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BOOK REVIEWS

Carol Harlow, *Accountability in the European Union,* Academy of European Law, European University Institute. Oxford: Oxford University Press, 2002. 198 pages. GBP 45.

This book originated as a series of lectures given in Florence for the Academy of Law in July 2000. It is written, as the author emphasizes in the Preface, by someone who tries to take a sceptical view of the place of accountability in the governance of the European Union (p. 1). An author also, who, as an administrative lawyer, is interested in the more lowly aspects of accountability relating to the notorious "Three 'E's" of public management: Economy, Efficiency and Effectiveness (p. 2). Harlow wishes to challenge the only truth of an integrationist vision of the Union, that is a vision which sees the Union in a "state of flux" towards "a destination defined in statal terms: a constitutional haven of federation, perhaps, with which we are familiar and comfortable . . . ". This view of the Union as a State "tempts the reader to prioritize(s) the traditional forms of accountability: election, representative institutions, and the opportunities these offer for calling politicians and officials to account. Expressed in terms of legitimacy, the argument could then be made that the 'democratic deficit' is supplied by the election of a responsible government or when directly elected parliamentary institutions are in place." This is an assertion which the sceptic, according to the author "should question . . . , seeking assurance that the machinery functions." (p. 3). With these statements, the tone is set: Carol Harlow pursues two objectives: on the one hand documenting the lack of accountability and, on the other hand, challenging the integrationist statal view of the European construction.

In *Chapter I* the author "thinks about accountability". Concluding an overview of a number of doctrinal writings, and with reference to the meaning, or lack of meaning, of accountability in different languages, Harlow sees a basis for a common understanding of accountability in Christopher Lord's categorization in terms of four elements. Those elements are: electoral accountability, parliamentary accountability, administrative (or ministerial) accountability, and judicial or legal accountability (Lord, *Democracy in the European Union* (Sheffield: Academic Press, 1998), p. 15). Borrowing from the private sector, she wishes to add to these typically external forms of political accountability, managerial controls which to-day are associated with the label of "New Public Management", warning however that "as we shall see in later chapters, (it is) difficult to supply the deficit in political accountability at EU level through audit and new public management techniques because of the existing management deficit within the EU" (p. 24).

Before analysing the accountability techniques as they operate in the Union, Harlow introduces her readers, in Chapters 2 and 3, to the complex contours of the EU policy and rule-making machinery, enough to identify "some accident black spots" in accountability (pp. 25–52), and into the workings of the Commission which she calls the Union's "Power House" (pp. 53–78). Following this introduction, she consecutively examines, in Chapters 4, 5 and 6, accountability through parliaments, accountability through audit, and accountability through law (courts).

The strength of Harlow's book lies in the detailed description of policy and rule-making mechanisms and administrative and auditing techniques in the Union, thus illustrating the lesser

known, and in many respects darker, aspects of European unification. Thus, she exposes (Chapt. 2) the powerful alternative decision-making process through COREPER and its feeder committees, the lack of transparency of Council proceedings, particularly in second and third-pillar matters, and the "Old Boys" Network decision-making procedures of the European System of Central Banks. The survey shows "the number of problems which need to be dealt with before EU policy-making can begin to be described as transparent and subject to democratic control." (p. 52). All of this is undeniably true. However, one may wonder whether policy-making in a traditional State is not subject to very similar and as un-transparent mechanisms. This reviewer's experience with a medium State like Belgium - be it a complicated one, because of its federal and multi-cultural character – is that this is undoubtedly so. Which points to a trend often present in critical assessments, also in Harlow's, to assess the accountability gap, and many other deficiencies, in the European structure against the backdrop of an ideal structure which is believed to exist in the traditional nation States, but does not exist there any more than it does in the Union. Of course, because of the existence in the Union of an additional layer of government on top of the one existing in the Member States, the accountability gap already existing in the States, risks becoming even larger within the Union, but that does not mean that it exists only in the Union.

In Chapter 3 Harlow analyses, with the same precision, the structure and workings of the Commission. She recognizes the institution's record of achievement over many years, but stresses nevertheless, and rightly so, that the institution was set up as an elite governance, and not at all designed with accountability in mind (p. 57). As a consequence, comitology was needed to represent Member State interests in the Commission's work of implementation in steadily growing areas of activity. The phenomenon has assumed a life of its own (p. 67) and made the initial lack of transparency and accountability even more conspicuous, as is illustrated for example by the BSE crisis, investigated by the EP's Special Committee of Inquiry, which the author describes at pp. 69–71. Moreover, enforcement by the Commission of Member State compliance with Community law, is carried out with a low degree of judicial control and raises many complaints, especially from environmental groups, aggrieved by the failure of the Commission to bring infringement proceedings (p. 74). In conclusion the author notes that "Sparked off by the investigation of the Committee of Independent Experts, there has been a growing realisation of a need for accountability of the Commission as the principal executive agency of the EU." (at p. 78). But, in spite of this growing awareness which shows also in the White Papers issued by the Prodi Commission, there are "apparently no accountability schemes devised or promoted expressly for a transnational system of governance" (ibid.). Again, in the opinion of this reviewer, that may be too rash a conclusion: comitology (unavoidable, and seen by some as an expression of participatory democracy) has become more transparent over the years; judicial control at the initiative of individual complainants will likely be broadened in the years to come if not at the initiative of the ECJ (see below), then as a result of legislative modification (see Art. III-266(4) of the draft constitution); and the author's reference to the BSE Committee of Inquiry and the Committee of Independent Experts, set up at the initiative of the EP, proves that, with some improvements, parliamentary control may become an important weapon of control of the executive, as it is in the USA.

As already mentioned, in Chapters, 4, 5 and 6 Harlow examines the ways in which accountability is supplied through parliaments, auditors and courts. Of these three chapters, the last dealing with "accountability through law" is obviously the one that lawyers are most familiar with. As is usual for enlightened lawyers, and in line with what has been said above, the author criticizes the refusal of the ECJ to open access to court for public interest groups, and applauds the CFI's attempt to do so in *Jego-Quéré* (pp. 150–153; but see C-50/00P, *Union de Pequeños Agriculturos*). In spite of this, she recognizes the ECJ's important achievement in creating a system of legal accountability and opening the system to provide access to private parties, and the remarkable measure of trust and cooperation between national courts and the ECJ in taking advantage of the preliminary ruling procedure involving individuals in the enforcement of

Community law (p. 157). Nevertheless the backlog and the long delays in rendering judgment should stimulate reflection on the nature and value of enforcement (pp. 157–159) – again a well-taken criticism, but one, I may add, that can be addressed to many courts. As a further achievement, the author underlines the development, particularly by the CFI, of procedural requirements of careful scrutiny on the part of the administration, and of the right of access to documents for individuals (pp. 159–165). Harlow is not blind, though, for the argument that not elected judges "should not dabble in law-making or policy," and that the rule of law concept, and the other concepts mentioned in Article 6(1) TEU, may be "fictions" that have "been of vital importance [though] in lending the ECJ the legitimacy it has required to bring into being the 'new legal order' of EU law" (p. 145). And indeed, she ends this chapter with a warning that the "erosion of democracy should not be allowed to continue without consideration whether a heightened degree of legal accountability to individuals is likely to end in inhibiting, possibly even superseding, the forms of collective political and democratic accountability which modern society has learned to value most highly." (pp. 166–167). That statement may contain some truth, but it does not in my view, nor in Harlow's I think, prevent "fictions" like the rule of law from being useful, no less than other "fictions," such as the "fictions" which underpin our understanding of democracy, and constitute the quintessence of participatory democracy, i.e. that all powers emanate from the people, that the people is represented by its elected representatives, and that the executive is accountable towards parliament. The truth is that we need these "fictions," and others like transparency, open government, because together they give insight in what a Western-style democratic system *tends* to be.

Chapters 4 and 5, again, contain an excellent analysis of the rule of parliaments respectively of auditors to enhance EU accountability. In Chapter 4 the author describes, admirably well, the differences in the national parliaments in monitoring EU policies. She explains that the degree of control depends essentially on two variables: the balance of power inside the national system between parliament and government, and the degree of parliamentary control over the conduct of foreign affairs. She discusses the Danish, French, German and U.K. parliamentary prototypes (pp. 86–92) which offer the overall picture "of national parliaments increasingly on the alert, anxious to participate in EU affairs and keen to strengthen machinery for scrutiny of government" (pp. 91–92). Harlow then describes the tools which are at the disposal of the European Parliament as a lever in enforcing accountability. They concern the Parliament's cooperation in law making, its power of intervening in the appointment and the dismissal of the Commission, its financial and budgetary powers and its powers of inquiry. The author rightly stresses the need to reinforce the latter tool in the European Parliament where committees still "are in their infancy," and to improve the cooperation between inquiries set up by national parliaments and the EP. As the author demonstrates, if the British Parliament and the EP committees of inquiry set up to investigate food-hygiene policy, had "been able to operate a joint inquiry, the EP would have had access to the evidence of UK ministers, while the national inquiry would have been better informed and empowered at the EU level" (p. 100).

In the last part of Chapter 4, the author discusses the cooperation between national parliaments, particularly within the framework of COSAC, that is the inter-parliamentary Conference of European Affairs Committees (pp. 103–105). In that respect Harlow appropriately recalls how Protocol 8 attached to the Treaty of Amsterdam states, in the first paragraph of the preamble, "that scrutiny by individual national parliaments of their own government in relation to the activities is a matter for the particular constitutional organisation and practice of each Member State," but nevertheless asserts, at point 7 of the Protocol, that "contributions made by COSAC shall in no way bind national parliaments or prejudge their position." (at p. 103). She further recalls that this ambiguity revolves around the uncertainty as to the role national parliaments ought to play in EU decision-making: some "parliaments prefer to focus their attention on the activities of the national government; others would extend this to the national government's performance in the Council; . . . others are concerned to win a greater role in Community law-making, [or] to ensure effective scrutiny of Community policy and law" (p.

104). She opines that, "if national parliaments are to retain their central place in European democracy, it is essential that they should find innovative ways to collaborate with each other." (p. 107) – rather than "to act as spokes in a wheel of EU parliaments," (p. 105) with the EP "at the hub of the wheel." (ibid., earlier in the text). This, I feel, is an essential point in Harlow's presentation, to which I will revert below.

Chapter 5 deals with Accountability through Audit, which is another under-explored area of accountability. The author points out that the EU, like other international organizations, suffers from the absence of an international audit tradition (p. 108) which brings her to describe different methods of auditing, as regards budgeting and control over expenditure. She emphasizes that, during the last decades of the 20th century, auditing has been transformed into a Value-for-Money audit. With a reference to a report from the English Audit Commission, she describes how public audit should be more than a check on probity and regularity, but should also evaluate the performance of an institution in terms of economy, efficiency and effectiveness, that is whether funds are spent wisely (p. 113). She explains that Union practice may have fallen behind Member State practice in countries like the U.K., the Netherlands, Sweden and France. In a following section of Chapter 5, Harlow successively describes the Union's internal, external and political auditing system (pp. 116–130). She analyses the deficiencies of the internal auditing system for which she refers to the Committee of Independent Experts' second report (pp. 119–122) – deficiencies which the Prodi Commission has attempted to cure (but not entirely successfully, as the recently revealed Eurostat scandal has shown). The author then examines the composition and functioning of the Union's External Controller, the Court of Auditors, and pinpoints two serious defects in the audit procedure: spot-check sampling and the contradictory nature of the procedure (pp. 125–127). The cool relations between that Court and the EU Commission are said partly to be due to disagreement over the Value for Money Technique which the Court tends to promote and the Commission is reluctant to apply (p. 127). As for political accountability, the procedures set out in Article 272 EC are said to suffer from the uneasy relationship between the Budget Commissioner, the Council President and the Chair of the powerful EP Budget Committee (p. 128–129). Finally, there are complaints about the follow-up, by the Commission and especially the Council, of supervisory remarks made by the Court of Auditors (pp. 128–130).

Further subjects discussed, and thoroughly analysed, in Chapter 5, relate to the Union's action in combating fraud (pp. 130–140). They include the creation of UCLAF, and the functioning of successor organization OLAF, the public interest disclosure by whistleblowers – the author observes that "the Commission ethos seems outdated and out of line with the values laid down . . . by the [British] Nolan Committee, or the OECD standards" (p. 137; an assessment I would subscribe to), and the reform of criminal procedure. As regards the latter, Harlow voices the traditional UK reluctance against the establishment of a European Public Prosecutor's Office, and even the setting up of Eurojust (p. 139). She clearly dislikes the Corpus Juris proposals: "It is distressing to find proposals of such import put together and developed by academics and official working parties. Proposals for new criminal proceedings go to the heart of the rule of law principle . . . and may in the long run contain a threat to civil liberties as grave as the threat of fraud" (pp. 139–140; a bold statement, I would think). She goes on to say: "Developed under the third-pillar regime, notable for its imperviousness to democratic accountability, these policy initiatives emanate for the most part from the ministries and bodies within the Member States responsible for crime prevention; to such bodies the Corpus Juris initiative offers an a unparalleled opportunity to avoid the stricter controls at national level." (p. 140). These outspoken opinions sound rather emotional, and difficult to prove. Moreover, if the draft Constitution is approved by the Member States in its present form, the criticism will be outdated, since the old "third pillar" will then be submitted to the co-decision legislative procedure, with the proviso that, for the establishment of a European Prosecutor's office, unanimity will be required in the Council (Arts. III-167 through III-170).

Most of the above demonstrates the richness of Harlow's analysis. The book is full of factual information, critical assessments and personal insights about lesser-known aspects of the internal functioning of the Union, assembled in less than 200 pages, index included. All of this makes the book indispensable reading for anyone interested in the subject of democratic accountability. Unfortunately enough, the last chapter, Chapter 9 on Accountability and European Governance, does not live up to the same high standards. In that chapter the author first gives an account of the present state of European unity in which I can hardly recognize the Union. Harlow argues that "[f]our decades of steady if discontinuous progress towards European unity have, at the start of the new millennium, been replaced by a feeling of great uncertainty." (p. 168). The Union, she says, "has lost its sense of mission." It has had to confront the threat of European war (she probably refers to Bosnia) "on a scale which it had hoped never to see replicated." It faces, the delicate task of incorporating a large number of new entrants. The Nice IGC resulted in a virtual stalemate. Our societies "are drifting into a new era of populist government" (ibid.). The Union has set out to give itself a constitution but "no draftsman is likely to be able to formulate coherent proposals" (p. 171; a statement already proven to be wrong).

The author then examines a plethora of proposed models of government (Caporaso, Lindseth, Majone, Steiner) to reject them all, as she also rejects the Commission's proposals in its White Paper on European Governance (pp. 172–178). The Commission's White Paper comes specifically under attack because of its unorthodox definition of governance, through which the Commission misses the chance of "recogniz[ing] the true nature of the EU as a transnational system of governance . . . and instead . . . has set off on a wild goose chase after a new form of supranational, participatory democracy." (p. 179). It would seem that Harlow herself chooses for some network theory (pp. 179–186, where the author discusses some doctrinal writings, but does not make clear what she thinks herself) – a paradigm which, nowadays, has become popular in political and legal thinking (see e.g. recently Ost and Van de Kerchove, *De la Pyramide au Réseau,* (Brussels, PFU Saint-Louis, 2002). To be sure, the Commission's White Paper can indeed be criticized, in my view however particularly so, for having missed the opportunity to examine its own democratic accountability (and that of the Council). Harlow does not present a valid alternative, though: she seems to approve the Commission's joined papers on reforming the Commission, stating cautiously that they could "do much to change the Commission culture" (p. 188), but does not, in the concluding three pages of her book (pp. 189–192), come up with a viable solution.

Remarkably enough, in these last pages Carol Harlow takes as a starting point that, in contemporary society, "transparency has been taken to extreme lengths, and has become a weapon with which the media presses incursions into public life, howling for punitive action and seeking exaggerated redress for the simplest of errors" (p. 189). As a result, "[t]his is a society which has taken accountability too far and in an inappropriate direction. The European Union, however, stands at the opposite end of the spectrum; from a management standpoint, it has grown too fast" (p. 190). Accordingly, "[t]he peculiar problems of welding together a transnational bureaucracy have made it hard to develop an ethos of management appropriate to the 'Community method' and the Commission's multifarious tasks" (ibid.). To cure that situation Harlow advocates managerial and audit accountability, but that "can never be the end of the story:" that accountability must go together with representative government and political accountability, that is "government directly responsible to a representative parliament" (ibid.). I could not *agree* more, and that was also the image which the Committee of Independent Experts (of which I was a member) had in mind, as Harlow recalls (p. 184; see section 7.14 of the Committee's second report). However, Harlow sees the solution to shape this political accountability in the Commission "becoming the agent of the Member States," and in the European Parliament's credentials to "depend not on its accountability to the European electorate, which, in the absence of elected government at European level, is a misconception, but on its position as agent of the national parliaments" (190–191). She would rather see "[t]he

full responsibility for policy accountability . . . rest, and, more important, be seen to rest with national parliaments, . . . " (p. 191). I could not *disagree* more, certainly so because of the final conclusion which Harlow draws from this statement: "Until the political accountability to which we have, in the course of the twentieth century, become used in the nation state, is replicated at transnational level, we would be wise not to entrust transnational organisms with too much power . . . (but to) remain in a state of 'provisional suprastatism' from which it is still possible to step back" (p. 192).

This, in my view, is an unsatisfactory conclusion. It does not do justice to the in-depth analysis which the author herself has carried out in the preceding pages and chapters of her book, in which she has shown how the Union's accountability system can be improved. The idea of building the political accountability of the Union's institutions around the national parliaments, does not match with the author's own findings, in Chapter 4, that the national parliaments are not ready to assume that role. It is moreover unrealistic to believe that it is still possible "to step back," after 50 years of European integration, to a loose system of cooperation (withdrawal by one or more Member States may still be possible, but not undoing the whole supranational structure). The impression is that, in her conclusion, the author needed to confirm what she had made clear from the very outset, which is that the "integrationist vision" of the Union is not an option she is particularly happy with (p. 3). On the basis of the impressive documentation which she has assembled herself in Chapters 4, 5 and 6, she could as well, and more credibly I would think, have taken the opposite road, which consists in constructing a coherent system of parliamentary political accountability at the level of the Union.

In a series of lectures presented at the University of Stanford in February-April 2003 (and, hopefully, to be published by Stanford University Press towards the end of the year), I have tried to propose such a coherent system. The main idea is that executive accountability, that is of Commissioners at the Union level (similar to that of Ministers in a State) should be based on various forms of accountability, in the words of Harlow: through parliaments (i.e. through politics), through audit, through law (and disciplinary sanctions), but also: through ethics (i.e. through codes of ethics which is a broader, and less bureaucratic, concept than codes of conduct), and values, more specifically the Republican virtue of "feeling responsible", not just of "being held responsible for." In contrast with Harlow, I believe that *both* the European Parliament *and* the national parliaments must each have a specific role to play in holding EU government – in the large sense of the word, i.e. executive *and* legislative – politically accountable. In the Union, the latter, legislative accountability, is still in its infancy because of the lack of political responsibility of one of the two arms of the *Union* legislature, the Council of *national* Ministers. Therefore, ways must be found to make the national (or regional) ministers, acting in their capacity of members of a *Community* organ, which the Council is, politically responsible towards a *Community* parliamentary body, which cannot be the European Parliament as long as Parliament and Council, together, compose the Community legislature. Therefore, an organ must be created which can play that role, which organ could take the form of an improved COSAC, that is a cross-national parliamentary commission composed of members from the European Affairs committees in the Member State parliaments, that would view the Council's behaviour as a whole. Obviously, it is not the place to discuss this executive and legislative accountability any further here. It may suffice to say that the draft Constitution goes in the right direction as regards the political responsibility of the Commission (but not regarding that of the Council, for which it does not make any proposal at all), by providing in Article I-26 (1) that the European Council shall put forward a candidate for the Presidency of the Commission "taking into account the elections to the European Parliament . . . ," and in Article I-25 (5) that "the Commission, as a college, shall be responsible to the European Parliament" and that "the Commission President shall be responsible to the European Parliament for the activities of the Commissioners."

One last remark. Harlow's presentation demonstrates how scientific research, accurate as it is, can be used for different purposes depending, in the present instance, on whether one firmly

believes in the future of an integrated, but differentiated, Europe, as I do, or rather believes that, awaiting further improvements, "we should remain in a state of provisional suprastatism," as Harlow advocates. Harlow's book was written before the Convention on the Future of Europe designed a constitution for Europe. Even if the draft constitution is not approved and ratified by the Member States, the Convention has at least demonstrated that a coherent constitution can be presented, something which Harlow rejected *a priori* (p. 171). It proves that dreams become true when one really believes that they can happen, and spares no efforts to make them happen.

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A. Verhoeven, *The European Union in search of a Democratic and Constitutional Theory.* European Monographs 38. The Hague: Kluwer Law International, 2002. 365 pages. ISBN 90 411 1872 1. €130.

Treading on the complex ground of the European constitutional debate, the book reviewed here deals with the challenges, crossroads and dilemmas of European integration in the disenchanted post-Maastricht constitutional landscape. Ambitious in its aspirations, its agenda, and its approach, Verhoeven's book sets itself three main objectives. *First*, to explain the background assumptions framing (in the double sense both of shaping, structuring *and* of closing off) our discussions of democracy and polity-formation in the context of the European Union. *Second*, to re-cast these assumptions in ways that allow us to renew our constitutional and democratic language to match the *sui generis* realities of European integration. And *third*, "to analyse the current constitutional practices of the European Union and their underlying ideals, in order to bring to the fore and critically reflect on the particular ideas of democracy and constitutionalism the European Union has embraced" (p. 361).

Organized in five parts, the book works its way through a rather impressive range of material: from classical social contract theory to the work of Habermas, Dworkin, and Hart; from the discussions on legitimacy and democracy in the EU to those on the nature of its legal order; from the constitutional debate to a set of issues arising in connection to the constitutionalization of European law – the meaning of EU citizenship and the question of the European *demos*; delegated rule-making in the EU context; differentiation in EU law; and the interface between the European and the national legal orders. In addition, Verhoeven's aim is not merely to present the discussions that have marked the constitutional debates in recent years, but also to intervene in them, and at the same time advance a broader argument, which she develops along two separate strands. One seeking to investigate "how democracy and constitutionalism can be (re)conceptualised in order to match the challenge of European integration" (p. xi), and a second one seeking to provide a topography of the Union's *sui generis* constitutional terrain along with "[a] conceptual clarification of [its] constitutional *acquis*" (p. 365).

At the basis of the first strand lies the oft-repeated diagnosis that the language in which we think about democracy and polity-formation in the EU suffers from a certain atrophy. That is, our language, rooted as it is in the conceptual framework of the nation-state, has been unable to keep up with the plural, non-unitary, post-national, and post-statal (supra-national and infra-national) ways in which the European polity has been developing. As a consequence, we lack the conceptual tools "to understand the nature of the EU polity and to carve out standards on the basis of which its democratic quality can be assessed" (p. xi). At the same time, though, for Verhoeven, this point also bears serious implications for the way we approach both the normative weaknesses of a largely unforeseen integration dynamic and the difficulties of promoting and defending democratic governance within the highly atypical and constantly evolving conditions of the European polity.

Consider the "democracy-deficit" for instance. Seen from this perspective, it no longer appears as the mere side effect of a technocratic, market-driven, allegedly non-political type of integration-operation, treatable with a series of carefully measured "democracy" injections. It now emerges as symptomatic of a much more profound "pathology", which Verhoeven refers to as the "constitutional deficit" – i.e. as the "incapacity to come to terms with the *sui generis* nature of the EU" (p. 71). This incapacity, according to Verhoeven, "has both a descriptive and a normative dimension" (ibid.). Descriptively, it signals the absence of "consensus . . . as to the nature of the Union as a juridico-political system or organisational structure" (ibid.). And normatively, it signals the "absence of consensus on how the Union as an integration project can be justified in democratic terms" (ibid.). We thus reach the problem, which Verhoeven places at the centre of her book. Namely, that, while there is a developing reality of "supra-national integration" (p. 134), we lack "a comprehensive conceptual framework matching the *sui generis* nature of the European constitution and its aspirations to democracy" (ibid.) – hence, the book's title, *The EU in Search of a Democratic and Constitutional Theory.*

And this is not all. There is a further twist in the problem Verhoeven identifies. For the difficulty here is not simply that we lack such a conceptual framework but also, and perhaps more importantly, that we lack the theoretical resources to come up with one. In other words, given that our existing conceptual tools are more disabling than enabling, we also seem to lack the means to start forging the sort of "democratic and constitutional theory" the Union is lacking. At this point, the book proposes a twofold strategy. On the one hand, refine and re-conceptualize some of our existing conceptual tools, such us the federal idea and the notions of the social contract and the constitution (p. xii), as well as some of the "classical parameters of our constitutional and international law thinking, such as sovereignty and the monist-dualist distinction" (p. 292). While on the other – and this brings us to the book's second argumentative strand – conceptually clarify the Union's constitutional *acquis*, and, turning to the Union's new constitutional terrain, bring into full relief the constitutional order it has already embraced.

Here, a central idea is that theoretical reflection alone is unable to tackle the Union's "constitutional" (and democratic) deficit (p. 119). As Verhoeven stresses, it is of no help "engaging on a path of rational constructivism and then superimpose one 'grand theory' model on the European Union. . . . [Instead,] theory must be confronted with an inductive analysis of the constitutional practices of the Union" (ibid.). Thus, any attempt to resolve the "constitutional deficit" cannot start from abstract schemas of either past or recent date, but with what is already there, what has already been achieved in terms of both organizational structure and normative substance. Thus, the second half of the book is devoted to four "areas" of the Union's constitutional landscape – the *acquis communautaire* (part III.II); EU citizenship (part III.III); the decisional and jurisdictional variability of European law (part IV); and the relationship between the European and the national legal orders (part V) – mapping their terrain. What ties together these areas is never explicitly formulated in the text. And yet it is clear that at stake, in all four of them, is the attempt to articulate relational forms of unity seeking to accommodate different claims to authority and/or identity in ways which (in varying degrees) depart from the unitary conceptual tools of the nation-state framework. Let us take a quick look at each of these in turn.

1. The *acquis communautaire*, according to Verhoeven, reinforces a view of the EU in non-static terms, as a process rather than as a fixed entity (p. 133). In the *acquis*, understood as the Union's "fundamental common ground" (p. 146), and as a "constitutional sediment" (p. xii), or "hard core" (pp. 144 et seq.) – of principles, objectives and procedures incorporating substantive value-choices (p. 133) – "that at all times must be respected, because . . . linked to the [Union's] very identity" (p. 146), Verhoeven sees an indispensable grounding to the Union's indeterminate, dynamic, and constantly evolving character. Both a point of stability and the marker of change, both formal-structural and substantive, the *acquis* provides, in this view, the European constitutional order with an "overarching framework of principle" (p. 143). That is, both a *framework* where the open-endedness of the integration process can be contained and a

set of *principles* that can both guide and foster this process.
2. Next, in EU citizenship, Verhoeven finds a notion radically different from statal ones (p. 187), that "ties in with the model of the Union as a process" (p. 187), and, at the same time, sustains a new type of *demos*. That is, type of *demos*, which does not rely on pre-political notions of community, and does not require a "strong" sense of peoplehood. As Verhoeven argues, this is a notion of citizenship which is "constructive, transformative and multiple" (p. 168). *Constructive*, in that it makes "concern for justice and the willingness to participate in the collective shaping of the European polity the basis for constructing a community in the EU" (Kostakopoulou in Verhoeven, pp. 168–169). *Transformative*, in that "it does not rest on a pre-ordained identity, but rather translates a commitment to creating an 'ever closer union among the peoples of Europe"' (p. 187). And *multiple*, in that it does not seek to replace national citizenship but complement it.
3. The theme of multiplicity is to be found also in the third 'area' of the Union's constitutional landscape. Decisional and jurisdictional variability, or differentiation, provides, in Verhoeven's view, the "institutional translation" of "the multiple or pluralistic character of citizenship" (p. 363). For differentiation seems to supply the European legal order with a novel paradigm of managing difference which privileges flexibility and plurality over uniformity and centralization. Its many forms can be seen as part of a complex pattern of governance positively seeking to accommodate diversity without forsaking either the overall unity of the Union's legal order or the commitment to further integration. Which is why Verhoeven sees differentiation more generally as "an attempt to overcome the [unitary] assumptions . . . upon which statal thinking rests" (ibid.).
4. Finally, overcoming such assumptions is also important when looking at the interface between the European and the national legal orders. For this interface, as Verhoeven stresses, should be seen neither in terms of command (as in vertically integrated legal systems) nor in terms of pure consent (as in international organizations), but in terms of a "moderate form of pluralism" (pp. 299 et seq.). That is, in terms of a network of overlapping and interlocking institutional arrangements and normative spheres, each with its own criteria of validity, where none is privileged over the rest, and where no central political power or final arbiter exists (p. 299). Within such a set-up, the interface between legal orders is governed by "principle[s] of loyalty and mutual recognition rather than command or hierarchy" (p. 304), and "requires the existence of a shared, overarching set of fundamental principles" (ibid.; but see also pp. 319 et seq.).

As a whole, Verhoeven's book offers an interesting approach to a number of difficult questions surrounding the constitutionalization of European integration. Showing a solid knowledge of the relevant law, it examines a wide range of complex issues arising in this context. Its great strength lies in its committed attempt to trace the determining features of the Union's novel constitutional grammar. Indeed, the book's most promising and thought-provoking moments – mapping out the Union's *sui generis* constitutional terrain; thinking the EU as a process; and conceptualizing its legal order in non-unitary terms – are all part of a growing research agenda amongst scholars trying to flesh out the specificity of the European polity and to forge appropriate normative frameworks for its different juridico-political practices. Its central theoretical choices, moreover, fit into a fairly new trend of academic writing in the field of European legal studies seeking to turn away from ontology towards hermeneutics, and to re-work, rather than abandon, existing conceptual tools when looking at the EU.

And yet, despite its merits, strengths and promise, the book's overall effectiveness is seriously compromised by a set of significant weaknesses. The sharpness of its central argument is blunted by pursuing too many discursive threads; its analysis often lacks depth and nuance in trying to be comprehensive; its choice of quick brushstrokes, when discussing rich problems mainly developed in other registers (such as "democracy", the "social contract", and the "nation-state"), results in rudimentary sketches, where what is most necessary is patient and rigorous analysis. Moreover, in its eagerness to be constructive and forward-looking when

drawing the defining features of the brave new post-national and post-statal European polity, it underestimates the complexity and ambivalence involved in such major operations of conceptual re-configuration and theoretical overhaul. It seems to think that the passage from the statal to the post-statal is linear, and in principle simple. As a consequence, the picture it draws of the Union's novel constitutional terrain looks too much like the negative double of the "old" statal one: where the former is dynamic, indeterminate, and heterarchical, the latter is static, fixed, and hierarchical; where the former privileges plurality, diversity, flexibility, and devolution, the latter privileges sameness, homogeneity, uniformity, and centralization; where the former does not rely on pre-political notions of community and does not require a "strong" sense of peoplehood, the latter *does* rely on such notions of community and *does* require a "strong" sense of peoplehood; and so on and so forth. By this, I do not wish to deny that this sort of negative redoubling can have its uses. Especially in the European context, where the grammar of the statal continues to exercise a strong normative hold on our conceptions of democratic governance and polity formation, such redoubling could be strategically indispensable in reworking and renewing our juridico-political vocabulary.

However, remaining content with a post-statal that is nothing more than the negative double of the statal means not only continuing to remain within the conceptual framework of the latter, trapped in an endless "negative theology", but also ultimately relinquishing the tools that would allow us to elaborate the sort of theoretical vocabulary the EU needs. For after all, if our inability to come to terms with the *sui generis* nature of the EU is grounded in the connection between our vocabulary and the theoretical exigencies of the nation-state, as Verhoeven's book suggests, then the passage to the post-statal cannot but go through the systematic disarticulation of this connection. At the same time, and insofar as at stake is the elaboration of a post-statal that is specific to the European polity, then the passage to the post-statal in this context cannot but also go through a methodical examination of the conceptual legacy of the Community and the unpredictable dynamics this legacy produces on both sides of the statal / post-statal divide.

In conclusion, *The European Union in Search of a Democratic and Constitutional Theory* is a book that makes an important start in the theorization of the post-statal polity and provides us with a sense of the work that remains to be done.

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E. Navarro, A. Font, J. Folguera, J. Briones, *Merger Control in the EU*. Oxford: Oxford University Press, 2002. 870 pages. ISBN 0-19-924470-7. GBP 145.

After the works by Ortiz Blanco and Buendía Sierra, another Spanish-authored book joins Oxford University Press's replete shelves devoted to EU competition policy. Much like those just mentioned, and Faull and Nikpay's *The EC Law of Competition*, this is a book written by insiders: two of the authors are current or past Commission officials with vast experience within the directorate dealing with merger control; the other two are partners with a large Spanish law firm and know the Commission's merger policy from the other side of the fence. The two forewords – by Karel Van Miert and Mario Monti – are an indication of how reliable this volume could be as an "unofficial" source revealing the Commission's thinking in the merger area.

This is an updated translation of a book first published in Spain by Marcial Pons in 1999 (oddly, the names of the authors appear in reverse order in this English edition). It purports to be a complete tool for the practitioner, and indeed this concept is pushed as far as to include appendixes with all relevant legislation, Commission interpretative notices, and even the Green Paper on the Review of the Merger regulation issued by the Commission in December 2001.

This wealth of documentation appears unnecessary, and at times wasteful: I fail to see any interest in the notice of the Commission concerning alignment of procedures for processing mergers under the ECSC and EC treaties, at a time when the ECSC treaty has already lapsed (since 23 July 2002). These documentary appendixes, together with the hundreds of pages devoted to less-than useful lists of merger decisions (alphabetical, chronological, by sector), replicate in effect information compiled by the Commission which is readily available – and continuously updated – on its internet site

The rest of the book, however, is immensely useful. The 15 chapters are filled with thorough discussion of most issues arising under the Merger Regulation as applied, since its entry into force in 1990, by the Commission and the EU courts. The initial chapters, drafted by Font, examine jurisdictional matters: the notion of concentration (Chapt. 2), the vexed issue of which joint ventures fall within the scope of the merger regulation (Chapt. 3) and the thresholds above which a merger is considered to be of "community dimension" (Chapt. 4). At some points, the reader will recognize the hand of a Commission official in the discussion of certain issues, such as the calculation of group turnover, where the authors favour a "liberal interpretation" of Article 5(4), whereby a minority shareholder would be part of a "group" (and therefore, mergers would more easily be brought under the Commission's jurisdiction) on the basis of a test of factual "control" akin to that used under Article 3. This is a bold proposition, because such a test would disregard the clear legislative intent to introduce bright-line criteria into Article 5(4), quite different from the test of "control" under Article 3. The authors' view thus represents a radical departure from the letter of the Regulation, a "lifting of the corporate veil" which I personally would envisage only in extreme circumstances.

The next chapters concern the substantive appraisal of concentrations and are more economic in content: market definition (Chapt. 5), single dominance (Chapt. 6), oligopolies and collective dominance (Chapt. 7), barriers to entry and potential competition (Chapt. 8) and vertical aspects of concentrations (Chapt. 9). Although these chapters are rich in insights, it is difficult at times to understand how they have been divided, and the hands of the different authors are, from time to time, visible: e.g. the reader is unlikely to find references to academic literature anywhere in the book except in some of the chapters drafted by Briones (Chapts. 5, 7, and 9). These chapters are more economics-oriented and include useful diagrams and charts, which is not the case elsewhere. The chapters drafted by Navarro (e.g. Chapts. 6, 8) line up comparatively more decisions, resulting at times in bulky footnotes. On the other hand, this heterogeneity is likely to emerge in any joint work, and, in all fairness, it does not detract from an overall sense of coherence: coordination seems to have worked well, and no major overlaps can be detected.

Chapter 10 is devoted to two distinct questions: the assessment under Article 81 EC of the "cooperative" aspects of full-function joint ventures under Article 2(4) of the Merger regulation, and the treatment of ancillary restrictions. These two topics bear no particular relation to each other, and the pages devoted to Article 2(4) in this chapter are not particularly enlightening, reflecting the meagre developments of Commission practice regarding the application of this provision. The discussion of ancillary restrictions is more informative, although the book, because of its publication date, does not take account of the judgment of the CFI (20 Nov. 2002) in Case T-251/00 *Lagardère and Canal+*, which radically compromises the Commission's new policy. Nit-pickers (and I am an unrepentant one) will also miss a reference to the judgment of 18 September 2001 in Case T-112/99, *Métropole Télévision* (TPS), of some importance in this area.

Chapter 11 wraps up the substantive assessment of concentrations with 3 disparate topics (efficiencies, the failing company defence and conditional authorizations), and Chapters 12–13 deal with the central procedural aspects of the merger control process. Chapter 14, drafted by Folguera, consider a number of "institutional issues", in particular cooperation and referrals between the Commission and Member States' competition authorities (Arts. 9, 21 and 22 of the Regulation). The closing chapter explores issues of judicial control of Commission decisions. Although the authors do mention the judgment of the CFI in *Airtours* in this final chapter,

the implications of this case for the standard of judicial review in merger cases would have warranted much more detailed analysis. This, however, may have become apparent, with the benefit of hindsight, after subsequent judgments *Schneider*, *Tetra Laval* and *Lagardère*, which were probably delivered too late to be taken into account in the book.

The focus of the book is the practice of the Commission and, in this regard, the authors have accomplished quite a *tour de force*: 700 merger decisions are cited and brought into their analysis. This English translation has been abundantly updated in every area, and almost 300 new decisions have been incorporated that did not appear in the Spanish edition. Thus, for example, the discussion (Chapt. 11) of the failing company defence (what the authors call "unviability") includes a thorough analysis of the *BASF/Eurodiol/Pantochim* decision (2001). The chapter on oligopolies and collective dominance refers extensively to the milestone judgment of the CFI in *Airtours* and important decisions such as *MCI WorldCom/Sprint* (2000) or *UPM-Kymmene/Haindl* and *Norske Skog/Parenco/Walsum* (2001) are amply discussed.

The analytical index, of fundamental importance in a reference book like this one, is accurate and does not call for particular comment. But the practitioner will find a real gem hidden in the introductory pages (xxiii to lii), namely: complete tables of every judgment, decision, legislative provision, and Commission notice cited in the book, with an indication of the relevant sections and paragraph numbers. This tool will prove invaluable.

It is worth mentioning that, unlike other books written – at least in part – by Commission officials, this volume does not shy away from proposing constructive criticism and personal views beyond the current state of the law. Even more importantly, the authors attempt to distil practical, ready-to-use conclusions from their analysis whenever possible. Thus, they sometimes resort to a "rule of thumb" approach to complex issues, which may in the end work surprisingly well: e.g. as to the importance of price differences in product market definition (p. 109) or as to the type of market structure that may well trigger concerns about collective dominance (p. 239).

The book is complete, up-to-date and provides the insight of officials and practitioners very familiar with the merger control process as it operates within the European Commission. It combines legal and economic analysis, and is presented in a manner that is eminently usable. It is, in short, indispensable for the practitioner, and ought to be in the library shelves of every law firm with a merger practice. However, this is an expensive book by any accounts. Even affluent and profligate lawyers will hesitate to purchase their own personal copy. Those having already acquired – at similarly hefty prices – the volumes mentioned in the introduction to this review may well find that they cannot afford to complete their collection. It would be a pity, because this is a book worth owning.

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R.J. Van den Bergh and P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*. Antwerpen: Intersentia, 2001. 598 pages. ISBN 90-5095-161-9. €125 (Hardback).

D. Hildebrand, *The Role of Economic Analysis in the EC Competition Rules: The European School*, Second Edition. The Hague: Kluwer Law International, 2002. 472 pages. ISBN 90-411-1706-7. €145 (Hardback).

In the 2001 volume of *Legal Issues of Economic Integration* (135–139), the board of editors wrote of what they call the *economization* of Community competition rules. This describes the recognition of the need for economic analysis in competition law enforcement. The supporting

evidence includes a notice on market definition, the reformed approach taken in relation to vertical agreements, and guidelines on both horizontal and vertical agreements. It is thus timely that these two works aim to introduce competition lawyers to the world of economic analysis and the value it can add.

Van den Bergh and Camesasca aim to introduce economic considerations to those already familiar with the mechanics of competition law. Though accepted at the outset that the economic rationale does not constitute the sole legitimating force for competition law, the general introduction argues that the economic rationale – efficiency – is the main goal. The initial explanation of the economic concern is too weak to convince those "hesitant to accept arguments based on probability statements, conceptions of frequency, and on hypotheticals such as potential entry", (p. 6) particularly when it is being offered as the overriding goal. A more detailed explanation is postponed until the second chapter, when the model of perfect competition and the concept of consumer and producer surplus and total welfare are explored. This is then compared with the monopoly situation, in which total welfare is reduced by comparison. Added to this are rent-seeking and x-inefficiency concerns. The debates covered in the first chapter would be more meaningful had this discussion preceded them.

The first chapter shows the changing state of economic theory in relation to competition. Thinking on competition is traced through classical economics, with competition as a type of behaviour; price theory, with competition as a static description of market structure; the Harvard school, with its structure-conduct-performance paradigm; a dynamic vision, embodying the Schumpeterian, Austrian, and Ordo-liberal conceptions; the Chicago school, with the exclusive efficiency focus; contestable market theory; and modern industrial organization. A key feature is that the policy implications of each theory are analysed and critiqued. This fits with an aim of the authors, not only to promote the understanding and use of economic analysis, but also to "avoid the use of outdated theories and to guarantee that poor economic arguments are identified" (p. 13). European competition policy is said to find support in the Harvard approach and this approach is even said to be influential in Germany (pp. 34–35, 49). This explains why the book is so fleeting in its treatment of German neo-liberalism, which some feel underpins EC competition thinking (see e.g. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 2001)).

The authors discuss the debate between the Harvard and Chicago approach, and find the Chicago approach more appealing. Though Chicago thought underpins most of the book, a normative choice of economic school is made, and the reader is provided with some basis on which to assess, accept or reject the normative choice. The authors use the different economic visions to discuss which normative choice the Community institutions have taken, but find that an ad hoc approach is adopted.

The second chapter contains a discussion of market power. It is neatly pointed out that market power may be measured directly or indirectly. The Lerner index is considered as the method of directly measuring market power, though the discussion is somewhat elliptical. The authors then turn to the more familiar, indirect, method of determining market power: market definition and inferences from market share. Market definition is explained, complete with a discussion of the Cellophane fallacy and the SNIPP test. Sadly, it is not explained why the direct method of measurement is not used in competition law analysis, though it seems that the initial reason was the lack of data. The authors argue that since the inference of market power from market share is weak, a return to a direct method of determination is warranted. They use the framework established to evaluate the Commission's approach and end the chapter with a brief discussion of barriers to entry (including barriers to exist) and their importance in assessing market power.

In Chapter 3 the authors discuss the allocation of regulatory powers, not only over which law to apply, but also of who is best placed to apply that law. The economic theory of competition between a diverse portfolio of competition legislation and enforcement reveals costs and benefits, one highlighted advantage being the ability to gather information about the costs and

benefits of different types of rule. This is compared with the economic theory of a monopoly on competition legislation and its enforcement, the primary advantage being the avoidance of a "race to the bottom". Public choice theory is also used to compare the merits of the two approaches – monopoly or competition in enforcement, particularly the influence of political considerations in competition decisions. This discussion has increasing significance in light of the debate concerning the new competition procedure Regulation No 1/2003. Co-operation between national courts and competition authorities and the Commission is considered.

Having established some economic foundations, the book then goes on to apply the economic learning to four specific areas. Chapter 4 discusses horizontal restrictions on competition: cartels and joint ventures. The aim is to "assess whether Article 81 EC Treaty provides the legal platform for an economically balanced consideration of both the anti-competitive effects and the efficiencies of horizontal cooperation." (p. 169). The costs of cartel conduct is explained, all be it briefly, before the prerequisites of a successful cartel, their inherent instability, and the possible efficiencies of horizontal conduct are explored. The treatment of horizontal agreements in Community competition law is then critiqued as to whether it properly identifies practices that coordinate output and price, and whether the benefits of cooperation are given due weight.

Chapter 5 discusses vertical restraints. The attempt is made to explain the manufacturers incentives for entering into vertical agreements, and the positive and negative impact they have on both inter and intra brand competition is neatly explored. Their treatment in Community law, US antitrust law and the competition laws of various Member States is than considered. An assessment of whether the laws of the various jurisdictions are economically rational is then provided, it being argued that the laws are not fully consistent with the allocative efficiency goal. The discussion is clear and concise. The Community regime, even with the modernized block exemption, is criticized for the continued reliance on legal form over economic consequences. Of particular interest is the discussion (pp. 243–247) of whether an agreement ought, as it currently is, to be a necessary requirement; whether a distinction ought to be drawn between vertical integration and vertical agreements; and whether agents and distributors ought to be treated differently.

Chapter 6 is perhaps the best in the book, both for clarity of exposition and analysis. It concerns the exclusionary practices of price discrimination, refusals to deal, tying and predation. These practices are clearly defined, and the conditions under which they are successful and rational are explored. A number of Article 82 decisions are criticized for prohibiting charging customers different prices without enquiring as to whether uniform prices would discriminate against different classes of customer. Further, the need for price differences to be based on the cost of distribution to different customers is criticized. Refusals to deal, particularly where there is an essential facility, are considered. The risk of removing incentives to innovate is discussed before welcoming the ECJ approach in *Bronner*. In relation to predatory pricing, the economic debate as to whether it is ever a rational strategy is neatly set out, before looking at whether the legal rule is designed and/or operates in an under or over inclusive manner.

Van den Bergh and Camesasca conclude with a chapter on merger control. In addition to an economic analysis, Community merger control is compared with the US and German regimes to highlight its strengths and weaknesses. The various types of mergers that occur are defined, and Oliver Williamson's welfare trade-off model is used to illustrate the relevant policy issues. The positive and negative economic consequences of various mergers are highlighted, and the treatment of these effects in law is considered. An interesting debate, touched on only briefly and rather opaquely, is whether consumers should share in any efficiency gains that result, and whether this gain to consumers must be in the form of lower prices (pp. 319–321).

The authors close with an outlook, and argue that "competition lawyers . . . will do a much better job if they are equipped with the industrial economist's toolkit and mindset." (p. 353). Perhaps the major theme in the book is that the law should see the trade-off between market

power and productive and dynamic efficiencies, though there are no policy prescriptions other than to recognize the trade-off.

As to weaknesses, although clearly written, at times it assumes that the reader is fully conversant with the concepts being discussed or at least has obtained some knowledge of the economics exogenously. Note for example the discussion of welfare enhancing mergers: "Referring to a merger's net effect on price, this paper derives a simple condition for implementing that standard as the touchstone for the merger's legality when the industry equilibrium is static Nash in quantities." (p. 319). The force of this point is entirely lost since what it means for the industry equilibrium to be static Nash in quantities is never explained. A further weakness is that the reader is not assisted by an all too brief index. Although discussed on pp. 201–201, no mention of a concerted practice appears either in the contents or the index. The scant indexing is even more frustrating considering that 16 pages is given to producing a list of references, even though the full citation is given each time in the text. A further criticism is that of the 598 pages of the book, 216 consist of appendix materials. These Treaty excerpts, guidelines and notices add considerable bulk to a book that starts from the premise that its users will be using it to supplement another book. It would be reasonably safe to assume that these materials were available elsewhere, particularly as they date so quickly.

Unlike van den Bergh and Camesasca, Doris Hildebrand does not offer an explanation of for whom and why this book is written, though appears to offer an examination of how the law and economics of Community competition law interact and seeks to emphasize that economics is relevant in both the design and application of competition law (p. 2). What is different from the first edition is that Hildebrand now seeks to argue that

"Today, a competition economics culture is developing, with the effect that the disciplinary division between law and economics diminishes *and a European School of thought emerges.* The ambition is that in the long run this school of thought, the European School, can be compared with the Harvard or Chicago School in the United States. At this stage it can be stated that the European School already plays today an important role in the enforcement of the EC competition rules." (pp. 4–5 emphasis added).

Chapter II starts promisingly enough with a policy discussion that could be used to advance the European School thesis, but this discussion is long forgotten by the time the thesis comes to be advanced. The Freiburg School is said to represent the "academic cradle of EC competition law" so that the "European School is embedded in the concept of a Social Market economy with a focus on consumer welfare" in which competition law concerns are tempered "not only by the unified market objective, . . . but also by the social objectives of the EC." (pp. 10–11). Hildebrand then devotes 25% of the book to a basic explanation of the substantive law and procedural operation of the Community competition regime as of July 2001. The law is not subject to economic critique at this stage, nor is it used to advance the thesis. The discussion is not rigorous or detailed enough to rely on as a sole source, and will add little to the knowledge of an informed reader. Since an additional book is required in order to fully grasp the legal and procedural aspects, the author would have been better served focusing on establishing the thesis.

Chapter III introduces competition theory and starts with the warning that "competition theory is undergoing potentially important changes" (p. 105). This means that though economics cannot provide determinative policy prescriptions, it can be used to provide a framework for analysis. Attention is said to be "concentrated on the development of a European competition theory." (p. 106). The European School is said to be an "emerging, pragmatic approach that transforms a scientific research results into a conceptual framework." (p. 109). However, rather than going on to show the existence or emergence of the European School, we are subjected to the basic building blocks of competition economics: classical theory; perfect competition; imperfect competition; price discrimination; workable competition; effective competition; the Harvard School; contestable markets; game theory and strategic behaviour; the Chicago School, and a neo-classical conception of competition as freedom. It is only then that we are

introduced to what is supposedly the central thesis: the development of a uniquely European Community conception of competition. Hildebrand then explains the ordoliberal concern with the interdependence of the economic and political system and competition policy's central role in maintaining a proper balance. It is argued that this concerns "one core problem – private economic power. This broad conception of economic power is one of the features of German and European competition law thinking that most clearly distinguishes it from U.S. antitrust law analogies." (p. 159). Ordoliberalism, one has to assume, provides the mode of thought, but not a mode of analysis. Unfortunately, not enough is done to show how the ordoliberal concern builds upon industrial organization or is relevant to an extended structure-conduct-performance model, which, in the end provides an analytical structure treating the market process as a dynamic organism. Nor is enough done to show that "ordoliberal thoughts of the Freiburg School extended beyond Germany and have penetrated the thought, institutions and practices of the European Community, as well as various Member States throughout the Community." (p. 160).

Having taken until page 182 to (rather opaquely, if at all) establish what the thesis to be proven is, one would hope that the remainder of the book would attempt to show that it can indeed be used to rationalize the case law. Yet, it is not clear that this is what occurs. Chapter IV examines competition practice, dealing with Article 81(1), 81(3) and 82, and the Merger Regulation. Hildebrand first argues that there is a need for an accurate market definition to determine effects under Art 81(1). The text then goes on to describe an "evolving economic approach." But rather than this being an economic critique, it is a doctrinal analysis of what the Court has called for. This establishes the need for an improved economic analysis, before we go further by examining the supposed existence of a rule of reason within Article 81(1), which again shows that economic analysis is required. The remainder of the chapter continues in a similar vein, doing much to establish the need for economic analysis, but little to inform the reader as to the acceptable techniques and approaches to carry this out. Perhaps this is a little harsh, for in the section on merger control the discussion of market definition methodology is good.

Chapter V, the conclusion, confirms that showing the relevance of economic analysis was the primary aim of the book, Hildebrand writing, as she does in the first edition, that "[t]his work demonstrated that economic analyses have become an active and lively part in EC competition law. It has been possible to indicate a clear trend towards an increasing meaning of economic assessments."(p. 415). This is all well and good, but it displays the chameleon character of the second edition, supposedly setting out to show the existence of a uniquely European School of thought in relation to competition economics, but leaving the reviewer with the very strong impression of a thesis tacked on to an existing work, and one that is not effectively prosecuted. Whilst there is much of value in this work, rather than merit a full reading, the informed reader could perhaps gain as much if not more value from reading Hildebrand, "The European school in EC competition law", 25 *World Competition* (2002), 3–23. Adding to the feeling of disappointed expectation, the table of cases and decisions at the back of the book is useless, as it does not contain page references to the discussion in the text.

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P. Beaumont, C. Lyons and N. Walker (Eds.), *Convergence and Divergence in European Public Law*. Oxford: Hart Publishing, 2002. 271 pages. ISBN 1-84113-211-X. GBP 35.00 (Hardback).

The relationship between the European Union and its Member States is a complex and evolving one: its tensions and *détentes* endow it with a unique character as it continues to define the

space governed by European public law. Generated by a symposium held at the University of Aberdeen in May 2000, this collection of papers tackles key aspects of that relationship: its multitudinous spheres of influence, the various processes through which it operates, the institutional and political actors that participate in it, and the legal principles that define it. The richness of the intellectual approaches and political viewpoints brought together in this volume is immediately apparent but, in addition to this, a number of themes recur, giving the collection some overall coherence and continuity. One prominent theme is the growth of EU law, and the shifting, contested nature of its boundaries. Another important theme relates to the competence of the EU and the legitimate remit of Community power *vis-à-vis* the Member States. A variety of challenges are levelled regarding the capacity of EU public law to mediate the relationship between the EU institutions and the Member States, or foster the even more fragile and elusive relationship between the EU and its citizens.

Territory is the theme of Keating's contribution, which considers the restructuring of territory as it is manifest in new forms of government and in the diminishing importance of the nation State as a primary basis for political authority or legitimacy. Scott explores the subject of regionalism in Europe, presenting the EU as a catalyst with its emphasis on proportionality, subsidiarity and diversity, rather than uniformity, homogeneity and harmonization. Scott's piece raises a number of important questions about the degree to which EU constitutional law directly and indirectly impacts relations between regions within the Member States. de Witte offers an original and insightful analysis of the process of EU treaty revision as a political conversation with constitutional content, highlighting the limits of the IGC for providing coherent solutions to complex constitutional problems, and its shortcomings with respect to participation and transparency. Loyalty as a general principle of EU law is the organizing principle for Curtin and Dekker's analysis of the relationship between the legal systems within the EU. Their paper also examines and the way in which the principle of loyalty makes operative the legal mechanisms of direct effect and direct applicability. Convergence is identified in the principle of loyalty or "sincere cooperation" and is conceived of as analogous to the principle of good faith in public international law.

Lyons examines the plurality of voices at work in the "constitutional conversation" being undertaken within EU public law, advocating a view of convergence, not as top-down imposition, but as bottom-up, positive integration around common values. Lyons argues that convergence can be viewed as gain, based on a reality in which participants in the constitutional conversation are not threatened by convergence, and in which transplants are not inevitable irritants. She relies on the cases of *Netherlands* v. *Council* and *Hautala* as illustrative of positive, "bottom-up" convergence, contrasting these with the negative, top-down convergence evident in the case of *Metten*.

Administrative law is the focus of Hinsworth's paper, which considers the role of Member States in applying EU law in compliance with core principles of the rule of law, looking at the strategies of convergence in the principle of supremacy, as well as in the Article 235 reference system both of which are observed to be operating under increasing strain. The special function of national administrative law is cited as a key variable in the implementation and reinforcement of EU law. Heukels and Tibs analyse convergence in the area of remedies postulating two distinct trends in ECJ case law. One being the principle of *ubi ius ibi remedium* which they identify in the requirement set forth by cases such as *Rewe* and *Factortame* that Member States provide minimum effective judicial protection and legal remedies for rights. The second trend is the communitarization of Member State procedural law, epitomized by cases such as *Francovich*, *Brasserie du Pêcheur* and *British Telecom.*

De Búrca's contribution is a perspicacious analysis of positive convergence in EU law in the area of human rights. Starting from a number of basic premises such as the presumptively inclusive nature of human rights discourse, and the conception of the EU and Member States as distinct but overlapping sites of decision-making, de Búrca inquires into the existence of a complex but plural system of transnational governance. A number of important challenges

facing the EU with regard to human rights are explored, including the problem of competence, and the controversial question of "refusing to do at home what it does abroad." She argues persuasively for the development of an EU human rights policy because of the need for coherence and credibility, as well as the possibility of providing a normative framework within which different norms and claims can be articulated and adjudicated; such a framework can be both sensitive to identity and conducive to transformation. The subject of human rights is again considered in Beaumont's critique, which is strident and perceptive. Beaumont attacks the ECJ's exercise of power over human rights on the ground that it lacks competence, arguing that the idea of binding EU human rights legislation is a step too far in EU public law convergence.

Relying on democracy as a normative baseline, Harlow takes a critical view of convergence, highlighting the need to protect what is local, diverse and particular against the universalizing forces of EU law, particularly as they are mobilized by an activist ECJ. Despite European convergence in a global context, Harlow argues persuasively for recognition of the great cultural divergences that endure *within* the European context, and for pluralism and subsidiarity as part of a much broader debate about governance in an expanding EU. Convergence and divergence are considered in the context of comparative law approaches in Legrand's piece. Arguing against the impulse to suppress difference in comparative law methodology, Legrand asks whether comparative law needs new methods and tools to defend and justify the divergence and particularity of domestic legal systems: "Only in deferring to the non-identical can the claim to justice be redeemed".

The originality and diversity of the individual contributions to this book, as well as the coherence of its responses to certain key, overarching challenges make it extremely worthwhile. Although decidedly theoretical, this tome will be of interest to a broad range of public lawyers within and beyond academia, particularly as the processes of EU integration and expansion continue apace.

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F. Schwab, *Der Europäische Gerichtshof und der Verhältnismässigkeitsgrundsatz: Untersuchung der Prüfungsdichte*. Frankfurt am Main: Peter Lang, 2002. 340 pages. ISBN 3-631-39223-0. €46.80.

Schwab examines the role of the proportionality principle in judicial review by the ECJ. Specifically, he analyses the varying degree of scrutiny the Court has applied in actions against the Community compared to cases involving Member State measures with a view to ascertaining the different factors which appear to influence the Court's decision on how strictly it should examine the challenged measure for proportionality. The author's treatment of these issues proceeds from the assumption that these factors include not just the Court's alleged institutional bias in favour of integration as well as the legal context of the matter in dispute, but also issues relating to the limits of the judicial role and to the separation of powers between the Community and the Member States. Schwab then summarizes the typical situations in which the issue of proportionality is likely to arise before the Court and briefly explains the three-part-structure of the proportionality standard. In the following survey of the Court's relevant case law, he covers proportionality review of Community measures as well as judgments on the proportionality of Member State restrictions on the free movement of goods, persons, or services. The final part of the book attempts to explain why there have been varying degrees of scrutiny in each legal context.

Part 1 deals with the role of the proportionality standard in judicial review of Community measures. Relying primarily on German constitutional and administrative jurisprudence, the

author starts out by presenting legal guidelines which in his opinion ought to influence a court's decision as to the level of deference appropriate in a particular situation. He convincingly argues that measures which are generally applicable and which involve policy choices are as a rule entitled to a higher degree of judicial deference than administrative measures which typically affect a limited group of persons. The lowest degree of deference, i.e. the most rigorous degree of scrutiny should be accorded to decisions which directly affect an individual's interests or fundamental rights or which impose a penalty. Turning to the different types of Community measures, Schwab calls for deferential review of regulations because of their legislative character. Believing that implementing regulations and directives as a rule have a limited scope of application, he suggests an increased degree of scrutiny for these measures. He favours strict review of decisions directly affecting an individual. He also insists on the Court's duty to review the factual and legal basis of the Community legislature's policy decisions and to address all three elements of the proportionality test. He acknowledges that there are better reasons for judicial deference in deciding whether a Community measure has disproportionately limited Member States' powers than in reviewing restrictions on individual rights. Having outlined what he believes are legal requirements governing the stringency of judicial review, Schwab goes on to discuss the Court's relevant cases assessing the proportionality of Community measures taken under the common agricultural policy and of approximation measures.

A separate chapter is dedicated to the Court's controversial treatment of the Regulation establishing a common market organization for bananas. The Court draws harsh criticism for its frequent failure to expressly apply all three elements of the proportionality test, i.e. to investigate whether the challenged measure is appropriate in order to attain the objectives legitimately pursued by the legislation in question as well as whether the measure chosen is the least onerous as well as whether the disadvantages caused have a reasonable relationship to the aims pursued. In Schwab's opinion this failure as such indicates an insufficient degree of scrutiny which is particularly disturbing in the fundamental rights context. Schwab also faults the Court for having frequently neglected to articulate the importance of the private interests adversely affected by a Community measure in relation to the significance of the objective pursued.

Part 2 is a brief summary of cases applying the proportionality standard to Member States' actions taken to help enforce individuals' obligations created by Community law. As Schwab points out, the Court has frequently emphasized the importance of the Member States' duty to ensure fulfilment of the obligations arising out of the Treaty (Art. 10 EC) and has on occasion given comparatively short shrift to individual rights, in particular in the Yugoslavia Embargo cases. Parts 3 and 4 deal with the Court's use of the proportionality standard in reviewing Member State restrictions on free movement of goods, persons and services. In Schwab's opinion the Court's treatment of Member State measures purportedly justified by interests listed in Article 30 EC has been somewhat inconsistent: while the Court has been deferential to Member States' decisions as to what is required by public morality or public policy, it has scrutinized national claims to restrict trade on public health grounds rather strictly. Member States' recourse to mandatory requirements within the *Cassis* doctrine generally has also been subject to comparatively rigorous examination. In the area of free movement for workers, the Court has in more recent cases shifted from its initial lenient approach and has shown itself to be willing to look closely at the necessity for national measures. With regard to freedom to provide services, measures directly affecting access to the market in services have been examined more rigorously than limitations on public policy grounds. National restrictions on freedom of establishment have generally been subjected to a close degree of scrutiny. Schwab adds some concluding remarks on the extent to which the Court's judgments have levelled out doctrinal nuances among the fundamental freedoms which constitute the internal market. He points out that the Court has expanded the ambit where the proportionality principle applies by means of the concept of non-discriminatory restriction. Also, he submits that the Court has implicitly indicated that principles analogous to those contained in the *Keck* judgment may

be applicable with regard to provision of services, freedom of establishment, or movement of persons.

In Part 5, the author attempts to give reasons for the perceived tendency of the Court to adopt a lenient approach when reviewing Community measures, and to subject Member States' actions to a more rigorous degree of scrutiny. As he readily admits, this part of the study inevitably is somewhat speculative. Still, he quite convincingly demonstrates that there are some factors embedded in the Community's legal order which in part explain the varying degrees of scrutiny employed by the Court. For instance, the Treaty definitely favours free movement of goods, persons, and services and thus appears to encourage relatively stringent review of Member State restrictions. Also, the Treaty attaches some degree of importance to the aims legitimately pursued by Community measures which makes it easier for them to override conflicting interests. However, the author's endeavour to ascertain the extent to which the Court's alleged institutional bias has prevented it from looking closely at the proportionality of Community actions necessarily remains within the realm of speculation.

All in all, Schwab gives a detailed and appreciative survey of the Court's extensive case law dealing with questions of proportionality. Whether he ultimately succeeds in establishing the true extent to which the Court's proportionality review lacks stringency and/or consistency, and whether his attempt at explaining this state of the law is totally persuasive, may be left to the readers' judgment. He certainly provides some useful observations. However, at the outset of his work, Schwab himself concedes that the brevity of the Court's published opinions presumably impedes a realistic assessment as to how strictly the Court examined a particular measure. This is an important point which if taken seriously appears to cast doubt on the validity of the author's analysis. In addition, Schwab's initial list of factors fails to mention the strength of the litigants' factual pleadings before the Court which of course is not open to easy examination but likely has considerable impact on the stringency of the Court's review. Also, the proportionality standard provides broad margins of appreciation to the lawgiver as well as to the judiciary. Therefore functional limits on the judicial power in relation to the Community legislature with its cumbersome procedures probably are more important than the author appears to believe. Consequently, there are good reasons even in the fundamental rights context for the Court's reluctance to disapprove of the legislature's appreciation as to whether the measure in dispute meets the proportionality test.

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C. Knill, *The Europeanisation of National Administrations*. Cambridge: Cambridge University Press, 2001. xiii + 258 pages. ISBN 0-521-00092-0. GBP 16.95 (Paperback).

Knill's book tackles the issue of how European integration affects domestic administrative practice – or style – and structures of Member States. Right from the outset, the author acknowledges that European law does not directly challenge existing administrative arrangements in the Member States. Institutional and procedural autonomy is still sort of a catchword in European jargon. European institutions' competences are rather substantive in character. They deal with substantive policies, usually leaving the Member States to make the relevant choices concerning implementation. To this end, the Member States can in principle rely on their national administrative structures and procedures. The author's attention is drawn to a different, but by no means less relevant, phenomenon: changes to the structures and styles of national administration induced by the need to implement European policies. The practical reason behind this potential influence is that policy content and administrative implementation requirements are often closely related. The potential for European influence is there. The real

question is why national administration sometimes bows under pressure while at other times it does not. Hence the book's subtitle: *Patterns of Institutional Change and Persistence*.

The first chapter of the book is devoted to explaining in more detail the theoretical frame of reference and the analytical approach underlying the research. The question of why at times national administration bows under European pressure while at other times it just doesn't is subject to different types of analysis. A historical institutional approach is outlined first. From the methodological point of view, this approach maintains that institutions count. They are social actors which have acquired a given position for historical reasons; they are ready to fight to retain their powers. The institutional approach shows that change is normally more difficult when structures and procedures are embedded into the core institutional elements of a given policy. If they are not so embedded, changes depend on the different degree of administrative reform capacity of any given domestic institutions. A general institutional approach is not possible here. Analysis has to consider each agency on its own merits and attentions has to be paid to the rational choices made by all stakeholders. The object of the research is more precisely defined in this chapter also. Administrative style is said to cover such different aspects of administrative activities such as the regulatory logic, whether following a case-by-case approach or a more deduction-based one; the hierarchical patterns of command-and-control regulation or non-hierarchical patterns relying on self-regulation and voluntary arrangements; the preference for substance or procedure, including due process rules; the amount of details put into the regulation. In short, all aspects relevant to the way the administration intermediates between the different interests present in a society are covered by the notion of administrative style. The different styles can in a way be linked to two ideal types, i.e. the intervening type and the mediating type. Administrative structure is explained as covering issues such as vertical and horizontal competence allocation and the co-ordination and control relations between different administration.

The chapter closes with the prediction that pressure from the European Union will be met with growing resistance depending on how much European requirements diverge from some fundamental or core assumption underlying the administrative style and/or structure of a given Member State. Administrative traditions are the key to compliance or resistance. Resistance can in turn lead to persistent divergences in national administrations, some of them being less ready than others, in some fields rather than in some others, to adapt to the Europeanization sweep coming from above.

The overall structure of a given national administration is thus instrumental in explaining change, or the reasons for the absence of any change. Chapter 2 is devoted to the analysis of the administrative traditions of Germany and Britain, the two Member States to which the research is confined. They are found to be characterized by opposing patterns and dynamics. The German tradition conforms to the intervening ideal type, legalistic in its working methods and with a comprehensive and rather clear cut division of tasks between different administration. The British tradition is rather that of a mediating type, with a lot of flexibility both in style and structure. The differences in the way administrative traditions were shaped in Germany and Britain also affect the question of how much reform capacity the two administrations have: the highly structured and entrenched German bureaucracy is certain to resist major reform attempts; the author rightly points out that even the much developed idea of rule of law can hinder reform process. On the other hand, the informal character of British administration makes it receptive to changes brought about in administrative style and/or structure.

The empirical analysis focuses on European environmental law. More specifically, attention is paid to the implementation of five pieces of Community environmental law, namely the directive on Large Combustion Plants, on Drinking Water, on Access to Environmental Information, on Environmental Impact Assessment, and the regulation on Environmental Management and Auditing System. Chapter 3 opens with a general appraisal of European environmental law aimed at showing the deep differences in the regulatory approaches taken by the relevant pieces of legislation. The directives and the regulation place highly differentiated demands

on the Member States' administrations. Some of them conform to the interventionist model; others are rather close to the mediating type; still others are in between the two approaches. A more articulated analysis of the responses given by the national administration to the pressure coming from European law is thus possible.

The factual analysis demonstrates convincingly both the constraints of a static core of administrative traditions, like that found in Germany, and the opportunities of a dynamic core like that characterizing British administration. Germany resisted the implementation of directives which were at odds with its administrative traditions, styles or structural arrangements, such as the one on Environmental Information; this happened even when pressures from social actors acted the same way as Community law. In contrast, British administrations were able to adapt easily to the requirements coming from European environmental law whenever those requirements found support in the local society.

A comparative assessment is drawn in the fourth and last chapter of the book. The theoretical model is fine-tuned and found to be applicable to other policy sectors, specifically to road haulage and railways sectors. As is plain from the way the issues have been analysed by the author, the book is not so much about law proper, as about the institutional and legal process as a whole. This makes the book even more relevant reading to a lawyer. Lawyers tend to take some characteristics of their legal order for granted and immutable. This is why they call them principles, at times giving them the further connotation of "fundamental" or – and the difference can be at times an important one – "constitutional". The book shows lawyers that these principles are the outcomes of evolutionary social processes which shaped the German and British system in different ways. This knowledge is useful in two ways. First it shows the principles do not come from Heaven: rather they were the product of social actors, included institutions, acting most of the time for their egoistic interests. Secondly, if they are not from Heaven, they can be changed again: one reason for change can be the necessity to make national administrations more ready to faithfully and timely implement European law. In the end, the book shows that obstacles to change are embedded deeper in social institutions than in legal rules (even if legalistic approaches can themselves hinder the evolution of national administrations). Lawyers, take heed!

This said in general terms, the book is successful in and as much it hints at and opens the way to new research. Here is just a short personal wish list. One obvious one is to cover more Member States and more policies. The author has chosen two Member States of very different administrative traditions. Most Member States probably conform to the German type, but an analysis of some Scandinavian States would probably bring some interesting result. Taking on board more policies would help proving the relative rigidity of German type systems. Which leads to another future research which is possibly even more challenging and worth pursuing. The author mainly confines himself to the national level with some limited inroads into Community policy-making in the third chapter. He also notes that the European level has already been the object of much research. This can be true concerning the structural – or competence – issue. It would be worth applying the author's method to the question where "Europe" itself stands on the administration style issue and whether it conforms more to the intervening or to the mediating ideal type. There too, the research would have to be supported by empirical evidence coming from different policy sectors concerning direct implementation of European law. The important questions will be why it has become the administration it is, bowing to which evolutionary pressures (and possibly resisting others).

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K. Hossain, L.F.M. Besselink et al. (Eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World.* Leiden: Martinus Nijhoff, 2001. 912 pp. ISBN 90 411 1586 2. € 200.

This book contains both more and less than its title promises. Its starting point was an Ethiopian conference on human rights commissions and ombudsman offices, apparently organized by the Ethiopian Government in order to obtain practical and academic information in the issue before installing an Ethiopian body. So it is not surprising that references to Ethiopia are frequent throughout the book, beginning with an introductory chapter on the context of human rights protection in this country and ending with an appendix on Ethiopian legislation on the ombudsman and the human rights commission. Dealing with national human rights enforcement, the volume in a way supplements the recent work edited by Philip Alston and James Crawford on *The Future of UN Human Rights Treaty Monitoring*, which deals with international enforcement.

The overall input to the voluminous book is very diverse, and comes from countries all over the world, with a slight overweight of African countries. So the work is anything but a Eurocentric enterprise. This is laudable especially in the area of human rights, in which the European perspective probably still dominates the field. Diversity is a key feature not only with view to the four editors, who come from the Supreme Court of Bangladesh and from the universities of Utrecht, Amsterdam and Rotterdam. The authors also have very diverse professional and geographical backgrounds. We find contributions by academics and by practitioners, such as human rights commissioners or ombudsmen, coming from all continents.

The book is organized in three parts. Part One contains background papers and special topics. The background papers deal with the structure of human rights in federations, with human rights and developments, and with the role of international organizations and NGOs in the protection of human rights. Special contributions examine, *inter alia*, the topical issue of how to deal with human rights violations of a previous regime.

Part Two is the actual comparatist core of the book. It begins with a useful typology of national systems of human rights protection which classifies the domestic systems in single, dual, and multi-organ systems. The ensuing country reports are organized according to that classification. These reports have been guided by detailed questionnaires on national human rights commissions and on ombudsman institutions, which should facilitate the comparability of the diverse systems. Not all country reports really follow the questionnaires, and they differ greatly in length and approach (ranging from a 7-page report on Colombia to 50-page reports on Canada and the UK). These divergences are at least in part due to the fact that not all questions are relevant to all countries, which is of course already one important insight to gain from the comparative exercise. Some country reports inform about unique institutions such as the Spanish parliamentary committees on human rights, the Dutch commission on equal treatment, or the UK commission on racial equality. Comparison of specific institutions is facilitated by the index, which contains the main cross references to the country reports. Part Two is concluded by a more general Chapter devoted to national human rights institutions in Africa.

Part Three of the book lays down principles and guidelines for establishing human rights institutions. In particular the first chapter of this part is useful reading for law-makers, as it gives the essential elements which must be considered when designing a new institution in a nutshell. One expects this part to be the *summa* of the comparison. However, the contributions do not consistently refer to the examples of the second part, but somewhat surprisingly introduce new examples.

The focus of the book is certainly rather practical than academic. It is not heavily footnoted. Instead, most country reports are supplemented by extracts of the relevant domestic legislation. With this work, the Ethiopian legislature and the editors set an excellent example of how to make practical use of comparative law. The volume is a source of information for anybody interested in the functioning of human rights protection throughout the world and it is in

particular a tool for law-makers. The merit of the book is its focus on the legal bases of national enforcement of human rights all over the world, with a special emphasis on Africa.

We all know that enforcement, not norms or theory is what is lacking in the field of human rights. Therefore, I would have preferred to read more about the actual functioning (or non-functioning) of the institutions described, not only about the law in the books. We should avoid any further "political illusion", as Alex de Waal provocatively describes current human rights formulae for Africa (p. 759). The book under review moves in the right direction.

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S. Lombardo, *Regulatory Competition in Company Law in the European Community. Prerequisites and Limits*. Frankfurt am Main: Peter Lang, 2002. 235 pages. ISBN 3-631-39778-X. €33.95.

The book reviewed here is Stefano Lombardo's PhD dissertation at the Graduate College for Law and Economics, Institute for Law and Economics of the University of Hamburg. Lombardo challenges the idea that the European common market needs a harmonized company law for its correct functioning. On the basis of a comparison with the U.S. he argues that the reasons advanced to justify company law harmonization are basically wrong. Instead of harmonization of substantive and procedural company law, a system of free choice of law both for initial incorporations and for reincorporations of companies should be pursued. Free choice of company law enables market operators to select the most advantageous company law, which in turn may lead to regulatory (or interjurisdictional) competition. In a situation of regulatory competition, Member States compete to attract businesses by providing a more favourable regulatory environment, *in casu* a more favourable company law. Competition among rules could, according to Lombardo, offer a number of advantages over harmonization, and even if Member States did not compete, a system of free choice would be preferable to a system of harmonization, because the different decentralized company law regimes would provide for a richer set of forms from among which users of company law could choose, guaranteeing innovation and flexibility that a system of centralized rules less efficiently sustains.

The book is divided into six chapters. The first, introductory chapter states the aim of the book, which – in short – is to analyse "the arguments advanced for justifying harmonization of company law on the basis of a law and economics comparative analysis with the American experience" (p. 17). Furthermore the chapter contains a plan of treatment. Chapter 2 is entitled "European company law: The state of the art", and deals which a much broader range of subjects than its title suggests. The phrase "European company law" in a narrow sense, only encompasses the provisions governing the Societas Europaea (SE) or European company (for an illuminating commentary on the SE see Edwards, "The European company – essential tool or eviscerated dream?", 40 CML Rev., 443–464), or more commonly, refers to (substantial) EC company law as opposed to Member States' or national company law. Chapter 2, however, goes beyond these topics. The fact is, that it starts with a description of the rules adopted by Member States for recognition of foreign companies, the so-called "incorporation" theory and the "real seat" theory, and the possibilities according to national law, of a transfer of seat (registered office or headquarters). Furthermore, this chapter contains a treatment of the prohibition of restrictions of the freedom of establishment, laid down in Article 43 EC and of the *Centros* case. EC company law then, is only taken up in the final two sections of the chapter, where the harmonization programme is reviewed.

Two reasons are generally given to justify harmonization of company law (p. 41). First, there is a standardization argument: relying on the same legal rules reduces the contractual costs

of cross-border business. Secondly, harmonization avoids a possible "race to the bottom". The race to the bottom theory claims that regulatory competition in company law harms shareholders by driving States to adopt company law rules that are too lax with respect to managers and controlling shareholders (cf. Cary, "Federalism and corporate law: Reflections upon Delaware", 83 Yale L.J.(1974), 663, 672 and 705). Lombardo disputes the correctness of these arguments in an interesting way throughout the next chapters of his book. One final remark on chapter 2. Although the book reviewed here was closed in May 2002 and the ECJ, at that time, had not rendered its judgment in *Überseering,* A.G. Colomer had already delivered his Opinion. In view of Lombardo's detailed comments on the *Centros* judgment and the fact that *Überseering* was generally expected to be of consequence for the "the free movement of companies", a discussion of the facts of *Überseering* and the Opinion referred to, would have been in order here.

The point of departure of Chapter 3 ("The theory of regulation and regulatory competition") is the economic theory of regulation. According to this theory, public regulation is justified in case of market failures, i.e. situations in which the market mechanism does not produce economic efficiency. Important sources of market failure are: monopoly, externalities and asymmetric or incomplete information. The view that federal monopolistic regulation (or harmonization) is the only valid solution to market failure, has been questioned more and more (p. 62). Nowadays many economists believe that a system of competitive supply among different jurisdictions, in other words a decentralized solution, can be more efficient. Lombardo (p. 62) recapitulates as follows: "The market for regulation is not necessarily a natural monopoly market, and like all markets, if competitive, can work better than the monopoly market . . . ."

Hereupon Lombardo points out the advantages of a system of regulatory competition (p. 64). In the first place it would bring with it "satisfaction of more preferences of citizens or firms"; a centralized solution, on the level of the EC, may not be appropriate to local conditions. Secondly there would be better possibilities for innovation. The correctness of Lombardo's analysis is supported by Woolcock who elucidates this innovative advantage of regulatory competition strikingly: "Just as monopolistic markets tend to be inflexible and unresponsive to consumer demands, so . . . a single set of harmonized rules is less responsive than competition among rules and a 'market for regulation."'. (See Woolcock, "Competition among rules in the single European Market" in Bratton et al. (Eds.), *International Regulatory Competition and Coordination*, (1996) p. 289, 299). Presently, the so-called petrification of EC company law is considered to be a major concern. The High Level Group of Company Law Experts (under the chairmanship of J. Winter) notes in this respect, that once Member States have agreed to a certain approach in an area of company law and have implemented a directive accordingly, it becomes very difficult to change the directive and the underlying approach. In addition, the Group observes that there is a growing need to continuously adapt existing rules in view of rapidly changing circumstances and views (see its Report on a Modern Regulatory Framework for Company Law in Europe, November 2002, p. 31). The Group recommends in this respect, that: "The EU should consider a broader use of alternatives to primary legislation (secondary regulation, standard setting and monitoring, model laws)." See Recommendation II.2, p. 5. This recommendation, however, could in my view fall through because of constitutional obstacles (cf. Committee on Legal Affairs and the Internal Market, "Draft report on the proposal for a directive on takeover bids, 11 March 2003", PE327.239 – 2000/0240 (COD), "Explanatory statement", p. 30). Democratic legitimacy could also be an issue. A third advantage of regulatory competition Lombardo mentions, is that it reduces the danger of regulatory failure. Competition between regulators decreases the risk of political compromises or opportunism determining the outcome of the process of law-making. In view of the above advantages, Lombardo comes to the conclusion that harmonization is justified if its benefits (notably the reduction of the costs of cross-border business) are greater than its costs, which will only be the case if economies of scale are large enough (pp. 75–76).

Chapter 4 ("The American market for corporate charters") provides a picture of the U.S. debate on regulatory competition in company law. Cary's view that state competition leads to a "race to the bottom" has not been widely endorsed. The now predominantly accepted theory is that competition ensures that company law benefits shareholders and that competition therefore leads to a "race to the top" (p. 100). Lombardo considers chapter 5 ("The European market for corporate charters") as the core of his book. This chapter consists of 98 pages, which is obviously too bulky for a single chapter in a book of 205 pages (excluding references). This chapter presents an economic theory of the business corporation and of company law as a regulatory device. On the basis of this theory, Lombardo analyses the reasons brought forward for harmonization (standardization and preventing a race to the bottom) more thoroughly. The worked-out analysis supports Lombardo's earlier conclusion that the reasons just mentioned do not justify a harmonization of company law. Lombardo's analysis provides a useful and concise overview of the topics involved. A shortcoming of this particular chapter, and the book in general, is, however, the absence of a discussion of the Societas Europaea (SE) as an instrument to further regulatory competition.

The last chapter – six – summarizes the conclusions of the preceding chapters. The study concludes with a short discussion of the still pending European regulatory projects. Their compatibility with the conceptual framework developed in the book is being tested. Erroneously, however, Lombardo refers in this context to the proposal for a fifth company law directive, which the European Commission in fact withdrew approximately half a year before the book reviewed here was concluded (see COM(2001)763, 11 December 2001, p. 22.) The book contains an extensive list of references; a subject index is lacking.

Despite some minor points of criticism, it must be noted that Lombardo's book challenges the necessity of a harmonized company law convincingly. The alternative of regulatory competition between Member States that Lombardo (and others incidentally) proposes, offers some important advantages. Lombardo's recommendation to compare relative advantages and disadvantages of centralized (harmonization) and decentralized (regulatory competition) solutions before deciding on more EC-company law, can only be endorsed. On 21 May 2003 the European Commission presented its Action Plan on "Modernising Company Law and Enhancing Corporate Governance in the EU". In implementing it, the Commission should certainly take Lombardo's recommendation to heart.

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