sup> and judges. Teaching EU law differently will be a step in the right direction of creating a cohort of future lawyers, judges and legal draftsmen who will be trained in identifying the practical application of EU law and principles. If it were introduced from the first year of study, and taught not as an additional facet of the syllabus but as a central component of it,<sup>88</sup> tangible benefits to students' understanding of EU law and its broad application may be the consequence. Our mindset should be of EU law as a pervasive element to the students' legal education and continued training.

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<sup>87</sup> Save for a few exceptions including the lawyer Nicholas Bevan (an expert in EU motor insurance law) who has worked tirelessly in this area in both practice and through a range of publications in practitioner and academic journals.

<sup>88</sup> For instance, Universities including East Anglia, Exeter, Kent, Kings, London South Bank, Queen Mary, Reading, Robert Gordon, Sheffield, Southampton, Warwick, and Westminster offer dedicated EU law based LLB programmes (albeit the offers can involve substantial study of EU law integrated into the course, and/or a traditional LLB programme with a year of study at a partner European institution).