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BOOK REVIEWS

K.J. Alter, *Establishing the Supremacy of European Law: The making of an international rule of law in Europe*. Oxford: Oxford University Press, 2001. 258 pages. ISBN 019 924347 6. GBP 40.

In this book – the first in a series of *Oxford Studies in European Law* – Alter examines the doctrine of supremacy of European Community law from the perspective of a political scientist. She does not purport to provide a legal analysis of the case law of the Court of Justice – or to enter the debate over the Court's alleged activism – but aims instead to cast new light on the topic by examining *why* national courts were prepared to enforce the supremacy of European law, *why* national governments did not actively resist the doctrine of supremacy, and *how* the development of the doctrine contributed to the emergence of "a successful international rule of law" in Europe.

The author's exploration of those issues proceeds from the view – briefly but convincingly justified in Chapter 1 – that the doctrine of supremacy was not inherent in the provisions or structure of the EEC Treaty. On the contrary, the development of that doctrine was the work of the ECJ which "has a bias in favour of European integration" (p. 53). It entailed a "transformation" of the Community and turned the ECJ into "probably the most influential international legal body in existence" (p. 229). Moreover, the author plainly rejects the view, widely held amongst Community lawyers, that judges and politicians in the Member States were won over by the compelling *legal* arguments invoked by the ECJ to justify the doctrine. In order, then, to explain *judicial acceptance* of the doctrine of supremacy in the Member States, Alter draws on a theory of judicial interests – anchored firmly in general institutionalist and judicial politics literature – according to which "judges are primarily interested in promoting their independence, influence, and authority" (Ch. 2). From this perspective, she argues that the lower national courts were prepared to make requests for and apply preliminary rulings from the ECJ to control national law essentially because that increased their influence within the national judicial hierarchies. The high and supreme courts of the Member States, who saw their powers curtailed by the principle of supremacy, resisted it for many years, but "unable to stop legal integration from progressing, seeking to avoid direct conflict [with the ECJ], and facing significant pressures created by the actions of lower courts, [they] were compelled to accept a significant compromise regarding the issue of EC law supremacy" (p. 59).

With a view to illustrating and substantiating these claims, the author gives a detailed account of the process which led to the acceptance (within certain limits) of supremacy in two Member States with different judicial structures and legal traditions, namely Germany and France (Chs. 3 and 4). While some of the material in these chapters may be well known to Community lawyers, they are well worth reading. The description of the national case laws, and the attempts of national courts at reining in the ECJ's activism, is clear and concise. Statistical information, useful illustrations and insights gained from the author's interviews with more than 70 key actors at the national and Community levels add further weight to the analysis. Comparing the reception of supremacy in the two jurisdictions, Alter concludes that the French courts "have thus far been less strident [than the German courts] in their assertion

that European law should be compatible with the [national] constitution ... and also less successful in their attempts to influence EC policy or ECJ jurisprudence" (p. 178).

The analysis of the acceptance of supremacy by *national governments* (Ch. 5) is less thorough and, perhaps, less interesting for Community lawyers. Alter's working hypothesis – provocative but well supported by empirical evidence – is that national governments did not share the ECJ's desire to deepen European integration through the establishment of a principle of supremacy of Community law. Initially supremacy was accepted, or tolerated, only owing to the fact that "political actors have short time horizons" and therefore "little personal incentive to mobilize to fight problematic legal doctrines" (p. 186). Once the doctrine had become more firmly established, and national courts had begun to refer significant numbers of cases to the ECJ, politicians might have been expected to attempt to reverse the Court's case law, but the practical difficulty of agreeing on a Treaty amendment effectively prevented the national governments from taking action.

Chapter 6 of the book is devoted to an evaluation of *the impact of the doctrine of supremacy* on the development of the Community legal order. The central point here is that while supremacy – combined with the principle of direct effect – led to greater respect for, and compliance with, Community law and thereby facilitated the establishment of a successful international rule of law in Europe, "the transformation of the European legal system ... also extended the shadow of the law into the political process itself" (p. 221). Supremacy, in other words, is part of the story of the judicialization of European politics.

Whether the book ultimately succeeds in explaining why the principle of supremacy was accepted by national courts may be left to the readers' judgment. It certainly provides an important part of the answer. Still, some might feel that the author overstates the importance of judicial (self-)interest, leaving too little room for the importance of legal reasoning in shaping judicial behaviour. While there may be general agreement that courts are to some extent influenced by considerations which do not find their way into the legal arguments used to justify final outcomes, the assertion that legal arguments are "simply a way of promoting judges' institutional interests" (p. 46) is clearly more controversial. A further possible criticism relates to the ability of the theory proposed by Alter to explain variations between courts in different Member States. Thus, although the book highlights a number of important differences between the German and the French courts, the reasons for those discrepancies are not explored in detail. Nor is there any attempt at explaining why judges in certain other Member States, such as the Netherlands, have been more willing to endorse the doctrine of supremacy than their German and French colleagues.

These comments should not be allowed to detract from the book's wider value, however. *Establishing the Supremacy of European Law* is a meticulously researched and stimulating book, brimming with provocative, but carefully argued, views. Written in an accessible and jargon free style, it deserves to be read widely: Community lawyers seeking a fresh perspective on a familiar story and political scientists with an interest in European legal institutions will find much to ponder.

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K. Nicolaidis and R. Howse (Eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, 2001. 537 pages + xvii. ISBN 0-19-924501-0. GBP 55.

D. McKay, *Designing Europe. Comparative Lessons from the Federal Experience*, Oxford: Oxford University Press, 2001. 167 pages + vi. ISBN 0-19-924213-5. GBP 45.

Y. Lejeune (Ed.), *La participation de la Belgique à l'élaboration et à la mise en oeuvre du droit européen*, *Aspects organisationnels et procéduraux,* Brussels: Bruylant, 1999. 813 pages. ISBN 2-8027-1315-9. EUR 128.90.

The three books reviewed cover a dazzling collection of, at times contradictory, but usually complementing, views on how European integration works, why it may often seem not to work as smoothly as one might expect, why it may (or should?) be stalling, where it is heading for. Whereas Nicolaidis and Howse have brought together the best and brightest in political and constitutional theory on both sides of the Atlantic, for a very high-level and at times spirited conversation on multi-level or multi-centred governance, Lejeune has asked both academics and practitioners from one small, but complicated Member State, Belgium, to describe and analyse in detail the actual operation of Belgian participation in the multi-centred European Union decision-making process, including implementation afterwards. For his part, McKay has taken up the herculean task of, on his own, drawing comparative lessons from the federal experience in the U.S., Canada, Australia, Germany and Switzerland, lessons which are meant to be useful for the task of "designing Europe". It is fair to say that all three volumes are extremely interesting for anyone interested in what is going on in the European Union, though they are quite different in approach.

The collective work edited by Nicolaidis and Howse attains the highest level of intellectual brilliance, and is remarkably coherent for a collective enterprise. It offers Europeans an update on the American constitutional debate and administrative practice of the last decades, and confronts legal-constitutional and political science perspectives on European integration. After two "vision" pieces, by the (now late) wise Daniel Elazar and brilliant-as-ever Joseph Weiler, extolling a "federal vision beyond the state" and "federalism without constitutionalism" respectively, two American political scientists Donahue and Pollack guide the reader through "centralization and its discontent: the rhythms of federalism in the United States and the European Union". The "rhythm" referred at is the pendulum of centralization and decentralization, whereby "at the moment, the US and the EU seem to be at roughly the same point in the cycle", and "the centralizing impulse is likely to reassert itself in both polities in the century's early years." (p. 117). Donahue and Pollack have the courage to make verifiable utterances, even predictions (such as the one just quoted), so that it is e.g. possible to observe that the table of "issue arenas and levels of authority in Europe" borrowed from Schmitter (1996) is overestimating the importance of the EU policy level, most obviously in the area of "justice and property rights" (p. 107). The welcome counterpoint ("Rhetoric and Reality") to the broad picture sketched by Donahue and Pollack comes from two sources, each taking care of one side of the Atlantic. American political scientist Kincaid, editor of *Publius*, *The Journal of Federalism* (ww2.lafayette.edu/∼publius/journal.html) points out how in the U.S., the expansion of the federal fiscal and regulatory role often occurred in step, "in a positive-sum manner", with a concomitant expansion of State and/or local government powers (p. 158). This insight mirrors Stanley Hoffmann's 1983 hypothesis that European integration saved the (European) nation State, a view shared by Moravcsik, Director of Harvard University's European Union Center (see Weiler, p. 58). Moravcsik in his counterpoint eloquently predicts constitutional status quo in the EU: "The EU may expand geographically, reform institutionally, and deepen substantively, but all this will take place largely within existing hybrid contours of European institutions." (p. 163; criticized as too "statist" by Schmidt on p. 341, who points out that what the Member State executive may gain in power over national legislatures, it loses through the ineffectiveness of veto at the EU level and through lessened control over domestic institutional actors, *inter alia* the judiciary).

Thus far for the facts and the diagnosis. Then come three contributions on the legal and regulatory instruments of federal governance. I highlight two of them. Bermann (Columbia University) states, in his otherwise thorough contribution on "the role of law in the functioning of federal systems", that the EC Court of Justice "has never taken the opportunity to define restrictively the Treaty's competence-conferring provisions, nor has it seriously questioned

whether a Community law measure bears a sufficient connection to the internal market to justify its adoption pursuant to the Treaty's internal market harmonization provisions.. . . In none of these legal basis cases was the measure claimed to fall outside of Community competence altogether." (p. 199–200) It is submitted that the Court's judgment annulling Directive 98/43/EC on advertising and sponsorship of tobacco products, did both these things, admittedly late in the day, but still in time for the April 2001 closing of the book's edition. Majone has contributed on "regulatory legitimacy in the US and the EU". Expanding on his earlier publications, Majone argues that not pre-emption (allocation of regulatory responsibilities between different levels of government) but partnership or the operation of a network of authorities is the central issue in regulatory federalism (p. 254–255). As the U.S. at an earlier point in the twentieth century had to grapple with the question of how to "control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person, one-vote election", it "has much to teach Europeans concerned about the 'democratic deficit' of their regulatory institutions" (p. 257). Majone thinks Europe could mainly learn in the field of procedural legitimacy, elaborating on the "general and apparently innocuous giving-reasons requirement" of Article 253 (ex 190) EC, or of an Administrative Procedure Act ("APA") on the U.S. model, to be considered by the EU (p. 265–266). It cannot be excluded that the move towards greater transparency, which has thus far led to Regulation 1049/2001 of the Council and the Parliament (O.J. 2001, L 145, 43), will be one of the chapters of the APA Majone wishes to see.

Meanwhile, Majone sees a threat to the credibility of European regulatory policies in the progressive parliamentarization of the Commission, which he nevertheless considers unavoidable and positive for the overall legitimacy of the integration process (p. 272). One could add that the problem of legitimacy is also mitigated in fields like education policy, where the Bachelor-Master (BA-MA) system of structuring higher education is being introduced across Europe on the basis of voluntary harmonization, fashionably called "the open method of coordination", despite the "exclu[sion of] any harmonization of the laws and regulations of the Member States" in Article 149(4) EC (for this "Bologna process", see europa.eu.int/comm/education/bologna_en.html).

Four contributions offer different models for understanding the issues of federalism, legitimacy and governance. First, Coglianese and Nicolaidis analyse the ways in which the institutional design of federalism in the US and Europe (more or less) fosters subsidiarity. Secondly, Peterson and O'Toole offer a policy network perspective, explaining how the EU's Member States "have pooled sovereignty but divided accountability" (p. 318). Their conclusion is, not surprisingly, that "it is now time also to master the problem of inadequate accountability" (p. 329), not the forte of networks. Thirdly, Vivien Schmidt addresses federalism and State governance in the EU and the U.S., delivering interesting insights on the impact of EU institutional structures on Member States, an impact which is different in differently-organized Member States (unitary v. federal, statist v. corporatist Member States – p. 341 and 353 respectively – cf. Lejeunes book discussed below). The fourth contribution, by Scharpf, is mentioned below.

The last group of four contributions deals with federalism, legitimacy and identity. These contributions seem to have been less thoroughly worked on, at least they do not manage to create the same level of debate found in the remainder of the book. The fact that the concept of "citizenship" was only introduced in the 1992 Maastricht treaty, and that the need was felt in the 1997Amsterdam Treaty to stress that it is derived from and a complement to Member State citizenship, may be a partial excuse for this state of affairs. The contributors and others might need another book to cover this aspect. Nicolaidis' conclusion of the entire book in fact contains the most inspiring starting points for this next book, exploring "a more proactive notion of constitutional tolerance . . . inspired by the overarching framework of polycentric federalism. . . . the constitution of shared identities" (p. 475). I would suggest Nicolaidis invite Padoa Schioppa, Member of the Executive Board of the ECB, to contribute to this next volume, building on the essay he has published in Italian under the title "12^{th} of September" (*Dodici*

settembre, il mondo non è al punto zero, Milan: Rizzoli, 2002), in which he pleads for a return to the core values enshrined in the Universal declaration of human rights, which we should not allow to be obscured by the due respect for minorities or by a glorification of cultural or religious differences etc.

Nicolaidis and Howse's work is definitely to be recommended to all members of the constitutional Convention convening at regular intervals in Brussels under the chairmanship of Giscard d'Estaing. In view of the vast subject matter chosen, the book has to have a few blind spots. These are, in my view, power politics and economics. Maybe the editors (or the *Zeitgeist* prevalent until 11 September 2001) selected authors sharing an idealistic, gentle view of the world, with the consequence that the word "power" only appears in the index as part of the combination "power-*sharing*". No economic approach either to the European integration process which arguably remains at its core an economic policy initiative, with only two mentions in the index of the euro (clarified as being a "currency") and none of the consumer. The only author to put economic policy at the centre of his thoughts is Scharpf, who brings his coherent social-democratic analysis of the root cause of European integration's democratic deficit: the "trilemma of the democratic welfare state": "EU Member States cannot want to shed their welfare-state obligations without jeopardizing the bases of their legitimacy; they cannot want to reverse the process of economic integration which exposes national welfare states to regulatory competition, and they cannot want to avoid regulatory competition by shifting welfare-state responsibilities upward to the European level" (p. 356–357, see also earlier his *Governing in Europe – Effective and Democratic?*, OUP, 1999.). A possible solution to the trilemma which is not mentioned, is that governments really want a leaner welfare State, and consciously use European integration as a way to achieve this end. Most economists will disagree with Scharpf when he attributes "mass unemployment" to market integration (p. 371–372); the absence of mass unemployment in e.g. the U.S. rather suggests the opposite. Against this background, the tension identified as a trilemma may simply be the best way in which (social-democratic or like-minded) politicians can obtain the best possible welfare State compatible with reasonable (although lower than U.S.) economic growth.

McKay's monograph is very coherent and structured, helped by the fact that he wrote the book on his own. Five mature federal democracies are analysed in turn, with a compact description of their political history, followed by a specific section on the role of political parties and of the fiscal dimension of the (evolving) federal arrangement. The attention paid to the fiscal element gives a refreshingly practical flavour to McKay's work, allowing comparisons between the different federations covered. They also allow the reader to verify that all federations covered are rather far removed from the loose and gentle, multi-centred ideal held up in Nicolaidis' and Howses collective work, and rather resemble classical nation States equipped with slow decision processes because of the involvement of well-developed regional and/or local authorities. In view of this very different situation from the relation between the EU and its Member States, the most hazardous parts of McKay's work are the last but one chapter, in which a context for comparison with the EU is drawn from the five "national" federations, along the "constitutional design", "institutional adaptation", "role of political parties" and "fiscal" dimensions, and the last chapter, which intends to draw conclusions for the EU and its institutional design. The final recommendation goes as follows: "Over the next several decades (sic) the most urgent (re-sic) task for the EU is arriving at a new and permanent constitutional settlement. In this endeavour, constitutional framers should look first to the experience of those democratic countries with the longest experience of federal political arrangements. Something can be learnt from all five of the countries under discussion in this book, but perhaps most can be learnt from the very decentralized institutions of the Swiss confederation. Where identity is localized and interstate heterogeneity great, a powerful case exists for the creation of devices that are specifically designed to limit the accumulation of centralized political power." (p. 152–153). The blind spot of this recommendation – apart from the long time-frame provided for the task identified as urgent – was described as follows by another UK political scientist, Siedentop:

"the dilemma facing the EU today is that French initiatives have brought Europe to the point where constitutional issues have become unavoidable. But the French republican tradition is singularly ill-equipped to deal with the problem of dispersing authority to limit the centralizing of power in Europe. So the French draw back from the federalist implications of their own project. The instincts of the *énarques* are bureaucratic rather than constitutional – putting a premium on coherence and efficiency rather than the checks and balances of a constitutional order." ("A citizens' Europe", *Financial Times*, 27 Feb. 2002) In slightly irreverent words, it is very doubtful that France wants to split up into thirty or fifty autonomous cantons, to fit into a scheme of post-State multi-centred happiness-for-all, as is clear from Lacorne's contribution to Nicolaidis and Howse (at p. 433 referring to the Constitutional Council's 09 May 1991 decision on the status of Corsica, www.conseil-constitutionnel.fr/decision/1991/91290dc.htm). For the sake of the efficient delivery of economic policy and, maybe, tomorrow, security policy, this is very likely to be a fortunate state of affairs.

McKay's book is inspiring reading, not only for students of European integration, but for everyone interested in one of the five national federal systems covered. For those who followed the September 2002 elections in Germany, it should be obvious that the CSU, which has won quite a few elections in Bavaria since World War II, does not call itself a "Christian-socialist" party, but more succinctly "Christian-social"; in Bavaria, the difference matters (p. 90).

Lejeune's collective work, finally, takes us into the heat of the kitchen, where the multi-centred federal operations of European integration are being prepared, and where the left-overs and dirty plates have to be dealt with (e.g. implementing directives). Few overarching ideas here, except in the contribution of Renaud Dehousse, who denies that the Belgian "case", of a Member State transforming itself slowly from a highly centralized unitary State into a loose federation, is atypical (p. 495–502). He claims that every Member State confronts the same double challenge of "bureaucratization" (the evolution towards Majone's regulatory State) and "globalization" (the increasingly perceived or increasingly felt inability to politically dominate economic events). Another academic contributor, Franck, stresses the increased autonomy of national executives *vis-à-vis* national parliaments and interest groups (p. 475), as Vivien Schmidt does in Nicolaidis and Howse. Dehousse touches on a sensitive issue, the degree to which the sectoral organization of the Council of Ministers, combined with a constitutional guarantee of autonomy within the government in at least one Member State, can contribute to political stalemate and incoherence (p. 498, referring to the German agriculture minister). Most articles in Lejeune's volume deal with a specific sector of European regulation, analysing the state of implementation of EU law in Belgium and the degree to which the nationally competent authorities are involved in the EU decision-making, "cooking" phase. Comparative contributions describe the situation in Germany and summarize the situations in a number of other Member States. All of these can be seen as input for research which draws on several Member States at the same time (e.g. Kassim et al (Eds.), *The National co-ordination of EU Policy* (OUP, 2000)).

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E.O. Eriksen and J.E. Fossum (Eds.), *Democracy in the European Union: Integration through Deliberation?* London: Routledge, 2000. 310 pages. ISBN 0-415022592-2. GBP 19.99.

Deliberative democracy is in vogue, it seems. In both the U.S. and in Europe, political theorists are turning away from representative democracy and towards its distant deliberative cousin. While the fashion may be transatlantic, however, the reasons for it are not. In the U.S., the recent fascination with deliberation is perhaps but the latest remodelling of America's proud

republican heritage. Institutions of representative democracy in the U.S. are hedged in by judicially enforced constitutional norms, and they are composed of delegates usually fixated on re-election and on how they are going to raise the vast sums which their television-driven campaigns are going to cost. America has always been a land with only limited representation: always more a republic than a democracy (this is not to be read as being necessarily a criticism). Yet few in either North America or Western Europe like to admit that they are not really democrats, or that they do not really live in a democracy, so political theorists get to work to re-invent the democratic wheel, to argue that the weaknesses inherent in and constitutional limitations imposed on the representative do not matter as long as we can all freely *talk* about it. Who cares if our votes count for little as long as we can all have a good argument?

And now we hear more and more talk of deliberation in Europe – and especially as regards the EU – as well as in the U.S. Yet in Europe, the reasons for the rise of deliberation are different. There is no great republican tradition here, for all its ancient Greek origins and renaissance Italian redesign. Rather, the fad for deliberative democracy among political theorists of the EU has arisen because if we cannot talk about deliberative democracy here, then we cannot talk about democracy at all. The EU is not a democracy, and democracy is not a crucial value to the EU. This is uncontroversial, and widely recognized, even if the Preamble to the recently proclaimed Charter of Fundamental Rights misleadingly states otherwise. "Democratic deficit" (an aptly economic term for an economic community) is an oft-repeated buzzword among both academic and journalist commentators on EU affairs. The usual cure proffered is, of course, to continue to expand the powers and influence of the only directly elected institution, the European Parliament. Eriksen and Fossum have valuably produced a thoughtful collection of edited essays which, in the opinion of this reviewer, should serve strongly to remind us that to travel further down this road is no cure at all – and, indeed, would be more likely to hinder than to facilitate prospects for democracy in Europe.

As ever with edited collections, the book is mixed. The editors are themselves responsible for four of the twelve contributions, and their principal concern seems to be a political-scientific analysis of what it is that drives the motor of European integration. They posit that – at least in part – it is deliberation which enables integration: it is the arguing and the talking, the very practice of deliberation, that acts as one of the prime forces, or the "glue", as they describe it, of integration (p. 257). This is the thesis around which Eriksen and Fossum have attempted to construct their book. Their purpose in bringing together this collection is to explore, in their words, the following issues: "What are the prospects for reasonable action and rational argumentation within the EU structure? Does the EU embody institutional arrangements that can sway actors to adopt disinterested or third-party perspectives, or that, at least, enable working agreements and intermediate forms of consensus based on the force of the better argument?" (p. 16).

These themes are explored across a wide variety of aspects of European governance. Two of the contributions which will be of particular interest to lawyers are those by Follesdal on subsidiarity, and by Joerges and Everson on comitology. Follesdal considers a range of approaches to subsidiarity, and suggests that the particular variant found in the Amsterdam protocol is likely to provide three challenges to deliberative democracy: first, "an urgent but unanswered task is how to secure accountable applications of Amsterdam subsidiarity" (p. 85); secondly, Amsterdam subsidiarity, Follesdal argues, grants unwarranted powers to Member States at the expense of smaller sub-units, or regions; and thirdly, the Amsterdam variant of subsidiarity "may hinder the development of trans-European values and commitments necessary for a stable European political order" (p. 85). Joerges and Everson offer a similarly valuable analysis of aspects of comitology, a feature of European decision-making with enormous consequences not only for European administrative law, but also for deliberative democrats.

In addition to these two chapters, two further contributions which stand out are "The anonymous hand of public reason: interparliamentary discourse and the quest for legitimacy" by Blichner, and "Can the European Union become a sphere of publics?" by Schlesinger and

Kevin. What makes these chapters so strong is their recognition that, for all the globalization and integration which Europe has witnessed over the past four decades, it is still the nation-state which remains the major player, and if we truly desire a fully democratic Europe, then our democracy must be one which is firmly rooted in the nation-state. It would matter a lot less that the institutions of the EU would fail any democratic audit if the Member States which make up the Union were themselves the repositories of full (representative and deliberative) democracy. The focus of Blichner's argument is on national parliaments, on the ways in which they hold their respective governments to constitutional and political account for their policies, decisions, and actions in the Council of Ministers, and on the ways in which national parliaments talk with one another about this. This is, in part, what the European Parliament was for before direct elections were introduced in 1979. Before 1979 the EP was a forum in which the representatives of the various national parliaments could meet together. Now, that forum has had to be replaced by the far less transparent (and more informal) COSAC: the *Conférence des Organes Spécialisés dans les Affaires Communautaires*.

The European Parliament may be democratically elected, but in other respects it is a bad democratic joke. It is neither particularly open nor accountable. The citizens of Europe know little of what it does and care even less. It comes across too often as an institution more concerned with enhancing its own powers than with reporting back to the people of Europe about how their governments are spending (and wasting, and losing) their tax-euros. If we really want to know what our governments are mandating the Commission to do on our behalf, we should insist that our national parliaments find out for us: after all, that is what they are for. And as Blichner demonstrates, there are far too many Member States with only eviscerated parliamentary oversight of European decision-making. The existence of the European Parliament acts as an expedient fig-leaf – without it the indecency of European governance is fully exposed such that no national parliament would any longer put up with it. In this sense Europe would be more democratic without the EP than with it. Schlesinger and Kevin remind us in their excellent contribution that the essence of democratic accountability is information. Unless we know what it is that those in positions of power are proposing to do, how can we hold them to account for it? And political communication, of course, continues to revolve around national institutions: namely, the press, and the broadcasters. While political communication remains focused on this level, so too must democratic control if it is to be at all meaningful.

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Oxford

T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future*. Manchester: Manchester University Press, 2001. 214 pages. ISBN 0-7190-5998-4. GBP 40.

What sets Kostakopoulou's book apart from most others that consider the three title themes is the author's attempt to fuse normative and positive theory with empirical evidence and then derive policy implications. This is an ambitious and perhaps even audacious project. Unsurprisingly, it is not entirely successful, although the attempt is laudable. Kostakopoulou appeals to post-modern and critical theory to argue for less restrictive European immigration policy and a "constructive" citizenship. The first chapter examines various options for European identity and settles on a constructivist approach which "conceives of the emerging community in the Union as a political design and of European identity as a task" (p. 35). Kostakopoulou argues that European identity "must be nourished by institutions, practices, rules and ideas embodying a commitment to social transformation and democratic reform" (p. 36). For her,

the constructivist model of European citizenship transcends the limitations of the nationality model and instead fosters the creation of a community of expectations and civic engagement, a democratic polity that takes "difference" seriously and critically while remaining inclusive. In the second chapter, the author turns attention to the institutional construction of European identity, examining the policies that culminated in the introduction of EU citizenship in the Maastricht Treaty. Her key point is that the early decision to restrict free movement provisions to nationals of Member States "biased the process of the institutional construction of a European identity by filtering out alternative considerations about a civic and inclusive mode of European identity" (p. 62). While this is clearly true, Kostakopoulou is perhaps being somewhat optimistic about the political prospects for wider application: would the Member States really have agreed to free movement rights if they had extended not just to EC nationals but also others?

The third chapter continues the history of the construction of European identity, citizenship and migration through to the Amsterdam Treaty. The chapter, in line with other parts of the book, provides a useful summary of the case law. Kostakopoulou argues that policies concerning European identity, citizenship and immigration "have reached the limit of their cognitive expansion" and writes that, if European citizenship is to become a "genuine form of citizenship beyond the nation-state and "mature" as an institution, then the normative foundations and boundaries of membership in the Euro-polity must be rethought" (p. 79). Kostakopoulou's political preferences are clear. Yet, although genuineness and maturity are perhaps desirable, it is less obvious why such a rethinking of European citizenship is necessary. Supporters of the status quo would counter the author's assertion that conceptual change is necessary with the counter-argument that the current model, in which EU citizenship remains derivative of national citizenship and in which individuals who are not citizens of Member States can claim only limited European rights, is fine and perfectly defensible. Kostakopoulou pursues her search for alternative institutional designs from a more theoretical angle in the short fourth chapter, which seeks a theory of European citizenship. The chapter is a literature review, which concludes that existing theories of citizenship are inadequate because they remain wedded to the territorial nation-state. In the book's fifth chapter, Kostakopoulou expounds her own "framework for democratic citizenship beyond the nation-state which is inclusive and respectful of 'difference"' (p. 101). This framework, which the author terms "constructive citizenship", is based on seven propositions. Constructive citizenship acknowledges citizens' multiple identifications and is therefore based on domicile; focuses on social membership; conceives of rights as tools for individual empowerment; encourages participation in democratic decision-making; implies more egalitarian distribution of socio-economic benefits; requires citizens to be concerned with justice, show respect for others, and be critical; and should be open to contestation. Some of these elements are more recognizable than others, but the author argues that together they form a single framework.

After laying out her vision of constructive citizenship, Kostakopoulou turns her attention to its potential implications for European immigration policy. Because immigration provisions mirror prevailing conceptions of membership, the author posits that her conception of constructive citizenship might change the way we think about immigration. The result of this reconsideration, she suggests, is the conclusion that "democracy in the Union [requires not only] flexible membership and a constructive model of citizenship, but also porous boundaries and a more liberal immigration policy" (p. 127). The chapter goes into a high level of detail about the design of this more liberal policy, but the central idea is the "transfer of migration-related issues into the full competence of the Community" (p. 146). This is a radical proposal, and it is certainly true that a "legally-binding, constitutional framework for immigration would free immigration from the whims and prejudices of transient majorities" (p. 150). Whatever the theoretical attractiveness of transferring responsibility for immigration policy to the Community, it is difficult, however, to imagine it occurring in the current context of rising populism and anti-immigration fears in the Member States; political opposition almost certainly precludes an EU immigration policy in the foreseeable future.

Many readers, if they have followed the author's policy-oriented analysis to this point, will be unfamiliar with the kinds of arguments presented in the seventh chapter to refute sceptics such as this reviewer. There, Kostakopoulou reaches the conclusion that "Heidegger's conception of boundary as *horismos* can be used to subvert the authoritative disciplining of boundaries by replacing the boundary-obsessed territorialism accompanying statism with a focal sense of territoriality" (p. 164). In other words, she proposes that Heideggerian thought can alter traditional concepts of the relationship between territoriality and nationality and thereby foster a new democratic sensibility. For Kostakopoulou, Europeans have "the responsibility to think about dwelling and to act for the sake of dwelling; to question narrow articulations of national interest and official discourses which undermine community by scapegoating migrants and admission seekers; to think what political belonging can be in the European polity; to think about exile and human suffering and to give an enlightened moral response to the plight of migrants and refugees" (p. 163). This responsibility, the author argues, grounds the "ethic of the other" and will lead to the realization of the institutional designs and more liberal citizenship and immigration policies her book suggests. For those not regularly exposed to discussions in political philosophy, it may seem extremely unlikely that any "democratic discourse of belonging" can "induce the readjustment of the individuals' cognitive structures" by "creating the right conditions for a philosophical and critical relation to reality" (p. 154). It may indeed well be the case that we remain so mired in concepts inherited from the construction of democratic nation States that we cannot conceive of new forms of postnational democracy. Nevertheless, Kostakopoulou's book is one step in the direction of overcoming the difficulties of such conceptual and political shifts.

W. Maas
Yale

V. Korah, *Cases and Materials on EC Competition Law.* Second edition. Oxford: Hart Publishing 2001. 687 pages. ISBN 1-84113-300-0. GBP 30.

Valentine Korah's second edition of *Cases and Materials on EC Competition Law* is a gem of a casebook for students, teachers, and practitioners with probing minds. This volume was published six years after the 1995 cut-off of the first edition. Those six years at the turn of the 20th century have been rich ones for EC competition law. Indeed, they have seen a maturing of European competition law in a direction long advocated by Professor Korah. In this brief review, I will first describe the structure and methodology of the book. Second, I will identify cases and developments that, if not directly influenced by Korah, have followed the path she has lighted. Third, I will identify issues that remain targets of Korah's pen and ask whether a future third edition of the casebook might be celebrating a Valentinian triumph. I offer a hypothesis at the start: globalization is pushing EC competition law in the directions (efficiency and market-reliance) that Korah has persistently advocated from the start.

Structure and methodology. Casebooks are different from treatises. Treatises are secondary law. They summarize the law. They seldom convey much about the analytical framework of the cases. But especially in competition law, the cases are the "real thing". They are the primary sources (along with the legislation), at least in common law methodology; and European competition law is some 80% common law. For a student or practitioner of competition law, understanding the analytical methodology is infinitely more important than knowing outcomes of particular past cases. The intricate mix of microeconomics, socio-economic policy, and the economic generalizations made to accommodate the demands of the legal system, distinguish the study of competition law from most other bodies of law and enhance the importance of a good casebook. The writer of a European competition casebook has a unique challenge: how to

capture the essence of competition law in a book short enough to be useful in the classroom or on the practitioner's shelf; how to select and organize a vast and increasing array of materials, which include, in addition to the EC Treaty articles, numerous Commission decisions, opinions of advocates general, Court judgments, regulations and guidelines including the Merger Control Regulation and various block exemptions, and economic analyses and other commentary.

Korah has more than met the challenge. In a book of 687 pages, she has made a remarkable selection of decisions, opinions, judgments, legislation, and commentary, and she has exercised excellent judgment regarding the length of included case excerpts. Moreover, she makes creative use of the Internet, providing web citations for much of the legislation, and advising users to read full texts of important cases on the web. She includes challenging notes and questions after each included decision or judgment. The book contains 12 chapters, including points of substance and procedure, and including restrictive agreements, abuse of dominance, State measures, intellectual property, mergers, joint ventures, enforcement and sanctions. The book is easy to read and use. Korah's short treatise, *An Introductory Guide to EC Competition Law and Practice* (7th ed. Oxford: Hart publishing, 2000), is a helpful complement.

Developments that follow the path of Korah. In this second edition, Korah includes major new developments, and most of them have followed the intellectual path she has lighted. The subjects of these developments include risk-taking joint ventures, duties to help competitors, "links" for collective dominance violations, and market partitioning by vertical restraints. Korah has been a constant critic of joint venture decisions and judgments that imply distortion to competition within Article 81(1) EC simply from the fact of cooperation by important competitors or by leading firms in adjacent markets that are presumed to be potential competitors; and she has been a constant critic of decisions and judgments that give little regard to the riskiness of a venture *ex ante*. Her concerns regarding risky joint ventures were taken seriously in *European Night Services* (p. 643). In the now famous case, the British, German, Dutch and French railways had cooperated to provide overnight passenger services through the Channel Tunnel. According to the Commission, the joint venture was caught by Article 81(1) EC. The Commission granted a short (eight-year) exemption subject to a number of onerous conditions including a duty of the venture to grant access to others. The CFI annulled the decision on many grounds, including failure to develop the important market facts, failure to muster facts necessary to critical conclusions (e.g. that access would be indispensable for a new entrant), and – even if the Commission's assessment of competitive effects had been soundly grounded – failure to appreciate that the hoped-for benefits of the venture could not have been achieved without considerable investment and thus without the time necessary to secure a return on that investment. In view of the risk factors, the CFI said, the term of the exemption was impermissibly short.

Korah has similarly been a critic of the Article 82 cases requiring dominant firms to supply products or give access to smaller competitors. She argues that a duty to supply chills incentives of firms to make the initial investment, and in general chills a firm's constant effort to be the best. In *Oscar Bronner* (p. 173), the publisher of a small Austrian daily newspaper, *Der Standard*, wanted access to the nation-wide distribution system of the dominant newspaper publisher, *Mediaprint*. The ECJ sharply limited the essential facility doctrine, as Korah has urged it should do. Even without access to its competitor's distribution system, *Der Standard* had enjoyed profits and growth, the Court noted. Therefore access was not necessary, and therefore it was not mandated. The Opinion of A.G. Jacobs was wholly attuned to Korah's approach, and she includes a very long excerpt including the following words: "To accept Bronner's contention would be to lead the Community and national authorities and courts into detailed regulation of the Community markets, entailing the fixing of prices and conditions for supply in large sectors of the economy. Intervention on that scale would not only be unworkable but would also be anti-competitive in the longer term and indeed would scarcely be compatible with a free market economy."(p. 183)

Typically, Korah has been impatient when the Commission, and at times the Court, uses a formalistic rule of decision without noticing that it has no economic significance. Thus, she had criticized the rule, as once understood, that a duopoly or entrenched oligopoly could not abuse collective dominance or run afoul of the Merger Regulation without "legal links" of ownership or contract between them. "Links" was not the point, said Korah. Competition may be harmed without links, and competition may be unharmed with them. What mattered was effect on competition. The critique bore fruit in both *Companie Maritime Belge* (p. 155) (under Art. 82 EC) and *Gencor/Lonrho* (under the Merger Regulation) (p. 593), where the ECJ and CFI held that the result must depend on an economic assessment.

The list of evolving pathways of European law would not be complete without reference to the case law's hostility towards vertical restraints blocking parallel imports – of goods in general and of goods protected by intellectual property in particular. Korah has been a particular critic of the EU perspective that these intrabrand vertical restraints are worse even than horizontal restraints. In particular she has criticized a tendency of European authorities to disregard the fact that a firm 1) can increase its market power by a vertical restraint only under very special circumstances, and 2) can use vertical restraints to prevent free riding and increase efficiencies in distribution and incentives to invent. It must have been rewarding, therefore, for Korah to reference the recent Guidelines on Vertical Restraints, quoting paragraph 7: "The protection of competition is the primary objective of EC competition policy, as this enhances consumer welfare and creates an efficient allocation of resources. In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market . . . " (p. 72).

Paths yet to be taken? But Korah has not yet won the war. The second edition also contains new cases and measures that violate her rules against formalism over substance, symbols (e.g. no intrabrand "market partitioning") over economic effects, and social policy or highly speculative economic presumptions over economic effects. Thus, she includes in the second edition the new vertical Regulation (p. 356), which continues to blacklist tight territorial vertical restraints, and she asks probing questions about the regulatory aspects of the Regulation and accompanying vertical guidelines. And she includes and asks critical questions about case law continuing to condemn use of national intellectual property law to protect against infringing imports from Member States that did not grant patent protection (*Merck* v. *Primecrown*, p. 438); tying by a firm not dominant in a market for the tying product (*Tetra Pak*, p. 140); price discrimination by a dominant firm that was merely taking advantage of what the market would bear (id.), and a dominant firm's deep discounts to a competitor's major customers where there appeared to be no opportunity of the low-pricing firm to charge a monopoly price and recoup losses. (id., and *AKZO*, p. 136).

Will a future third edition of the casebook claim victory on the issues that still resist the paradigm of efficiency through a non-interventionist lens? As noted, the forces of globalization are conspiring with Korah to move the law and its argumentation in this direction. Indeed, in the wake of the European prohibition of General Electric's acquisition of Honeywell, following U.S. clearance, the transatlantic merger dialogue has been engaged within the framework of the U.S. paradigm: non-intervention unless the merger threatens a price rise. Narrowing the debate for at least this moment, the Europeans justify their decision to prohibit the GE/Honeywell merger on grounds that the merger threatened to raise prices of large aircraft engines and avionics. The U.S./EU gap is narrowing. In my view, however, it will not close. In a future third edition, Korah will almost surely be able to report "progress", but European competition law will retain its unique centre of gravity that "cares" about preserving the competitive structure of the market and opportunities of the non-powerful firms to compete on the merits.

E. Fox
New York

K. Neunreither and A. Wiener (Eds.), *European integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*. Oxford: Oxford University Press, 2000. xii+ 384 pages. ISBN 0 19 829641 X. GBP 50.

This is a collection of papers first presented in a series of seminars held in Brussels during the Inter-governmental Conference leading up to the Amsterdam Treaty. The book aims to evaluate the progress to European integration resulting from the introduction of the Amsterdam Treaty. Contributors include the editors, and a number of specialists in EC politics and law. The interdisciplinarity of the contributing team is one of the strengths of this work, which unfortunately is not prominent enough in the arguments of each paper. This is due to the single-dimension analysis of each topic. The *gravitas* of the contributors is another strength of the book. Strangely, the selection of prominent contributors with strong interests in specific aspects of integration seems to result in the main weakness of the book, which is the lack of a common denominator in the topics addressed in its chapters. The structure of this edited book remains unclear and this renders the evaluation of the achievement of its ambitious aim debatable.

The book is divided into four Parts. Part I aims to evaluate the changes imposed by the Amsterdam Treaty to the institutions. It includes a chapter on the use of the Amsterdam Treaty as a possible blueprint for institutional balance and an analysis of the changing mandate of the European Commission. This reviewer finds little justification for the inclusion of an otherwise excellent chapter on the implementation of Directives under this part. Part II refers to the EU's prospects for democracy after Amsterdam and includes inspiring chapters on the Commission President investiture procedure, comitology and political representation in the EU as factors of assessment of democracy after Amsterdam. It is unfortunate that perhaps more traditional issues, such as the legislative process or the powers of the European Parliament, are ignored in this Part. Part III discusses flexibility and enlargement. It contains chapters on negotiating flexible integration in the Amsterdam Treaty, flexibility as a contributor to the future of EU integration, and a presentation of enlargement to the East. Part IV analyses the theoretical perspectives on constitutional change but – apart from Shaw's chapter on constitutional settlements and the citizen after Amsterdam – limits itself to the discussion of esoteric topics such as the interpretation of the Treaty as a Blairite type of reform, or the analysis of the embedded *acquis* as a prism of new governance.

The selection of topics in this book is puzzling. However, the timing of the actual conferences -which constitute the basis for this publication – must be taken into account: they took place at the time of the Intergovernmental Conference where the consequences of the new Treaty had not been scrutinized. Therefore, recognizing which specific issues would be of particular significance for analysis would have required perhaps immeasurable intuition. The topics selected are treated in depth, at least from a politics point of view. The arguments of the authors are valuable. In view of delay in the ratification of the Treaty of Nice, the Treaty of Amsterdam is still the current regime. This renders the book topical. Therefore, the book is a valuable addition to the library of political scientists and EU specialists. Even lawyers and legal academics would benefit from exposure to some of its chapters.

H. Xanthaki
London

C. Régnier-Heldmaier, P. Jouret, A. de Lecea Flores de Lemus, L. Nuñez, D. Discors and X. Yataganas, *Les finances de l'union européene* Brussels: Éditions Universitaires de Bruxelles, 1999. 483 pages. ISBN 2-8004-1204-6. EUR 81,80.

This volume – in French – is the second edition of a comprehensive exposition of the legal framework within which the EU budget is set and operated. It forms part (volume 11) of an authoritative series of "commentaries" on different aspects of the law of the European Community and the European Union. It is written by six officials of the European Commission under the guidance of the then Director-General of the Directorate-General for the Budget, Jean-Paul Mingasson.

There are five substantial parts to the book, each signed for by one (two for part three) of the authors, and a short concluding section. The first part traces the evolution of the budget from the early days of the Community, and describes its current architecture and the roles of different institutions in agreeing the budget. The resolution of the problems posed by the UK's net contribution is explained, and there is an account of the creation of procedures to take much of the political heat out of the budgetary process, notably the establishment of a medium term framework and the striking of the inter-institutional agreement between the Council and the European Parliament. *Titre II* of the book looks in much more detail at the functioning of the Financial Perspective, the medium term framework within which annual budgets are situated. *Titre III* examines how the budget is financed and explains the operation of the four instruments used to finance the budget: the two "traditional" own resources (agricultural levies and customs duties), the cut from national VAT and the GNP based fourth resource. The chapter takes great care to specify precisely how the amounts due from each member state are calculated. It concludes with a brief discussion of possible alternative "own resources" that shows why the search for a solution has become something of a quest for the holy grail, with a similar probability of success. The fourth section discusses five principles that lie behind the budget (unity, universality, annuality, specialization and balance) and shows how these govern the manner in which the budget is implemented. The fifth main section is about execution (principally by the Commission) and control procedures which involve both internal controls and external scrutiny by the European Parliament and the Court of Auditors. In the very short concluding chapter, the authors take stock and look forward to what might be expected from then forthcoming inter-governmental conferences.

This book has the great merit of explaining in detail just about every thing anyone might wish to know about the budget and its legal base. But while praise is warranted, the book also deserves criticism for decidedly bad timing. Its publication coincided with the striking of the deal at the Berlin European Council that settled the shape of the EU budget for the seven year period from 2000–2006, yet Berlin and the flurry of publications that preceded it simply are not mentioned, presumably because the publication lag meant that the text was completed too early in 1998. Thus, the (accurate) statement that a report on own resources would have to be produced by the Commission by 1999 was overtaken by events well before the book appeared: the report in question having been published in October 1998. Moreover, the book misses out on the various innovations in control procedures, notably the powers accorded to OLAF, that followed the resignation of the Santer Commission. Although the Berlin agreement, in practice, largely retained existing structures and procedures, a number of developments have ramifications for the legal order. Consequently, readers who want to use this volume as a reference source will have to be alert to the possibility that some of the detail has been amended. This is a pity, because the evident care with which the book has been brought together deserves better. Given that the obligation on the EU to agree a new budget deal in 1999 was well-known and that some of the possible amendments were prominent in political debate by 1998, one can only wonder why either the authors or the publishers failed to anticipate that changes – however minor – would inevitably result from the new settlement and that it would thus have made sense to postpone publication.

An example of change is the decision to lower the contribution of four Member States (Austria, Germany, the Netherlands and Sweden) to the UK abatement to 25% of what the formula would otherwise have yielded, thereby increasing the levy on the others – with France and Italy shouldering much of the burden to the predictable dismay of President Chirac.

Similarly, the settlement included an increase in the "fee" to Member States for collecting traditional own resources from 10% to 25% of the proceeds, a change that can only be understood in the context of the heavy political pressure exerted by, notably, the Netherlands to reduce its net contribution. The UK, by contrast, agreed to forgo its "windfall" gain in relation not only to the higher collection fee for the traditional own resources, but also a change in the method of calculating the VAT resource, adding to the complexity of the legal provisions.

More generally, the book perhaps underplays the political dimensions of the Budget, especially the key decisions taken at European Councils that settle the shape of the budget for years to come. Thus, Fontainebleau (1984) resolved the question of the UK net contribution by introducing the abatement mechanism, while Brussels (1988), Edinburgh (1992) and Berlin (1999) not only produced new financial perspectives that largely structured Community expenditure for the years to come, but also led to changes in the detail of implementation. Legal scholars may want to reflect on the ramifications of the European Council's powers and the apparent weakness of the European Parliament and the Commission in this context. In conclusion, this is a substantial and carefully written book that achieves its aim of providing a comprehensive description and analysis of the finances of the EU. But it is bound to suffer from what has to be seen as an error of judgement that led to it being published just as new rules of the game for the next seven years were being agreed.

I. Begg
London

K. Adamantopoulos and M. Pereyra-Friedrichsen, *EU Anti-subsidy Law & Practice.* Isle of Wight: Palladian, 2001. 506 pages. ISBN 1 902558 32 4. GBP 80.

While the field of EU anti-dumping law is more than adequately covered, this new book on EU anti-subsidy law fills a gap, and would be a useful addition to a practitioner's library. To their credit, the authors recognize that an introduction to the international background and context is essential to an understanding of the EU subsidy rules. They begin by giving due attention to the applicable GATT articles and the WTO Subsidies and Countervailing Measures Agreement (the "SCM Agreement"). Within WTO subsidies law, there is a penchant for classifying subsidies by means of red, amber and green "traffic lights", and the authors provide a welcome clarification of these intricacies. Also helpful to complete the reader's understanding of the WTO context is the brief explanation of the Agreement on Agriculture treatment of agricultural subsidies, as well as of the special rules applicable to developing countries.

The international context is especially relevant when one considers that the EU can counter subsidies in two ways: either multilaterally, through a WTO challenge before the WTO Dispute Settlement Body or unilaterally, through an anti-subsidy procedure in the EU. With regard to the multilateral remedy, the authors preface their explication of the WTO route with an explanation of the WTO dispute settlement system and of the procedural rules applicable to WTO dispute settlement.

The bulk of the book is, as one would expect, dedicated to the unilateral route, the EU's anti-subsidy rules. This remedy is the one which is of the greatest interest to private parties. Here, the authors provide a complete commentary on the EU's anti-subsidy regulation, Council Regulation 2026/97 on protection against subsidized imports from countries not members of the European Community (the Basic Regulation). First, the authors look at the substantive aspects of the law, with analysis of crucial concepts such as the definition of a subsidy, what constitutes a "financial contribution" by a "government", what constitutes a "benefit", how subsidies should be categorized under the Basic Regulation, and how an individual subsidy

margin is calculated. The authors also furnish an analysis of injury, causality and "Community interest".

Next, and of great practical interest, is the book's detailed explanation of the "ins and outs" of a procedure under the Basic Regulation. This advice from clearly experienced practitioners would be especially helpful to a lawyer faced with an anti-subsidy, or for that matter, anti-dumping procedure.

The footnotes themselves are a significant contribution, because the authors provide a road map to the decisional practice of the EU in the field of anti-subsidy law. That being said, the body of decisions in EU anti-subsidy law, especially in comparison to the volume of EU anti-dumping decisions, is modest. Many issues have never been treated in the context of an anti-subsidy case. There, the authors go further and lead the reader to analyse the issues in other contexts, to the extent that such information could be an indicator of how the issue would be treated if it were to arise in the anti-subsidy context. Of primary interest are the anti-dumping cases, but the authors also draw on relevant WTO cases.

The buyer should be aware that more than half of this book is made up of its appendices, which include the GATT Articles, the SCM Agreement, the WTO Dispute Settlement Understanding, the EU's Basic Anti-subsidy Regulation, a table of countervailing measures currently in force in the EU, the Commission's Guidelines on the calculation of countervailable subsidies and Documents from the WTO Subsidies and Countervailing Measures Committee. With that *caveat*, this new book on EU anti-subsidy law is a useful resource, and a welcome addition to the body of scholarship on EU commercial policy.

N. McNelis
Brussels

F. Castillo de la Torre, *El Control Judicial de los Acuerdos Internacionales de la Comunidad Europea.* Madrid: Dykinson, 2001. 237 pages. ISBN 84-8155-755-2. EUR 18,03.

What is the role that the ECJ has played in the review of international treaties in Community Law? Castillo de la Torre's book is constructed around this major question. The book consists of six chapters. In the first two chapters the author accomplishes a comprehensive analysis of the different judicial procedures for the review of international treaties in Community Law. The third chapter is devoted to the constitutional dimension of the judicial control of those international treaties. Chapter four analyses the use of different instruments by the Court to check the constitutionality of international treaties, while chapters five and six explore the effects of judicial control inside the Community legal order and other technical problems related to that control.

The first and second chapter consist of an in-depth analysis of Article 300(6) EC. For his analysis, Castillo de la Torre has completed a comprehensive literature research and a detailed review of the case law of the ECJ. The ECJ's reading of the procedure in Article 300(6) is analysed. One of the main conclusions of these two chapters is that the procedure of control of international treaties has been crucial in the definition of the identity of the Community in international relations. Moreover, the ECJ has utilized this procedure to stress the constitutional character of the constitutive treaties. However, the author has some critical comments concerning the sometimes incoherent case law.

The third chapter is devoted to the constitutional dimension. The author convincingly argues that the ECJ has granted an extensive interpretation to the procedure of Article 300(6) in order to affirm the constitutional nature of the constitutive treaties. The central role played by the ECJ in transforming international law texts such as the treaties into a constitution is then charted. One interesting case is Opinion 2/94, on accession of the European Community to the ECHR.

Castillo de la Torre disagrees with the opinion held by many scholars that the ECJ has a short-term vision on the implicit powers of the Community. On the contrary by declaring the lack of competence of the Community to join the Convention the Court is stating the impossibility to modify the constitutive treaties by simple accession to an international treaty and, therefore it is preserving their constitutional character. It is only through formal amendment according to the specific procedure foreseen in the constitutive treaties that they can be modified. The entrenchment of the constitutive treaties, that is, the impossibility of amendment by a different procedure than that specifically conceived for this purpose is one of their most remarkable constitutional features.

Chapters four, five and six are devoted to some specific problems of the Article 300(6) procedure. In chapter five an analysis of the effects of the judicial annulment of international Community treaties is undertaken. The reference to similar legal proceedings in the Member States helps in the correct understanding of the peculiarities of the procedure in Community law. Subsequently the author distinguishes between the effects of an annulment in international law and Community law. This control over international treaties by the ECJ would be seen with some perplexity if only the implications in international law were to be taken into account. However, a much more coherent vision arises when considering that the ECJ has a constitutional background in mind. If some contradictions arise in the case law of the ECJ these are also to be found in the case law of the national constitutional courts: both the ECJ and the constitutional courts of the Member States are the guarantors of the supremacy of their constitutional texts.

This book is the result of extensive research, which has giving rise to reasoned positions. However the work could at times have resulted in a more elegant construction. To give one instance, the comprehensive and exhaustive case-by-case technique may result in a difficult text to read in some occasions. Moreover an index of cases would have been most useful in helping the reader to find the relevant case in the text. In conclusion, the merits of the book heavily outweigh certain shortcomings. Aside from minor criticism, the publication is unquestionably a valuable service to the legal community. The relevance of the Article 300(6) procedure in the Community legal order is another confirmation of how far this legal order has moved from its inception in international law texts. The book is a timely contribution to the exploration of the European constitutional landscape.

M.L. Fernández Esteban
Brussels

M. Kiikeri, *Comparative Legal Reasoning and European Law*, Law and Philosophy Library Volume 50. Dordrecht: Kluwer Academic Publishers, 2001, 334 pages. ISBN 0-7923-6884-3. EUR 130.

The ambition of the book goes far beyond the rather modest and traditional title: The author aims no less and no more at a critical methodological evaluation of the process of legal reasoning by the leading European jurisdictions, namely the European Court of Human Rights and the ECJ, to a lesser extent also of national jurisdictions. This is supplemented by empirical content-orientated interviews with judges and their *référendaires* in different European and national jurisdictions, without however producing much new relevant and interesting material.

The author starts from a discourse theory of legal interpretation and reasoning which is contrasted to more traditional methods of comparative law, like finding the best solution in a "family of laws" (p. 24), "continuation of the legal dogmatic discourse" (p. 38) or looking at universal patterns in the understanding of law (p. 21). Comparative legal reasoning can be divided into two spheres: "the first sphere is the sphere of adoption. This includes the real adaptation argumentation . . . and the systematization reasoning. . . " (p. 50). The second part

is called "social systematization reasoning", consisting of two approaches, namely sociological and phenomenological (p. 51). These are great and complex words, and one wonders how this is supposed to function in the real world of limited resources, time and knowledge! Comparative law allows adjudication beyond strict formal validity of the decision (p. 55), but in this sense it would not deviate very much from modern interpretation theories which (in continental reasoning) have been suggested by such authors as Ihering, Gény, Heck and others, all striving to go beyond the pure letter of the (codified) law. In this sense, "comparative law is rather a collection of legal information from which inventive arguments *can* be derived" (p. 47, italics author).

Chapter 3, the longest and most informative of the book, is then read with particular interest because the author is taking a "hard look" at comparative law in European legal adjudication. I would have expected some discussion of the author on the *autonomy paradigm* which is so frequently invoked by European jurisdictions but surprisingly enough one reads very little about this metaphor (p. 113–152 mostly referring to the opinions of the advocates general). The author also goes back to his *questionnaire* of European and national jurisdictions which, however, does not contain many new insights: he mentions the (not surprising result) of his inquiry regarding the approach to principles and facts: "while continental judges approach the instances from principles, the common law judge goes from the instances to the principles" (p. 68). What does this have to do with the comparative legal argument? Indeed, the inquiry is not very revealing: from the French courts which lack comparative observations in general (p. 92 – one may say more drastically: they lack true legal reasoning because of their cryptic oracle-style of argument), to the situational use by Finnish courts (p. 86) to a more profound analysis in some instances by Dutch, German and (if the parties invoke this argument) English courts. Of course everything depends on the concrete case: international private law conflicts or *lex mercatoria* cases are aiming more at comparative law as the (only) source (p. 98), while the application of strict rules is hardly ever supported (or rejected) by comparative legal reasoning. Is this such a surprising result?

European law is more interesting, to some extent made possible by the "principle" orientation of Community law (p. 99). Some of them have indeed been adopted from national law and become "europeanized", e.g. proportionality, legitimate expectations, right to be heard and right of self-defence (p. 106; for a general discussion, cf. Tridimas, *The General Principles of EC Law*, OUP, 1999). Art. 6(2) TEU (ex F(2)) can be read in the same direction (p. 112). It is certainly true when the author insists that "no really systematic structure of analytical reasoning can be identified" (p. 148). The European Court of Human Rights is somewhat more open to comparative reasoning because it allows dissenting opinions of individual judges coming from different jurisdictions. Interestingly enough, "comparative arguments usually support quite conservative solutions" (p. 185).

A long section is devoted to the very detailed and subtle analysis of "hard cases" in the two European jurisdictions (p. 194 et seq.), and the reviewer acknowledges having discovered many new lines of argument carved out by the author, especially when he looks at the opinions of the A.G.s (with regard to the ECJ) and to dissenting opinions of judges (ECHR). Space makes it impossible to go into details, so a few remarks may suffice: *Hoechst* (p. 208–222) is for me not really a case concerning comparative reasoning, but overcoming the – to my opinion excessively broad – interpretation of the German Constitutional Court of the concept of "inviolability of home (*Wohnung*)" thus including business premises. The case is concerned with the efficient enforcement of competition law on the one hand and the co-operation of Community and national authorities (and courts) on the other while respecting certain rights of business, e.g., as the ECJ said, on protection against arbitrary and disproportionate intervention. Comparative arguments only played a minor role, mostly put forward by the losing party. *Bachmann* (p. 204–208) and *Kalanke* (p. 242–250) show very little sensitivity to comparative legal reasoning but rather to policy-making by the court (tax cohesion privilege to Member State restrictions on free movement on the one hand, political rejection of "hard gender quotas" by the Court

and even more A.G. Tesauro on the other). The leading case for comparative argument in the ECJ is indeed *Albany* (p. 222–241) on the interrelation between competition law and collective bargaining in industrial relations, thus creating a special immunity from competition rules: "collective negotiations between management and labour pursuing social policy objectives must, by virtue of their nature and purpose be regarded as falling outside the scope of Art. 85 (1) EC" (p. 228, citing the ECJ). This contrasts very well with the narrower, though more thorough, comparative argument of A.G. Jacobs who wanted to restrict this exemption to the very essence of collective agreements negotiated in good faith. In its later *Pavlov* case (C-180–185/98) the ECJ made clear that it will restrict this immunity only to true collective bargaining, not other types of "self-regulation" of industries.

Chapter 4 contains – surprisingly enough – nearly 50 pages of conclusions, a heading which the author had already used 9 (!) times. This makes reading the book and following the argument of the author not particularly easy. I must admit that for me the conclusions contributed rather to confusion, and I can't really tell the reader what the true conclusion of the book is, except that the comparative argument can be used in many contexts! The idea of "comparative discursive reflexivity of legal systems" (p. 290) may be something to think about, but does it tell us anything about the specific strategic meaning or theoretical thrust of the comparative argument and the results to which it may lead? Will it help more to convince the losing party, which seems to be the particular task of the judge according to Lord Justice Schiemann of the English Court of Appeal (cited as *leitmotif* of the study on p. 314 f.)? Can it really be regarded as one specific method of legal interpretation, or is it just an eclectic instrument to be put to work in rationalizing judicial discretion? I have found many arguments in the book in all the directions mentioned, but none conclusive to rejecting the critique of relative *Beliebigkeit* in which comparative legal reasoning finds its foremost place. Indeed, "it is, in many ways, a subjective and institutional method of reasoning. Furthermore, the increasing flow of information, also in the field of comparative law, has resulted in a tendency toward the sketchy use of comparative information" (p. 304). Doesn't this remind us of the first monologue of Goethe's Faust: *"Da steh' ich nun, ich armer Tor Und bin so klug, als wie zuvor. . . "*

N. Reich
Riga

M.A. Smith and G. Timmins (Eds.), *Uncertain Europe: Building a New Security Order?* London: Routledge, 2001. 276 pages. ISBN 0415237351. GBP 55.

At a time when enlargement, in particular institutional reform, is high on the European agenda, the book under review explores a somewhat more neglected aspect of the issue, namely security. As its title clearly indicates, this collection of works sets out to depict the evolution of the European security order in the years to come, taking heed of the enlargement both of the European Union and of NATO. As one of the contributors, Archer, puts it, Europe is now in a period of uncertainty.

The interest of the book lies in the wide approach taken by the editors who have decided not to limit the contributions exclusively to EU and NATO enlargement processes. The book also contains analyses of theoretical concepts such as the notions of "order", "security" and "identity". Furthermore, a number of contributions are devoted to the role of other institutions, namely the OSCE (Organization for Security and Co-operation in Europe) and the WEU (Western European Union), in the post-Cold War era. Another very interesting element is the examination of the security issue from the point of view of different States or regions. The book is therefore divided into four sections. As mentioned, the first part focuses on three theoretical

concepts: "security", "order", "identity". It makes clear that the three notions are interrelated. European security and order are illusory without some form of European identification. The emphasis of the second section is on the place of the main European institutions from a security perspective. The third section concerns the national and regional perspectives. The approach taken is particularly interesting insofar as some of the States under examination have rarely been analysed as they are in the book under review. Most of the contributions relating to such countries or regions would generally focus on them as an object of study rather than a subject whose views on the European security issue are of the utmost importance in order to achieve a peaceful Europe. The fourth part is the final and concluding part. However, it goes further than a mere conclusion and tries to evaluate whether a European security order is likely to come into being in the near future.

As far as the notions of "order" and "security" are concerned, it is shown that they are interrelated. The definition of order Archer seems to favour is one that refers to a situation whereby States or individuals are "seen, by themselves and by others, as being bound in a societal relationship by common interests, values, rules and institutions". According to Archer, there are at least three levels of order in the world: a global order (among mankind as a whole), an international order (among States) and local orders. The existence of three different levels has potential consequences for security. Thus, as Archer rightly puts it, "three systems that differ over important values carry the seeds of conflict". On the other hand, systems with matching values are more likely to coexist peacefully. That is why Archer underlines the fact that, in Europe, there is increasingly "a feeling of 'us"' in relation to security questions. In other words, Europe has developed common values, rules and institutions that bind it together in terms of security. It follows from this that if one wishes to secure a peaceful and prosperous Europe, one has to promote modes of identification to the common values. This is what Bideleux makes clear in his contribution. He also emphasizes the fact that it will take some time for the current candidates for adhesion to the European Union to accept its rules and norms. It will inevitably involve "profound changes in political and cultural values, mentalities, attitudes and power structures". Bideleux deems these changes more fundamental than the economic reforms which are given a far greater deal of public attention. The effort the candidate countries have to make is all the more important as, since 1918, most of the Central and Eastern European States have had a strong ethnic, religious or clannish bias. Furthermore, the gap between Eastern and Western identities has widened insofar as, in Central, East and South-East Europe, ethnic identities have been reasserted as the basis of States and citizenship whereas, in Western Europe, the notions of identity and citizenship have been driven apart as a consequence of the increased transnational mobility, the development of an EU citizenship and economic and cultural globalization. In conclusion, candidate countries have to "actively subscribe" to the rules, laws and standards to have a chance of becoming members of the "European club".

The second part of the book focuses on the different international organizations which have a role in the context of European security. It clearly demonstrates that both the OSCE and the WEU have lost momentum, leaving the EC and NATO well in the foreground. In his contribution on the OSCE, Cottey makes it clear that the organization is a security regime of "limited robustness". Thus, he enumerates five fundamental problems which limit the OSCE's potential: the inherent difficulty of establishing a security regime, the fragility of commitments to OSCE norms in parts of post-communist Europe, the tension between some core OSCE norms, the difficulty of promoting compliance with OSCE norms and the OSCE's limited role in non-military areas. That is why most States are unwilling to rely on the OSCE for their security. However, Cottey does not dismiss the OSCE entirely. He believes that an OSCE-wide security community can be built in the longer term. Even if the OSCE is unlikely to be the solution to Europe's security problems, one can predict that it will have a "continuing role as a pan-European normative framework and in the areas of democracy promotion, conflict prevention and resolution, and arms control". As far as the WEU is concerned, Rees starts by

stating that the WEU is disappearing as an international organization. At the beginning of the 1990s it was believed the WEU could provide an alternative to reliance on NATO. The idea was that the WEU would be used both as the defence arm of the EU and as the European identity within NATO. However, the EU has finally decided to develop its own military capability. Interestingly, Rees notes that what triggered this transformation was a perception of European weakness rather than strength. For instance, the Kosovo crisis in 1998–9 bore witness to very serious strategic disagreements between European capitals and the U.S. Nonetheless, in view of their relative military weakness, the Europeans could only exert limited influence on the Clinton administration. This encouraged the UK to reappraise its approach towards European defence. The fact that Rees does not formally come back to the fate of the WEU after having analysed the building of a defence structure within the EU suggests perhaps his belief that the WEU is bound to disappear.

NATO, for its part, has been significantly reshaped since the end of the Cold War. Smith, who is the author of the chapter on NATO, distinguishes the "internal adaptation", which refers to the discussions relating to the possibility of creating structures and procedures enabling European members of NATO to undertake military operations without the participation of U.S. forces, from the "external adaptation" which relates to NATO relations with non-members. This chapter dwells on the second of these concepts, "external adaptation", and sets out to demonstrate that the principal contribution of NATO to the development of security in Europe has been through enhanced co-operation with non-Member States. Interestingly, Smith does not limit himself to NATO's relations with Eastern Europe through enlargement, the Partnership for Peace initiative and relations with Russia, but also deals with the so-called "Mediterranean Dialogue" which has been in existence since 1995. Regarding the latter, the author notes that there is no military component to it and that this reflects the lack of substance of the Dialogue. However, he concludes that the mere existence of the Mediterranean Dialogue is a development that would have been unthinkable during the Cold War.

In the chapter on the EU, Smith and Timmins devote much attention to the process which led to the development of a military security element into the European integration process. In their conclusion, the authors express doubts as to the likelihood and the usefulness of the EU developing a meaningful military component. The second half of the chapter focuses on the EU as a soft security actor. It is made clear that the new democracies have to be supported if a pan-European security is to be built. The conclusion Smith and Timmins draw on this point is somewhat pessimistic as they state that technical assistance programmes (such as PHARE) will not be enough to close the socio-economic gap between the Members and non-Members of the EU and thereby contribute to European security. Enlargement is necessary. In this respect, the authors warn against the danger of creating "expectations gaps". They also emphasize the difficulty the EU will be faced with when having to absorb new members.

The third section of the book concerns national and regional perspectives on security. Although the first four chapters, on the U.S., France, the UK and Germany, give interesting insights into these countries' security policies, the last four chapters deal with countries or regions whose views have rarely been presented and are therefore more instructive. These are Russia, the Baltic States, Poland and South-east Europe. The position of Russia is accurately described by Cleary. At the beginning of the 1990s, it was thought that, if a pan-European security order were to be built, Russia would have to be a strong component of it. However, Russia did not seem to be convinced of this. Instances such as contradictory statements made by Russian politicians and inconsistent policy positions adopted by the government, are given by Cleary. The argument she develops to explain this incoherence revolves around the idea that Russia is uncertain about its identity. In this respect, her trail of thought is closely aligned to that of Bideleux. She states in her conclusion: "participation in NATO or the EU means more than joining a military or economic alliance, it means ascribing to a particular identity". The point of view taken by Gower in her chapter on Baltic States is particularly interesting as it does not only deal with the belief of these States that EU and NATO membership will provide

some kind of protection against the Eastern neighbours. It focuses on the idea that Baltic States can serve as a bridge between the EU and Russia. Russia's interest in the Baltic region would therefore be converted "from a potential source of tension into a positive incentive to engage constructively with neighbours". Latawski's first contribution concerns Poland. The originality of the chapter lies in the idea developed by Latawski that Polish integration into the EU and NATO is linked to the internal development of the country. "Poland is not only seeking to import norms but to export its own regional perspectives in the evolving European security order". Finally, the interest of the chapter on South-East Europe lies, in part, in the criticism expressed by Latawski towards the Western European approach in the region. Latwaski is of the view that the Stability Pact norms should be rebased so as to correspond to concepts that have some kind of resonance in the Balkans. In this respect, his concluding sentence is very meaningful: "The failure to do so may produce an imagined order that brings neither security nor stability to South-East Europe". In the fourth and concluding part, the editors try to assess whether a pan-European security order is possible in the near future. Their conclusion is somewhat pessimistic as is reflected in the title of the book. They believe it is uncertain whether, first, the members of the EU and NATO will be prepared to enlarge their institutions further and, second, whether these members will know how to manage relationships with long-term outsiders.

Overall, the book under review contains very stimulating ideas about the security issue in a wider Europe. However, the many overlaps between the different chapters, which render the reading a little tedious at times, is regrettable. This is largely counterbalanced by the original angle most of the contributors have taken for conducting their analysis.

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G. Ferrarini (Ed.), *European Securities Markets, The Investment Services Directive and Beyond*. The Hague: Kluwer Law International, 1998. XX+ 406 pages. ISBN 90-411-0736-3. EUR 131,50.

This book is written by academics in charge of the introductory chapter on the implementation of the relevant directives in national legal systems, and by regulators dealing with securities markets in Europe. It arose out of a research program at the University of Genoa and a follow-up conference in 1996 on the European Investment Services Directive of 1993 and its implementation in the Member States. It may be remembered that not until the 1990s did the EC begin to realize that passing legislation on European company and financial markets law harmonization was not enough; in addition, and even more importantly, adequate implementation counted. Only then did the European Commission, with the help of national experts, begin to assess whether the nation States have lived up to their transformation obligation, not only formally, but as far as content and national practice of company and financial law were concerned. The preface does not make it clear whether or not the work on this book was part of this Community effort. But even if was not, it still fits perfectly into the need to look beyond the law in the books toward what happens in reality, both in the member states and on the European level. In this respect, the book is not only a piece of good comparative law in which mere paper rules have long been considered passé. But it is also a valuable contribution to modern EC law, understood in a functional way.

While this bringing together of academia and regulatory practice is in itself meritorious, the editor has gone beyond law to include contributions of economists. Altogether there are 25 contributions by authors from the European Commission (former DG XV, Internal Market, and Financial Services), one from the U.S., and seven from Member States, though most of these are

from Italy, the UK and Germany. The academics prevail – most of them are law professors – but there are also a good number of economists. A third of the contributions come from regulators and legal practitioners from several national stock exchange and securities commissions, such as the Italian CONSOB, the British SIB, the French COB, the Spanish CNMV, and the German Federal Office of Securities Trading (BAWe). In the meantime, Wymeersch, the author in charge of the introductory chapter on the implementation of the relevant directives in national legal systems, has become head of the Belgian *Commission bancaire et financière*. It is important to mention this cross-sectional and interdisciplinary approach because it is characteristic for the book and for its editor, Ferrarini, professor of financial law and banking law at the University of Genoa, who already produced a similarly set-up, highly useful book called *Prudential Regulation of Banks and Securities Firms, European and International Aspects*, (1995, Kluwer Law International). The 1998 book contains a three-layered index that gives easy access to the content. Normally this might not be even mentioned by a reviewer. But this index simultaneously presents a sort of system of legal and economic coordinates concerning the regulation and functioning of financial and securities markets. One stimulating and informative way of going through the book is by starting from the sets and subsets of problems mentioned there. By doing so, one learns not only a great deal about the Investment Services Directive (ISD) and the Capital Adequacy Directive (CAD, for once not computer-aided design), but also, for example, about conduct of business rules, conflict of interest, and consumer protection. For economics and markets, there is information about derivatives, equity and securities markets, stock exchanges, and financial and investment services. And, of course, one can learn about implementation (of the ISD and the CAD), organizational duties, and national and transnational regulation and supervision.

Exploring the book in the more traditional manner, one appreciates the clear overall structure of the presentation in six major problem areas: I. General, II. Prudential Rules and Insolvency, III. Conduct of Business, IV. Exchange Competition, V. Exchange Regulation, and VI. Enforcement and Taxation. I hope the description of the many interesting topics will have already sufficiently allured the reader so that I may be permitted to refrain from going through each of the 25 contributions, which might be a bit tedious. Instead, three key articles will be chosen as highlights from Parts I, III, and V, keeping in mind, of course, that such a choice is necessarily subjective and dependent upon the specific interests of the reviewer; this should not be misunderstood as a lack of appreciation for the other articles. Those who are particularly interested in economics should look at the four articles in Part IV by Pagano, Schaefer, Röell, and Onado on exchange competition. To those with a special interest in enforcement and cooperation between supervisors, the articles by Carbone/Munari, Biancheri, and Bergsträsser in Part VI can be recommended.

The book starts with the long and magisterial article by Wymeersch, on the implementation of the ISD and CAD in national legal systems. This article sets the tone for the whole book insofar as it deals with the core problem of the project and the book, i.e. implementation of the two directives. It presents an inventory of the principal implementing instruments in eleven Member States (in four others the implementation was still outstanding). One key choice as to implementation techniques is public versus self-regulation. The directives, though differing in language and approach, do not opt clearly for public regulation; they allow room for self-regulation. In any case, however, they do provide for review and enforcement before the courts. The classic land of self-regulation, of course, is the UK. However, as Wymeersch puts it, the self-regulatory model seems to be on its way out. This may be an overstatement, but we do know that in the meantime even the UK has the Financial Services Act 2000 and the Financial Services Authority. Even though the Panel on Takeovers and Mergers remains functional, it is doubtful how far and even how long this stronghold of self-regulation will still hold. Some British observers say just as long and as far as the courts will allow it. This depends not only on the record of actual enforcement, but is also to a certain degree the product of accidental failures and fraud that not even the best system can fully prevent. On the other side, there is

a whole new wave of self-regulation in the context of the corporate governance codes, again following the British example of Cadbury and the Combined Code. So the evidence remains mixed.

In two other respects the article has remained most timely: organization of supervision and cooperation of supervisory bodies. The author found that division of prudential and transactional supervision is noticeable in most Member States. This is still true, but in the meantime this pattern has given way in a number of countries to a type of supervision that combines banking, insurance, and securities markets supervision. Such an integrated supervision follows the trend to the so-called one-stop shop (*bankassurance, Allfinanz*) and to financial conglomerates. The most recent country to follow this trend (and the UK) is Germany, as of 2002. Cooperation between the supervisory bodies, both national and international, is an absolute necessity. Yet, as the author says quite rightly, if there are no adequate solutions, the need for a European-wide supervisory body may be felt, at least at the level of coordination. This is indeed the key question of supervision. Since 2001 we have known the solution proposed by the Lamfalussy Report, i.e. integrating the national supervisory bodies more tightly into the European law-making and enforcement procedure. The European Union will try this way. It is promising.

Another stimulating article is by Köndgen, on rules of conduct and further harmonization. It starts out with the observation that rules of conduct as dealt with in the ISD (for example, the duty of care, the duty of loyalty, or the duty to avoid conflicts of interest) are not novel, but agency law proper. What the ISD does is to transform them into public law obligations, thereby adding enforcement by a supervisory agency to the existing civil remedies that the investors might or might not invoke (in practice rather the latter). This in itself is an improvement to investor protection. But there is more. The civil courts can be expected to add, by implication or analogy, the statutory public duties to the terms of the contract or the statutory fallback rules in the civil code. This is a highly interesting cross-fertilization – between private and public law and back between public and private law (cf. in more detail the Hamburg doctoral thesis by Bliesener, *Aufsichtsrechtliche Verhaltenspflichten beim Wertpapierhandel* (Berlin, 1998)). The article continues with doubt as to whether the Community has the power to set such rules. It might fall under the competence concerning consumer protection, but would then be restricted to non-professional investors, a restriction not followed by the ISD. From a more practical viewpoint, these parts of the article remain somewhat speculative. So are the remarks on minimum harmonization and subsidiarity.

What is more interesting is the observation that the ISD has not been able to convincingly allocate the regulatory and supervisory jurisdiction between home State and host State. One argument for host State control is that violations of rules of conduct are frequently referred to the competent authorities only at the complaint of abused investors. On the other side, home State control is better for day-to-day routine supervision. A new argument is added: the alignment of regulatory and civil jurisdiction as to the violations of rules of conduct. Yet upon closer inspection, this argument does not lead clearly to one of the two approaches – host State or home State – since conflicts of law rules may differ depending on the nature of the claim (contracts, torts) and the person of the injured (consumers or others). In the long run, home State control of business conduct seems to be preferable to the author, dependent, of course, on more harmonization. On the whole, as theoretically challenging as the article is, it might appear overly academic because there is a pro for each con. Yet – who knows? – this may be not only today's type of theory but also today's type of practice of harmonizing and enforcing rules of conduct transnationally. Unfortunately, there are no pat solutions in sight.

The article by Ferrarini on exchange governance and regulation is called an overview. This is too modest. The author is well known for his dual interest in the law and the economics of stock exchanges and financial markets (cf. recently "The European Regulation of Stock Exchanges: New Perspectives", 36 CML Rev., 569). This shows also in this article. The key question it analyses is as follows: Are stock exchanges markets or firms, and what follows

for European law and policy? The former perspective, the traditional view that defines stock exchanges as markets, is the focus of the directives before the ISD. The ISD itself, however, is already more open in this respect. If the exchanges are firms, as economics and modern legal thinking on exchanges tell us, this has considerable consequences for exchange governance, exchange ownership, and exchange self-regulation. There is still much resistance, both by practitioners and legal academics, against treating stock exchanges as normal firms, which under a public choice perspective is hardly astonishing. For this means that stock exchanges are to be subject to full competition just like any other firm (among themselves, internationally, and from proprietary trading systems), and that pleas for preserving the national market from foreign intruders for the sake of the national investing public make no more sense than they do for normal firms, i.e. none. In the light of such competition, the ownership and governance structure also tend to change: from members' ownership, as it has been since the Middle Ages, to investor ownership; and from self-regulation by members that is bound to create conflicts of interests to more outside and state regulation. Furthermore, at least in Germany, the stock exchanges prefer to stick to the traditional public law status by which they can operate under the shadow of protective public law (for example, imposing public fees like a State authority). In reality, competition under civil contract law is a substitute for regulation, as the author states fully to the point.

The forerunner in treating stock exchanges as firms is the UK. The first stock exchange to be privatized was the Stockholm Stock Exchange in 1992. Other European countries have already followed, and we hope that Germany will eventually follow as well. The article is fascinating insofar as it uses modern economic thinking in analysing and evaluating the ISD. This brings completely new insights that might also be useful in the ongoing reform of the ISD, which is dated. As to this reform problem, the reader can look forward to a very recent article by Ferrarini called "Securities Regulation and the Rise of Pan-European Markets: An Overview", just appeared in a 2002 book edited by Ferrarini et al. and entitled *Capital Markets in the Age of the Euro, Cross-Border Transactions, Listed Companies and Regulation* (Kluwer Law International).

K.J. Hopt
Hamburg

T. Wessely, *Das Verhältnis von Antidumping- und Kartellrecht in der Europaïschen Gemeinschaft – Eine Untersuchung der wettbewerbsrechtlichen Schranken des EU-Handelsschutzrechts*, München: Beck Verlag, 1999. 471 pages. ISBN 3-406-45497-6. EUR 64.

Thomas Wessely's dissertation is the most detailed discussion in German of the relationship between anti-dumping and competition policy in the European Community to date. His scholarly and laborious contribution, in 459 pages of small print, provides an overview of the relevant discussion in the past together with recommendations for change. The discussion provides much food for further reflection and debate even if one – like this reviewer – disagrees with certain findings and recommendations.

The work is in two parts. In the first five chapters, the basis of the relationship between anti-dumping and competition law in the Community is discussed. In the second part, Wessely elaborates in three chapters the competition law limitations that should be imposed on anti-dumping policy.

The first chapter contains Wessely's discussion of the competition policy concept underlying actions against dumping. Thereafter, the author describes what, in his opinion, is a discrepancy between the theoretical justification and the actual practice of acting against dumping. He considers that the legal framework and actual practice have – overly – protectionist consequences.

The author concludes that the real function of anti-dumping law in the European Community is to work as an instrument of import protection and of industry policy. Wessely continues in the third chapter with a description of the differences of the criteria used in competition and anti-dumping law. He concludes that anti-dumping law contains stricter and less favourable rules than competition law for price discrimination. In the fourth chapter, Wessely analyses the competition-restraining potential of anti-dumping law. He reviews particular aspects of the procedures as well as certain cases. Regarding the latter, he considers that anti-dumping practice assisted companies in their anti-competitive behaviour and in general favoured the distortion of competition. In chapter 5, Wessely reviews attempts and developments to replace anti-dumping rules by competition law. The aspects so reviewed include the rules on intra-Community dumping, those contained in international agreements concluded by the European Community (free trade and association agreements), the rules in other free trade agreements and the work done for an international competition law. In the second part of his work, Wessely develops his thesis that the principle of undistorted competition contained in the EC Treaty should in the future be used in anti-dumping practice with a view to applying anti-dumping law in accordance with competition law principles. In chapter six, Wessely describes the contents of the principle of undistorted competition in the EC Treaty in the context of the legal order erected by the Treaty and in comparison with the Treaty rules on trade policy. In the following chapter seven, the author reviews Commission practice and Community courts' decisions up to 1997/98, insofar as the decisions refer to competition concerns in particular cases. In the concluding chapter eight, Wessely develops his opinion and proposals regarding the proposed future application of anti-dumping law in conformity with competition law principles. He advocates a number of restrictive interpretations of anti-dumping rules as well as the inclusion of procedural rules safeguarding the taking into account of competition concerns.

The description of the relevant competition law principles, their analysis and application to anti-dumping practice is a very laudable exercise and well done. However, this reviewer considers that Wessely overstates his case in a number of instances, and that his suggestions are neither in line with the intentions of the Community legislature nor desirable, as they would weaken the Community's position in international trade. In our view, Wessely's allegations that the Community administration (ab)uses the anti-dumping instrument in order to pursue protectionist and industry policy goals overstates the case. This reviewer, who has tried to describe and pin down the protectionist bias in certain features of the anti-dumping rules and their typical application (see Bierwagen, *GATT Article VI and the Protectionist Bias in Anti-dumping Laws* (Deventer, 1990)), and who has since assisted third-country as well as European companies in defending against anti-dumping charges as well as in drafting complaints, cautions against portraying the Community administration as abusing its powers. Wessely's analysis becomes judgmental without necessarily being based on a broad factual basis: he relies *inter alia* on critical voices in the literature and sometimes incoherent reasoning in anti-dumping regulations which he sweepingly criticizes.

This reviewer cautions against this approach. As regards the literature, whereas there are many critical voices, few are those who undertake analysis of the issues in detail such as Wessely and there are hardly, if any, detailed factual studies of a large number of cases. This reviewer considers that one would need a large field study to be able to conclude that the administration abuses its powers, in general. With regard to the reasoning of the anti-dumping regulations in individual cases, even though they have become more understandable to third parties not involved in the proceeding, it is difficult to interpret them without further factual knowledge. By way of example, Wessely refers to the collaboration between an industry association and producers in the monitoring of an undertaking as evidence of collusive behaviour on price (p. 145 at note 212, and p. 272). This interpretation of the text is far from correct: this reviewer represented the industry association which collected the data from the companies for transmission to the European Commission. The individual companies did not receive copies of other companies' data. In addition, as the undertaking was not based on price but on a

"cost plus" – formula, collusion on price was impossible between the third-country producers. Neither could the European producers know the prices or their levels (given that there were none), nor align their prices. Therefore, the allegation that European producers could easily align their prices is not borne out by the facts. In any event, in many undertaking cases, the Community industry could hardly align its prices given that there are typically many different models with different prices etc.

The dissertation contains a number of gratuitous criticisms. For example, on p. 317 before note 223, Wessely bemoans incoherent data, misleading comparisons and a tendency to sweeping set phrases ("*pauschale Floskeln*"). Deficiencies in the reasoning, such as found in the *NTN* and *Koyo Seiko* judgments are said to be characteristic of many anti-dumping regulations (note 223). This reviewer begs to differ: if it were so, one would have to expect many successful court cases given that misleading comparisons and incoherent data are standard grounds for annulment. Or: on p. 334 Wessely complains that the Commission counted long-term supply agreements toward the captive market and did not investigate their potential anti-competitive effect. However, the citation in the text does not allow such a sweeping statement, rather the contrary. Moreover, the argument was revisited in the definitive duty regulation (there recitals 19–21).

Wessely criticizes *inter alia* that the analogue country principle would lead to unjustifiable high dumping margins and should therefore be abandoned. This reviewer does not subscribe to such a plain statement as to the results of this concept. In any event, it is a concept used by all GATT signatories and universally accepted. At any rate, it shows that there are aspects of anti-dumping law which cannot be "fine-tuned" by competition law without rendering the instrument not working. This criticism applies to certain other points as well, such as residual duties and the injury margin (See chapter 2).

This reviewer has two major objections to the approach advanced by Wessely. One pertains to the balance of rights and obligations in international trade relations. The other concerns the Community legislature's intent. To start with the latter, it should be recalled that the Commission provides a yearly report on its activities to the European Parliament. The members of the EP seem fairly satisfied with the Commission's practice. No proposals exist for changes in the legislation. Wessely himself acknowledges that the EC Treaty's competition provisions do not oblige the authorities to take his suggestions into account, his recommendations are *de lege ferenda*. To the extent that competition concerns arise, the reviewer considers that these are taken seriously by the officials of DG Trade. Given that all interested parties may come forward with their concerns and must be heard, this reviewer considers that competition concerns, if there are, will be brought up. Accordingly, there is no need to involve a third team in the investigation, which should be concluded within a strict timeframe. If interested parties consider that DG Competition should investigate, they can bring all evidence to the authority's attention (and to the attention of the 15 Member States, represented in the Advisory Committee). Most evidence will be available in non-confidential form. Where data is confidential – such as individual financial and sales data – it is usually irrelevant in a DG Competition investigation. Given that the exporting companies are usually represented by lawyers, the fact that there are hardly any (parallel) investigations of DG Competition in the product or industry subject to anti-dumping proceedings indicates to the reviewer that the potential of competition concerns is overstated. In this respect, it should also be pointed out that the Annual Reports of DG Competition do not mention anti-dumping policy as one of their concerns. The *stainless steel bright bars* case may serve as an illustrative example. The lawyers defending the Indian companies brought a complaint to DG Competition, alleging that a cartel between the European producers had led to unrealistic price levels. These price levels were in turn used in the injury analysis. Whereas DG Competition on the one hand threw out the complaint as unfounded, the CFI on the other hand nevertheless scrutinized the reasoning for the definitive duty and concluded that it contained a manifest error of assessment in not analysing the impact of possible artificial price levels of an upstream product in more detail (see Case T-58/99, *Mukand*

et al. v *Council*, para 41 et seq.). With respect to the second major objection, the balance of rights and obligations, this reviewer considers that unilateral modifications along the lines suggested by Wessely would weaken the Community's position in international trade. Whether this should be done, is a matter for the legislature to decide.

As a general point, it should be recalled that irrespective of its competition law roots, anti-dumping law has been understood and accepted by GATT signatories as a trade policy instrument. Signatories have discussed the competition policy implications over the last decades but modified neither Article VI of GATT 1947 nor the Anti-dumping Code. Wessely's inward looking approach neglects the discussion and understanding at multilateral level. A further point may be added: the practices criticized by Wessely may be brought before dispute settlement panels and the EC's practice is regularly reviewed by the GATT secretariat, and, to the knowledge of this reviewer, the EC's practice has so far not been criticized for not taking competition law concerns seriously.

On the basis of the above-mentioned observations, this reviewer consider that "fine-tuning" the anti-dumping instrument with competition law concepts misses the point that the Community and its trading partners have opted for a trade policy instrument and have *not* seen fit to limit the instrument's application by competition law concepts, as demonstrated by the Anti-dumping Code. The international community is likewise much more interested in devising and establishing a universal competition policy and much less in the interface of anti-dumping and competition law (see WTO, Report (2000) of the Working Group on the interaction between trade and competition policy to the General Council, 30 Nov. 2000, WT/WGTCP4). This reviewer's conclusion is therefore that the – distant – future will bring a replacement of the anti-dumping instrument or its abolition, rather than its fine-tuning.

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U. Schildknecht, *Grundrechtsschranken in der Europäischen Gemeinschaft. Eine Untersuchung der Rechtsprechung des Europäischen Gerichtshofes*. Frankfurt am Main: Peter Lang, 2000. 279 pages. ISBN 3-631-36609-4. EUR 45.50.

Academic discussions about protecting fundamental rights within European Community law have always been a subject of controversy in Germany. The issue itself has received even more attention since the proclamation on the European Charter of Fundamental Rights. The doctoral thesis of Schildknecht is a valuable contribution to the ongoing debate. The author deals primarily with the limitation clauses of fundamental rights. According to the subtitle, his work is restricted to an analysis of the case law of the ECJ. The book focuses on the question of how far the ECJ develops differing intensities of control within its doctrine of limitation clauses. In that respect, Schildknecht especially refers to the question of whether the intensity of control depends on the fundamental right in question. Dividing his analysis into three parts, the author first deals with the limitation clauses of the right to property and the freedom to pursue an occupation. The second part describes other fundamental rights developed in the ECJ's case law. Finally, the third part details the meaning of the constitutional traditions common to the Member States and the ECHR as sources of inspiration in view of the development of limitation clauses.

As far as the intensity of control is concerned, Schildknecht clearly shows that the ECJ does not discriminate between the right to property and the freedom to pursue an occupation on the one hand and other fundamental rights which are not especially related to economics on the other hand. According to the Court, fundamental rights and their possible restrictions must be viewed in relation to their social function. As a consequence, restrictions on fundamental

rights can be justified when the measures pursue objectives of general interest. In contrast to the other fundamental rights doctrines such as the German one, the ECJ hardly integrates any formal limits to restrictions, like the requirement of certainty, effective administration of justice or procedural safeguards in its human rights doctrine. All those aspects are examined without any particular reference to fundamental rights – if at all. Schildknecht lays emphasis on the fact that the Court has consistently held that the principle of proportionality is one of the general principles of Community law and therefore a very important limit to any restriction of fundamental rights. By virtue of that principle, measures imposing a limitation are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the measure in question. Furthermore, given a choice between several appropriate measures, the least onerous must be chosen. Finally, the limitation imposed must not be disproportionate to the aims pursued. Schildknecht thoroughly depicts how the Court uses the principle of proportionality in order to determine differing grades of protection. For example, the case law of the Court – e.g. *ERT*, *TV 10* and *Familiapress* – shows that a very strict control is applied when freedom of expression is restricted. (The Court confirmed this position in its *Connolly* judgment in March 2001, after Schildknecht's book had already been published). Such a high level of control is not applied to any other non-economic fundamental right, e.g. inviolability of the home.

In much detail the author goes on to show that the intensity of control depends on the origin of the measure. Schildknecht proves that the ECJ differentiates between measures from an administrative authority on the one hand and measures from a legislative authority on the other. As regards administrative measures, the principle of proportionality is applied strictly, whereas legislative measures are controlled less strictly, as the legislative authority is endowed with discretionary powers. Discretionary powers are especially conceded in the Common Agricultural and Common Traffic Policy. The level of control of the principle of proportionality is more generally reduced where the authority is obliged to assess the future effects of measures and those effects cannot be accurately foreseen. The authority's assessment is open to criticism only if it appears incorrect in the light of the information available to it at the time of the adoption of the measure in question. Further strategies are applied by the Court in order to lower the level of control: in cases where the authorities are endowed with discretionary powers, their measures are open to criticism only if they appear manifestly inappropriate, unnecessary or disproportionate. In other cases, the burden of proof is shifted: the plaintiff asserting a violation of fundamental rights is required to set forth the violation conclusively. Moreover, the legal control of facts can be limited.

But Schildknecht's analysis concerning the principle of proportionality is not limited to the meaning of the principle within the fundamental rights doctrine. He is also aware of the fact that the principle of proportionality is often applied solely as a general principle of law. That is, only with regard to the measure in question and not with reference to any fundamental right. Here again, the author shows how the ECJ applies the same strategies in order to vary the level of control. Assessing the Court's approach, Schildknecht argues that the Court is right in protecting the legislative competences especially in the area of Agriculture (Art. 37 EC). Nevertheless, he thinks that the Court does not fulfil its duty following from Art. 220 EC, namely to guarantee administration of justice effectively. He continues by arguing that highly restrictive measures demand a strict control. In this context, it is important to notice that a strict control provides that the highly restrictive character of the measure in question is thoroughly determined. As Schildknecht shows, the ECJ often fails to do this. In addition, Schildknecht reprimands the Court for not reflecting general principles of law such as the requirement of certainty or procedural guarantees within its human rights doctrine. Those principles have to be assessed with respect to fundamental rights. But Schildknecht's reasoning is always balanced. It also shows that a lot of criticism concerning the fundamental rights doctrine of the Court is exaggerated. Confronted with Schildknecht's analysis, the reproach made by Coppell and O'Neill ("Taking rights seriously", 29 CML Rev., 669) saying that the ECJ controls restrictions

on fundamental rights taken by Member States too strictly cannot be maintained any more. In this context, the author rejects the idea of reducing the level of control concerning measures taken by the Member States with regard to the exceptions of the fundamental freedoms.

In the last part of his book, Schildknecht points out that the sources of inspiration (Constitutional Traditions of the Member States and ECHR) have hardly influenced the Court's case law concerning limitation clauses so far. He is of the opinion that the developing doctrine of limitation clauses should be orientated towards the doctrine of the ECHR. Besides, the author describes the different views concerning the difficult relation between the principle of proportionality and the very substance of the rights guaranteed (*Wesengehaltsgarantie*). His description would have been even more interesting if he had depicted his own point of view concerning that issue; but, developing a consistent system of limitation clauses was outside the scope of the work. To put it in a nutshell, the analysis of Schildknecht is very helpful. The book is warmly recommended to all lawyers interested in a profound and cleverly written stocktaking about limitation clauses within the case law of the ECJ.

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