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BOOK REVIEWS

A. von Bogdandy (Ed.), *Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzüge*. Heidelberg: Springer, 2003. 978 pages+ XXVIII. ISBN 3-540-43834-3. EUR 59.

This book was published when the work of the European Convention was near completion. Its subtitle promises a theoretical and systematic outline of something whose existence has been until recently vehemently denied by a particular strand of German scholarship. The publisher calls it a "textbook", which it is definitely not. It is a collection of excellent, highly erudite essays. The first, long part of the book consists of contributions by younger scholars who have already excelled in the concrete and specific field they are covering in Bogdandy's book. Their essays deal with important aspects or elements of European constitutional law. Not all of these aspects belong to the hard core of the constitution, at least not at first sight. On the other hand, some issues, such as the principle of solidarity/social Europe (now treated within a Chapter on structural principles), might have deserved more extensive treatment. But on the whole, the chosen range of issues is convincing, and, moreover, these issues are analysed in a comprehensive, in part quite ambitious, often interdisciplinary (with links to political science), and mostly illuminating fashion.

Christoph Möllers writes on constitution-making, the concept of constitution and constitutionalism. He explains the various meanings of the term "constitution" and asks whether and how these meanings apply to Europe. Of course he refuses to tie the concept of constitution strictly to the nation state, but he criticizes the attribution of a constitution to the Union merely on grounds of ostensible constitutional functions. Ultimately, Möllers fears an abuse of the concept of constitution in the context of European integration – and in this point, the first and the one-but last Chapter (written by Paul Kirchof) meet. Stefan Oeter writes on federalism. He pleads for a federal consociational constitution (*Verbundverfassung*) and foresees that the European Union will on the long run not become a federal State, but a mixed system based on international law with increasing federalist features. Antje Wiener writes on institutions from the perspective of a political scientist. She concentrates on "soft" institutions, such as ideas, social norms and practices. Wiener distinguishes three phases of integration (and constitutionalization), and then examines the formation of institutions in the area of citizenship and the constitutional process. Somewhat surprisingly, she considers the Humboldt address of German foreign minister Fischer (of May 2000) as the starting point of the debate on finality, and the Laeken Declaration of 2001 as the beginning of the constitutional debate. Maybe this is true for popular politics, but certainly not for the respective academic debates.

The editor himself calls for a theory of European principles and prepares the field under ample recourse to Hegel. According to von Bogdandy, true constitutionalism means that the constitution pervades the entire European legal system, and this might be effected via constitutional principles. Von Bogdandy identifies the structural principles of freedom, rule of law, democracy, solidarity, and then focuses on those principles which balance unity and plurality. As long as it is kept in mind that a pervasive hyper-constitutionalism risks suffo-

cating the political (more or less democratic) process, and that grand principles hardly resolve concrete problems, the endeavour is laudable and worth pursuing.

Alexander Schmitt Glaeser writes on sovereignty and on the primacy of European law and concludes that no general statement can be made: the relationship between European law and Member State law is determined by each Member State on its own. But what about the European claim to decide on that relationship in a centralized manner? Franz C. Mayer's contribution on constitutional adjudication deals exactly with that question: who is the ultimate umpire? A comparative survey reveals that most Member State courts have already assumed (or are prepared to assume) the power to determine the ranking of European (constitutional) law in relation to their domestic constitutions and claim primacy of national constitutional core principles even over the European Constitution. This reserve jurisdiction compensates for dwindling single-state impact on European decision-making. The ensuing Chapter by Christoph Grabenwarter on national constitutional law referring to Europe also starts off with a comparative survey. Grabenwarter then gives examples of fields with high impact of European (constitutional) law on Member States' law substance (e.g. women's rights) and also observes a strengthening of the European Convention of Human Rights via EC law. On the whole, Grabenwarter diagnoses a system of mutual constitutional stabilization, which he deems essential for the existence of the European constitutional consociation.

Robert Uerpmann looks at those rules and principles of public international law which have an impact on the European constitution. The most important regimes in that respect are the WTO and the ECHR. Uerpmann criticizes the ECJ's too general denial of direct effect of WTO-law, and also its opposition against accession of the EC/EU to the European Convention on Human Rights. Uerpmann explains the paradox that the EC/EU, which has never been a sovereign state, hesitates to bind itself fully to public international law regimes, by its need to assert its still fragile identity. In a globalized world, this course does not seem to be in Europe's own interest.

Werner Schroeder examines the constitutional relations between the European Union and the European Community. He explains the existing duality as a result of the tension between supranationalism and intergovernmentalism, which are both essential principles of the European integration. Whether this tension will be overcome with the currently projected abolishment of the pillar structure remains to be seen.

Is it a sign of kindred spirits that Martin Nettesheim declares a theory of the division of powers between EC/U and Member States to be the "*royal path*" towards a true understanding of European integration, in the same words as Armin von Bogdandy praised the theory of principles (p. 149 and 415)? In any case, the issue of competencies is the most controversial practical question of the current constitutional process, and the political debate might benefit from theoretical analysis.

Jürgen Bast deals with the types of Community Acts. Parts of this Chapter may become obsolete with the reform of Community legislation as projected by the Convention (introduction of a European law and the like). However, Bast's quest for the elaboration of a scholarly systematization of Community Acts in a dialogue with the concrete legislative practice remains justified. Stefan Kadelbach analyses Union Citizenship by comparing the law as it stands with the constitutionalist theoretical perspective. He points out that in this field of law, the *Vorverständnis*, that is the preconceived role of the European citizen, determines the analysis probably more than usual. Interestingly, the opposing camps in the debate on citizenship parallel those of the general constitutional debate, which might indicate that both extremely open concepts (citizenship and constitution) tend to be abused as panaceas. Jürgen Kühlung writes on a German pet-subject, fundamental rights. However, he does not suffer form the *malaise allemande*, but instead discusses (and rejects) the proposal of an active Union human rights policy. Kühling sketches out a system of European human

rights, which is influenced by German concepts, but seems sufficiently linked to European law, especially to the ECHR.

A typically (and self-consciously) German contribution is also Thorsten Kingreen's Chapter on the four freedoms. A major problem is their reconstruction as fundamental rights, which is confirmed by their integration into the European Charter of Fundamental Rights. In this regard, many questions still await exploration.

Armin Hatje describes the European Economic Constitution. He identifies a systemic guarantee of the free market economy with free competition. This system stands in a mutual supportive relationship with individual (economic) rights. The most important consequence is that legislation which realizes or safeguards the free market needs no further justification, whereas intervention is the exception which must be justified in each concrete case. In the event of a codification of the European constitution, market- and competition-related rules would probably not form part of this constitutional document, but its substance would most likely not be affected by such a re-ordering.

Josef Drexl wrote the following Chapter called "Constitutional Competition law". While the constitutional aspects of competition law remain obscure, Drexl extensively discusses the ordo-liberal notion of an Economic Constitution and tries to prove the applicability of that concept to European law.

Ulrich Haltern writes on *Gestalt* and finality of the EU. He uses a law & culture approach whose starting-points are an understanding of law as a form of imagination and of constitution as a stock of meaning. This approach reveals, according to Haltern, a failure of the project of a European constitution, as it is pursued to date. Most importantly, Haltern sees a fundamental difference between the "imagination of the political", at the level of the nation state and at the European level. He recommends acknowledging the fundamentally a-political, market- and consumer-oriented "imagination in" (of?) Europe (p. 845). Ironically enough, it is this hypostation of the State which marks the conclusion of the first part of the book.

The second, much shorter part offers general views on European integration and constitutionalism, written by eminent "elder statesmen" who have both practical, personal and theoretical knowledge of the issue. The views of three senior academics who have during their career also been judges dealing with Europe are highly divergent. I was most impressed by Ulrich Everling's sweeping picture of the EU caught between communitarian and national law and politics. His insights, drawn from personal involvement in European politics from the very beginning, allow him to demonstrate convincingly that tension between the Member States and their citizens has always been a feature of European integration which should not be glossed over in search for fictious and sterile harmony. Paul Kirchhof, former judge at the German Constitutional court and reporting judge of the Maastricht decision, argues that the term constitution is a deliberate misnomer for European law, used by academics and politicians in order to create an illusion of unity and democracy. He defends his position by frequent quotes from the judgment mentioned. The directly opposing position is taken by Manfred Zuleeg, former judge at the ECJ. In his contribution on the advantages of the European Constitution, he uses an extremely pragmatic approach. He has no problems with considering parts of European law as a constitution, both in form and in contents. As regards the ongoing constitutional process, he argues against the currently fashionable idea of organizing parallel national referendums on a possible constitutional treaty, because of the danger of disapproval in at least one Member State (p. 952).

With this book, the editor and the authors have managed to fuse expertise on specific aspects with a coherent, but not standard or uniform, overall view of the European Constitution. The outcome of their collective enterprise is an academic landmark in the emerging discipline of European Constitutional Law. The book fully illustrates the hypothesis which

Armin von Bogdandy formulates in his preface: the constitutionalist reading of European law does not aim at fraudulent legitimacy-creeping, but has a critical potential as well. The European enterprise deserves more work of this kind.

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M. McKee, E. Mossialos, R. Baeten (Eds.), *The Impact of EU Law on Health Care Systems*. Brussels: Peter Lang, 2002. 314 pages. ISBN 90-5201-106-0. EUR 26.

To shape and unite the different colours of a rainbow to a fine arc against the background of the dark blue and grey sky is an excellent masterpiece of heaven. The editors and authors of *The Impact of EU Law on Health Care Systems* are far from claiming to be masters fallen from heaven. Yet they have achieved all together – similar to the stripes of a rainbow – an excellent common work in their area of expertise, which builds on the results gained in Ghent. There, in December 2001, the Belgian Presidency of the EU convened a conference on the implications of European law for the social nature of health care. Two complementary books emerged from this process. The volume at hand provides an in-depth analysis of some of the most important issues facing health policy makers in Europe, in which leading commentators provide their perspectives on the current situation and prospects for the future. It was the Minister for Social Affairs and Pensions of the Belgian Federal Government, Frank Vandenbroucke, who invited the editors of this book and gave – together with other highly qualified experts – constructive comments on earlier drafts. So the volume is a result of a well ripened process and makes one curious as to its contents.

The editors present in chapter 1 in brief the contributors' conclusions. The book will help to ensure, that European law acts as a help rather than a hindrance to those trying to improve the quality and accessibility of health care for which they are responsible. Still, the contributors – demonstrating the complexity of European law as it relates to health policy – identify many areas of ambiguity and contention.

In Chapter 2, Hervey explores the legal basis and structures of the rapidly developing European Community public health policy in their historical context. Even though there are many obstacles on the way, the direction here is relatively clear. While the competence to determine public health policies remains primarily at national level, in accordance with the principle of subsidiarity, the EU institutions now have a clear obligation to participate in the public health field. The problem is more the implementation of suggestions for improvement: How to institutionalize health promotion or prevention in the best way? Currently there is the question how to establish a European Centre, able to provide a structured and systematic approach to the control of communicable diseases (e.g. SARS) and other serious health threats (cancer, AIDS).

The dominating role of the European Court of Justice in the discussion about the future of Europe-wide health care becomes clearly visible in the following chapters. The ECJ is until now the leading motor in developing the way to a free Europe-wide movement of patients. With its rulings, it constructed in a very short period of time a comfortable new modern and wide – but still almost empty – motorway that doesn't end in the thorns of the impenetrable bramble of the narrow field path of Regulation 1408/71 EEC, but is illuminated by the rules of the internal market.

It has not always been totally clear how the ECJ decisions are to be construed. Especially in the last few years, after *Kohll* and *Decker*, there was a very controversial discussion. It is the merit of the authors to interpret for the reader – carefully elaborating all problems that occur – the ECJ rulings. Nickless first introduces *Kohll* and *Decker*, in Chapter 3 on "The

Internal Market and the Social Nature of Health Care", portrayed at the end of his contribution by a flow chart. The second section then advances a hypothesis concerning the limits of their application. The third section deals with *Smits*, *Peerbooms* and *Vanbraekel*. The final section of the chapter addresses the wider issues behind *Kohll* and *Decker*, and what they mean for the balance between the economic and social domains of the EU. It is disputed, Nickless writes, whether the economic rules designed to create the internal market should be fully applied in the social health care sector. In his view, which he substantiates, the inappropriateness of applying internal market rules to the health care sector stems from the unique features of this sector. However, the right role for Europe in the health care sector could lead to improved treatment at lower costs. And – the author accentuates – there is no resisting the relentless tide of Europe. But Nickless pleads for a balance. Special internal market rules have been created for sectors such as transport, agriculture, sport and military procurement, which balance the interests of the internal market with the special features of these sectors. Similar rules, the author concludes, are needed for social health care.

In Chapter 4 (The Right to Health Care across Borders), Jorens focuses – in continuation to Nickless' inquiries – on the implications of the evolving legal situation concerning free movement of patients. After describing the principles of the national health care systems, he elaborates the extent to which the ECJ has permitted movement without prior authorization and compares the result with cross-border health care as stipulated in EC co-ordination law. The Court has made clear that cross-border medical care is required by the fundamental freedoms. Restrictions on the freedom of movement are only allowed if they are indispensable in providing a balanced hospital service accessible to all and must take into account the principle of proportionality. The judgments, the author concludes, will not cause an avalanche that would destroy the entire social security system. To develop a European health market – he rightly concludes – is an enormous opportunity.

In Chapter 5 ("Do the Rules on Internal Market Affect National Health Care Systems?") Hatzapoulos examines the consequences of EU law on State and public procurement for health services. The ECJ has established that health care services do qualify as services within the meaning of the Treaty and acknowledged exceptions only in a few number of special circumstances. Moreover, it has been argued that social security funds may, in certain circumstances, be considered as undertakings and, hence, be subject to the rules on competition (but see the recent judgment in Case C-264/01). In another recent case and concerning another social institution (case *FENIN*) the CFI was of the opposite opinion. So the discussion Hatzopoulos describes, is still very current. The ECJ case law, the author concludes, is directed to the effective application of internal market rules. In the opinion of the author this causes legal uncertainty and leads to a confusing situation where three different sets of rules may apply simultaneously to the same situation: the rules on competition, on public procurement and on State aid, which have some fundamental differences. Still, it is believed that free movement of both professionals and patients is an irreversible acquis, which should be further encouraged. This necessitates – the author underlines – the adoption of secondary legislation co-ordinating, along the lines set by the recent case law of the Court, the conditions under which health care services are to be organized within Member States. Such legislation should run parallel to the rules of Regulation 1408/71 EEC.

The status of health care institutions as undertakings and exemptions from this status in the light of European competition law is the subject of Chapter 6 ("Competition Law and Health Care Systems"), by Karl. Each Member State is free to determine how to organize its social security system. But this does not imply – the author points out – that health care institutions are automatically exempt from competition law just because they are holders of sovereign rights. If an activity is to qualify as being sovereign, the decisive criterion is whether that activity must necessarily be carried out through the exercise of official authority. Exemption from the application of competition rules requires that the public has an

interest in the performance of a particular task within the meaning of Art. 86(2) EC. The distinction between sovereign and economic activity is thus reduced to the question of whether the activity involved in the exercise of official authority could be carried out, at least in principle, by a private undertaking intending to make a profit (p. 165). European competition law is applicable in so far as sovereign institutions operate as business enterprises. The decisive issue is, the author concludes, the effect of such an action in terms of competition, rather than its legal form.

There is a growing demand for voluntary health insurance, since public coverage is declining. Palm describes in Chapter 7 ("Voluntary Health Insurance and EU Insurance Directives") to what extent market rules and the solidarity principle have to be positioned to harmonize the interests of social security and voluntary health insurance, a subject which is found in current political discussions also. Palm depicts the different types of and different approaches to voluntary health insurance and searches for ways to an integrated European market for voluntary health insurance. He discusses the application of the principles of the third Non-life insurance directive (1992) to voluntary health insurance and its transposition and develops ideas towards a broader social concept in voluntary health insurance. "Fair competition" needs another definition in the sense to observe commonly agreed rules of general interest that rule out practices of selection and exclusion.

Chapters 8 and 9, the editors announce, take into the arena of trade in goods, specifically pharmaceuticals and medical devices. In Chapter 8 ("The Pharmaceuticals Market: Competition and Free Movement Actively Seeking Compromises"), Hancher reviews some of the potential avenues now open to the Community institutions to encourage the supply of generics to the European market and to ensure their more widespread availability across the Union. She concludes, that the growth of the information society and increased patient awareness can be used to promote more widespread awareness of generic alternatives and expresses the hope, that the G-10 High Level Group Initiative on Innovation and Provision of Medicines may contribute to an important re-evalution and reorientation of the role of Community law and policy for the pharmaceutical sector and provide the basis for a new and coordinated focus on the demand side of pharmaceutical provision in the European Union.

Altenstetter examines in Chapter 9 the regulation of medical devices in the EU compared to the regulation of pharmaceuticals because, the author explains, the difference between medical devices and pharmaceuticals sheds the most light on the complexity of medical device regulation. The lines between drugs and medical devices were never satisfactorily demarcated. The author describes the EU regulation of medical devices, the regulatory responsibilities in the Member States and in a third section Member State Policies and EU regulation. She argues that national medical device vigilance reporting and post-market surveillance are the weakest link in the European Union process. If patient access to effective, safe and high-quality medical devices is to be achieved, then a series of measures must be considered.

It is to be resumed that the provision of health care services is not yet a market, as this is the case in industry, but it has left its hitherto strictly state-ruled position and is moving towards the internal market as can be seen by recent case law of the Court. The authors, approaching from different directions, similar to participants of an expedition, finally reach the new modern motorway, constructed by the ECJ. They announce their finding and give an excellent description and documentation of the way.

The rainbow, vaulting the motorway, is, alas, not yet visible for all. Governments, health care systems, associations of professionals and other interested parties, with only a few exceptions, haven't found it yet. The rulings of the ECJ have until now only partly been transposed into national rights, as can be seen by the new German Statutory health insurance modernization law. In its last decisions on Europe-wide healthcare, the ECJ expressed its unwillingness to discuss questions of the system of health care. If there are to be adaptations

of national rules concerning the provision of Europe-wide health care to the rules of the internal market, this should be the exclusive duty of the Member States. For them and for the above-mentioned institutions it would be favourable to have, together with a big portion of their own creativity, this book as a guideline.

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B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union.* Vienna: Springer Verlag, 2002. 599 pages. ISBN 3-211-83774-4. EUR 129.

As the author states in the preface, the book is the shortened (!) version of her *Habilitationsschrift* which was submitted to the law faculty of the University of Graz, Austria, in 1998 and accepted roughly one year later. Unfortunately, the administrative process for getting financial support for printing took considerable time. Accordingly the work could only appear in 2002. Not wanting to alter the structure of the underlying *Habilitationsschrift*, Lurger did not fully take account of all developments that had taken place in European contract law since 1998. Whereas, for example, the Commission's consultation paper on European Contract Law and its Action Plan are taken into consideration, the national transformations of the late payment Directive or the Directive on consumer sales and, connected with the latter, the German modernization of the law of obligations are not covered. Fortunately for her work, however, the basic questions of European harmonization of private law, or more specifically, of contract law, are not subject to rapid change. Lurger's issues are still as burning as they were in 1998 when the *opus magnum* was completed.

The author does not limit her consideration of European contract law harmonization or unification as an unpolitical exercise in comparative law or in legal history. Convincingly, she rejects the idea that a European contract law might emerge from mere comparative study with its presumption of similarity, or from a revival of the *ius commune*. To her, modern contract law goes beyond dogmatically founded rules. It necessitates political choices, such as the right level of protection for consumers and other "weak" parties. This and other "stakeholder" interests, such as, for example, the protection of the environment, must be weighed against the principles of freedom of contract and the proper functioning of markets. Far from abandoning those principles altogether, she regards them as equally decisive. To Lurger, the process of building a uniform contract law is a unique chance to unite social principles and values underlying modern consumer protection law with older general contract law founded on freedom of contract and self-interest.

This main thesis is developed in five chapters: The first one on "competences, methods and contents of European contract law unification" gives a (mostly critical) overview of the current developments and debates. In its more than 200 pages, Lurger covers rather heterogeneous subjects. Under the sub-title "The dream of a European Civil Code" (chapter 1.1.) she starts with an outline of the current political developments, the different working groups who are already active in preparing a European civil law and the main arguments raised against such a project. She then turns towards the possible foundations of private law unification in the EC Treaty, and to the status of private law harmonization to date. In chapter 1.4., she comes back to two selected scientific projects, namely the Lando-principles and the Gandolfi-code. The Lando-principles are considered as valuable preliminary studies but in the opinion of the author, they lack a comprehensive, value-based foundation. Lurger rightly points out that the Lando-commission was frequently forced to go beyond a mere restatement of European contract law, but failed to give the reasons for their choices.

The next chapter of the book (1.5.) is again dedicated to the competence of the EU to promulgate a uniform contract code. Such basis is found in Art. 95 EC. Confusingly, the question whether the EU should use the instrument of a directive or a regulation is only discussed in chapter 1.7., together with the problems of uniform interpretation and a possible future structure for the ECJ. In between both rather technical chapters, the author examines "alternative or limited approaches to contract law unification". Convincingly, she rejects the idea of a competition of national contract laws as a possible unification method as well as a unification through international treaties or "soft law" such as restatements, uniform acts or model laws. Drobnig's suggestion to introduce a uniform contract law only for international contracts and leave the realm of purely domestic transactions to the national legislators is not followed either. In Lurger's view, introducing such a new distinction would greatly enhance uncertainty as to the applicable law. What exactly is a contract that transcends the borders between Member States? Cases such as *Torfaen*, *Keck* and *Hünermund* sufficiently demonstrate the difficulties to draw such a line. Contrastingly, the suggestion to introduce a future contract code in some Member States for a trial period meets with more sympathy. The last sub-chapter (1.8.) is entitled "The ECJ's present contribution to the unification of contract law". Here, Lurger mainly covers the ECJ's case law on the interpretation of directives and on general legal principles. The impact of the basic freedoms on private law are left to be discussed in chapter 2. Perplexingly, in chapter 1.8., Lurger also discusses at considerable length the possibility to create a uniform contract law through a revival of the *ius commune*, something that the author, without denying the important role of legal history within the current debate, clearly considers as insufficient and not feasible.

The other four chapters are considerably shorter and more homogenous in their structure. Having concluded that the main problem of the current projects aiming at a European contract unification is their lack of underlying values and principles, Lurger sets out to build such a foundation; or rather, as she modestly says, to make a first attempt. In chapter 2, she looks at fundamental rights on the national constitutional and the European level. She discusses with considerable depth the influence of the EC Treaty's fundamental freedoms on private law in general and contract law in particular. This part of the book is partly built on an earlier publication (*Regulierung und Deregulierung im europäischen Privatrecht*, 1997). Lurger refuses to consider national private law and, more specifically, national contract law as mere "selling arrangements" in the sense of *Keck*. Likewise she rejects the idea – which could be drawn from *Alsthom Atlantique* – that only internationally binding contract law rules, that means rules which cannot be overcome by the contracting parties through a choice of law, are capable of being qualified as "measures having equivalent effect". On the other hand, Lurger pleads for a liberal application of the tests of mandatory requirements and proportionality. In her view this is also necessary in order to weigh the protective aims of national private law against the basic freedoms which are unilaterally orientated towards market functionality and freedom of contract. From a future European constitution which should also incorporate "social" fundamental rights and freedoms, Lurger expects a more balanced impact on European private law.

Chapter 3 further develops the central thesis according to which the "social principles" incorporated in national and European consumer protection law should be extended to contract law in general. The aim of the author is threefold. First, she seeks to bridge the gap between the older, neutral rules of general contract law, and the bulk of relatively modern "protective" contract law, that is often separated from the codes' provisions and contained in special pieces of legislation. Secondly, she wants to enlarge the sphere of application of the protective rules, because – as she rightly demonstrates, most attempts at drawing a clear line between parties that deserve the law's protection and those who can look after their own interests are fruitless. Thirdly, she hopes to find within the values and principles underlying such special protective legislation, general principles that could also be used as a basis for building a modern general contract law. At the end of the chapter she baptizes her new, all

encompassing principle, the "principle of considerateness and fairness". In a few pages (chapter 3.5.4.) she briefly discusses one possible argument against the introduction of such a general principle: it could suffer the same fate as the principle of good faith which, as Hesselink in his book "De redelijkheid en billijkheid in het Europese privaatrecht" (1999), points out, has been turned to a mere façade behind which judges can manipulate the law as they wish. To avoid this danger, Lurger pleads for relatively precise and specific rules that make her "principle of considerateness and fairness" operable in a foreseeable manner.

Chapter 4, which has been considerably shortened compared to the original *Habilitationsschrift,* gives an overview of current contract law theory, ranging from the "older" theories of ordoliberalism and economic analysis to the "newer" critical legal studies and contract law theories of Wilhelsson, Adams and Brownsword, Hugh Collins, Gautrais and Ghestin. Especially in this chapter, it is not always easy to separate Lurger's own opinions from her reproduction of other author's views . She finds aspects worthy of criticism in all theories but also draws inspiration from them. Yet, to what extent she follows one or the other or whether she understands her own principle of "considerateness and fairness" and its relation to freedom of contract as a completely new invention remains unclear. Perhaps, however, these remarks only prove the reviewer's lack of understanding of complex issues of legal theory.

In the final chapter, Lurger tries to demonstrate, how the principle of considerateness and fairness could be transformed into specific rules for the solution of basic contract law problems, where the question of a fair balance of the parties' interests is evidently at stake. As examples she selects information duties in the period before the conclusion of the contract, and the change of circumstances during the fulfilment of the contract. Here, she reaches surprisingly precise guidelines. Yet, to what extent these spring from comparative study, from the author's own feelings of what is right and just or from her new contract theory is for the reader to judge.

Lurger has perhaps written the most comprehensive book on European contract law unification to date. There is no question in the current debate that lacks coverage. In addition, Lurger goes far beyond questions of desirability and feasability or of comparative preliminary studies and tries to find basic principles on which a modern uniform contract law could be built. The range of literature of which she has made use is enormous. The bibliography extends over nearly 60 pages. The work is certainly more on the theoretical side. Outside the fifth chapter, hardly any examples are given. At some points, one might miss illustrations, for example where the author states that the Lando-principles fail to justify political choices. Although some passages could have been written in a slightly more concise way, all in all, the style is lively and elegant. At least for a native speaker of German, it was a pleasure to read. The foreign reader might have wanted a list of abbreviations. Also an index would have been desirable, although the table of contents does give a reasonable overview of the subjects covered.

Now, that the EU at last seems to tackle the task of building a common contract law for the common market, one hopes that this work receives the resonance that it so rightly deserves.

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N. Moloney, *EC Securities Regulation*. EC Law Library. Oxford: Oxford University Press, 2002. 897 pages. ISBN 0-19-826891-2. GBP 110.

European regulation in the field of securities and capital markets has for a long time been viewed as consisting of a series of highly technical directives, the common foundation of

which was to contribute to capital market integration across Europe, but with a considerable lower degree of consistency than the integration efforts in other segments in the financial industry (banking, insurance). However, the 1985 Internal Market Programme and, more recently, the 1999 Commission's Financial Services Action Plan, have put the focus on the creation of a consistent legal framework at EU level in the field of capital market integration, which is assumed to achieve substantial economic gains. The high regulatory activity at EU level in the field of securities regulation over the last years has indeed resulted in the gradual construction of a more consistent body of EU securities law, the ultimate goal of which is to promote cross-border investment and EU wide raising of capital by issuers.

Moloney's *EU Securities Regulation* is illustrative of the shaping of a new legal discipline in EU law. This book clearly fills a lacuna in legal writing, as until now hardly any work had been devoted to both an in-depth analysis of the foundations and the evolution of EU securities regulation in general and a detailed analysis of the different EU directives in this field. This is the ambitious objective set forth in the present book, and which Moloney has managed to achieve in an impressive way. Notwithstanding the author's academic background – Moloney is lecturer in law at Queen's University Belfast – her work will prove of utmost use both for understanding the rationale and theoretical debates surrounding the harmonization process, and for obtaining guidance on the interpretation and application of the provisions of the various directives. The voluminous result of Moloney's research – nearly 1000 pages – will not act as a deterrent, thanks to the clear structure of the work and the detailed subject index, which prove most helpful to readers in search of a specific topic.

The different chapters in the book are construed in a logical manner: After an introductory Part on the legal foundations of EU Securities Regulation in EU law and a historical account of the regulatory process, the chapters dealing with the various EU directives are grouped in topical Parts (investment products; investment intermediaries; secondary markets; market integrity and takeovers; the supervisory structure). This structure indicates that EU Securities Regulation has gradually evolved into a coherent body of law, which "tracks to some extent the development of securities regulation as a discrete discipline on this side of the Atlantic" (p. 3). At the same time, the author rightly points out that EU harmonization should not be an objective in itself, given the functional character of EU regulatory competence in the context of market integration (p. 8). Moloney therefore warns for the possible effects of the Court's *Tobacco* judgment in the securities field as well: relying extensively on Art. 95 EC as legal basis for securities directives, in particular with respect to investor protection, might increase the risk of having them challenged before the ECJ (p. 585–586).

EC Securities Regulation is published in a period of high regulatory activity in EU securities law, to a large extent attributable to the Lamfalussy process. Inevitably, some chapters appeared to have already been superseded by new directives or were outdated due to non-adoption of draft legislation (e.g. takeovers) already at the moment of publication of the book. The author has therefore outlined in the Preface the most recent evolutions, which, in combination with the other chapters, enables to ascertain the present legal situation in this field.

A common feature of all chapters in the book, and one of the main qualities of this work, is the permanent search by Moloney for the foundations and the rationale of the various, often highly detailed and technical rules of the various directives which are analysed and commented over the different chapters. The book is much more than a mere "law commentary"; it allows the reader, in an impressively clear and didactic style, actually to understand what the EU regulatory framework is about, and to place the technicalities in a larger conceptual picture. Ultimately, the book is about understanding European securities law as a necessary tool for both scholarly research and use of the rules in legal practice.

The introductory Part I of *EC Securities Regulation* discusses a number of issues relating to the legal foundations of the EU regulatory framework. Moloney first discusses some

theoretical questions arising from the regulatory competence at EU level in the field of capital market integration and investor protection, but also the ambit and extent of harmonization and issues related to regulatory competition. The author systematically draws on an extensive study of the existing literature in order to sketch, in a clear and concise way, the arguments advanced in legal writing, without imposing a personal viewpoint. Further, Moloney describes the roots of EU securities regulation, identifying the 1966 Segré Report and the 1977 Code of Conduct as landmark events in the conception of EU securities regulation, but also underlining the importance of the gradual liberalization of capital movements as a catalyst for capital market integration.

Part II groups different chapters on "The EC investment products regime", basically encompassing EU regulation on primary markets (admission to listing, information disclosure and collective investment schemes). Before analysing in detail the different directives, Moloney attempts to analyse the rationale for regulating the capital-raising process and the techniques used to promote market integration through harmonization, subsequently supplemented by mutual recognition regimes. The limited use of the mutual recognition regime in the present framework leads the author to welcome the new prospectus directive, as it widens the scope for mutual recognition and eliminates the obsolete distinction between official listing and other (regulated) trade venues (p. 80–82). A detailed analysis of the different relevant directives follows. Adopting a consistent approach, the author for each directive starts with examining the rationale for regulation, the objectives of the directives, their legal basis and the harmonization technique used, before focusing on the detailed provisions. A large section is devoted to the mutual recognition regimes, subsequently introduced in all the aforementioned directives.

A large portion of the book is devoted to the analysis of the EC investment services regime (Part III), with the 1993 Investment Services Directive (ISD) at the forefront. Again, the author first discusses the rationale for regulation before turning to the legal analysis of the regime. In this regard, Moloney stresses the two tier system of regulation, the foundation being laid by the Treaty freedoms, upon which the "superstructure" of harmonization rests. An extensive analysis of the passport regime for investment firms follows, witnessing again the author's in-depth research. Moloney points to different lacunae in the regulatory system, in particular with respect to the risk of abuse of the "general good" clause under the directive: "Although the Court generally takes a robust approach to measures restrictive of financial services, in the absence of further harmonization, the general good jurisdiction and the danger that it may be used as a veil for protectionist action nonetheless represents a significant obstacle to market integration." (p. 396–397). Moreover, the author expresses her concerns on the system of regulatory competence over conduct of business rules contained in Art. 11 ISD, the complexity of which further increased after the entry into force of the 2000 E-commerce directive. Moloney therefore welcomes the possibility of moving to "branch state supervision" over conduct of business rules, as suggested by the European Commission in 2001. This apparently also seems to be the position adopted by the draft ISD II directive as adopted in first reading by the European Parliament in September 2003. Chapters on the prudential regime, the application of investor protective regulation and investor compensation schemes close Part III.

Part IV of the book deals with the securities trading markets regime. Developments on the rationale for regulation and the legal competencies to harmonize at EU level precede the extensive analysis of the current legal situation as regards market organization. Beside the current legal situation as it arises form the 1993 ISD directive, the author also pays attention to the more recent developments in the area of alternative trading systems, taking into account the important work undertaken at the level of FESCO and the Commission's proposals on reforming the regime (which at present are embodied in the draft ISD II directive). Finally, a chapter on securities settlement discusses the main issues surrounding the position

of these systems into the system of the ISD and the 1999 "Finality directive". Only very limited attention is paid to the Collateral directive, which still was a draft at the moment of publication of the book.

Parts V and VI discuss market abuse and takeovers respectively. Here, the author has been victim of the success of the Financial Services Action Plan, as the new directive on market abuse was adopted shortly after termination of the author's manuscript. An extensive description of the draft directive will however provide sufficient guidance to the reader with the adopted directive at hand. As for takeovers, the author was less lucky, as due to the rejection of the directive by the European Parliament, a new draft is currently being heavily debated both in the Council and in the European Parliament.

The final part focuses on the institutional framework for securities regulation, encompassing both the EU institutional process in law-making, notably the tremendous evolution initiated by the Lamfalussy-process, and the organization of supervision and supervisory co-operation in the field of securities law, hereby also sketching the main arguments for or against more centralization of supervision at EU level. Moloney does not express a personal view on this issue, but stresses the need for enhanced co-operation and co-ordination between national supervisory authorities as a short-term necessity, and simultaneously welcomes the move to increased centralization in lawmaking induced by the Lamfalussy process.

Overall, *EC Securities Regulation* can undoubtedly be labelled as an authoritative book. Niamh Moloney has managed to provide insight into both the technicalities of EC securities regulation, providing useful guidance to practitioners, and into the main theoretical and academic debates surrounding the shape and evolution of EC securities regulation. This book is an invaluable tool to guide all those involved or interested in EU securities law through what can be considered a regulatory jungle.

Michel Tison
Ghent

A. Herwig, *Der Gestaltungsspielraum des nationalen Gesetzgebers bei der Umsetzung von europäischen Richtlinien zum Verbrauchervertragsrecht*. Bern: Peter Lang, 2002. 250 pages. ISBN 3-631-38887-X. EUR 42.

What degree of private law harmonization does the internal market require? EC consumer contract law has traditionally followed the concept of minimum harmonization. Only recently, a shift towards total harmonization has been initiated, especially with Directive 2002/65/EC on the distance marketing of financial services and with the proposal for a new Consumer Credit Directive. However, even the minimum harmonization clauses of the various consumer contract law Directives explicitly require more stringent national rules to be "compatible with the Treaty" in the field covered by the respective Directive.

André Herwig's book deals with the leeway left to national legislators when implementing consumer contract law Directives, and particularly with the boundaries set by Art. 28 EC on the free movement of goods. The manuscript was finalized in March 2001.

In his first chapter (pp. 13–48), he lays down the basics of EC private law harmonization in the field of consumer law, summarizing the German debate on EC competences in this field and on the manner in which harmonization of consumer law took place.

With chapter 2, he describes, analyses and evaluates the strategy of minimum harmonization that was developed by the Commission in its White Paper "Completing the Internal Market" (COM(85)310 final) as a reaction to the poor achievements of the preliminary programme for a consumer protection and information policy (O.J. 1975, C 92/1) and which

gave new impetus to the development of EC consumer law (pp. 49–74). The author welcomes this approach due to its practicability and flexibility, but he also points out that it is necessary to limit the Member States' discretion to adopt more stringent rules. This is because Art. 95 EC, unlike Art. 138 EC, does not explicitly allow for minimum harmonization but requires measures to aim at the establishment and the functioning of the internal market. Whilst this does not prevent the creation of a uniform minimum level of consumer protection, it implies a certain level of harmonization of the Member States' laws to be achieved. The author illustrates the dangers to the internal market that are inherent in the concept of minimum harmonization using the example of the German implementation of Directive 87/102/EEC (pp. 75–87). German consumer credit law, as a number of consumer credit laws of other EC Member States, exceeds the protection level of Directive 87/102/EEC by far, and it is widely accepted, not least by the Commission, that this Directive has not served the establishment of the internal market of consumer credits well.

Based on this perceived need to limit the Member States' legislative freedom, the author explores, in his core chapter, chapter 3, the boundaries set by the EC Treaty (pp. 89–181) and by the relevant Directive itself (pp. 181–90). Regrettably, he only spends two pages on limitations set by the competence rule of Art. 95 EC (p. 181–2), and this despite the ECJ's decision in the *tobacco advertising* case. Whilst he recognizes that excessive making use of the minimum harmonization clause may corrupt the harmonizing effect of a Directive, the author regards the criterion of the degree of de-harmonization as too uncertain and therefore useless. With a view to the *tobacco advertising* case and to ECJ case law on other issues, such as the principle of effectiveness, that applies just such criteria as the degree of rendering the enforcement of rights difficult, the author appears to put too little trust in the ECJ's ability to deal with flexible concepts.

Instead, the author focuses on compatibility with the four freedoms. Relying in particular on the ECJ decision in *Alsthom Atlantique* (Case C-339/89), he establishes that national private law rules are, in principle, capable of violating the four freedoms. He denies that a possible choice of law renders a violation of the free movement of goods clause impossible and points out that, at least in the field of consumer law, a choice of law has only limited effect anyway, due to Art. 5 of the Rome Convention (pp. 95–8). However, he also soothes fears that the ECJ might gain too much influence on national private law, referring to the ECJ judgment in *CMC Motorradcenter* (Case C-93/92), where the ECJ declined to apply ex-Art. 30 EC because the effects of German rules on pre-contractual liability on the free movement of goods were too uncertain and indirect (pp. 102–3). After following ECJ case law from *Dassonville* to *Cassis de Dijon* and after, the author analyses *Keck* and the related German literature in great detail with respect to the impact of Art. 28 EC on national private laws. He argues in favour of a substantive approach that concentrates on the effect of a rule of national private law on market access rather than formally distinguishing between product-related rules and selling arrangements, an approach that appears to be taken by A.G. Stix-Hackl in *DocMorris* (Case C-322/01, pending). This approach he proposes to transfer to the other freedoms as well (pp. 166–181). In contrast, the author does not find any restrictions to the Member States' regulatory freedom in the relevant Directives themselves. In particular, he rejects the ideas of a fixed core of rules that have to be implemented without change (p. 182–3) and of a barring effect of provisions in consumer law Directives on more stringent national rules (p. 183–9).

In his fourth chapter, the author develops a "general methodology" for determining the leeway left to national legislatures by EC consumer contract law Directives. He proposes a two-step system. In a rather obvious first step, relevant EC law is to be interpreted. In this context, the author describes the well-known methods of interpretation that the ECJ applies (pp. 191–211). The second step consists of testing potential more stringent rules against the four freedoms. He then turns to the mutual impact of private law harmonization and ECJ

case law on the four freedoms (pp. 222–240). In the author's opinion, private law harmonization by secondary legislation is more likely to occur where national disparity is great. Thus, one might conclude that reducing the control on selling arrangements by the ECJ might lead to more intense harmonization through legislation. However, pointing at advertising law, the author predicts no such development – an error, as is obvious now the Commission has published its proposal on a Directive on unfair commercial practices (COM(2003)356 final).

Finally, he applies his methodology to the case of Directive 87/102/EEC, testing two more stringent rules of German law – the extension of the personal and substantive scope of application – against the Directive (pp. 231–7). The result of this test is rather surprising. The author argues that Directive 87/102/EEC is to be interpreted in such a way that the extension of the personal and substantive scope of application should be allowed. He then argues that such an extension does not violate the four freedoms, interpreted in the light of *Keck*. Therefore, so argues the author, more stringent rules that are allowed, due to the proper interpretation of the relevant Directive, do not need to be tested against the four freedoms. Their restrictions only relate to national consumer law rules that find no equivalent in the relevant Directive, such as the right to withdraw from a consumer credit contract. This conclusion, with due respect, appears to be somewhat contradictory to what the author argued throughout the book. Following the line of argument that he has developed before, it would appear to be a matter of market access only whether or not more stringent national rules violate the four freedoms, regardless of whether rules are mentioned in the relevant Directive or not. One might, however, be able to follow that distinction with a view to the scope of the minimum clauses in consumer contract law Directives. Most of them relate to the "field covered by this Directive", which implies that the legal situation might be different with regard to rules outside the scope of application of the relevant Directive, a conclusion the ECJ implied in *di Pinto* (C-361/89).

All in all, the book provides a thorough analysis of the myriad of opinions on the effect on private law of the four freedoms that can be found in German literature, unfortunately without regard to literature from other EC Member States. However, the book would be easier to read had practical examples been used throughout the rather abstract discussion.

Peter Rott
Bremen

Y. Devuyst, *The European Union at the Crossroads. An Introduction to the EU's Institutional Evolution*. Brussels: Peter Lang, 2002. 161 pages. ISBN 90-5201997-5. EUR 16.

At first glance, enthusiasts for an ever closer European Union seem to have every reason to be chuffed these days. The great venture that started little more than 50 years ago with Schuman's plan for France and Germany to combine their coal and steel industries has developed into something only visionaries then believed in. Much is in place, and the Union is entering new areas such as security and defence as well as police and judicial cooperation. Yet, in institutional terms, the European Union's structure is by no means settled. Modelling the EU is a work in progress. Over the past decade, the direction, speed, and geometry of the Union have been constantly debated. But the disruptive discussion at Maastricht on the EU's "federal" vocation has led the Heads of State and Government to avoid discussions on long-term efficiency and coherence. Instead, the Member States have tended to focus on the short-term and have left the Union's constitutional order bungling "somewhere between what remains of the supranational components of the Treaty of Rome's Community method and a series of compromise solutions that tend to steer the EU in a more intergovernmental di-

rection". The European Council at Nice was the culmination of this approach. The quasi deadlock has become untenable in view of the imminent enlargement of the Union, precisely because enlargement without a profound institutional adaptation would further undermine the EU's efficiency, effectiveness and accountability, and eventually lead to a complete paralysis in European decision-making.

It is in this context that the EU truly stands "at a crossroads" and that an analysis of the evolving constitutional structure of the EU is particularly topical. This is reflected by the cascade of publications in the wake of Joschka Fischer's famous Quo vadis Europa speech at Humboldt University on 12 May 2000. Devuyst's book can be firmly placed in this "tradition". Devuyst has – rather modestly – wanted to clarify the ongoing constitutional debate on the future of the European Union on one major point, namely the conviction which he shares with Jacques Delors and other illustrious adepts of the *orthodoxie communautaire* that no method other than the Community method is a viable guarantee for effective and peaceful collective decision-making in an enlarged Union (pp. 15, 161). By describing the evolutionary process of EU institution-building, the author has embedded his argument in a historical context. From the Community method of the 1950s to the more recent Treaty reform sequence at Maastricht, Amsterdam and Nice, Devuyst analyses the institutional tensions characterizing today's European integration project. In examining the institutional evolution of the European Union, the book focuses on the EU's decision-making capacity and efficiency, not on equally interesting questions such as the Union's democratic nature, legitimacy and degree of transparency. Neither does the book review the theoretical approaches developed by political scientists with respect to the EU's institutional evolution. "At the crossroads" is therefore narrow in scope. With a subtitle that may create more expectations than it can deliver, it is bound to dismay those who had hoped to have laid their hands on a comprehensive coverage of the evolution of EU institutional law. Devuyst exhaustively describes, in a pleasant and very informative way, the opposing dynamics in the history of European decision-making on half a score of issues.

In six chapters, attention is paid to the centralist and centrifugal decision-making and enforcement mechanisms in the EU, with particular focus on the first pillar and the cross-pillar fields of freedom, security and justice, and the external (economic, political and security) relations of the European Union. One chapter is devoted to the fundamentally important concepts of differentiation and solidarity between the Member States of an enlarged Union. In this chapter, as in others, Devuyst convincingly shows that while the current Member States are eager to build a more constitutional framework to facilitate enlargement and better accommodate a broader and more diverse EU membership, they have been less focused on long-term solidarity with the acceding countries from Central and Eastern Europe by maintaining short-term veto rights, for example in the field of structural funds. When explaining the development of decision-making on representative issues such as these, the author sticks to a more or less neutral descriptive approach and often stops short of presenting the readership his own critical opinion on questions which he has raised. For example, while Devuyst suggests that proposals for a "two-circle Europe" could regain in significance if the ongoing reform process fails finally to produce a forward-looking constitutional document that improves the EU's decision-making capacity, he leaves his readers *in dubio* whether, to his mind, the provisions on enhanced cooperation will be sufficiently flexible to allow for the further evolution of European integration while maintaining the coherence of the project, and if they are not, what will be needed to reinforce the Community method which he so cherishes (p. 151). It almost seems that Devuyst suffers from the Commission's shadow hanging over him, even if he has brushed off every professional liability in the usual disclaimer. Of course, one should not expect to find the author of a standard introductory work to incite iconoclastic behaviour, but then again, this book is not a standard introduction. Going by the timing of this publication as well as its narrow focus and the key argument it

puts forward, it is difficult to see why a heavy proponent of the *orthodoxie communautaire* such as Devuyst has not seized the opportunity to influence the debate on the future of Europe in a more forceful manner. Standing at the crossroads, the members of the Convention on the future of Europe and the representatives of the Member States at the IGC surely would have been eager to take every single argument into account to endow the European Union with the most efficient, effective and accountable way of decision-making.

Steven Blockmans
The Hague

C. Forstinger, *Takeover Law in EU and the USA. A Comparative Analysis*. European Monographs 41. The Hague: Kluwer Law International, 2002. 169 pages. ISBN 901 411 1919 1. EUR 80.

Literature on takeover law is abundant in the US and, increasingly, in Europe as well. The Germans alone managed to publish some 15 – mostly voluminous – commentaries and handbooks in less than two years after the enactment of their new takeover law in January 2002. However, it is rare to find comparative studies that encompass the US regulatory regime in its entirety – including federal regulation and the essence of state takeover statutes – as well as the core of different European takeover regimes on the Community level and in selected member states. The volume presented here courageously ventures into this field. The author utilizes an impressive amount of material to develop an answer to the central question of her analysis: Given the existing experience of US company and takeover law, is regulatory competition an alternative to harmonization of European takeover law? And if yes, will it lead to more efficient answers for Europe's Common Market? (p. 3).

The book is formally organized into seven sections, but it divides naturally into four major parts. First, the author discusses the United States and European company law in some detail, including the harmonization program of the EU, showing that the conditions for regulatory competition are different in Europe compared to the US (pp. 15–56). She then turns to the controversial question of whether state charter competition has led to a race to the bottom or to the top. In this she is closely following the pertinent U.S. discussion, especially the arguments of Roberta Romano and Lucian Bebchuk. For readers not familiar with these arguments, this section provides a concise and reliable overview of the different positions that is hard to find elsewhere. The author strongly sympathizes with Bebchuk's assumption that in the given presence of externalities, state competition in the context of takeover regulation cannot be relied on alone to produce socially desirable results, and thus at least a minimum of federal legislation is required (pp. 57–70).

The following extensive chapter summarizes and partly analyses the regulation of takeovers, first "from the U.S. perspective" – the Williams Act and state takeover regulation – and second "from the European perspective" – the (failed) Proposal of Takeover Directive and selected takeover regimes in member states of the EU, namely the United Kingdom, Germany, and Austria (pp. 71–146). Because of the ambitious "geographic" scope of this section, the author has to supply a stupefying range of information. A reader who is not well versed with the various takeover regimes that are addressed might occasionally feel a bit lost. However, the comparative analyses are always richly rewarding (e.g. pp. 108–111). They usually result in stimulating insights, such as the sharp criticism of the major argument of Klaus-Heiner Lehne, the German *rapporteur* of the European Parliament, for rejecting the amended proposed Takeover Directive in 2001. Forstinger argues that Lehne's assumptions about the perceived extensive defence measures permitted in the US are erroneous, for he "apparently overlooked that an evaluation of defensive tactics in several US states, espe-

cially Delaware, requires enhanced judicial scrutiny above the standard of the traditional business judgment rule …" (p. 139).

The concluding chapter advances an answer to the initial question of whether regulatory competition is a viable alternative to harmonization of takeover law (pp.147–166). It starts with picking up the question of regulatory competition once more, this time from the perspective of company law within the European Community. The author rightly criticizes the long dominant view that there is no alternative to harmonization in this field because of the danger of a European Delaware effect in cases of regulatory competition. She sees this possibility as being rather remote for Europe because – for a variety of reasons – the institutional setting in Europe is not comparable with that of the US.

The focus then shifts to takeover law. Although, in principle, Forstinger regards regulatory competition as more likely to produce efficient rules than harmonization, here *full* regulatory competition is *not* seen as a superior solution to harmonization. She sympathizes with the cited US criticism that regulatory competition has led to anti-takeover statutes favouring the interests of management over those of shareholders. Consequently, harmonized rules regulating the conduct of the target board are deemed necessary for Europe to prevent target managers from opportunistic behaviour in the case of an unsolicited bid, and thus are "particularly necessary to protect the interests of minority shareholders." This conclusion is somewhat puzzling because the specific interests of the minority shareholders are not typically threatened by management but rather by the bidder, and, accordingly, it is the mandatory bid rule rather than the non-frustration rule that is regarded as an appropriate regulatory measure for a protection of these against exploitation in a takeover situation. However, putting aside the question of minority protection, the issue of protection of the interests of *all* shareholders against exploitation by management remains a valid one. In this regard, the position of the author may be summarized as follows. First, *full* harmonization of company law and/or takeover law is not necessary and probably not even possible within the EU. On the other hand, given the U.S. experience, *full* regulatory competition in takeover law is also not a desirable alternative. As a solution, Forstinger proposes a middle road in the form of what she calls "reflexive harmonization." She defines this as a regulatory approach that "uses both centralized regulation of minimum standards to overcome market failures … and some degree of self-regulation to preserve space for autonomous governance at member state level" (p. 158). Although this is a cumbersome process, reflexive harmonization is regarded as rewarding and the most efficient way to progress in creating a EU takeover law. It allows for local level experimentation and thus takes the differences in governance structures among the member states into account. Furthermore, in accordance with recent proposals of Bebchuk and Ferrell, the author sees it as a positive way to enhance shareholder choice (pp. 162–166).

Regardless of whether one agrees with the author's analysis in all its facets, the solution proposed is at least *one* credible way for European legislators to proceed with takeover regulation. Some vexing questions remain open, however: What exactly should be regulated by legislation and what should be left for self-regulation? Does a strict neutrality rule necessarily have to be complemented by a mandatory bid rule? Given the dynamic developments in this field in Europe, this topic presents a "moving target" in many aspects. For a treatise published in 2002, the book is definitely up to date: it reliably covers events in all jurisdictions addressed through approximately late autumn of 2001 – an achievement in itself. The *Centros* decision of the ECJ of 1999 is naturally analysed in detail; unavoidably, the follow-up decisions of *Ueberseering* (2002) and *Inspire Art* (2003) are not, though both have had a major impact on regulatory competition in company law within the EU. The German takeover law is addressed on the basis of the 2001 legislative draft rather than the somewhat altered final version. With respect to the proposed Takeover Directive, developments are discussed up to the definite rejection of the amended proposal by the European

Parliament in July 2001; the Commission's renewed proposal of October 2002 was released after publication. However, the author's predictions about future trends in these areas are remarkably close to what has actually happened, thus guaranteeing rewarding reading nonetheless.

Harald Baum
Hamburg

M.C. Bianca and S. Grundmann (Eds.), *EU Sales Directive. Commentary*. Antwerpen: Intersentia publishing, 2002. 386 pages + xiv. ISBN 9050951937. EUR 77.

This book is a Commentary by distinguished scholars from different legal families in the EU on a Directive which affects contract law of the Member States in its heart. The book is unique in the sense that it is published in four languages: in French by Bruylant, in German by Otto Schmidt and in Italian by Giuffrè. The annexes to this English version contain the text of the Directive in the three other languages and the English version of the United Nations Convention on Contracts for the International sale of Goods of 1980 (CISG). The book contains an article by article commentary preceded by the text of the Sales Directive and an extensive introduction, mainly by Grundmann, with a contribution by Gomez (economic analysis of the directive) and by Bridge and Hondius on main transposition problems in Great Britain and the Netherlands.

In the Commission's Action Plan on European Contract Law (COM(2003)68 final), a common frame of reference, establishing common principles and terminology in the area of European contract law is seen as an important step towards the improvement of the contract law acquis (para 59). Most of the examples of (inconsistencies) in the acquis, mentioned in the Action Plan, are drawn from consumer directives (doorstep selling, time share, distance selling, unfair contract terms, product liability directives). The Commission also refers to its Communication on Consumer Policy Strategy for 2002–2006, where it emphasized the need for greater convergence in EU consumer law, which would notably imply the review of existing consumer contract law, in order to remove existing inconsistencies, to fill in gaps and to simplify legislation (para 73). The latter Communication indeed suggests a review of existing consumer contract law in order to remove existing inconsistencies, to fill gaps and to simplify.

In the approach suggested in the Action Plan (a mix of non-regulatory and regulatory measures) the Commission mentions the improvement of the quality of the acquis, the promotion of the elaboration of EU-wide standard contract terms and further reflection on non-sector specific measures such as an optional instrument in the area of European contract law. Again the Commission refers to the Unfair Contract Terms in Consumer Contracts Directive. Standard terms should be in conformity with this Directive, where it applies. The Commission will publish guidelines reminding the persons concerned that certain legal limits apply to the drafting of standard contract terms. The Commission also rightly refers to the competition rules in this respect. All this raises the question to what extent a specific approach of consumer contracts is desirable. The EU Sales Directive, Directive 1999/44/EC of the Parliament and Council, on certain aspects of the sale of consumer goods and associated guarantees, discussed in this book is a good example of the relevance of this question. The concept of consumer in this Directive (see Art. 1(2)a)) is defined as follows: "consumer shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession." This definition corresponds substantively to the definition of consumer in the other consumer law directives. It includes professionals who act outside their business.

In his introduction, Grundmann observes that the consumer protection character of the sales Directive cannot easily be brought into line with the fact that virtually all solutions in this Directive are the same as in the CISG (the UN Convention on the International Sale of Goods, although this author admits that there are some important differences as well, like e.g. binding nature of the legal guarantee: Art. 7of the Directive). He advocates an integrated system in which transactions between professionals and consumers and between two professionals are as far as possible regulated in a parallel way. He stresses that modern codes – since the Italian Codice civile of 1942 – no longer segregate commercial law from general private law (p. 30–31). It is submitted that the necessity of convergent rules for consumer contracts and contracts between professionals, is exacerbated by the existence of a third category of contractual relationships: contracts between non-professionals, contracts which by definition are governed by general private law.

Member States should have implemented this Directive not later than January 2002. Not all Member States have done so. Preliminary references to the ECJ on the interpretation of the Directive will undoubtedly follow. In many respects this book will give valuable guidance to those who have to apply the national implementing provisions. First, in the introduction, the Directive is put into context (of international sales law, Community consumer law and national sales and consumer law) which will facilitate the delicate exercise of changeover to often new concepts. Second, there is the comparative approach. It was obviously not the editors' ambition though to produce a comprehensive comparative analysis. In a book of 386 pages (including annexes) this would have been impossible. Instead each article has been assigned for commentary by one (or two) authors. Inevitably each author looks at the specific provision of the Directive primarily from the angle of his or her national law, although all contributions contain extensive comparisons between different legal systems (see in particular Grundmann, Bianca, Hondius, Luna Serrano, Stijns and van Gerven) and discuss, where appropriate, the relationship with other instruments of Community law and/or the CISG.

The (expected) implementing problems with this Directive are well explained by Serrano in his commentary on Art. 1: the harmonization is partial (heavy arrangements of national law will be required where other aspects of sales law will remain unchanged) while Member States remain free to provide for more far-reaching consumer rights (minimum character of the harmonization in Art. 8(2):Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by the Directive, to ensure a higher level of consumer protection). In this respect attention should also be paid to Art. 8(1): the rights resulting from the Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability. In his comments (p. 269) Grundmann rightly refers to the Product Liability Directive, which contains a similar provision (Art. 13). In this respect attention may now also be drawn to the April 2002 judgments of the ECJ concerning the latter Directive: Case C-183/00, *Commission* v. *France*, C-52/00, *Commission* v. *Greece* and C-183/00, *González Sánchez*. In these judgments the Court stressed that the as far as product liability in the proper sense is concerned (but leaving unaffected the additional possibility to apply general contractual or non-contractual liability rules) the Product Liability Directive, unlike the Unfair Contracts Terms Directive – and now indeed the Sales Directive –, achieves *complete* harmonization. It can be predicted that questions as to whether Member Sates have correctly implemented the (minimum harmonization) Sales Directive will therefore be even more difficult to answer.

The EU sales Directive also raises the following fundamental question: should consumer contract law be a test field for the improvement of the acquis, as it now seems to be? The answer is double: EC consumer law should be made more consistent. This may be a learning process for further action in the field of European private law. But at the same time the

necessity of specific rules for consumer contracts should be critically evaluated in the light of efficiency, efficacy, the coherence of the system of contract law, the objectives of consumer policy and the relationship between rules and principles of contract law with extra-contractual matters (like advertising and commercial practices). At different points the book reviewed contains this critical evaluation, it is one of its important merits.

A final remark from the author of this book review: the Europeanization of Consumer contract law – or contract law in general for that matter – should not be limited to questions of drafting (an optional) Code. A high level of consumer protection (soon to become a constitutional principle of the Union) also supposes research into how instruments of consumer redress function in real life. The results of that research may tell us to what extent we need more "unification". The research also includes questions of private international law, the comparative study of cases (of the highest courts in the Member States) and the relationship between the application of consumer contract rules and the basic freedoms of the EC Treaty (especially free movement of goods and free provision of services).

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Nele Dhondt, *Integration of Environmental Protection into other EC Policies*. Groningen: Europa Law Publishing, 2003. ISBN 9076871159. EUR 98.

The subject of this PhD thesis is one of the central – although often neglected – issues of environmental Community law. Since nearly all EC policy matters have a considerable impact on the environment, environmental policy can not just be identified with measures under Title XIX of the third Part of the EC (Arts. 174–176). Therefore, since the Single European Act the EC contains an "integration clause or principle", the wording of which has continuously been strengthened. With the Treaty of Amsterdam, the clause was moved to the front (Art. 6), to make clear that it is a general principle of EC law, that "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Art. 3, in particular with a view to promoting sustainable development". Ms Dhondt has thoroughly examined whether and to what extent Art. 6 EC requires the Community policy maker to adjust policies so as to ensure that they are compatible or even supportive of environmental policy. The outcome of her research is a book of more than 500 pages; however, before being "frightened" by this fact, one should realize that a relatively large part of the contents are intermediary introductions, summaries and conclusions. These intersections make it easier for the reader to get into the author's line of thoughts at nearly any part of the book and to understand where one stands within this line – or one might rather say within the "spiral", because the logical structure of the book can be seen as a spiral than a line, insofar as the author often takes a look back to former findings and combines them with new ones.

For any one dealing with EC environmental law, practitioner or academic, the first substantive chapter ("The Content of Article 6 EC") is particularly worth reading. It treats the genesis of the principle, its scope and *ratio legis*, and the related definition of "environmental protection requirements" as well as the meaning of the term "integration". In brief, the conclusions are the following: The scope *ratione personae* lies with the EC institutions, but Member States also have a (passive) obligation to refrain from (counterproductive) measures. With regard to the scope *ratione materiae*, the author states with some unease that it covers neither activities based on Art. 308 EC, nor any activity under the "second" or "third pillar" of the EU. In this context, it is noteworthy that the Draft Treaty establishing a Constitution for Europe of July 2003 provides for an extension of the integration principle to all

EU policy areas (Art. III-4: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities referred to in this Part, in particular with a view to promoting sustainable development"). Of course, the book was completed before the publication of the Draft Constitution.

The *ratio legis* of Art. 6 points to ("with a view to…") the concept of sustainable development. In a particularly interesting part of her book, Dhondt examines this concept in the light of international law and the definition found by the Brundtlandt Commission, while avoiding a simply transfer of those definitions to EC law. Her thesis is that the overriding aim of the principle in EC law is "the reconciliation of the Community's ecological objectives with its socio-economic ones". I am tempted to say that one cannot recall this too often. She then defines "environmental protection requirements" correctly as the objectives, principles and criteria laid down in Art. 174 (1)–(3) EC. Probably the most important and excellent part of the book is on "What is integration?". Dhondt presents three possible approaches to this question: a "weak interpretation", according to the environmental requirements "must be taken into account", a strong one ("must be observed") and a "very strong" interpretation ("should be applied at all times"). She very convincingly argues that the second interpretation "seems" the most plausible one" (having read her arguments, one would indeed want to say it "*is*"). If taken seriously, thus, Art. 6 can have very important impact on all sorts of EC legislation. Besides on numerous elements of literal, contextual and teleological interpretation, this conclusion is also based on a comparison with other so-called "horizontal clauses" in the Treaty. Dhondt has worked out convincingly that Art. 6 is the strongest clause. In this respect, it might be called misleading if those other clauses are sometimes also named "integration clauses". In any case, the findings on Art. 6 may not easily be applied to other integration clauses.

In the next Chapter, the "legal consequences" of Arts. 6 and 174 EC are set out. In particular with regard to this part, I may come back to what I said above on the "spiral structure" of the book, because it deals with similar issues to the foregoing Chapter, while further developing them and putting them into more concrete terms. This method is very appropriate for a matter as complex and "holistic" as the integration principle. It makes the book useful both for teaching purposes, for achieving a comprehensive view into the various questions and problems, and also as a reference work. However, for the latter function, the book would be much more usable if the structure of the table of contents had been presented more clearly, e.g. by using different fonts and/or tabs for different levels within the structure. Under the current presentation, one has to study the table of contents quite a while, before being able to find an answer to a certain problem. But this minor point might also fall into the publisher's sphere of responsibility. On the whole, the language and readability of the book is fine; the only aspect hindering the "reading flow" is sometimes an excessive use of the expressions "it seems" or "it appears". Relying on her thorough analysis, the author could have afforded to sometimes be more affirmative. Again, this does no harm to the excellence of the work.

Chapter 3 also contains a remarkable and successful attempt to apply certain legal theories on the relation of rules and principles (particularly Dworkin, Hart and Raz) to a practical problem. One might ask, why the author has concentrated on those legal theories while more theories might be available concerning the definition and delimitation of rules and principles. But there is nothing to say against such an approach in a PhD thesis, as long as the sources and legal theories are clearly identified without excluding other possible theories. Dhondt does not overweigh those theoretical assumptions, but she turns back to look at possible "institutional support" for her preliminary thesis that Arts. 6 and 174 as can be seen as "legal principles" with considerable legal consequences. She rejects a view sometimes to be found in literature, according to which those Articles are merely "political guidelines". Then, she takes a close look at the case law of the ECJ and finds her thesis partly supported.

She concludes that, except for the criteria of Art. 174(3) EC, Arts. 6 and 174 qualify as "legal principles". They "do not apply "mechanically" or "in an all- or nothing fashion, but rather point to a direction". Thus, the Community has a wide discretionary power, but "it would seem impossible to systematically disregard the environmental principles". One may regret a little bit that, when dealing with the further consequences of these findings, the author rapidly goes over an issue which can be of growing importance: the interpretation of EC law (which formally can be seen as "non-environmental law" as the author calls it), where there is a scope for more and less environmentally "friendly" interpretations, or where lacunae can be identified. One would assume that it follows from Dhondt's conclusions and from the principle of interpretation of secondary EC law (legislation) in line with primary law (here: Art. 6 EC), that in cases of doubt EC legislation should be interpreted in such a way that it is compatible with Arts. 6 and 174 EC. Unfortunately, the book does not go further into this matter – perhaps occasion for other legal researchers.

In the third part of the book, which makes up almost half of its quantity, the author applies her theses to three selected policy areas: Common Agricultural Policy, Transport Policy and Energy Policy. The examples given are instructive and of practical importance. Apart from the above-mentioned fact that the issue of interpretation falls short, they give an overview of the variety of problems which have arisen. It is not possible in such a work to cover all relevant policy areas, but it can be left to the readers' imagination to discover examples from the remaining policy areas (such as internal market, public procurement and tax law, for instance). Indeed many relevant questions have already arisen in various areas. It would, therefore, be useful if more people, not only environmental lawyers, look at this book.

M. Wasmeier
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E. Brouwer, E. Catz and E. Guild (Eds.), *Immigration, Asylum and Terrorism. A Changing Dynamic in European Law*, Recht & Samenleving series 19. Nijmegen: Centre for migration law of the University of Nijmegen, 2003. ISBN 9071478726. EUR 30.

"Security", like "freedom" or "equality", may be described as an essentially contested concept. The various meanings attributed to it are not merely the consequence of different political commitments and beliefs of individuals along a Right/Left spectrum. Notions of security are influenced by broader cultural factors, as well as by the socio-economic and professional environments. A very complex interplay of beliefs and perceptions therefore emerges.

The book reviewed here, which is divided in ten chapters, could not be more timely and pertinent. The book aims to document and comment the first reactions of several European States and the US Government with respect to the treatment of immigrants and asylum-seekers following the 11 September 2001 events. The main questions put are:

To what extent did the terrorism measures change the legal status of immigrants and asylum seekers?

To what extent do historical, cultural and political factors play a role in the varying response, including the national political situation at the time?

What kind of government was in power in each country analysed; were elections imminent?

To what extent did the individual countries and or the EU as a supranational organism follow the US?

What was the public debate on matters of asylum and immigration; to what extent did a racist discourse surge following the events?

To what extent did some countries feel directly responsible with regard to the events of 11 September (e.g. some of the 11 September terrorists had been previously legally residing in Germany).

The authors very competently and thoroughly analyse how a predominance of a security rationale over that of freedom predominated in Europe and the US following the 11 September events. In the case of Europe, the analysis takes place comparatively both at Member State level (France, Germany, Italy, Netherlands and the UK) as well as in the supranational debate. Four of the countries analysed, Germany, Italy, France and the UK have had their own individual experiences with terrorism at the national level in the past. However, since 11 September 2001, terrorism and acts of political violence have taken a more transnational dimension, therefore other countries now also feel concerned and are drawn into the debate which is taking place both at European as well as at the transatlantic levels.

What emerges very clearly from the analyses carried out in this book is that in the debate on terrorism in Europe two parallel processes are taking place: the "Europeanization" and "externalisation" of what were traditionally labelled as "internal security" issues. Terrorism, since 11 September, is no longer considered as coming from within the State concerned but also from the outside. This is why the debate on terrorism has a spill-over effect, as shown clearly by this book, on policies in the fields on immigration and asylum. The Europeanization and the externalization of internal security have had a major impact on structures, methods and contents of the policy-making process in the field of justice and home affairs. Europeanization of the (perceived) threats has been the central incentive (and crucial legitimizing argument) to reinforce and institutionalize the already existing European cooperation in that field. The externalization of internal security issues created an incentive for national law enforcement agencies, whose activities had been exclusively concentrated within national borders, to devote an increasing share of their institutional and operational efforts to the international arena.

The book concludes with a chapter by Guild on future perspectives, whereby she drew on a number of important developments in the relationship of the State with the individual to evaluate what these could imply for the future of the European Union and its third country nationals.

Joanna Apap
Brussels

D. Fairgrieve, M. Andenas and J. Bell (Eds.). *Tort Liability of Public Authorities in Comparative Perspective*. London: BIICL, 2002. 581 pages. ISBN 0-903067-72-2. GBP 85.

This book contains papers, most of which were presented at a BIICL-UKNCCL conference in June 2001, concerning developments in government liability. The nature of the contributions has resulted in some repetition but the essays are individually interesting, stimulating and, in the main, complement each other. The book is divided into four sections: the first deals with human rights and liability under English law; the second deals with European Community law influences; the third part compares systems and the fourth contains reports from selected countries. In his introduction, Bell concatenates themes of the writers which are not quite congruent. There appear to be two trains of enquiry in the collection that do not sit easily with one another. The first is a critical examination of public authority liability under English law which is then compared with other systems. The second is a consideration of the degree to which a common tort law is emerging within Europe. The third section of the book contains two key contributions, by Caranta and Markesinis, which give coherence to the collection. Markesinis explains the methodology of the comparative approach and Caranta clarifies the types of claim under discussion.

According to Markesinis, comparative study requires the identification of factually similar cases which have been considered by the courts in the legal systems to be compared, which he categorizes as the first circle of investigation. The second circle comprises the legal argument of the case as characterized by differing concepts, notions and legal reasoning. The third circle of investigation confronts the core issues of political, social, economic and moral debate underpinning the legal reasoning of the second circle. Through such investigation, differing outcomes in factually similar cases may be explained and may inform judicial decision-making in the future. In a wide-ranging survey, Caranta categorizes governmental liability in three areas and compares their treatment in the legal systems of France, Italy and England. The first category is the illegal administrative measure which may be susceptible to judicial review or damages (the *Factortame* situation); the second is the illegal administrative decision which forms part of a scenario causing damage but where judicial review, if available, cannot provide redress (the *Three Rivers*, *BCCI* situation); the third is the execution of a task or delivery of a service pursuant to an administrative decision (the *X Minors*, *Osman*, *Phelps* situation). In the main, the papers in this collection deal with claims falling into the third category, particularly: child protection and special needs and police investigations in England, France, Germany and the USA. Markesinis argues that, within this third category, social solidarity demands the compensation of citizens suffering damage as a result of administrative activity. This "can never be a wrong use of public money", and it may be "the best possible use of public money" to compensate those who "have randomly been affected by administrative action". This compelling proposition informs much of the debate contained in the collection. The problem then is how to achieve social solidarity in systems where it is absent when, as Markesinis and Stewart note, judges are rather less inclined than they used to be to take account of judgments of other jurisdictions.

In the human rights section, Judge Costa deals with "just satisfaction" under the ECHR which will "alleviate the detriment" suffered by victims but is ineffective to address the inherent defects in the system. Essays concerning the English legal system amply illustrate the point. Case studies focus on the treatment by the courts of claims against public authorities where a duty must be shown, but a statutory duty has given rise to blanket immunities, and a public duty of care in negligence is limited by control factors of public policy. The failure of administrative law and tort law to provide a satisfactory remedy in compensation against public authorities conflicts with requirements both under the ECHR and EU law. Hickman discusses the tension between notions of duty and the jurisprudence of the ECHR. He notes a shift in favour of the protection of the individual so expanding the role of negligence where the courts have been reluctant to countenance new actions based on modern political and human rights. As a result, negligence has tended to permeate all claims in tort, even those actionable *per se*, such as trespass, permitting the intrusion of tests of reasonableness. In the *Osman* case, the ECtHR had ruled that the finding of no duty of care in negligence had resulted in the creation of an exclusionary rule or immunity restricting the right of access to a court in breach of Art. 6. Wright provides a critique of the ruling in the case of *Z* v. *United Kingdom* reversing *Osman*. Formalistic and out of step with Strasbourg jurisprudence, the judgment was justified because English courts have developed claims in negligence, and immunities were not being applied to public authorities. However, not all rights are actionable under the residual HRA remedy so, Wright argues, the common law needs to reflect Convention rights in order to protect the individual. Fairgrieve examines the availability of damages under the HRA. It is not clear what type of action the HRA has created: breach of statutory duty, a public tort for breach of Convention rights, or, as Fairgrieve prefers, power to award damages for unlawfulness. The uneven awards of damages emanating from the ECtHR stems from flexible rules on causation. Such flexibility could be adopted by the English courts as they did previously in breach of EU law claims. A flexible

approach would enable the UK courts to find new solutions. For example, the case law on solicitors' negligence, causing loss of opportunity to institute or defend proceedings, could be used to formulate analogous lost chance claims under the HRA. Difficult standards of causation would not have to be met and second-guessing the outcome, had the claim proceeded, is avoided.

In the European section, Amos traces the development of the Eurotort. Van Gerven identifies a nascent Common European tort law emerging from remedies for breach of rights under EC law and the ECHR, the use of comparative law and the adoption of harmonizing legislation all of which have tended to lead to a convergence and homogeneity between integrating European States. Tridimas looks at developments in liability for breach of Community law by both Member States and Community Institutions. Whilst the first generation of cases on State liability protected rights through equivalence and effectiveness, the second generation is characterized by "selective deference" and the elaboration of causation, although the ECJ has provided no systematic principles of causation. The problem with these essays is that they deal with cases falling within Caranta's first category: the legislative act or omission within the single internal market. The writers have not explained whether the principles developed in that category ought to be applied to Caranta's third category of case which, in any event, scarcely exists at EU level. The EU system of liability requires demonstration of illegality but, like the English system, this is not sufficient to engage responsibility whilst, conversely, fault is insufficient without proof of illegality. This section is concluded by an essay by Andenas and Fairgrieve who look at the *BCCI* case, a second category case of supervisory powers. The failure of the English courts to adopt a comparative approach and refer to other jurisdictions' interpretations of the First Banking Directive in assessing the claim of misfeasance in public office in the BCCI claim is regretted. Nonetheless, the authors see an increasing use for the tort given the shortcomings of the negligence action.

The comparative section opens with a study by Markesinis and Stewart, taking us back to Caranta's third category claim, of English and American tort liability for negligent misdiagnosis of learning disabilities. Such claims usually come from the poorest and most vulnerable members of society. The public policy defences of economy, inhibition, discretion and alternative relief, have been well rehearsed on both sides of the Atlantic. The authors point out there is little empirical evidence to support them and, taking each turn, largely debunk them. These misdiagnosis cases are revisited by Fairgrieve later in the book. The shift away from the duty concept as the overriding control mechanism in the tort of negligence, has been accompanied by a more sceptical view of policy arguments, so that *Caparo* and *Bolam* are now determinative of responsibility. Caranta notes that while the English courts labour between public law illegality and private law responsibility, French law has taken a far more vigorous approach. French law treats first category cases showing illegality as amounting to fault engaging liability. In second category claims, supervisory powers are defined and then conduct is measured against general standards of diligence which have abandoned *faute lourde* in favour of *faute simple*. In the third category, where injury has arisen from the performance of operational tasks or the provision of services to the public, the basis of responsibility is negligence in the sense of fault in failing to meet standards identified by the courts. In such cases, liability may be strict as, for example, in medical negligence even where the procedure was non-essential and at the request of the individual. The attractions of this system for the claimants in *X Minors* are obvious. The very lucid contribution by Surma compares the English and German judicial approach in third category cases. Following the Markesinis model, he takes the *Hill*, *Elguzouli-Daf* and *Stovin* cases comparing them with three similar German cases. The German courts have taken a different view of public power which is perceived as comprehensive and far-reaching with the potential to interfere with the rights of the individual who deserves protection. Whilst the

defensive argument persuades the English courts to deny public liability, the German courts have deployed it to protect the administrator from personal liability, but not to deny state liability. A contextual study of New Zealand and English claims against child welfare agencies is presented by Atkin and McLay. They observe that there has been no success in the articulation of a single, coherent principle in other areas of negligence and that there can be no one approach to common law liability in the family law context. The priorities of family law are not always clear and not always consonant. The problem for the courts is to decide whether the imposition of a private tort duty would cut across the scheme of modern family law. The section concludes with the essay by Markesinis who, drawing on research by Fairgrieve, turns to the third circle of investigation to find that the policy considerations that deny liability in the English system are inherent in French legal concepts but have not resulted in the denial of liability.

The final section of the book is rather a mixed bag: Fairgrieve analyses recent developments in education cases; Brodie looks at omissions to act; van Dam, Goldberg and Brüggemeier give useful overviews of public liability in the Netherlands, USA and Germany respectively. Gilead describes the Israeli system derived from the law of the British Mandate where there is a dual-system of judicial review either under tort or administrative law. The same policy considerations and many of the excluding mechanisms familiar from the English system are found here. Gilead describes a second category case of state supervision of a private insurance company. He indicates that the 1992 Basic Law: Human Dignity and Freedom provision may have an effect on liability but it would appear that the courts have yet to consider its import.

There is great disparity in claims against public authorities set out in these papers. They range from the abused child to the package-holiday tourist to bank investor, and suggest that a single uniform approach to tort liability is neither appropriate nor achievable. The essays contained in this book set out vital issues that wealthy, sophisticated societies must address: how we view the communities in which we live and those with whom we share a life. Almost alone amongst the contributors, Gilead argues for a restrictive approach to State liability but, having read the essays, it would be difficult to sustain such a position. This collection deserves the attention of academics but, more importantly, should be read by those practitioners who are forging the law and have the ability to change the relationship between State administrators and the most vulnerable members of the public whom the administrators are employed to serve. Markesinis has shown that the same political, social and economic issues are at the core of legal considerations in all systems. The divergence between the French and English systems can be traced back to the 1960s when France adopted a consumerist vision of public liability espousing ideas of "equality, socialization of risks and social solidarity", which translated into1990s legislation protecting terrorist and AIDS victims. The arguments in this book would, surely, also persuade the UK legislators to rethink public liability.

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Paul Magnette, *Contrôler l'Europe. Pouvoirs et responsabilité dans l'Union européenne*. Bruxelles : éditions de l'Université de Bruxelles, 2003. 175 pages. ISBN 2-8004-1306-9. EUR 16.

For many years, in the works he has written or edited, Magnette has been "thinking Europe" or "rethinking Europe" in terms of what is most fundamental in European integration as an emerging political system: citizenship, democracy, the constitution. It is in this vein that he has written *Contrôler l'Europe. Pouvoirs et responsabilité dans l'Union européenne*. The

opening sentence of the book gets straight to the essential question: where, in the final analysis, does the legitimacy of a political system stem from? Magnette takes as his starting point the resignation of the Santer Commission, which was viewed as an expression of a crisis of legitimation in the sense of Habermas' analyses, and an event which revealed the structural deficiencies of the European political system. It is analysed in all its constituent parts in order to ascertain whether it is possible to derive from it a general theory of political responsibility, or of accountability, which could be applied to such a complex political object as the European Union.

The book is divided into two parts, bringing to light first of all the resources of responsibility by the parliamentary way, and then those resulting from "the vigilance of private individuals" to use the expression from *Van Gend en Loos*. The author does this without necessarily following the current trend of favouring a "post-parliamentary" vision of the political destiny of the Union. Magnette shows that it is difficult to establish a global doctrine of parliamentary responsibility applicable to the European Union. A clear analysis of the 1999 crisis brings out first of all the ambiguity of the half-political, half-administrative nature of the Commission, as well as the half-judicial, half-political character of the censure. The Commission is one of the most monitored executives in the world. The problem, therefore, is not one of a monitoring deficit, but rather of a failure to signify the existence of this monitoring, due to the absence of identity of the Commission. It could be thought that the proposed reforms, in particular the election of the President of the Commission by the European Parliament according to European election results, may clarify the situation. The Central European Bank provides Magnette with the possibility of offering us some instructive reflections on the relationship between responsibility and independence. While the Central Bank is independent in order to be free from political pressures, it nevertheless has to be accountable. Democratic control here has to be devoid of any notion of sanction or censure, and is based entirely on transparency, publicity and motivation. This has to be done in a spirit of responsiveness and not of responsibility, something which requires a genuine effort on the part of an institution which tends to feel more comfortable working in a climate of secrecy. Furthermore, how can these parliamentary monitoring techniques be developed with regard to institutions which, just like the Council of the European Union, are of an intergovernmental nature? While it is comparable at times to a diplomatic conference where decisions are unanimous, the Council is also increasingly one of the two branches, with the European Parliament, of the Union's legislative power. If, in this case, the Parliament has to develop a practice of influencing legislative work, it is up to national parliaments to monitor the governments of member states for the rest. We know that procedures have been developed in the different States, but a parliamentary system still needs to be organized here, a network of parliaments, which would view the relationship between the European Parliament and national parliaments in terms of complementarity rather than of competition.

The difficulties involved with trying to find standard solutions of effective and coherent monitoring of the Parliament explain the success, over the last decade and a half, of mechanisms which solicit the vigilance of private individuals. On the face of it, the jurisdictional way appears particularly attractive, knowing, as we do, what the jurisprudence of the ECJ meant for the bold construction of the legal order of the Community. Could it be relied on henceforth to consolidate the political system of the Union? The book chooses to examine two particularly significant themes, because they constitute potential vectors of a new culture of political monitoring: European citizenship and transparency. It notes that jurisprudence is more demanding with regard to transparency, around which the living strength of civil society is really mobilized, than it is with regard to the development of citizenship. It is true that the author does not take into consideration the acknowledgement of direct effect for the measures instituting citizenship of the Union implemented by the Court on 17 September 2002 (*Baumbast*).

Although this aspect too has not really been developed by Magnette, we wonder whether the question of the access of private individuals to the Community courts is a crucial one. It would be desirable that the position of the CFI here (*Jégo-Quéré*), prevailed over the "self-restraint" of the ECJ (*UPA* , and *Jégo-Quéré* appeal). The conclusion, in any case, prompts us to be sceptical where the mere resources of the jurisdictional way are concerned, and encourages us to contemplate other means.

These other ways, those of the Ombudsmen or the right of petition, are not entirely conclusive. While petition remains a marginal instrument, it must be said that the Ombudsman of the European Union, on the other hand, has developed a culture of transparency and responsibility in the space of a few years and that it has been able to transform its mission. From its initial role relating to the limited resolution of individual cases of "poor administration", it has become "the conscience of European citizenship", promoting a culture of "good administration". However, these kinds of instruments, while positive, can be no replacement for parliamentary responsibility. And that is what this book drives at. Even if he remains balanced, the author touches on the movement of "New European Governance", which, for some, could offer an alternative to the concept of parliamentary monitoring by multiplying the processes of transparency, participation and consultation. Magnette considers that the procedures of mediation, of petition or of transparency can complement the standard forms of political monitoring, but can by no means replace them.

We agree wholeheartedly with the author on this point, while pushing our caution even further and seeing in this "new governance" not only a new conception of the control of public action, but also a new conception of public action itself, as well as a new conception of the legitimacy of the Union. The "post-parliamentary" notion which rejects the political dimension is added to a "post-legislative" notion which advocates the development of regulation, or of co-regulation. And we realize that in this kind of process, the consideration of "organized civil society" replaces the consideration of the European citizen.

The conclusion of this book is strong: if it is the absence of a true European political identity which has led to a situation where it is considered impossible to put in place a true European democracy, then that identity simply has to be constructed. And Magnette insists on the illusion that accountability may have to be conceived of without electoral sanction.

The adoption of a European Constitution, which may take place soon, the recently adopted statute for European political parties, the possible election of a President of the Commission according to voting results, and that of a President of the European Union, all seem to be heralding a period of reform of the political dimension of the Union, when Magnette's useful reflections will take on their full meaning.

Marc Blanquet
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F. Breuss, G. Fink, S. Griller (Eds.), *Institutional, Legal and Economic Aspects of the EMU*. Research Institute for European Affairs Publication Series, vol. 23. Vienna: Springer-Verlag, 2003. 346 pages. ISBN 3-211 –83856-2. EUR 64.

The recent rejection of the Euro by the Swedish electorate and the mounting concerns about persistently bad budgetary situation in a number of large Member States remind us that Economic and Monetary Union and its success so far is far from undisputed. Considering the conceptual and operational difficulties involved, EMU remains an attractive area of study of Community law. The economic rationale of the institutional structure provided for by primary and secondary Community law in this field calls for a multidisciplinary analysis involving both legal and economic scholars. Indeed, it could be observed that here even more

so than in other areas of European integration law is merely the vehicle by which economic objectives are transported. The book intends to offer such a multidisciplinary approach by examining legal and economic issues surrounding EMU. Under four themes including (1) the institutional and legal set-up of EMU, (2) its fiscal policy framework, (3) monetary policy, financial markets and payments systems and (4) Enlargement and EMU, the work compiles ten separate contributions.

The book highlights that the focal point of discussions concerning EMU has shifted from the observance of the institutional structure and the underlying economic rationale to more mature in-depth analyses of particular legal and economic issues mostly, albeit not all, having emerged from the implementation and application of the rules governing economic coordination and the conduct of a single monetary policy in EMU.

Dutzler's contribution summarizes and analysis the discussion on the legal position of the European Central Bank in the Community legal order which was sparked off by a controversial contribution to this *Review* by Zilioli and Selmayr (37 CML Rev. (2000), 591–644), in which the latter had exclaimed the European Central Bank to be an independent specialized organization of Community law. While finding some support in the EC Treaty for the view that the ECB can be considered a "new community" Dutzler doubts that the drafters of the Treaty on European Union by insulating the ECB from political influence intended to exclude the latter from the Community framework. Indeed, these doubts have been confirmed since by the ECJ in its judgment in *Commission* v. *European Central Bank* (C-11/00), regarding the question whether the right of internal investigations vested in the European Anti-Fraud Office (OLAF) extends to the ECB. The Court stated rather bluntly that the "…the ECB, pursuant to the EC Treaty, falls squarely within the Community framework."

The ECB has not only been the focal point of discussions regarding its degree of independence and position inside or outside the Community framework, but likewise for its conduct of monetary policy. Breuss revisits the two-pillar monetary policy strategy currently pursued by the ECB which assigns a prominent role to the money growth rate in the assessment of risks to price stability and, moreover, relies on a broadly based assessment of the outlook for price developments. This strategy has been criticized not only by academics, but also by the markets for its lack of transparency and, indeed, efficiency. While sympathizing with those commentators which are in favour of abandoning the money growth target, Breuss puts more emphasize on the need for a reorientation of monetary policy to target "core" rather than "headline" or total inflation, thereby optimizing monetary policy and increasing the economic outcome in the EU. Analysing the monetary policy stands of the ECB throughout the 2000/2001 oil price shock, Breuss concludes that the targeting of "headline" inflation including such volatile sectors as food and energy has resulted in an overly restrictive monetary policy in the Euro area.

The success of a single currency arguably cannot only be measured by the extent to which it provides stability within the single currency area, but also by the role it plays internationally. One of the main issues in this regard has been whether and to what extent the Euro can fulfil the function of an anchor currency. Fenz offers an economic analysis of the single currency in the international arena as a vehicle and international financing and investment currency. While stressing the increasing importance of the Euro as an anchor currency he provides evidence that its role is still much linked to the region in which it is situated.

Indirectly linked to the ECB and its role as the monetary policy authority in the euro area is also the joint contribution by Badinger and Dutzler, which examines the status of the official foreign reserves held by the ECB and the national central banks participating in the euro area. Arguing that the existing level of reserves in the euro area is excessive and thus, could be reduced, the authors examine the question of ownership and the right of disposal of the foreign reserve assets held by the ECB and the national central banks. Indeed, the EC Treaty is rather vague in this regard, as Art. 105(2) 3rd indent EC merely assigns the task

of holding and managing the official foreign reserves of the Member States to the European System of Central Banks and thus both to the ECB and the national central banks. This is more than a purely academic question, since autonomous foreign reserve operations by the Member States and/or national central banks potentially affect and maybe even neutralize the single monetary policy of the ECB.

As well as the role of the ECB and the conduct of monetary policy in the euro area, the book focuses on the legal and economic rationale of the current rules in primary and secondary Community law on economic coordination. Here, one issue has recently dominated the discussion that is the application of the excessive deficit procedure as provided for in Art. 104 EC and Council Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure. Griller takes a closer look at the excessive deficit criterion and examines the effects which denationalization and privatization, in particular the shifting of public debt to a legal entity distinct from the state, have on the overall budgetary position of a Member State. Indeed, the fact that according to Eurostat, in 2002 five of the currently twelve Member States of the euro area were nursing government debts of above the 60% threshold, in two cases being above 100% (see www.europa.eu.int/comm/eurostat), highlights the need for a more effective supervision in this area. The seemingly technical but in practice rather important question discussed is whether and to what extent under the existing rules the accounts of public owned entities have to be included in those of the general government, thereby possibly contributing to an excessive government debt. The contribution anatomizes the difficulties involved under the current legal regime in classifying publicly owned entities and highlights the legal inconsistencies in the application of classification criteria.

Artis examines the development of economic coordination in EMU from a somewhat broader perspective. His challenging credo is stated in his first sentence, where he refers to the Stability and Growth Pact, which in its two Council Regulations lies down detailed rules for the application of the multilateral surveillance and excessive deficit procedure, as "…one of the most remarkable pieces of policy coordination in world history". In this context he considers the achievement of some credibility to be the most important accomplishment, whereby in his view the events of 2002 surrounding the application of the early-warning procedure to Germany and Portugal support this assessment. This is certainly not uncontroversial as for many critics it is precisely the extent to which the early warning procedure has in fact not been applied by the Council, which highlights the deficiencies of the present system of multilateral surveillance in the EU. Despite the overall upbeat view of the current system of economic coordination Artis also notes what he refers to as "signs of growing tensions". Maybe most notably, considering the imminent enlargement of the EU, is his critical appraisal of the current 3% excessive deficit criterion included in Art. 104 EC which in the author's view is not only a choice of reference value arbitrary beyond belief, but also one which may suppress public sector infrastructure investments vital for growth in the new Member States.

Arguably another structural deficiency in the current system of economic coordination is the asymmetric two-pillar structure of EMU whereby competences are shared between the Community and the Member States. While economic and thus fiscal policy in principle remains the responsibility of the Member States, economic policy coordination namely through Council and Commission in the context of the multilateral surveillance and excessive deficit procedure and the conduct of a single monetary policy by the independent ECB, put considerable restraints in their conduct of economic policy. Hallett and Viegi offer an economic analysis of this structure of EMU and make the case for closer inter-institutional coordination. Rethinking economic coordination in the EU will certainly also require more legal studies in this area.

If there is one development in Community law which is likely to have considerable impact on EMU in the years to come it must be Enlargement. Arguably the most prominent issues in this regard are the ability of the acceding states to join the euro area and the economic rationale for them to do so. Applying economic theory on optimum currency areas Mahlberg and Kronberger present a critical analysis of the ability of the Central and Eastern European countries to fulfil the economic conditions as laid down in the EC Treaty and, moreover, assess the economic benefits for these countries from joining the euro area. Haiss emphasizes the importance of financial sector integration for the acceding Member States as a prerequisite for their successful integration into the euro area. In his view the majority of prospective new Member States still face considerable challenges with regard to the creation of a functioning market economy. Yet, financial market integration may not only be an issue with regard to the candidate States, as Habacht, Hoffenberg and Schubert highlight in their contribution on the payment systems currently in operation in the EU. Indeed, they conclude that with regard to retail payments in commercial bank money the single currency area does not yet include a single payment area. The continued efforts by the Commission to establish a legal framework for the single payment area in the internal market provide evidence for this point.

A danger inherent in any compilation of different contributions on a topic as diverse as EMU is the lack of a clear link between the different contributions. The book largely succeeds in avoiding this pitfall, as an informed reader will find many links between the different submissions. The present short book review, which has not followed the system of the book, arguably serves as an example in this regard. While the book was published in 2003, it has to be assumed that in the contributions themselves developments have only been taken into account until mid 2002. Considering the fast developments in this area this may diminish the value of some analysis offered throughout the book. Thus, for instance considering the more recent development of the government deficit and debt positions it seems somewhat awkward when Breuss, based on data from autumn 2001, refers to "minor" deficit positions of some countries. The time leg between the drafting of the contributions and the publication of the book may also explain the lack of reference to some of the more recent issues raised, such as for example the reform of the system of economic coordination or the implications of the Draft Treaty establishing a Constitution for Europe for institutional structure of EMU as a whole.

All things considered this book keeps the promise that its editors make in the preface by offering a multi- and interdisciplinary approach to EMU. As such this book can only be welcomed as yet another contribution to the integrated studying of the highly complex issues surrounding EMU.

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B. Dutzler, *The European System of Central Banks: An Autonomous Actor? The Quest for an Institutional Balance in EMU*. Vienna: Springer, 2003. 293 pages. ISBN 3-211-83861-9. EUR 50.

The author of this interesting and well-documented book intended to analyse the ESCB in its environment in order to give an evaluation of the legitimacy of the System and to make some proposals for reform.

To the question raised in the title, the author answers that indeed the ESCB "must be called autonomous" in comparison with the Fed, which commands a "critical mass" of independence, the difference lying in the integration of the Fed in the political landscape of the US, as confronted with the situation of the ECB. 80 pages on 270 pages of text are

dedicated to the lessons to be drawn from the Federal Reserve System. They are among the most interesting developments at least for the European reader. Part One is a description of the System and its Powers. Dutzler adopts the present trend of the literature that, contrary to a first wave of commentators, recognize some "reality" in the System, although described as a hierarchical one. On the objectives of the ECB, she opposes the way legal writers assimilated "non-inflationary" with "inflation-free", as if the ECB should foster a climate of zero-inflation, and the views of economists, and indeed of the Bank itself, favouring low inflation in order to avoid deflation (p. 29–30). Dutzler defends, rightly, the apparently still unorthodox view that it is not necessary that price stability be achieved at any cost before attempting the second objective (the support for general economic policies) (p. 37). This statement takes into account the fact that price stability is a medium term objective. It refers to the concept of "relevant time horizon" used by Wyplosz.

On the two pillar structure of monetary policy, the author quotes Issing saying as early as 1998 that "a short-term deviation from its (M3) reference value will not lead to a 'mechanistic' adaptation of the monetary policy" (p. 45). A philosophy that led, in the review of monetary policy in May 2003, to renounce publishing the figures for M3. Dutzler criticizes the two-pillar strategy of the ECB, not for the results achieved up to now, but for the "opaque structures" and the total discretion in the definition of the rule. An attitude not uncommon among the ECB-watchers. On the external competences, the analysis of Art. 111 EC can be generally shared, but I would hesitate to qualify the Bank for International Settlements as one of those "international gatherings of central banks" mentioned by the author (p. 61). It is an international organization to which, it is true, only central banks participate.

Part two is provocatively entitled "Controversial aspects". There are four: legal nature, democracy and independence, accountability and institutional balance. On the legal nature, she is closer to René Smits' views, exposed in his Amsterdam inaugural lecture of 4 June 2003 than to the writings of Zilioli and Selmayer on the ECB. One quotation will be enough: the ECB is "an independent institution (in the technical meaning?) of primary Community law, which functionally, by conducting one of the main tasks of the Community, is integrated in the framework of Community law... not a third party to the Community but an instrument of the Community set up to achieve its objectives" (p. 86). This is in line with the judgment of the ECJ in the *OLAF* case, and compatible with the provisions of the draft Constitution in this field.

The author develops her views on the autonomy as an additional layer to independence. It means "independence of the political will" (p. 105), a formula which appears either excessive or too vague. Anyway, the author intends to illustrate by that the "unprecedented degree of independence enjoyed by the ECB" (p. 107). The classification criteria are (i) the degree of determination of the ECB's objectives, (ii) the degree of accountability, (iii) the ECB's inclusion in a network of relationships (p. 108). Accountability is rightly held as the other side of the coin of independence, with the usual references to transparency, political accountability and, an addition: legal control, the potentialities of which should not be overestimated. For the author, the ECB manages "not to clarify the basic determinants of its strategy" (p. 121). It does not, like an accountable institution, feel responsible to convince the public about the appropriateness of its decisions. In so far, Dutzler justifies the concerns of the European Parliament. She doubts that the "links of communication are compatible with the democratic principle". She also observes "the ESCB can choose what appears appropriate rather than having the procedures imposed upon it" (p. 165). This judgment introduces the third part on the "Lessons from the Federal Reserve System", which includes not only a synthetic and well-written description of the Fed but also a comparison with the ECB. A quotation of J.A. Clifford (1965) sums up the philosophy of the Fed and the one the author favours for the ESCB: "Conflicts of authority are injurious to independence and difficult to solve. Unless they can be avoided by previous cooperation and coordination, the indepen-

dence of the system becomes subject to sacrifice. Ultimately, the independence of the Federal Reserve System will be as safe in such a situation and as useful in all situations, as the System is adequate in its explanations, cooperative in its actions, and accepted in its status." (p. 199). Particularly interesting is section II on the Fed's objectives, with the not surprising conclusion that "factually" since the collapse of the Bretton Woods arrangements, the Fed has had goal independence (p. 206). On accountability, let us mention the description of the modification of the Humphrey-Hawkins procedure of reporting to the Congress, the arrangements being brought in line with reality by the reform of 1999. The author observes that although "there are no inherent limits to the power of Congress to restrict the Fed's leeway in the pursuit of monetary policy", however "there is no substantial control of the Congress" (p. 243), an observation we have already done in 1988 and that finds two explanations: first, the Congress lacks the necessary expertise, and second and foremost, it does not want to enter into the details of day to day monetary policy, because it does not like to be held accountable for it by the voters. Curiously enough, Dutzler supports the view that for the European Parliament to ask for "full explanation and justification" of decisions taken by the ECB (including, writes the author, on realignments, which is not a competence of the ECB) would infringe the prohibition of giving instructions to the ECB (p. 245).

Part four is about *Evaluation and Outlook*. Dutzler opposes the integration of the Fed within the political landscape of the US to the "splendid isolation" of the ECB (p. 250). Those are strong words as when the author claims that the autonomous System is "critical according to the common understanding of democracy and accountability" (p. 252). Why this situation? Because of the elevation of the ECB to "constitutional dignity". Indeed, the ECB law is enshrined in primary law and that it is not in line with democratic requirements because "the establishment consistent with democratic principles cannot guarantee a democratic execution of delegated tasks" (p. 255). The author objects to the so-called "modification theory" of the democracy in favour of the independent central bank, adopted by the BVerfG in the Maastricht decision of 1993. She opposes to this conception a less-known decision of the BVerwG of 1973, more requiring respect of democracy. Dutzler rejects also the comparison of central banks with courts because courts are not asked to take political decisions raising legitimacy problems (p. 260). She quotes Lastra/Miller who wrote that independence is not an absolute good. She then indicates that consensus is decisive.

Eventually come the conclusions with the proposals of reform. The difficulty seems to differentiate between "such institutional guarantees which ensure independent decision-making, and elements which result in rendering the ECB autonomous" (p. 262). There are two most fundamental reforms: to limit the goal independence (by having the EP and the Council setting jointly, preferably for two years, new targets in terms of concrete ranges for inflation rate, under the co-decision procedure) and to increase the coordination of monetary and fiscal policy. She advocates the absence of instructions in normal circumstances but the supremacy of political authorities "by means of a truly exceptional review clause for ECB acts" (p. 269). But it is precisely in these "abnormal circumstances" that independence is valuable. Of course, that is not true for wartime where it is not only the status of the central bank which could be at stake. Dutzler also wants to have the co-operative practices and standards reflected by law. Why such a hurry to enshrine in the law a still evolving practice? The author is more fortunate when she asks for an injection of Community method to the area of economic governance.

I must say that I am not convinced by the description of the ECB as an "ivory tower". We can all observe that the Bank has engaged in an impressive campaign of communication. It has developed a kind of "monetary dialogue" with the Parliament that is without precedent in the relations of a central bank with a parliament. This evolution should be closely followed because a new form of accountability is growing far beyond what the authors of the Treaty had in mind when providing for reporting obligations of the ECB. As far as the le-

gitimacy of the ECB is concerned, let us notice some limited evolution in the Convention's draft and in the works of the IGC, through a double movement towards the extension and the democratization of the simplified revision procedure.

In conclusion, this book is a thoughtful contribution to the legal and institutional debate about the ECB and the ESCB. It is not an easy field of research. The author has succeeded in presenting a synthesis and a thesis. So the discussion keeps going.

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Stefan Collignon, *The European Republic: Reflections on the Political Economy of a Future Constitution*. The Federal Trust for Education and Research in Association with the Bertelsmann Foundation. London: The Federal Trust, 2003. 212 pages. ISBN 1 903403 51 0. GBP 29.

Welcome to Utopia. This, one might suspect, could have been the title of the book that is under review here. And this suspicion provides the busy reader – relentless as ever when scaling down the reading list to reasonable proportions – the perfect reason to dismiss this publication at face value. After all, even if the hope for reaching some kind of agreement on a European Constitution is again carrying the day, the prospect of a European Republic seems a bit far-fetched. This book, however, is not about that result *as such*. It is about the *process* of getting at a result that works in terms of both legitimacy and efficiency. It exposes the logical dilemmas involved in facing the challenge of making the European Union work also after its enlargement by ten new member states. More specifically, it is about the functional requirements of the modern monetary market economy. Collignon, a professor of European political economy at LSE, seeks to establish that these requirements would *logically* lead to the acceptance of the notion of a European Republic. As the author genuinely believes that agreement should follow deliberation, not precede it, the value of this book is in providing benchmarks giving direction to smaller pragmatic steps, rather than a vision or grand design.

The basic argument of the book is that the EU needs a full-fledged government, which draws its authority from European citizens, not States. Building his argument, Collignon takes a political economy approach. The Bertelsmann Foundation and the Centre for Applied Policy Research at the University of Munich have commissioned this study in the framework of their joint project on "Consequences and Implications of the Euro". Thus, the principal focus of the study is on how economics affects politics, and how politics affects economic outcomes. Collignon observes that European integration is based on market integration in a monetary economy, and he takes it from there. Making use of *the theory of collective goods*, Collignon restates his basic argument by acknowledging that a large number of European collective and public goods have been created, and that it should be recognized that the governance of these goods has become a 'public thing'. Collignon considers the disequilibrium between Economic and Political Union, the Achilles heel of European integration. In this review I will first outline how Collignon seeks to strike a balance between the two, and then I will critically appraise his approach.

I will concentrate on the Chapters 1 and 3, since they constitute the theoretical framework of the study by which all else stands or falls. Chapter 1 is about what Collignon considers to be "the essence of European integration". To be able to grasp this essence Collignon offers the reader some analytical tools, one of which is Olson's *principle of fiscal equivalence*. This principle has been developed within the theory of fiscal federalism. It says that the geographical incidence of the benefits of a public program should coincide with the jurisdic-

tion of the government operating and financing the program. Collignon applies this principle by interpreting "public programs" as the provision of collective goods of all kinds, including policy decisions. He distinguishes three categories: epistemic constituencies (policy input), polity (decision-making domain) and policy domain (policy output). As to Fischer and Schley's *principle of jurisdictional congruence* – another analytical tool Collignon uses – polity and decision-making domain should coincide. How all three categories relate to each other is apparent from Collignon's own definition of a polity as "an epistemic constituency that agrees on a constitution for procedural policy-making rules, although it may split into different epistemic constituencies on the evaluation of substantial and distributive issues" (p. 28). This definition points at another important distinction, *viz.* between two kinds of rules, which Collignon works out as his third theoretical precept (see *infra*).

Having formulated the various definitions and distinctions so far, Collignon makes his first theoretical point: While in classical policy-making models for the nation state the assumption is that epistemic constituency, polity, and policy domain all cover the same set of individuals, on the level of the European Union one can identify two types of policy-making inefficiencies. The first is related to the gap between polity and policy domain (leading to policy output externalities), the second to the incongruence between epistemic constituencies and polity (leading to a lack of legitimacy). The other theoretical point that Collignon makes in Chapter 1 with regard to the essence of European integration is about values, norms and consensus. To be able to make his point, the author revisits *the model of stochastic consensus* (see Collignon and Schwarzer, *Private Sector Involvement in the Euro. The Power of Ideas*. London: Routledge, 2003) and further develops it in Annex 1. This model of stochastic consensus is to be distinguished from deterministic consensus. Whereas the latter assumes unanimity *a priori*, the former is concerned with getting there. The stochastic model of preference formation is all about the conditions under which equilibrium can emerge. These conditions evolve in three steps: "(I) Individuals have *naturalistic preferences*, which are derived from cultural contexts and conventional values. (II) These immediate preferences are re-valued in light of new empirical evidence and more abstract norms and reasons, leading to *rational preferences*. (III) *Collective preferences* are established through dialogue, deliberation and higher order beliefs where individuals evaluate other individuals' views" (p. 31). Equilibrium can emerge if (i) individuals in the same consensus domain have mutual respect, and if (ii) there is a chain of respect that connects them. As long as equilibrium has not been attained yet, there is *dissent*. If either of the two conditions is not fulfilled, no equilibrium is possible, and *conflict* arises.

Making use of his model of stochastic consensus, Collignon argues that the purpose of European integration was to overcome conflict, not to abolish dissent. The author points out that the dissent in the constitutional debate in Europe between sovereignists (intergovernmentalism) and integrationists (supranationalism), very much like the controversy in philosophy between communitarianism and universalism, stems from the fact that sovereignists (like communitarians) start with the result of step III (see *supra*) that becomes part of the "background", whereas integrationists (like universalists) maintain that consensus is the final outcome of a rational process. The author argues that if any equilibrium is to be attained at all, it is by focusing on the deliberative structure of consensus formation (step III). To make collective choices acceptable, open and inclusive deliberation in a European epistemic constituency is called for. Collignon recommends that a European Constitution set the rules and institutions whereby this can be achieved. In Chapter 2 the author expands his argument by looking at the context within which European unification takes shape. He discusses issues such as migration, globalization and EU enlargement, only to buttress the point he made in the previous chapter.

In Chapter 3, on rules and constitutions, Collignon makes his third and fourth theoretical point. The third point was already stipulated in the definition of a polity, mentioned above.

It is based on the distinction that must be made between *constitutive rules* and *regulative rules*, the latter of which regulate already existing activities. This distinction goes back to Hume and Rawls' two principles of justice. What matters, says Collignon, is constructing a constitution that will sustain and deepen a collective acceptance of its constitutive rules, which are never "value-neutral", while remaining neutral with respect to distributional issues (regulative rules). The fourth and also last theoretical point is about power and legitimacy. It is based on the distinction between *conventional power* and *institutional power*. Collignon associates the former with step I (background values), and the latter with steps II and III (normative consensus) in his model. He argues that constitutive rules (and legitimacy) *create* institutional power. And institutional power, based on European constitutional consensus, will endogenously create a European Republic. Collignon does not mean this in any holistic sense. He distinguishes the traditional concept of people as an organic unit from the modern concept of *demos*, which has individuals as its foundation. What creates a European *demos*, is European-wide deliberation about adequacy of policy choices and this requires an integrated polity, which needs to be constructed. A European Constitution must therefore focus on setting up structures for European-wide policy deliberation.

These are the four theoretical points constituting the framework that Collignon uses to build his argument in the remaining chapters. Thus, in Chapter 4, the author elaborates on his earlier claims in the third and fourth point. He propounds that a European Constitution has normative content that must reflect the fundamental values of modernity as they have arisen from Europe's history. In Collignon's account of history, this would entail the primacy of the republican values of freedom and equality over fraternity. In Chapter 5 the author elaborates on the two types of inefficiency he distinguished when making his first point, and shows how to make trade-offs between the two. When making a typology of collective goods, defining them by their externalities, and explaining how the logic of collective action (and free-riding) works, Collignon is at his best. He proves that the efficient assignment of policy competences does not depend on taste, but on the nature of the collective good. In Chapter 6, on what he calls "the elusive policy mix", he further develops this point. Though the last chapters are thought-provoking – and particularly Chapter 7, containing Collignon's own practical suggestions on how a future European Union should look like – I will not discuss them. Instead, I will take issue with some of Collignon's assumptions and theoretical points. These are, so to say, Collignon's "constitutive rules".

First, Collignon's aim was to produce logical arguments, because he believes that intellectual coherence is a *necessary* condition for sustainable and enduring policy-making. Even if one assumes that this is true, one is left with a sense that this condition is by no means sufficient (as Collignon himself admits *a contrario*). The rationalist bias that pervades the whole book makes it one-sided if consistent. Second, Collignon's argument is based on the theory of *federal* fiscalism. Thus, he imports a whole set of assumptions into his argument from the outset. Logically, indeed, these federalist assumptions must lead to certain conclusions, but why should we agree with the assumptions in the first place? What about the *sui generis* nature of European integration? Third, Collignon is concerned with developing a European Republic *endogenously*. But what logic forbids us to weigh in exogenous factors more heavily? Even where he takes into account such factors, they are interpreted in terms of an inside-out approach. Such an approach is concerned with the question of how one can be part of a bigger whole (like a European Republic), whereas an outside-in approach starts with the whole and takes it from there. Why choose one to the exclusion of the other? Is not every part also a whole in itself, depending on the perspective one takes?

On the whole, Collignon seems to have a problem with the concept of a *whole*. He associates it with homogeneity, fraternity, communitarianism and holism, and believes that these principles should be dominated by the respective principles of heterogeneity, freedom/equality, universalism and individualism. Collignon subscribes to Dumont's notion that

while in every society both principles, holism and individualism, coexist, what matters is their mutual articulation, which makes one principle dominate whilst containing the other (see Dumont, *Essais sur l'individualisme. Une perspective anthropologique sur l'idéologie moderne*. Paris: Editions du Seuil, 1991). This notion is at odds with a balanced view that gives equal weight to the whole and its parts by recognizing that both concepts are Janus-faced. Such a view has nothing ado with domination of any kind, but rather with some notion of checks and balances.

Whatever one may think of the argument that Collignon develops and the conclusions he draws, his approach is both original and remarkable.

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