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BOOK REVIEWS

Brown and Jacobs (L.N. Brown and T. Kennedy), *The Court of Justice of the European Communities.* 5^{th} Edition. London: Sweet & Maxwell, 2000. 470 pages. GBP 24.95. ISBN 0421681209.

The European Court of Justice has, at times, been criticized both by politicians (V. Giscard D'Estaing and H. Kohl successively claimed that it acts illegally) and by commentators (see, recently, T.C. Hartley, *Constitutional Problems of the European Union*, Hart Publishing, 1999). Critics of the Court tend to reproach it for displaying a certain amount of judicial activism. On the other hand, numerous commentators argue that the intensity of the Court's recent case law has considerably weakened.

Brown and Kennedy treat the ECJ as an ever evolving organism, which goes through different phases of development, both organizational and intellectual. This dynamic approach to the study of the ECJ is one of the most striking characteristics of the fifth edition of "Brown & Jacobs" which has already become a classic textbook. This approach covers both the structure and the case law of the ECJ. The accurate and detailed information provided by the authors strikes a balance between form and substance that Pirandello himself would have envied. Moreover, the up-to-date insight provided by the authors comes at a moment when a number of other analogous books have become significantly outdated (Usher, *European Court Practice* (1983), Lasok, *The European Court of Justice: Practice and Procedure* (1984, 2^{nd} Ed. 1994) and Butterworths, *European Court Practice* (article by article) (1993)).

In the first part of the book, dealing with the "Organization and Composition" of the ECJ, one can read how the Judges and Advocates General are appointed, how their role may be compared with that of the French *magistrature assise* and *magistrature debout*, respectively, what the status of the legal secretaries is, and how many of them have already been "recycled" into judges (four in the ECJ and six in the CFI). The role and geographic location of the different Court services is admirably set out, the various instruments of dissemination of information well presented, and the proper use and citation of the law Reports explained. The insight into the Court's structure and organization is such that we learn (in a footnote) that "the various ducts, valves and other equipment for the ventilation and air-conditioning system in the old courthouse employ the same colour scheme as the law reports"! The organization and functioning of the CFI is, naturally, the subject of lengthy discussions, followed by a very interesting chapter on "The interaction between the two courts". The judicial approach of the two courts on key issues, such as transparency and access to documents, is set out.

In the second part of the book, the authors explain the various grounds of "Jurisdiction" of the Court. Through a mass of briefly presented cases they manage not only to describe accurately the different forms of actions dealt with by the two Courts, but also to touch upon the core doctrines of supremacy and direct effect of EC law. These doctrines are approached from a functional point of view. They seem to be central not only to the smooth functioning of the Community, but also to the very needs of the Court itself. This part of the book may be used as a handbook for those who wish to study the EC legal system.

Practitioners find their point of interest in the third part of the book, named "Procedure and Practice". Issues of procedure, costs, legal aid etc. are addressed. Special attention is paid to common lawyers who are supposed to be less familiar with the procedural rules of the Court inspired as they are by the French *Conseil d'Etat*. There, however, lies the one possible reproach to the book: being destined mainly to English speaking readers, the doctrinal sources it uses are almost exclusively of English language, ignoring thus the richness of non-English literature. This deficit is all the more present in the fourth and final part of the book, which is the richest one in terms of policy considerations.

In the final part of the book, called "The Court as Law-Maker", the Court's policy is approached through considerations of a functional and technical nature. By means of rich references to the Court's case law, the authors examine the various methods of interpretation used by the Court. They refer to a triple distinction between a) fundamental doctrines of Community law, such as supremacy and direct effect, b) general principles of law, which are to be found in various instruments of national and international law and serve as source of inspiration for c) general principles of Community law. In this latter category, the authors place what Judge Pescatore would have classified as "functional" general principles of EC law, i.e. proportionality, freedom of commercial activity, non-discrimination, etc. Last but not least, they offer some ground for reflection concerning what they call the "Cross-fertilization of legal systems" and the future evolution of the Court, in view of the forthcoming widening of the Community.

"Brown and Jacobs" manages simultaneously to be very rich and informative and to make for pleasant reading. The extremely rich tables of cases, before each Court separately, presented in numerical (and alphabetical) order, the various statistics concerning the functioning of the Courts and the addenda on the Notes of the Court a) on the citation of the Articles of the Treaty, b) on references by national Courts for preliminary rulings and c) on the guidance of Counsel for the parties at the hearing (before the Court of First Instance), make the book a source of valuable information. Furthermore, constant reference to elements of comparative law, analysis of which is not confined to legal issues but also extends to the reactions of public opinion and the press, humoristic cartoon drawings from the press and an apparently simplistic way of resolving serious problems (e.g. on the issue of delays: "Justice, like digestion, cannot be rushed"!) make sure that the reader is never let down.

V. Hatzopoulos
Athens

M. Höreth, *Die Europäische Union im Legitimationstrilemma: Zur Rechtfertigung des Regierens jenseits der Staatlichkeit*. Schriften des Zentrums für Integrationsforschung, Band 10. Baden-Baden: Nomos, 1999. 387 pages. DM 128.

Marcus Höreth has sought to offer a contribution to "inter-disciplinary European studies" (p. 20), and he has succeeded in making a worthy one. The book under review arose from the author's dissertation in political science at the University of Freiburg, Germany; the research was supported, inter alia, by the Centre for European Integration Studies in Bonn.

Höreth's basic question is that of the opportunities, conditions, and limits of legitimate governance beyond the State. He does not seek to develop his own model of trans-state governance, but limits himself to pointing out problems linked to the development of such models. Without conflating legitimacy with democracy, he concentrates on the notorious so-called democratic deficit of the EU and begins with a short description of that deficit (part. A.II).

Part B. of the book lays out a theoretical groundwork. Of course Höreth must first ask what "legitimate" means. He distinguishes an "empirical-sociological" notion of legitimacy from

a "normative-philosophical" one, leaving the former notion aside. A system of governance is legitimate in the "normative" sense when it has good arguments for its claim to recognition as good governance. Everybody who has read and thought about legitimacy will honour these clear lines and definitions.

The second portion in part B contains Höreth's most original contribution and explains the book's title. Starting from Abraham Lincoln's famous definition of democracy as "government by the people, for the people and of the people" (The Gettysburg Address of 19 November 1863), Höreth reconstructs the three elements of that definition as input-legitimacy, output-legitimacy and legitimacy via the Member States. His basic hypothesis is that those three types of legitimacy are inversely correlated. Höreth argues that to the extent where one strand of legitimacy is strengthened, the others will be weakened. A "gain of legitimacy" beyond the triangle is therefore hardly achievable through institutional reforms (p. 96). This is what Höreth calls the "trilemma of legitimacy". The triangle-model is interesting and intriguing, and very well presented (with illustrations), but subject to challenge. Input- and output-legitimacy (i.e. legitimacy via participation in political decisions and legitimacy via beneficial outcomes of political decisions) as described by Fritz Scharpf may be considered as opposites. They are antagonistic, if one equates better input with more consensual decisions, because this mechanism tends to hamper decision-making. One could, however, argue inversely that input-legitimacy will be improved if decision-making is made more transparent and more majoritarian; and in this view, input- and output-legitimacy would be equally strengthened. What Höreth calls the third strand of legitimacy is the group of problems commonly discussed under headings such as the (ostensibly missing) European demos, European identity, homogeneity, and the like. Höreth gathers these problems under the label "legitimacy via the Member States", because the identity-elements are present in the Member States, but hardly at the European level. This aspect is not necessarily antagonistic to input or output. It is not, in itself, an independent third type of legitimacy, but rather (also according to Höreth, p. 90 et seq.) a pre-requisite of input-legitimacy. Construing a triangle seems somewhat artificial.

After presenting his hypothesis, Höreth describes different integration theories and their respective views on legitimacy (part. B., IV). The division of theories into three groups ("progressive-idealist", "realist-conservative", and "sober-pragmatic" theories (p. 103)) is unconventional. In Höreth's scheme, theories normally conceived of as rivals (such as federalism and neo-functionalism, which is explicitly anti-federalist), appear under one heading ("progressive-idealist"). On the other hand, the model of multi-level governance is presented as something altogether different from federalist ideas, although there seems to me to be a close connection between those lines of thought, at least in German scholarship. Similarly, affinities of Giandomenico Majone's regulatory State model to Hans-Peter Ipsen's notion of the "functional assocation" [Zweckverband] could have been pointed out. But probably the classification of theories is not so important. What counts, is that Höreth describes academic positions or schools clearly and concisely and gives well-researched references. Ordinary lawyers (such as the reviewer) will welcome the fact that concepts such as the EU as a "network", which are so often used in integration literature, but rarely defined or explained, are analysed in detail by Höreth. To sum up, a table shows how the different theories treat the question of legitimacy: is there a need for it, what are the sources of legitimacy, is legitimacy produced by the EU system of governance? Höreth concludes, not surprisingly, that each singular perspective has deficiencies, and that an approach to the question of legitimacy combining insights of all theories is needed, using the multi-layer-governance-model as a basis.

Part C of the book contains heterogeneous sub-parts. Section C VI is the most "legal" part of the book. Höreth discusses whether the EU enjoys "formal" legitimacy as a community of law. He first asks whether there exists a European constitution. One might add that this fact alone would of course not render European governance legitimate per se – the constitution itself would have to be legitimate. Höreth emphasizes (and in my eyes, exaggerates) the differences between State constitutions and a potential European constitution. Features such

as dynamism, a (now no longer) lacking catalogue of fundamental rights, and the principle of limited competences do not constitute differences in kind, but in degree. Most importantly, the assertions that the Member States are the real pouvoir constituant and that Community law lacks an autonomy which is (allegedly) a prerequisite of a constitution, are debatable. But these are highly complicated and highly controversial problems of legal theory, whose solution would require another book. Höreth then opposes the rule of law to the rule of the Member States as the "Masters of the Treaty" and argues that the Member States are the masters of primary, but not of secondary law. His discussion does not exactly cover the aspects lawyers expect under that heading (Member States' right to unilateral secession and the like), but it is satisfactory.

Section C VII is the most "applied" one. Höreth meticulously analyses the European institutions' contribution to legitimacy. This part of the book is praiseworthy, because it tries to show very concretely how democratic the EU really is. The author's findings are multi-facetted, and they point out legitimating and de-legitimating features in all institutions. In Section C VIII, Höreth relies heavily on Fritz Scharpf's distinction and suggestion of an asymmetry between "negative" and "positive" integration. "Negative" integration (removal of national trade barriers and of restraints to competition) functions well, and effective supranational legislation has replaced Member State action. "Positive" integration, roughly corresponding to interventionist measures correcting market failures, does not function well. Respective Member State action is blocked, but the vacuum is not filled by effective supranational measures.

Part D gives a very good picture of the current reform debate. Höreth regroups the various positions according to his triangular scheme and looks at proposals to strengthen the input-legitimacy, the output-legitimacy, and the identity-dimension. This scheme makes sense, although of course other schemes are conceivable. Input-legitimacy would most of all be increased by strengthening the European Parliament. But Höreth argues against this option on five grounds (p. 254–263). Here again the author demonstrates his analytical skills and his power to order an overflowing debate and extract clear arguments. Another important reform-proposal concerning the democratic input is to introduce European-wide referenda, and Höreth is sceptical about this idea as well. The most important output-oriented proposal seems to be the expansion of the majority principle. This, again, is an extremely complex question, which Höreth discusses somewhat superficially, without taking into account important public choice and constitutional economics approaches.

Part D XIII offers two concepts that should, according to Höreth, guide any reform. The starting-point is the assertion that "social" legitimacy, which can in his view be acquired only via the Nation States, requires a strong and continuing influence of the Member States. Höreth thus comes close to the rather intergovernmentally oriented position of the *Maastricht* decision of the German Federal Constitutional Court and of academics like Marcel Kaufmann. Höreth then relies on Fritz Scharpf and elaborates the concept of "autonomy-saving coordination". This type of co-ordination presupposes or consists in a reciprocal duty of loyalty, which finds its legal expression in Art. 10 TEU. The second guiding-principle presented is the idea of differentiated integration.

Part E contains the conclusions. Höreth finds his initial hypothesis of a trilemma of legitimacy supported by the analysis of the reform debate. He emphasizes that what he called three types of legitimacy must be equally taken into account, last but not least because the EU is a system of multi-layered governance.

"Die Europäische Union im Legitimationstrilemma" is a well-researched, well-written and original study in political science which tackles one of the most intriguing problems of European governance. Höreth presents an interesting working hypothesis, situates his own work within past and current integration theories, analyses in a very concrete and profound manner the potentials of legitimacy of the European institutions, presents reform options in an orderly fashion, and pleads for a Popperian piece-meal approach to European reforms. The result is a truly interdisciplinary work to the extent that, on the one hand, socio-political

theories are made accessible for readers coming from other disciplines, while on the other hand legal problems are discussed adequately. This is a book worth reading which has, after the IGC 2000, lost none of its topicality.

Anne Petersen
Basel

R. Zimmermann and S. Whittaker, *Good Faith in European contract law.* Cambridge: Cambridge University Press, 2000. 720 pages. GBP 75. ISBN 0 521 77190 0

The main part of *Good Faith in European Contract Law* consists of about short 30 cases which have been put to lawyers from 17 European legal systems asking them how a court in their country would decide these cases. One of the cases is the following:

> Audrey is under an obligation to deliver 100 personal computers to Bartholomew. Should the computers not be delivered, for whatever reason, by October 10, Audrey has promised to pay a fixed sum of £ 3000. When Audrey tries to deliver the computers on October 10, Bartholomew refuses to accept them, since, he says, he cannot remember having concluded a contract with Audrey. A week later, he requests delivery and demands payment of the fixed sum.

Whether you are a lawyer or not you will take a position when you are presented with a problem like this. Your sense of justice will tell you how to solve this problem: A*udrey* should not be obliged to pay the £ 3000. As a lawyer you will then try and find the legal arguments for this position.

An English lawyer would say that the clause is most probably a penalty clause, and penalty clauses are invalid under English law and have no effect. A German lawyer would argue that failure to deliver the computers is a condition for *Audrey*'s duty to pay the fixed sum. If, as in the present case, this condition has been brought about, contrary to good faith, by *Bartholomew* to whose advantage the condition would operate the condition is not fulfilled, and *Bartholomew* cannot claim the money. Lawyers in eight other European countries will hold that *Bartholomew* can only claim the penalty if *Audrey* has committed a breach of contract. Since *Bartholomew* refused to accept the computers when they were tendered he was in *mora creditoris*, Audrey never committed a breach of contract and therefore *Bartholomew* cannot claim the penalty.

The book starts with a "Setting of the Scene", containing four sections; one is a survey of the legal landscape by the editors, one is on bona fides in Roman law by Schermeier, one on good faith in the mediaeval *ius commune* by Gordley and one on the conceptualization of good faith in American contract law by Summers. The main parts of the book consists of the national reports, followed for each case by the editor's conclusions. There are contributions from 23 national reporters. It ends with the final conclusions of the two editors.

Why this exercise? It is part of a larger project based on a scheme which Schlesinger, a comparatist who worked in the US in the 1950s and 1960s had thought out. He saw that when he and other lawyers read foreign court decisions they found that a court applying rules that were different from those governing in his own country often came to the same result as his own courts had or would have arrived at. Schlesinger wondered whether this was a coincidence or whether there was any regularity in this phenomenon. There might be what he called a *common core* of the legal systems. He then started his research project to find this out. He limited his investigation to the formation of contracts. As the common core had been discovered by comparing court decisions Schlesinger decided to base the investigations on cases. He engaged about a dozen scholars from the various legal families in the world. Together they produced cases, some taken from reported decisions some imaginary which were then discussed in the

group. The results were published in a book, Schlesinger, *Formation of Contracts, A study of the Common Core of the Legal Systems* I-II 1968. It disclosed that in spite of the fact that the courts used very different techniques for the solution of legal problems there was a certain concordance in the outcome of many problems.

Some years ago Schlesinger's idea was taken up again by the so-called *Trento Group* headed by professors Mattei and Bussano. The project was launched in the University of Trento, Italy. The plan was that in order to ascertain the common core of the private laws of Europe, working groups of lawyers should do the same as Schlesinger's team back in the 1960s. The results of their investigations and discussions are planned to be published in the series "The Common Core of European Private Law". The present book is the first to appear in the series. Others will follow.

The 30 cases describe typical examples of the application of the good faith principle. Some of them illustrate a party's duty to co-operate and safeguard the other party's interests A doctor becomes liable in damages if he forgets to tell his patient that a drug which he has advised him to take slows down his reactions, with the result that the patient causes an accident while driving under the influence of the drug. Some of the cases show that a person cannot act against his own earlier acts. *Bartholomew* v. *Audrey* above is an illustration of that. Some provide a term which has to be supplied in order to produce a reasonable result. For instance, a divorcee's payment of maintenance to the other, stipulated to last until the other remarries, is to be discontinued when the other lives together with another woman in extras-martial cohabitation. Some give relief to a party in case of hardship and thereby supplement the rules on frustration or *force majeure.* Thus, most of the laws will allow the supplier to have the fixed price agreed upon in a long term contract for the supply of steam raised, if after many years the price has become derisory due to normal inflation. Some of the cases are about a person's abuse of right. The seller of a quarry is entitled to payment of 10% of the annual gross turnover of the quarry. In order to control buyer's turnover he has got a right to inspect his books. When seller buys a new quarry he wants to inspect buyer's books. He wants to learn the names of the buyer's customers in order to establish his own sales network. Can he do that?

Is there a common core in the attitude of the European laws to the good faith principle? Trying to draw more general conclusions of the responses of the legal systems the two editors are "struck by the considerable degree of harmony as to the results reached on the particular facts of many of the cases." In 11 of the 30 cases the result was the same in all systems, and in 9 in all systems but one or two (p. 653). On the other hand, the legal systems employ a wide variety of legal techniques to reach their results, some relying more or less on the good faith principle and others on other doctrines as we see in the case *Bartholomew* v. *Audrey* above.

In Germany and the Netherlands the good faith principle is given a broad application. It is a king of their contract law. It is also an important principle in the other Continental laws. In England, on the other hand , the courts do not recognize any general obligation of contracting parties to act in accordance with good faith and fair dealing. As late as 1997, the Privy Council refused to order specific performance of a contract for the sale of land to a purchaser who had paid the price 10 minutes too late, time having been made expressly of the essence for the performance of the contract. The court refused to apply equity to this situation, and Lord Hoffman expressly rejected the civil law approach to good faith. In the view of the court the predictability of the legal outcome of a case was more important than absolute justice (*Union Eagle Ltd* v. *Golden Achievement Ltd* [1997] 2 All ER 215 at 218). One would therefore think that because it does not accept the principle of good faith, English law would be found to deviate from the other systems as to the results it would reach. This has not been the case. The fact that the courts do not recognize any general obligation to act in accordance with good faith and fair dealing has little influence on the outcome of the cases. Other rules than the good faith principle are used to reach the same results as in the Continental countries.

Instead, the Nordic Legal systems have often been found to be out on a limb. In the Nordic countries many lawyers are proud of their "social contract law "which is governed by a spirit

of co-operation and collectivism. One would therefore think that the Nordic courts would be as ready to help a party who wishes to invoke good faith as the other European courts. In fact the reports show that they (and the Irish courts) are not. One possible reason for this may be that they are small legal jurisdictions. According to the editors "where a legal system by its size tends to engender less litigation there are fewer occasions on which courts are presented with facts suitable to test and clarify the application of existing legal rules; and where rules are untested and uncertain, they either remain untempered or are interpreted in a cautious (and therefore often more conservative) way" (p. 655). I agree that because of the existing paucity of cases a lawyer in the Nordic countries would probably warn a client, who may wish to invoke the good faith principle, against litigation on virgin soil. The reporters' prophecies of what the Nordic courts will do are equally cautious, but do not necessarily tell us what the courts will do if in the future they are presented with more cases. Since the Nordic laws are governed by a spirit of co-operation and collectivism the courts may be more audacious in their application of the good faith principle to new cases than the Nordic reporters to *Good Faith in Contract Law* venture to predict. It is also implied in the editors' explanation of the phenomenon that the Nordic and Irish conservatism would not persist if there were more Nordic and Irish cases.

Good Faith in European Contract Law is a promising start of a series of books. It is clear and extremely well written and a very valuable contribution to the literature on European private law. It shows the wide variety of legal techniques which courts in Europe use to reach their results and this makes it an excellent introduction to comparative law as a study of legal method. It is very well fitted as a text book for students.

Ole Lando
Frederiksberg

M. Dony (Ed.), *L'Union Européenne et le Monde après Amsterdam.* Brussels: Éditions de l'Université de Bruxelles, 1999. 352 pages. BF 1350. FF 249. ISBN 2-8004-1212-7.

The external relations of the European Union constitute an incrementally developed area of law based on a sophisticated system of interrelated rules whose *sui generis* nature has raised no shortage of interesting questions. As the EU constitutional order is based on three distinct but interdependent legal frameworks, namely the Community legal order, the Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters (formerly Justice and Home Affairs), important legal issues have been raised in terms of the coherence of the international presence of the Union and the effectiveness of its policies.

In the light of the above, the book under review is very interesting. It consists of a collection of essays written by researchers in Universities of Brussels, Ghent and Liège; this is the product of a research programme organized by the University of Liège. The common thread of the contributions is the external relations of the European Union in general and the impact of the Treaty of Amsterdam in particular. All contributions, except for the preface by Louis, follow a common structure: they provide a historical overview of the area in question, they outline the legal developments in the post-Maastricht era and, finally, they examine the content and implications of the amendments by the Amsterdam Treaty.

The book starts off with a general assessment by Gaudissart of whether the Amsterdam Treaty has left the European Union well-equipped for the imminent enlargement. As far as the institutions and their functioning are concerned, this question has already been answered implicitly by the European Council decision to launch the Intergovernmental Conference which has just produced the Nice Treaty. Gaudissart argues that the EU has been left ill-equipped for the enlargement and he criticizes the limited extension of majority voting, the failure to fully ensure the transparent functioning of the institutions and the failure to simplify

the EU constitutional structure. He refers to the "artificial" division of competences between the pillars (p. 31) and mentions the need for either a restructuring of an all-encompassing Community framework or an express and clear definition of the scope of Community and national competences. Given that the former suggestion seems to run counter to the very foundation of the constitutional order of the European Union, one would expect an elaborate analysis of its rationale and ramifications; it is regrettable that none is provided. As to the latter suggestion, it has already been taken up by the Member States: the Nice European Council decided that another IGC would address the issue of the division of competence between the Union and its Member States.

The book is structured in five parts dealing, respectively, with general aspects of the EU external relations, the free movement of persons, the external economic relations, the CFSP and the third pillar. The first part consists of three essays. Bribosia and Weyembergh address the issue of the legal personality of the European Union. Their analysis is focused more on the pre-Amsterdam legal developments and reaches the conclusion that the European Union does not actually seem to be endowed with legal personality. As to the ingenuous treaty-making procedure of Article 24 TEU introduced by the Amsterdam Treaty, their rather short overview correctly points out that its repercussions are to be determined on the basis of how it is to be relied upon by the Member States. In the following analysis of Article 300 (ex 228) EC, de Walsche examines the amendments introduced by the Amsterdam Treaty in relation to the provisional application of an agreement concluded by the EC prior to its entry into force, the positions adopted on behalf of the EC in a body set up by an association agreement and the suspension of the application of an agreement. The first part is completed with an analysis by Schmitter of the closer cooperation clause inserted in the EC Treaty by the Amsterdam Treaty and its possible application in the field of external relations.

The second part of the book consists of three essays on the free movement of persons. Trotta examines the three different ways in which Member States have approached this area, namely within the Community legal framework, the third pillar and beyond the EU framework, particularly within the Schengen context. She points out the problems which became evident in the post-Maastricht era, namely the lack of clear objectives of the third pillar, the inadequate nature of the measures provided thereunder and the institutional complexity. A positive assessment of the amendments introduced by the Amsterdam Treaty is provided, while the author expresses certain reservations as to the limited input of the European Parliament and the limited scope of the preliminary reference procedure in relation to the new Title IV of the EC Treaty. Pollet analyses the integration of the Schengen *acquis* within the framework of the European Union; it is the external dimension of this which is more interesting: on the one hand, the position of Iceland and Norway which have concluded a special agreement with the Schengen countries and, on the other hand, the Central and Eastern European countries negotiating accession to the European Union. Finally, Bribosia and Weyembergh deal with the immigration policy of the European Union towards the Central and Eastern European and Mediterranean countries, a subject of major importance in the light of the accession negotiations and the effort of the Union to enhance its Mediterranean policy.

The third part of the book deals with the external economic relations of the EC. Two essays examine the Common Commercial Policy (CCP): the first, by Smits, deals with services, and the second, by Michaux-Foidart, with intellectual property rights. The issue of the scope of the CCP is most interesting, not least in the light of the long-standing debate between the Council and the Commission and the Opinion 1/94 delivered by the Court on the conclusion of the General Agreement on Trade in Services and the Trade Related Intellectual Property Rights within the WTO context. The amendment of Article 133 (ex 113) EC, whereby the Council has the right to decide unanimously on a proposal from the Commission and after consulting the European Parliament to extend the scope of CCP so as to cover services and intellectual property rights, is considered conservative. Smits, in particular, points out the various legal issues to which this arrangement may give rise to and appears sceptical as to whether it actually

enhances the coherence and the effectiveness of the international presence of the Community. This part of the book on the EC external economic relations concludes with an informative essay written by Dony on the external aspects of the Economic and Monetary Union.

The fourth part deals with the EU's CFSP in general and focuses on two specific issues. The first is the role of the Union in the peace process in the Middle East, a topic covered by Lannon. His paper outlines both the declaratory policy of the EU on the peace process and the proactive approach adopted in a number of issues. The three joint actions adopted by the Union under Title V TEU within the period 1994–1997 are examined and a number of communications put forward by the Commission outlined. Lannon then examines the amendments introduced by the Treaty of Amsterdam in CFSP, namely the reform of the decision-making process, the provision for common strategies, the definition of the scope of joint actions and common positions, the appointment of the Secretary-General of the Council as the CFSP High Representative, the express provision for the Union's special envoys, the establishment of the Policy Planning and Early Warning Unit and the institutionalization of the Petersberg tasks. He concludes that, while the Amsterdam amendments may enable the Union to conduct its foreign policy in the Middle East in a more efficient and coherent way, it is ultimately the political will of the Member States that will determine their success. The second essay on the CFSP framework is written by Dardenne and discusses the role of the European Parliament in the financing of the CFSP. This is an interesting subject, as the Treaty on European Union provides expressly for the interaction between the EC framework and the second pillar by enabling the Union to charge the Community budget. The author finds the new Article 28 TEU, whereby administrative expenditure and non-military operational expenditure is charged to the EC budget, an improvement. The book ends with an essay written by van Raepenbusch on the third pillar and the impact of the Amsterdam amendments, especially the procedure provided under Article 24 EC.

All in all, this book is a welcome addition to the existing literature on the external legal relations of the European Union. Its scope is comprehensive and its contributions are informative, thorough, well structured and well-written. There is one shortcoming: while focused on various specific issues pertaining to the external relations under either of the three legal frameworks upon which the EU is based, this book does not contain an analysis of the external relations as a whole based on distinct but interrelated sets of rules. This would have been most welcome, especially as various contributions make brief references to the need for the international presence of the EU to become more effective. However, this will not make the book less appealing to postgraduate students and academics interested in the field.

Panos Koutrakos
Durham

F. Sudre, S. Quellien, N. Rambion and C. Slaviejo, *Droit communautaire des droits fondamentaux.* Serie Droit et justice, Vol 26. Bruxelles: Bruylant, 1999. 252 pages. ISBN 2 8027 1288 8. BEF 2400. 59,49 Euro.

Elspeth Guild, Guillaume Lesieur (eds.), *The European Court of Justice on the European Convention on Human Rights – Who said what, when?* The Hague: Kluwer Law International, 1998. 440 pages. NLG 250.00. 113.45 Euro.

These two volumes both aim to bring together the case law of the ECJ on the protection of human rights in the EC, with this restriction that the volume edited by Guild and Lesieur – as the title indicates – is limited to the case law explicitly involving the European Convention

on Human Rights; whereas the collection *Droit communautaire des droits fondamentaux* has cast the net much wider. Both books are valuable reference tools, especially for those not having access to CD-ROM editions of the case law or on-line access (provided they have elaborate search tools) to complete versions of the case law. Even for those having access to such databases, books like those under review have the advantage of being printed and therefore better to read and thumb through, and more importantly: the editors of both books have applied more important and more relevant intellectual criteria than the search tools of digital bases seem to be unable to cope with. Nevertheless, both books have their limitations.

Numerically, the volume edited by Sudre *c.s.* contains 81 judgments with a brief case description, while the collection of Guild and Lesieur contains 68 cases, either an Opinion of the Advocate General (17 out of the 68), a judgment, or both, but without case descriptions. The book edited by Guild and Lesieur has a preface of July 1998, but the last case it contains is *Kremzow*, of 29 May 1997, thus excluding a highly important case like *Vereinigte Familiapress* (26 June 1997). *Droit communautaire* announces 1 September 1999 as the cut-off date, the last case being *Montecatini*, of 8 July 1999. *Droit communautaire de droits fondamentaux* presents the judgments chronologically, whereas Guild and Lesieur organize their materials by provision of the ECHR (and Protocols) and one chapter entitled "The ECHR in General"; this is preceded with a chapter giving a very brief summary, arranged along the same lines, of all the cases more fully reported in the book. The tables provided at the end of *Droit Communautaire* contain a chronological, alphabetical, analytical and thematic index. The book of Guild and Lesieur contains a table of cases by ECHR Article, a list of cases by type of action under the EC Treaty; a general table of cases of the ECJ, the European Commission of Human Rights (mistakenly entitled "Applications before the European Court of Human Rights"), and judgments of the ECtHR. This list of cases, however, does not only list the cases reported in the book, but refers to all cases mentioned in the judgments and opinions; hence it does not count 68 but 144 ECJ cases. This book also contains a table of treaties and conventions and an analytical index. A list of the cases (opinions and judgments) actually reported in the book is missing, which means that those who wish to use the book as a quick reference tool to look up the relevant passages of a particular case, will spend a fair amount of time in tracing it in the book, sometimes only to find out that it is not there. Also the first chapter, giving brief summaries, is not only unhelpful for being exceedingly short in its summaries, but also misleading because it does not indicat whether a summary refers to an Opinion of the Advocate General only, or to a judgment of the Court.

Guild and Lesieur have taken their self-imposed restriction to the ECHR quite literally: only those cases in which the Convention is mentioned in so many words, have been taken into account. The justification the editors present for limiting themselves to the ECHR is the pre-eminence of the Convention in the field of protection of human rights at the level of the EU. It does quite obviously mean that we have to miss out on fundamental rights case law which relies on other sources than the ECHR. The criterion that the Convention has to be mentioned literally, is infelicitous. It means that some important cases on the right to property, as also guaranteed by Article 1 of the 1^{st} Protocol to the ECHR, are not included. Thus, for instance, Cases C-2/92, *Bostock*, and C-63/93, *Duff* (both present in *Droit communautaire des droit fondamentaux*), of which the relationship to the intricate Strasbourg case law has been object of discussion in the literature, are absent.

The editorial principle under discussion occasionally, but accidentally leads to somewhat broader horizons, by including Opinions which happen to mention that something does *not* come under the ECHR, or where a mere analogical reference is made to this instrument. It has meant that the opinion of the Advocate General in *AM&S* is included because he held that the confidentiality between lawyer and client is not protected under Article 6 ECHR. Unfortunately the strict interpretation that a literal mention of the ECHR is necessary before a judgment is reported in the collection, has the curious result that the judgment in *AM&S* is not included. This gives a most distorted view of what the Court actually held on the right to confidentiality

in *AM&S* and why we know this case in relation to the protection of fundamental rights. An analogical reference to the ECHR led to the inclusion of part of the Opinion in *R.* v. *Henn and Derby.*

I have found one exception to the otherwise strictly applied principle of literalism, Case C-49/88, *Al Jubail Fertilizer*, in which the Opinion does explicitly refer to the ECHR, but the judgment does not. Perhaps the inclusion of both the opinion and the judgment in Case C-85/76, *Hoffmann LaRoche*, may also count as an exception (the opinion referred particularly to Art. 7 ECHR, whereas the judgment does not, although it does go into the rights of the defence).

That the opinions of the Advocate General are included in the book by Guild and Lesieur is very positive and indeed a clear advantage over the collection in *Droit communautaire*. Without the famous opinions in *Konstantinidis* and *Grogan*, any collection of case law is incomplete, although the Court never took over the views there expressed. These opinions can stand on themselves. Nevertheless, it is also meaningful to see whether the Court did or did not take the same view as the Advocate General. In this respect it is a pity that Guild and Lesieur have not been able consistently to include both the opinion (if there was one) and the judgment.

In comparison, the sections which Guild and Lesieur reproduce are briefer than the ones included in *Droit communautaire des droits fondamentaux*, sometimes too brief given the fact that – unlike *Droit communautaire* – there are no case descriptions. This occasionally leaves the reader who is unacquainted with a particular case at a loss as to the background and context of the texts reproduced. In this respect *Droit communautaire des droits fondamentaux* compares more favourably, although also here the case descriptions sometimes remain briefer than one might wish.

Between the two books there is an overlap of only 38 cases. It may make one wonder whether to feel unsettled with the arbitrariness of fishing materials from the pond of fundamental rights cases, or whether it should be a comfort that in the relatively sizeable case law of the ECJ only 38 cases seem to constitute the core of case law in the field of the protection of fundamental rights. If we take into account the periods covered, and we antedate the cut-off date of *Droit communautaire* to that of the book of Guild and Lesieur, the former contains 74 judgments against the 68 cases of Guild and Lesieur. The 38 cases overlap is then slightly more than half. But if we deduct the cases in which the latter only reproduce the opinion of the Advocate General (17 cases), in fact the overlap of 38 cases concerns a collection of 74 and 51 cases respectively (which perhaps is still uncomfortably small). To some extent this is explained by the limitation of Guild and Lesieur to the ECHR, but on the other hand the criteria for selection used by the editors of *Droit Communautaire des droits fondamentaux* contribute to the incommensurability.

The editors, under the leadership of Sudre, have included the case law on certain fundamental principles which are connected to human rights, such as the principle of legal certainty. As a matter of fact, in the editorial preface in *Droit communautaire* this is said to be inspired by the reference which the Strasbourg Court has made to it (in *Marckx)* as a principle inherent in the law of the Convention. Taking their cue from the ECHR, they have thus found it necessary to include fundamental principles which the ECJ has not actually called a "fundamental right" (p. 9). On the other hand, the editors have decided to exclude the free movement of persons, notwithstanding Article 18 EC, because this has primarily been enshrined in Article 39 (ex 48) EC as an economic freedom which has not been approached by the ECJ from the perspective of the protection of fundamental rights, this in contrast to the right to equal treatment (p. 10). Although there is much truth in this, it overlooks the fact that the Court has called the free movement of persons – just as is the case with the other economic freedoms – a "fundamental right" before it considered the classic human rights as fundamental rights which deserve protection under EC law. As a matter of fact, the distinction between the economic freedoms and the right to equal treatment in terms of their fundamental nature has only recently been made in a decision by the Fifth Chamber in *Schröder*, C-50/96, and *Sievers and Schrage*,

C-270-271/97 (10 February 2000). Moreover, it is not entirely true that the free movement of persons has not been constructed in the light of fundamental rights in the classic sense. The judgment of the ECJ in *Konstantinidis* is a clear example of a construction of the restrictions on the free movement of persons in the light of the principle of non-discrimination (at any rate in the judgment – as opposed to the Advocate General's Opinion).

Although the choice for legal principles related to classic ECHR rights might lead to an approach which is not far removed from that of Guild and Lesieur, in fact there is a fair amount of material over which one might disagree as to whether it really belongs to the *droit communautaire des droits fondamentaux*. Thus the collection begins with *Dineke Algera et al.* (Joined Cases 7/56, 3/57 and 7/57, 12 July 1957), which is quite interesting with regard to the fundamental principles of Community law and their basis in the common legal principles of the Member States, especially in acquired rights, reasonable expectations (Treu und Glauben), renunciation and estoppel. But this case does not immediately strike one as being most relevant to fundamental *rights* in the by now classic sense of the word. This applies *mutatis mutandis* also to most of the fifteen other judgments included under the general theme of legal certainty.

If we thus eliminate also these 16 judgments for a fair comparison, the ratio between Sudre c.s. and Guild and Lesieur becomes 59 to 51, with an overlap of 38, which seems more reasonable than it at first appeared. Had Guild and Lesieur included judgments which really are (though implicitly) dealing with Convention rights (as can be deduced from the opinions of the Advocate General in relevant cases), things would have looked even more reassuring.

There remains one curious omission in the Guild collection, which must be mentioned. It concerns the cases on HIV tests and Article 8 ECHR, which in the editorial introduction is hailed as setting out a line "which has excited some interest" (p. xxii). In an endnote to this text (endnotes are not really very practical in a book which by its nature already necessitates a lot of turning pages backwards and forwards – why do even these very expensive books have no ribbons for pagemarkers?) reference is made to X v Commission, (CFI, 18 September 1992), of which the most relevant recitals are reproduced in the book. However, this judgment was quashed on appeal to the ECJ, precisely because it had drawn a wrong conclusion on the meaning and scope of Article 8 ECHR in the context of this case (involuntary medical tests) (see ECJ Case C-404/92 P, 5 Oct. 1994, ECR I-4737). The ECJ case is missing in this collection. It is not missing in the collection of Sudre c.s., where the judgment of the Court of First Instance is – understandably – omitted.

Are these books useful? For the reasons already indicated at the outset, the answer must be in the affirmative. Although both have their limitations, they are useful reference tools for the case law up to May 1997 for the book by Guild and Lesieur and for Sudre c.s. until July 1999. For the later case law, the generally accessible site of the Court can be searched and consulted without great difficulty. From this perspective they should be wished on the desks and in the libraries of scholars and students in the field of Community law and in that of human rights.

Are they to be purchased? The Kluwer Law International book by Guild and Lesieur is nicely printed in a clear type face and hardbound. Although the process of producing it has obviously taken a fairly long time (more than a year between the last judgment included and the date of the preface), there are quite a few remaining typing errors. A disturbing one changes Case 323/82 to 323/52 and thus turns the *Intermills* case of 1984 into the oldest of cases in the list of cases. The collection by Sudre *c.s.*, although paperbound, is nicely compact and has certain advantages over Guild and Lesieur's book. But for both there is an obstacle. The price of the book by Guild and Lesieur – as with so many books and journals by Kluwer Law International – is absolutely prohibitive for most academics, let alone students. This is a great pity, because the book might very well be used in university courses. Although the Bruylant book by Sudre *c.s.* is nearly half the price and contains more material in fewer pages, it also suffers from a price which cannot be expected to be paid by students. The librarian might be

more easily convinced; as will be the academic who takes a special interest in the ECJ and fundamental rights and has no easy access to the digital databases.

Leonard F.M. Besselink
Utrecht

I. Christodoulou-Varotsi, *L'Adaption du droit maritime Hellénique et du droit maritime Chypriote au droit communautaire.* Bruxelles: Bruylant, 1999. 305 pages. ISBN 960-15-0120-7 (Sakkoulas) 2-8027-1326-4 (Bruylant).

This book is an updated version of a thesis defended at the University of Paris I. It offers an attractive and original approach to the study of a largely neglected area of Community law: maritime transport. At the same time it provides an analysis of the reception and implementation of Community law in one of its Member States: Greece and a candidate Member State: Cyprus. The choice of maritime transport for a case study involving these two countries is deliberate. For both countries maritime transport is a very important sector of the economy. Furthermore, a significant part of the fleet owned by Greek interests, but not registered under the Greek flag, is registered in Cyprus. Finally, the Cyprus register is generally considered to be a flag of convenience and hence it is very interesting to see whether and how this candidate Member State can or will cope with the implementation of the *acquis communautaire* especially in the area of safety and pollution. And, of course, conversely how the Community will handle this very tricky point in the accession negotiations. In view of the recent tanker casualties, in the eyes of the public opinion largely to be blamed on substandard ships, the Communities can not be seen as condoning anything that reeks of substandard shipping.

It is important to clarify the concepts of "flags of convenience" on the one hand and "substandard ships" on the other hand. Flags of convenience denotes the phenomenon of registering ships in countries other than that of the main company seat according to convenience of the shipowner. The reasons for such registration elsewhere will normally be tax advantages or advantages resulting from a lax enforcement of safety, manning and pollution control measures. There is some reason to believe that the latter may actually be oe of the reasons for registering in Cyprus, because the author notes on p. 118 and 132 that the Cyprus legislation for the enforcement of the rules on port state control and the supervision of classification societies is "lacunaire" and needs substantial amendments

A study of this nature faces the familiar problems of scope. Should it provide a comprehensive overview of the Community maritime transport policy and should it at the same attempt to give a full treatment of the issues involved in the implementation of the acquis in a particular Member State? To which one could add for this particular study the questions related to the accession of a Member State and the accommodation of important economic interests. The author has chosen to strike a balance between giving full treatment of the maritime transport policy and the problems related to the implementation of the acquis. In following such an approach the author, inevitably, cannot do full justice to both topics. As for the third topic, she has not, at least not to any extent, discussed the accession questions. Nevertheless, her study does provide useful information and insight into Cyprus maritime law, for those involved in the negotiations. I am referring in particular to p. 132, where the author reaches the conclusion that Cyprus needs substantial changes in order to fulfil its obligations under the Port State Control Directive (No. 95/21, O.J. 1995, L 157/1). This Directive constitutes the centrepiece of the acquis in the area of safety and pollution. Its full and effective implementation by Cyprus would go a long way to elevating the status of its register to international standards beyond the flag of convenience level.

The following topics of the Community maritime transport policy are discussed: the freedom of establishment in relation to conditions for registration, cabotage (vitally important for

Greece), towage and other auxiliary services, exclusive fishing rights in the territorial waters, the most important Community legislation in the area of safety (including the above mentioned directive on Port State Control), legislation concerning maritime pollution, state aid, competition law, company law, free movement of workers, social security and the mutual recognition of diploma's.

The general format followed is that the relevant Community rules are briefly discussed where after the implementation into Greek and Cyprus law are addressed. In the areas of safety and pollution control the relevant Community rules are very appropriately put in the worldwide context of the applicable IMO (the International Maritime Organization) and ILO rules.

The author's approach also has its drawbacks. A few examples may illustrate this. The section on the obligations of Member States to implement Community Law is rather short. It cites the *Van Schijndel* case C-430 and 431/93 and *Peterbroeck* case C-312/93 judgments but completely omits a discussion of the case law on the implementation of directives as well as other important principles on the obligations of Member States to observe Community Law. The section on the relationship between the general principles of the EC Treaty and the special provisions of the transport title contains a lengthy discussion of the French Sailors Case (167/73, *Commission* v. *France)* but does not mention the important *Corsica Ferries* judgments.

A final note concerns the absence of a substantial body of literature of the topic in major Community languages English and German. This is all the more regrettable because a substantial part of the literature on maritime transport is written in English. There are some references (among which the omnipresent citations of Power's EC Shipping Law), but that does not compensate such absence on the contrary it makes the reader wonder why the author can read this English text and not others. The above noted gaps in Community law could easily have been remedied by just a cursory look at same of the major textbooks on Community Law.

A similar failure to take account of non-French literature was signaled in earlier book reviews in this Journal, cf. the review by Gormley, CML Rev. 2000, 1298. It is very much to be hoped that the French law faculties will participate in the legal debate on EC law by reflecting and commenting upon studies in other Member States written a major languages.

Piet Jan Slot
Leiden

P. Magnette, *La citoyenneté européenne.* Bruxelles: Editions de l'université Bruxelles, 1999. 249 pages. FF 157.

Magnette proposes a canonical analysis in both structure and contents. Both traits derive perhaps from the origin of the book: it results from a Ph.D. thesis. Description of historical development of EU citizenship provides the bones for the structure of chapters. The first part of the book starts with a review of the early precedents of European citizenship from 1957 to 1990. In particular, Magnette stresses rightly the importance of the invention of a tradition of European identity around a patchwork policy (p. 113–120). This emphasis is fully justified because EU citizenship illustrates a constructivist thesis better than most other EU institutions: discourses on EU citizenship provided a background of added legitimacy (further than current Member States interests) on which the institution was grounded. Also, his focus on the relevance of the non-discrimination principle is fully justified. The second part of the book goes as far as the review of the minor changes introduced by the Treaty of Amsterdam with a predominant focus on the political debates around the concept.

Apart from the examination of the origin and evolution of EU citizenship, the author places his discussion within a broader comparative historical perspective. Most works dealing with EU

citizenship have drawn inspiration in the general concept of citizenship; i.e. an institution rooted within the domain of States and domestic law. Magnette, in turn, suggests in the introduction an additional dimension: EU citizenship could be regarded as a contemporary manifestation of an historical species; i.e. the institutions that reflect federalizing links among independent public powers. Earlier manifestation of this could be found in the common citizenship of Greek city-states, the American confederation citizenship, the Commonwealth citizenship until 1948, etc. In all these cases, common citizenship manifests the special solidarity between independent public powers.

Although this additional consideration to the common way of reflecting on EU citizenship is very appealing, the historical analogies may nurture some analytical difficulties. Magnette provides a good account of the failures and shortcomings of EU citizenship. However, his conclusions also show some of the obstacles placed by traditional categories and ideal types (such as federation and confederation) when applied to the EU. Legal and political studies have progressively given up attempts to characterize the EU under these classical banners and, instead, the *sui generis* nature of the Union became a commonplace. When these categories reappear, they add puzzlement rather than clarity. To be faithful to Magnette's argument, he adheres to mainstream thesis and argues that the EU represents a wholly different legal order because the integration process results from a compromise between several dualisms: federalism vs. intergovernmentalism, etc. But he does not avoid the temptation of using typical categories; for instance, he says that the EU is not a confederation or a federation but a þfederation of States (p. 234)

Because of this, similar analytical complications reappear linked to EU citizenship, since it replicates the same kind of contradictions that are inherent to the nature of the EU and the whole integration process. Whilst it is hard not to agree with the parallelism, the implicit corollary results more arguably: shortcomings of EU citizenship derive from their failure to reproduce a given model (legally configured) of citizenship. He concludes that EU citizenship is the typical institution of confederations and a symbol of solidarity among independent public powers (p. 229), and, similarly, he considers that the rights of EU citizenship are far from these of a federal citizenship (p. 228). Even though he accepts that relations embedded into EU citizenship escape traditional classifications (p. 233).

Qualifying EU citizenship as confederal does not say much about its weaknesses, and the author has to distinguishing two dimensions in order to further explore his argument: the horizontal and vertical ones. Vertical dimension means a juridical direct relationship between individuals and Union. In Magnette's view, this is lacking and what exists, in turn, is a horizontal dimension: an extension (i.e. generalization) of the Community principle of non-discrimination. However, he accepts that certain rights constitute a direct link between citizens and Union (p. 230).

In reality, the suggested weakness in vertical links (between individuals and Union) matches the current institutional situation. Probably, Magnette insinuates the necessity of more political links; i.e. "vertical" political rights. Arguably, some of these (for instance, EU referendums on certain issues) are absent and this would mean a larger say for citizens in EU politics and processes. However, it seems that what determine the "vertical" or "horizontal" dimension is not so much the kind and content of rights. Rather, these dimensions seem to be determined by the level of the institutions at which rights are addressed. And it should not be forgotten that national institutions (and mainly national governments) constitute still the basic foundation for EU politics. If the essential trait of citizenship (legal equality) is taken simultaneously into account, then it seems more evident that the essential point in the construction of EU citizenship is the full deployment of the non-discrimination principle in the file of domestically reserved political rights; i.e. voting rights in national legislative elections and referenda.

The full account of the "politization" of EU citizenship requires taking into account two further issues: the already mentioned enlargement of citizens' participation in EU politics, and the non-positive dimensions of the notion of citizenship. Magnette pays attention to this second

question. He argues rightly along a growing body of literature that the horizontal dimension of EU citizenship is matched by the emergence of a European civil society. This, nevertheless, is restricted to the most active socio-economic and cultural sectors of national societies (p. 229) and it is not matched by a European civic space or public sphere. From this, Magnette induces a certain risk of elitism a point that is undisputable.

In summary, Magnette's book is a tidy account of the construction and development of EU citizenship written with an appealing narrative. In this sense, it must find a place within the large body of literature on EU citizenship.

C. Closa
Zaragoza

P. Larouche, *Competition law and regulation in the European telecommunications.* Oxford: Hart, 2000. 466 pages. GBP 45.

This comprehensive and systematic analysis of competition law and regulation in European telecommunications is of state of the art quality and worth reading by all those who are interested in the legal foundations of European telecommunications and the normative aspects of the transition towards the age of "Cyberspace". The author has both academic and practical experience. This is well reflected in the topical relevance, precision, thoroughness and depth with which the author explores European telecommunications law, starting from the run-up to the liberalization of the European telecommunications sector, the main policy goal in the 1990s, through to today's era of post-liberalization and convergence of digitalized communications networks and possibly also services.

The central contention of the book is that there exists a reiterative mutually reinforcing interrelation between European communications law and the economic and technological dynamics of the telecommunications sector. Just as EC telecommunications law was instrumental in bringing about a deep change in the workings of telecommunications, that very economic and technological change must in turn be reflected by the legal framework. The author argues that today's major challenge for the European institutions is to adapt the regulatory framework to the "post-liberalization" era. On the basis of numerous examples, the author describes the methods used to direct the liberalization process and assesses their validity in the post-liberalization context. A critical analysis is made of the so called "phasing out" approach, i.e. the claim that sector specific regulation should gradually yield to competition law and that competition law will offer sufficient means to regulate the sector in the future. The author distinguishes between economic sector specific regulation, primarily designed to manage the transition from monopolies to open markets, and non-economic sector specific regulation. The latter comprises e.g. safety and health protection. While sector specific regulation designed to create or guarantee access to functioning markets might be replaced by competition law at an appropriate time in the future, the second role of sector specific regulation will be needed as long as telecommunications plays its role as the underlying transport means and "economic and social foundation, i.e. always" (p. 364).

The main argument advanced by the author to justify this position is the specific nature of telecommunications as a network based industry. Telecommunications, in fact, provide the classical example of direct network effects: the value of the network to a given subscriber is increased through others joining. Because of the very network effects, which are characteristic of telecommunications, it is possible that the play of market forces is not sufficient to ensure normal optimization effects in terms of proper level of activity. In this case regulation would have to monitor the sector. The author is convinced that the telecommunications sector of the future (fused with computers and media) will increasingly become a backdrop for economic,

social and cultural transactions where communications are not sold as such but act as facilitators for the production of wealth and welfare.

Another focal point of the authors interest is the way in which EC competition law changed in the 1990s using the "essential facilities" concept which is often seen as an outgrowth of the classic refusal to deal cases under Article 82 EC. Pursuant to this "essential facilities" doctrine (inspired from US antitrust law) an enterprise would be ordered under certain circumstances to provide access to a facility if it is essential to its competitors to compete on a related market. The "essential facilities" doctrine remains controversial in case law and literature. The ECJ) put a high threshhold on the application of the "essential facilities" doctrine (Case C-7/97, *Oscar Bronner)*. This jurisprudential development reduces the possibility that competition law would completely take over from sector specific regulation. In conclusion Larouche explores the limits of competition law and puts forward a long term case for sector specific regulation, with the primordial mandate to ensure that the telecommunications sector as a whole fulfils its role as a foundation for economic and social activity.

Larouche, who is known for his work on telecommunication services and the WTO, could have gone one step further in the present book. Telecommunications and global information networks enhance opportunities for unleashing creative market forces amd wealth by engendring competition between enterprises but may also imply "regulatory systems competition" among states and even a potential for neoprotectionist conflict and struggle between countries and regions. Varying governmental policies and regulatory practices in different countries and regions pertaining to the new digital environment may lead to cases of "systems friction" to the disadvantage of consumers, enterprises and other economic and civil society actors. Such issues concerning "Governance" in the transition to the age of "Cyberspace" may be adressed along several central lines: notably the institutional aspects, regulatory elements, and the normative capacity to contribute to the solution of conflict. As self-restraint prevails in the field of economic regulation and de-regulation progresses internationally, some international scheme, possibly in the framework of the WTO will have to ensure the proper degree of procedural consistency and fairness. As competition law is at present predominantly national or regional, elements of a "Global Competition Order", including schemes for dealing with mergers, would gradually have to be developed, starting from existing bilateral and multilateral cooperation arrangements and agreements.

However, it is Larouche's great merit to have exposed in his excellent book clearly the present development of legal principles and doctrines underlying the substantive, procedural and institutional interplay between European competition law and telecommunications regulation which is far from having reached its final balance.

Klaus W. Grewlich
Bonn/Freiburg/Bruges

S. Gierschmann, *Dezentralisierungsmöglichkeiten im EG-Kartellrecht.* Frankfurt am Main: Peter Lang, 1999. 309 pages. SFR 79. ISBN 3-631-35215-8.

In her work, which appeared in 1999, the author deals with the possibilities and limits of a decentralized application of EC Competition Law by national antitrust authorities. In general, the European competition rules are enforced on the basis of a system dating from 1962, manifested in the Council Regulation 17 of 1962 although the competitive environment has completely changed as compared to the early days of the European Community, due to the progressing integration of the European Common Market and the enlargement of the Community. On the basis of the current system, also national courts and antitrust authorities may, besides the Commission, apply the prohibition of Article 81 (ex 85) EC; the Commission, however,

is exclusively empowered to grant constitutive exemptions pursuant to Article 81(3) EC. This centralistic system, originally created for a Community with only six member states, is not apt for an enlarged Community with already 15 Member States; the number of notifications is continuously increasing, and the thus growing accrual of work make it more and more difficult for the Commission to focus on the really substantial violations of competition. Thus, reform and decentralization of the surveillance system have in recent years become a central plank in the academic and political debate in EC antitrust law. Against this background, the Commission issued the now well-known White Paper on Modernization of the Rules implementing Articles 85 and 86 of the EC Treaty in 1999, followed in 2000 by a proposal for a regulation implementing the EC Competition rules. It is suggested here to replace the current authorization system by a directly applicable exception system, which enables national courts and cartel authorities to directly apply not only the prohibition set forth in Article 81 (1) EC but also the exemption rule of Article 81 (3) EC. According to the envisaged system the Article 81 prohibition does not bite on agreements that do not meet the prohibition criteria; prior notification can thus be avoided. According to the Commission's time schedule, the necessary legislation measures shall be taken by 2003. With a view to this development of law, Gierschmann's work is of particular relevance.

The study proceeds first from an overview of the current surveillance system. In a first step, the author deals with the investigation and decision competences of the EU Commission on the basis of Regulation 17. In this context, Gierschmann takes a particularly critical look at the Commission's efforts to accelerate proceedings by issuing block exemption regulations and the tendency to close files on an informal basis, especially through so-called comfort letters. These forms of accelerated procedures are not, according to the author, appropriate means for an acceleration of procedure. Especially the informal closure of the file leads to a lack of transparency and legal security. Irrespective of whether one shares Gierschmann's doubts, the author is right on one point: none of the described efforts to accelerate procedures has contributed to limit the workload of the Commission and to make the enforcement of EC Competition Law more effective.

Therefore, the question of decentralization of the EC Competition rules arises immediately. In a next step, Gierschmann consequently examines the possibilities and limits of a participation of national antitrust authorities in a surveillance system. In this context the author also reviews the option of a more intensive application of national antitrust laws. After a comprehensive analysis of the authorities and instruments the national antitrust authorities have at their disposal with a view to the application of the European competition rules, as well as of the hierarchy between national and European antitrust law, the author reaches the conclusion that the intended decentralization of competition control by a more intensive participation of the national antitrust authorities on the basis of the relevant legal framework conditions entails difficulties. In general, national antitrust authorities hesitate to use their power to apply Articles 81, 82 EC. In addition, Gierschmann proves that a national application of EC competition rules is hindered by the principle of integral application of Article 81 EC. A more intensive application of national antitrust law is not to be expected due to the broad scope application of European antitrust law, neither is it desirable, from the author's point of view, for the associated risk of an incoherent policy of competition regulation.

Proceeding from an overview of the current surveillance system, the author illustrates in the second part of her work, the possibilities of a decentralized enforcement of EC Competition law. From Gierschmann's point of view, the core of the envisaged reform should be the elimination of the Commission's monopoly to grant exemptions from the prohibition of Article 81 EC. Insofar, Gierschmann is in line with the ideas of the EU Commission. In contrast to the proposals expressed in the Commission's White Paper, however, Gierschmann's approach is "inherent in the system": unlike the Commission, Gierschmann does not argue in favour of replacing the current authorization system by a directly applicable exception system but merely suggests transferring the exemption competences to the national antitrust authorities. At least after a

transition period, agreements following in the scope of Article 81(1) EC shall be notified to the national antitrust authorities. The implementation of such a system requires the elaboration of clear criteria, not only for the allocation of responsibilities between the Commission and the national authorities but also among the national authorities. In this context, Gierschmann deals with the limits arising from the territorial principle with a view to the effectiveness and enforceability of the decisions of national authorities. The study ends with a concrete proposal for a system of decentralized application of EC competition law according to which the competences of the Commission and of the national antitrust authorities shall be allocated pursuant to quantitative (relating to turnover and market shares) as well as qualitative criteria.

Gierschmann's work is a conclusive and clearly structured study, which comprehensively evaluates case law and legal literature. Especial emphasis must be given to the author's attempt to provide her own proposal for a solution which well merits to be paid attention to in the discussion still going on regarding the modernization of EC Competition law.

Ulrich Scholz
Cologne