

BOOK REVIEWS

André Klip, *European Criminal law, an Integrative Approach*. Mortsel: Intersentia, 2009. 532 pages. ISBN: 978-90-5095-772-4. EUR 125 (student edition EUR 45);
Valsamis Mitsilegas, *EU Criminal Law*. Oxford: Hart Publishing, 2009. 352 pages. ISBN: 978-1841-1358-54. GBP 35.

As Mitsilegas says at the beginning of his book, “EU criminal law is one of the fastest growing areas of Union law, both in terms of legislative production and increasingly in terms of case-law.” This has led to an outpouring of books, but so far, nearly all of them have been in languages other than English. The arrival of these two books is therefore particularly welcome.

The books are very different – not least in what they perceive EU criminal law to be about. For Klip, EU criminal law is a system in the making. According to his vision, EU criminal law is (in part) “about the development of a criminal justice system for the European Union”. Thus in his book, the European Public Prosecutor – a figure whom the TFEU has provided with a potential Treaty basis, but nothing else – is presented as something that “will” happen, rather than something that just might. And the central section of the book consists of three chapters entitled “European substantive criminal law”, “European criminal procedure” and “European sentencing and penitentiary law”. At present, as every EU lawyer knows, the EU (unlike most Member States) does not have its own Code of criminal law, criminal procedure and sentencing, and to sketch the “European law” on these topics is an exercise that involves the imaginative use of fragments: rather as archaeologists reconstruct ancient pottery by strategically arranging a few broken shards. This, in effect, is what Klip has done when writing these three central chapters. Each chapter is a sort of frame, on which he has hung such fragments of EU criminal law as currently exist. Among the materials he has used to clothe the frame is EU competition law which, as he puts it, “provides a micro criminal justice system at Union level”; a view supported by the practice of the Court, which sometimes analogizes from competition law when an issue of criminal law falls to be decided.

These three central chapters are preceded by chapters which explain the EU and its institutions, and give an outline account of its main constitutional principles: notably the “four freedoms”. The preliminary chapters are written primarily for the benefit of criminal lawyers who, before learning about EU criminal law, need to get to grips with the structure of the Union and the basic principles of EU law. As someone in that category, this reviewer found them lucid, and very helpful.

On their other side, the central chapters are flanked by further chapters entitled “Bilateral cooperation” and “Multilateral cooperation and direct enforcement”. The first of these covers, among other things, mutual legal assistance, and the movement away from this and towards “mutual recognition”. The second deals with the central bodies: Europol, Eurojust, the Commission as the body enforcing competition law, and the proposed European Public Prosecutor – though, surprisingly, there is little here about OLAF, the official agency for investigating EU fraud. A final chapter pulls the threads together. One of Klip’s conclusions, predictably, is that “the gradual establishment of Union bodies and offices in the field of criminal justice demonstrates that a European criminal justice system is emerging”, and a little later he foresees the eventual possibility of a European criminal court.

Mitsilegas does not explicitly set out his underlying notion of what EU criminal law is, but it is clear by implication. For him, it is not so much a new system in creation, but rather a series of areas of legal business in which EU law increasingly impacts upon the criminal justice systems of the Member States: sometimes by preventing them from penalizing certain things,

sometimes by requiring them to penalize certain other things, and often by encouraging them to cooperate.

This train of thought underlies the structure of the book. It begins, like Klip's, with an account of the institutional framework. This is followed by a chapter entitled "Harmonization and competence", in which the legal basis for measures of harmonization in criminal law and criminal procedure is examined, and an account is given of the main instruments so far enacted. This is followed by a big chapter on "mutual recognition", central to which are discussions of the European Arrest Warrant, and the case law on the *ne bis in idem* principle. Next comes a big chapter on "bodies, offices and agencies", where we learn about Europol, Eurojust and OLAF. This is followed by a chapter entitled "databases", in which we learn in detail about the astonishing (and worrying) array of powers whereby the EU, in the name of security, collects and stores information about its citizens, and others, and having collected it, increasingly shares it with other countries, notably the USA. The last substantial chapter deals with "the external dimension": the ways in which, in the context of criminal justice, the EU engages with its neighbours – both those which are on their way to becoming Member States, and those (like Russia and the USA) which are not. As with Klip's book, a final chapter draws the threads together.

So from the perspective of the would-be reader, how do these two books compare? In terms of up-to-dateness, Klip clearly wins. At the time these two books were written it was uncertain whether the Treaty of Lisbon would come into force or not. Klip gambled that it would, and wrote an account of EU criminal law as modified by Lisbon, mentioning here and there that the law described would be different "if the Lisbon Treaty does not come into force". Mitsilegas made the opposite assumption and followed the reverse technique. In consequence, large parts of his text are devoted to issues that are no longer relevant: how the "Third Pillar" differs from the "First Pillar", and demarcation disputes between the Council and the Commission as to which type of instrument is appropriate.

On the other hand, of the two books, Mitsilegas's is in some ways the more "user-friendly". Its more conventional approach, and its smaller size, combine to make it more accessible for those who wish to get a general grasp of the subject by reading a book from end to end. And for UK lawyers, in particular, it has the further advantage of looking at the subject from the perspective of the United Kingdom and British law. So the UK's celebrated "opt outs" are fully dealt with, and when European instruments are discussed, the reader learns about the UK's attitude during the negotiations, and how it brought its influence to bear. The footnotes, too, are full of references that point the reader in the direction of the UK legal literature (and, it should be added, to much Continental legal literature as well). Klip, by contrast, takes an Olympian overview, as if he were surveying the topic from the top of the Atomium Tower in Brussels. And though the text is packed with footnotes that refer the reader to European instruments, Commission documents, Luxembourg case law and other official sources, they contain no reference to *la doctrine*; although it should be said that there are 11 pages of bibliography at the end. A further aid to readability is that Mitsilegas's book, though lighter on theoretical discussion, provides more information about the political background to many of the legal developments that are discussed. When reading about Europol, for example, it is interesting to learn that at the time of its creation a minority of European politicians, led by Helmut Kohl, were pressing for something much more muscular – a "European FBI".

Both books score highly on what might be called "academic backbone". The information they contain is full and accurate, and in both books, difficult issues are examined in depth, and often critically. A good example is the concept of "mutual recognition", and the practical consequences of applying it. At the end of his analysis, Klip points out that the policy of mutual recognition is "egocentrically mandatory". In principle, what a State demands of its neighbour, it then gets. "The interests of the requested state and those of the suspect or of the victims do not count. National law enforcement authorities only execute without being in a position to have any control or make any choices or prioritization." Mitsilegas's examination of this

concept is equally penetrating. He critically analyses the notion of “mutual trust” on which mutual recognition is supposedly based and asks how, at a time when the Commission is publishing reports that are highly critical about corruption in Bulgaria, it can be reasonable to expect the legal systems of all Member States to operate on the basis that the others are all equally trustworthy. Both writers are highly critical of one of the arguments that has been repeatedly used to support the case for mutual recognition – that within the Union, legal decisions, like products, must be allowed “free movement”. In terms of solidity, however, there are two respects in which Klip’s book is perhaps slightly in the lead. First, being bigger, there is more in it. And secondly, his innovative scheme has caused him to think ahead. It is to his book, I suspect, that both lawyers and policy-makers will increasingly refer when confronted by some new issue.

Since they arrived in my office, these two books have spent more time on my desk than on the shelf. Both, in my view, are remarkable and welcome additions to the literature. Both authors deserve congratulations.

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Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza, *Shaping Rule of Law through Dialogue*. Groningen: Europa Law Publishing, 2009. 433 pages. ISBN: 978-90-8952-057-9. EUR 68.

Being convinced that “judicial dialogue is a privileged point of view to read the relationship between legal orders”, Fontanelli, Martinico and Carrozza invited a number of scholars to join forces in investigating how judges may create “connections between legal regimes and proceedings”, as a counterweight to the phenomenon of “the fragmentation of the international legal order and the absence of constitutional devices governing the connections between the various legal regimes”. The book under review is a voluminous work containing fifteen (including the foreword) contributions by both established and promising scholars. It is the result of a two-year cycle of seminars organized by the famous STALS research programme of the Scuola Superiore di Studi Universitari e di Perfezionamento Sant’Anna in Pisa, Italy. The editors do not provide a clear answer as to whether the Rule of Law corresponds to an established reality at the international and the supranational level (more than a normative, fictional objective). Rather, they opt to place the object of their research, that is, judicial dialogue, at the service of this very idea.

The format of the volume suggests that the editors were confronted with a large number of abstract concepts, ranging from fragmentation to judicial dialogue, and activism to pluralism and Rule of Law. Leaving these terms as vague and undefined as they may be, created room for more unconditional analysis. The consequences of that strategy are twofold. First, the advantage is that the studies in the book cover a wide spectrum of both theoretical and practical issues, legal regimes and judicial *fora*, in which they succeed in bridging – in an admittedly anarchic, but “filling” way – an impressively rich number of schemes of interaction between the national, the supranational and the international levels. However, the disadvantage of that richness is the difficulty of domesticating it. This presumably explains the reason that the editors abstained from structuring the contents of the book in a more systematic way and refrained from introducing certain more detailed questions in the form of subtitles destined to categorize the studies and help the reader to follow arguments and identify general sub-topics or research questions to which each set of studies responds.

Although it risks arbitrariness and neglecting certain important parameters of the analysis, this review grosso modo discerns four different general trends in the studies included in the book.

First, it contains four theoretically oriented articles. The first set of these four studies consists of Petersmann and Palombella's contributions. We shall come back to these two studies, but, for now, suffice it to mention that they are comparable units in that they both address the question of the Rule of Law globally from a less technical and more jurisprudential perspective and explore the conditions for it to flourish. The second group is made up of the papers by Shany and Pauwelyn and Salles. Both articles tackle the question of the powers of the courts with regard to the fragmentation of international law. While Shany's contribution aims at demonstrating the breadth of the institutional landscape and investigating the extent and conditions under which national courts are acting as international judicial *fora* and, thereby, contribute to the interpretation of international law (that is, potentially also to its fragmentation), Pauwelyn and Salles demonstrate that because (outside the emerging notion of *le juge naturel*) international law lacks effective means against *forum shopping*, courts enjoy wide discretion in the exercise of competence.

The second group of contributions discusses examples of judicial dialogue within and "around" the EU. The studies on the judicial dialogue in the EU raise a number of interesting questions regarding both institutionalized and informal ways of interaction between the Member States' courts and the ECJ. Martinico seeks to explain the increase of preliminary ruling references by constitutional courts and, *inter alia*, points to the margin of appreciation practice followed by the ECJ and to the consolidation of human rights at the EU level. Komárek calls for limiting (with certain exceptions) the preliminary ruling procedure strictly to national courts of last instance. Meanwhile, Cortese investigates commonalities in the methods of judicial reasoning between the ECJ and the national administrative courts. Interestingly, Lavranos' contribution is situated at the crossroads between dialogue within the EU and its impact on the way that regime regards international law (dialogue "around" the EU). Lavranos' analysis explains how the ECJ has recently succeeded in identifying "a new untouchable core of fundamental European constitutional law values". These values stem from national constitutional law and their emergence at the EU level is seen as a sign of ECJ's transformation into a true constitutional court for Europe. The reinforcement of the autonomy of the EU *vis-à-vis* international law entails the subordination of the latter to primary EU law.

When discussion comes to the international dimension of ECJ's judicial channels of communication (dialogue "around" the EU), the point of reference cannot be anything other than the seminal *Kadi* case. The volume contains two studies devoted to that case law that illustrate a number of both topical and innovative questions. Adam explores evolution in the practice of the Union's judicial system before *Kadi*, pointing to the objectives pursued by the ECJ and investigating the ramifications of that case law with the practice of the UN. Fabbri's study puts a clear emphasis on the broader European dimension of *Kadi*. After outlining the main traits of what the author describes as a multilevel system of human rights protection, he stigmatizes the ineffectiveness of that very system and explores possible channels for improvement (through informal dialogue and institutional reform).

In the third category of studies one can group the contributions that treat the role of international courts. Beginning again with a case study of European interest, Angelini's article analyses the ECtHR's decision in *Behrami and Saramati* and illustrates the questions of broader (both practical and theoretical) interest that the Strasbourg Court abstained from raising. Raffaelli investigates the relationship between the ICC and other international judicial *fora* (including the ICJ) and appraises the ICC's willingness thus far to avoid unnecessary conflicts. Last but not least, Huerta-Goldman juxtaposes WTO Panels to the 1904 NAFTA Panels and explores their co-existence through a comparative course.

The fourth and last group of studies discusses judicial interpretation. Alemanno examines the dialogue between judges and experts in the framework of Union law and WTO, and makes a number of proposals on how to help the judge in her task to review science so that risk analysis finds a proper place in the process of judicial interpretation. Finally, Fontanelli explores the role of necessity in the WTO Panels' and the Appellate Body's practice in

assessing State measures that are deemed necessary for promoting certain values that are conflicting to trade obligations.

Albeit brief, this exposé of the contents of the *Shaping Rule of Law through Dialogue* amply suffices for the purposes of revealing its merits. The question of judicial dialogue is examined through multiple perspectives that shed light on the proportions of fragmentation. Thereby, the volume reveals the compound dimensions of the phenomenon, which move well beyond the ILC's narrow vision – limited to the so-called normative fragmentation. The book traces evidence of judicial dialogue in the practice of domestic courts, the ECJ and a number of other international judicial *fora*. Finally, it minutely depicts the transformation (through the reinforcement of human rights and the common constitutional traditions of the European States) of the EU order into an increasingly autonomous, that is, a “real” self-contained regime that raises strict constitutional barriers in the reception of international law.

However, one of the very main assets of the volume, namely its special attention to the EU paradigm, also renders it susceptible to criticism. For, devoting almost half of the studies in a collective volume discussing judicial dialogue and fragmentation to the Union system, it might have been useful to investigate how these two phenomena emerge and interact within a *sui generis* and dynamic supranational regime. Yet one is obliged to stress that, despite its focus on EU, the volume remains quasi-silent on the rigid dualism introduced by ECJ. Likewise, it abstains from criticizing dualism as a potential source of fragmentation of international law. Also it refrains from illustrating that, human rights being an integral part of modern international law that enjoys a special *erga omnes* status, different, equally effective, and more international law-friendly paths are available to the ECJ for promoting human rights within the Union constitutional order. Arguably, beyond a mere academic interest on a system that is both “sexy” and opportune for analysis, placing the emphasis on the EU equally reflects a certain eurocentricism in the definition and the axiological weight that concepts such as human rights and Rule of Law bear.

This might also plausibly explain the editors' choice to delegate their privilege of using either the introduction or the conclusion to defend their personal understanding of the terms to two authors, Petersmann and Palombella, who promote a rather unitary and cosmopolitan conception of the Rule of Law and justice (if it existed as these authors conceive it, fragmentation would simply be a non-issue). “For” (as Albert Camus argues in “The Myth of Sisyphus”) “if, bridging the gulf that separates desire from conquest, we assert with Parmenides the reality of the One (whatever it may be), we fall into the ... contradiction of a mind that asserts total unity and proves by its very assertion its own difference and the diversity it claimed to resolve.” For if by abstaining from spelling out their personal doctrinal and philosophical premises the editors skilfully escape falling into Camus' contradiction, this is not the case for “the A and the Ω” of their book – which is entrenched behind the authors who sign the very last study and primarily its foreword.

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Alicia Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental Pillars*. Oxford: Oxford University Press, 2009. 212 pages. ISBN: 978-0-19-956996-0. GBP 60.

As Shapiro pointed out almost thirty years ago in his classic *Courts – A Comparative and Political Analysis*, law students are usually brought up with the idea that courts consist of an independent judge applying pre-existing legal rules, after adversarial proceedings that reveal truth, leading to dichotomous decisions where one party is assigned the legal right and the other the legal wrong. This idyllic model corresponds to a prototype that does not exist in

reality. Yet, for students specializing in EU law, the myth probably never needed much debunking: for generations, they have been spoon-fed the tale of a court stretching and moulding the rules on several occasions, giving shape to its own truths and axioms, (almost) single-handedly driving forward the integration process. Countless volumes have been dedicated to this topic. The antics of the ECJ in the CFSP and the AFSJ form the subject of the book by Hinarejos, based on a DPhil thesis defended at Oxford in 2008. Her study is however not limited to the role of the Court alone, but encompasses the longitudinal changes in the (former) Second and Third Pillar, culminating in the grand reforms carried out by the Treaty of Lisbon. According to the author (p. 13), the aim of the book is twofold: to map out the evolution of judicial control in two specific fields of Union activity, and to study this process as a further step in the development of the ECJ as the constitutional court of the EU. The result fits in neatly with the existing literature, claiming a rightful place somewhere between Denza's *The Intergovernmental Pillars of the European Union* and Arnulf's *The European Union and its Court of Justice*.

In Chapter 1, the author expounds her general view of the Court, founded on the premise that it performs the role of a federal constitutional court. Although the claim is made that this position can count on a broad consensus in legal doctrine, this statement appears to contain a slight misrepresentation: indeed, few will deny that the ECJ has functions that, to a considerable extent, liken it to a constitutional court; yet the federal model does not necessarily provide the most valid point of reference, as constitutional courts have also emerged in an abundance of unitary States. Moreover, the author distinguishes rather crudely between supreme courts and constitutional courts, almost immediately leaping to a conclusion, thereby sidestepping those ECJ features that are also present in international dispute settlement bodies. The prime contention remains nonetheless that "considerations on the Court's jurisdiction and its role within the EU legal system are best placed within the context of the general discussion on constitutional adjudication and the problems it raises" (p. 1). Curiously, this context receives only scarce further elaboration. Moreover, the consequences of placing the considerations in said context are not entirely clear, as a sustained comparative analysis with other constitutional adjudicators takes place neither in the remaining pages that make up the first chapter, nor elsewhere in the book. This instantly draws the reader's attention to a broader weakness of the study, namely that its theoretical approach to the concept of "judicial control" is articulated rather thinly. Admittedly, the author does draw on Kelsen's ideas on constitutional adjudication, but only very briefly. The seminal writings of Hart, Dworkin and Posner are all conspicuous by their absence, and the works of Raz, Ely and Sunstein crop up in footnotes only. This leads to various laconic statements and the use of terms begging for clarification, such as that constitutional courts are "positive legislators" (p. 11), that they have to take "political decisions" (p. 7), and that national courts expect from the judges in Luxembourg to have an "ethos" similar to theirs (p. 8). In addition, the lack of a broader conceptual framework reinforces a one-dimensional vision of the EU as a legal system with one inescapable final interpreter, thereby taking for granted that the latter role belongs with the European Court, which "considered itself legitimized" (p. 10) from the early beginning – without detailing how such a hierarchy could *in abstracto* be superimposed, and without considering the non-vertical or pluralist options for the interplay between the highest national courts and the ECJ. All the same, we do here come across the quintessential recognition that the Union's judicial system rests upon the "respect" that national courts are willing to grant to the Court (p. 5). In addition, appropriate attention is drawn to the fact that constitutional courts will only be considered legitimate if they decide on the basis of the shared values underpinning the system, and that thus, in the absence of a pan-European consensus, the legitimacy of the European Court's constitutional adjudication will always be weaker (p. 11). These observations are not entirely new, but deserve to be rehearsed more often, as they go a long way towards explaining why many legally sound decisions (e.g. the judgments in Case C-285/98 *Kreil*; Case C-147/03 *Commission v. Austria*; Case C-127/08 *Metock*) continue to attract hostile comments from large quarters of the EU.

Chapters 2 and 3 comprise the heart of the study. Therein, the development of judicial control in the AFSJ and CFSP, respectively, take centre stage. Attention goes *inter alia* to the nature of the legal measures in both domains, the Court's jurisdiction, the system's maladies, and the ways in which the European judges have sought to cure these. Generally, the analyses in these two chapters are pervasive, stimulating, and of an overwhelmingly high standard. Occasionally, the depth of discussion even eclipses that in treatises devoted exclusively to EU external relations or Justice and Home Affairs law. Unfortunately, however, although the rules are depicted in their pre- and their post-Lisbon forms, phrases like "the current law", "the rules at present" and "[the institutional framework] nowadays" are employed profusely – all relating to the law as it stood prior to 1 December 2009. Undoubtedly, every effort was made to ensure that the text would be up-to-date upon publication – yet the Lisbon Treaty entered into force days before the book was published. Of course, a similar fate has befallen other authors whose works were scheduled to appear in late 2009 or early 2010. Even so, the wiser course of action might have been to delay their publication by a few weeks more, to revise them and ensure they were future-proof – for to a contemporary readership, they would have been slightly more palatable if full account was taken of the finality of the planned amendments. This notwithstanding, Hinarejos' monograph remains eminently valuable, especially the paragraphs discussing the "policing the borders clause" (formerly Art. 47 TEU, now Art. 275 TFEU), the enduringly problematic issue of private parties' *locus standi*, and the possible extension of the doctrine of supremacy to Title V TEU and the associated risks and dangers.

Chapter 4 contains the study's concluding remarks, and provides some final reflections on the Court's conduct in the past and its role in the time to come. As in the previous chapters, the author takes a predominantly sympathetic stance, giving her blessing to the institution that has tried to make good for the "federal incomplete bargain" comprised by the Treaties (p. 192). Overall, she clings to common orthodoxy, stating *inter alia* that it was "inescapable" or "unavoidable" that the Court acted as it did, that it "had to lead the way" in adjusting the rules, so that the system was sure to undergo its "much-needed reforms". We thus encounter manifestations of what in earlier debates has been dubbed the "most-favoured rationale", a classic line of reasoning that suffers from an intrinsic circularity. The argument goes that the European legal edifice is marred by certain deficiencies, for which the Court has endeavoured to compensate through judge-made law; of course, it did so, because it had to do so, since the edifice would otherwise continue to be marred by its deficiencies. To be sure, one may still adhere to the rationale, but not without a solid conceptual assessment of when a deficiency can be said to represent a true deficiency, and conversely, when a lacuna equals a deliberate omission. Such an assessment is absent from the present study. Nevertheless, when it comes to the intergovernmental pillars, the Court's activism can be more readily understandable: as the author emphasizes, the (hitherto) flimsy democratic credentials of EU criminal law and foreign policy decisions, which may nevertheless affect natural and legal persons adversely, provide a patent case for increasing judicial control by whatever means. Especially when one examines the franchise through a fundamental rights prism, the Court's mandate for ensuring effective judicial protection is hard to put in question. All the same, one would then expect the author to come down somewhat more harshly on the Court's position in *Segi* (Case C-355/04), rejecting liability of the EU for wrongdoings in the Third Pillar, as this stood at odds with ECHR standards, and left the offended claimants without proper redress. It also rested uneasily with earlier more generous case law (e.g. Case C-294/83 *Les Verts*; Case C-221/88 *Bussoni*; Joined Cases C-6 & 9/90, *Franovich*): previously, a principle of financial liability could be conjured up *ex nihilo* to the detriment of the Member States, but not to the detriment of the Union. By the same token, a much more critical appreciation of Case C-160/03, *Spain v. Eurojust* would have been apposite. Instead, the author voices the creed that, for all its creativity, the ECJ will respect insurmountable textual limitations (p. 188), which seems to be passing over the heart of the matter. Indeed, at some points the Court will retreat, yet at others, it will advance. The literal wording of a provision rarely prevails in the face of a ringing injustice, yet

poignant lacunae will not always be remedied either. Contrary to what may be expected of a constitutional court aiming to promote justice and enforce the rule of law, the dealings of the Court in the intergovernmental pillars did not display a consistent pattern, and the glaring examples of double-heartedness could well have been commented upon with a little bit more vigour.

On the whole, the book lives up to its first aim of mapping out the evolution of judicial control in the former non-Community domains. In the end, this has however resulted in a fairly unadventurous exercise. Moreover, the second aim of studying the process as a further step in the development of the ECJ as the constitutional court of the EU does not wholly come into its own. Certainly, the analysis is there, but it does not provide for an innovative take on its subject. In addition, the argumentation lacks persistence, as evident from the fact that no constructive inferences are drawn from the twin chapters that lie at the heart of the book, as well as from the brevity of the last chapter, which merely contains concluding “remarks”. Consequently, the main finding that, as apparent from its performance in the former Second and Third Pillars, the Court can indeed be considered to have carried out a constitutional role, fails to impress. At the same time, this should not distract from the book’s great virtues: it constitutes a sharp-witted, meticulously researched disquisition on jurisdictional transformations in the Common Foreign and Security Policy and the Area of Freedom, Security and Justice, it exhaustively scrutinizes the relevant Treaty rules in both their pre- and post-Lisbon form, and manages to accomplish all this in a conveniently compact volume.

In the work referred to earlier, Martin Shapiro underlined that an element of consent is required for legitimate dispute resolution. In tribal societies, this was resolved by direct consent obtained by the “big man” adjudicator from each of the parties. Nowadays, losing parties abide by court decisions as long as they believe that the rules are unequivocal and that they form part of the same social fabric. In the heterogeneous, increasingly complex domain of EU law, these beliefs were becoming ever harder to maintain. As Hinarejos rightly asserts in the final pages of her book, recurring bouts of judicial activism may increase compliance – but in the long run, they might just as well render it impossible to compel subjects to abide by all the ECJ’s judgments. For that reason, the recent evaporation of the pillar structure, and the simultaneous endorsement of the Court’s dealings is to be hailed with relief. Besides much else, the book reviewed here can be regarded a suitable *Kaddish*.

Henri de Waele
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Henri De Waele, *Rechterlijk activisme en het Europees Hof van Justitie*. Den Haag: Boom Juridische Uitgevers, 2009. 483 pages. ISBN: 978-90-8974-111-0. EUR 59.

Judicial activism and the European Court of Justice is the English translation of the title of this important book. It is by no means an easy topic, as judicial activism has become an often heard allegation – or more neutrally, characterization – in the discussions of the case law of the European Court and its role in the European integration process. As is often the case with popular catchphrases, it is used on many occasions, in different legal and non-legal settings and in many different senses, leaving uncertainty about its precise meaning and hence significance. Although not easy, precisely for that reason it is a good topic for thorough inquiry. De Waele’s book, based on his PhD thesis, does a very good job in carefully defining the concept, and meticulously dissecting the selected case law of the ECJ in order to evaluate the quality of legal reasoning and determine whether it should be qualified as activist or not. Indeed, upon reading this book, it becomes painfully clear how often the concept of judicial activism is used

in relation with the ECJ's case law without a clear and precise basis, and one is relieved finally to find a comprehensive study on the matter.

The book's first quartet of chapters is devoted to establishing a sound theoretical basis for the analysis conducted in the subsequent chapters. De Waele introduces an abstract framework, featuring a scale "of four gradations of intensity in judicial law-making", distinguishing between extreme restraint, restraint, activism, and extreme activism. In particular, the difference between activism and extreme activism is enlightening, and his argument that only the latter should be condemned as excessive and undesirable *per se*, is convincing. De Waele rejects impact assessment and decides to operate by means of a more nuanced and objective two-step method, firstly focusing on the quality of the case law by testing its legal and intellectual credibility (i.e. whether the reasoning is logical, sound, consistent and convincing), and secondly embedding this in a broader perspective in order to establish whether the judgments in question "are legally/dogmatically defensible". The author hereby provides himself and the reader with convenient mental handles for the concrete analysis of the case law, and by conducting the assessment of each case on the basis of clearly defined indicators and following a well-structured pattern, the final conclusions are highly credible. The study is objective in a way that is rare in legal research, and that certainly suits this topic particularly well.

Of course, the real heart of the book lies in the case studies, taking up chapters 5 to 10, dealing with five threads of case law, to wit on direct effect and supremacy, on judicial protection, on State liability, on European citizenship, and on European criminal law. In total 15 judgments are dealt with. Because of the fact that the preceding chapters have successfully destabilized the reader's pre-set assumptions and ideas about the Court and its activism, by the time Chapter 5 arrives one is positively curious as to the result of the concrete analysis of the case law. In that sense, the fact that the selection of the case law consists of only "the usual suspects" (*Van Gend en Loos*, *Costa Enel*, *Les Verts*, *Francovich*, *Sala* and *Pupino*) that run the risk of having become over-familiar to the targeted audience, proves largely unproblematic because De Waele does manage to shed new light on them. Although it is true that many of the arguments and considerations, that have by now become commonplace, are repeated, they are also challenged and subjected to a final and ultimate authoritative evaluation.

This is typical of the book's entire style. Holding itself to the high standard of quality reasoning that it applies to the ECJ, it exhaustively sums up all the different arguments and viewpoints that exist on a certain issue and carefully weighs them against each other. In doing so, it does a better job than the ECJ, it seems. Although the final verdict on the Court is that only in the minority of cases it can be accused of excessive activism, there is not too much reason to rejoice, because the book also conclusively demonstrates that the quality of legal reasoning in almost all of these landmark cases has left a lot to be desired. Then again, it seems that here and there, a tiny dose of the bolder attitude of the ECJ, in going out on a limb and pronouncing a forceful opinion instead of endlessly qualifying and re-qualifying other commentators' viewpoints, would not have been entirely unwelcome. But although the book is sometimes a little over-elaborate as a result of its desire for exhaustiveness and completeness, it does at times take a more provocative stance, provides ample food for thought and remains a pleasure to read.

It is, it should be said, a pity that this pleasure is beyond the reach of the non-Dutch speaking world, for although the book features excellent summaries in English, French and German, it obviously cannot in a few pages convey the same message with the same quality. Although the present reviewer is speculating here, it seems that the linguistically gifted author, whose language is perhaps even more impeccable than his legal analysis, who flawlessly weaves in Latin, English, French and German phrases and expressions, and whose thorough knowledge of these languages is reflected in the bibliography, could perhaps also have chosen to write this book in English. Although the pressure to write in English in contemporary Dutch legal academia is to be regretted – for the beauty and richness of the Dutch language as well as the advantages of writing in one's native tongue should not be underestimated – a book on a topic

like this, of equal and considerable relevance to all the EU countries, should be available to a larger public.

In any event, the main findings of the concluding Chapters 11 and 12 are available in the summaries in the various languages, and they should be taken to heart. Rightfully criticizing the Court's "curt, apodictic and often cursory argumentation", its "emphasis on systematic and teleological interpretation to the detriment of literal and historical interpretation" and "the seemingly structural preference for judgments which favour the expansion and strengthening of the Community legal order", transgressing "the limits of its judicial task more than once" especially in the area of European citizenship, De Waele is right that the Court should do better. For a start, the Court could improve its argumentation and rely less on the systematic and teleological interpretation methods. Although perhaps one has heard it all before, this time these are well-researched and well-argued conclusions.

The book is honest in admitting that by selecting precisely the landmark constitutional cases that one expected beforehand to feature some degree of activism, the conclusions cannot automatically be considered as representative of all of the Court's case law. De Waele argues that the fact that the Court has exercised activism on these defining constitutional moments is nonetheless worrying in itself, and that it is a typical and accurate depiction of the Court's judicial behaviour. This is true, but it could also be said that these cases have been defining moments in EU law precisely because of the underlying activism. Where would citizenship be without the ECJ conjuring things up out of thin air?

De Waele is also honest in admitting that to a certain extent the lack of quality of the judgments is inevitable in being caused by the particularities of the Court, such as its French legal tradition and the consensus-based approach. Some suggestions are forwarded to help ameliorate the situation, like the introduction of dissenting opinions, more parliamentary involvement in the selection of candidate judges and hearings preceding their appointment. But although the book eventually argues that these suggestions – which have been proposed, discussed and dismissed before – should be given strong consideration in the future, the case made for each of these propositions is rather weak. For, in typical style, De Waele has just done too good a job in not only setting out the advantages of these alternatives, but in also convincingly setting out the disadvantages.

Sacha Garben
Florence

Andreas Obermaier, *The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy*. Aldershot: Ashgate, 2009. 220 pages. ISBN: 978-0754-6782-74. GBP 55.

The end of territoriality: is it a hope, a fear or even a "threat" (pp. 3, 183)? Obermaier reports in his study, reviewed here, on the implementation of the *Kohll/Decker* rulings of the ECJ between 1998 and 2007 into national law in these three countries. The ECJ held that the basic freedoms of free movement of goods and services stipulated in the (then) EC Treaty are directly applicable to health care provision Europe-wide. The author concludes that the transformation of the ECJ rulings into national law was successful: in one step in Germany (2004), gradually in France, and à la carte in England and Wales (p. 159).

In his book Obermaier highlights the interaction of the different actors. A harsh "No!" was the initial reaction of many Member States to the *Kohll/Decker* rulings. How could such a strong wall against the ECJ rulings ever erode? Obermaier describes in detail, and from various viewpoints, the different factors which in combination drove forward the implementation of the rulings in the three countries: national courts, political parties, circulars, decrees, health insurers and the Commission. He also gives a brief summary of the situation in the other

Member States. In France, for instance, the government was mainly pushed along by the European Commission, through several infringement proceedings, and by the decisions of its own national courts at all levels, especially the *Cour de Cassation* (pp. 166, 187). In Germany, numerous semi-official working groups were, after 1998, preoccupied with the ECJ case law (p. 160). This gradually led to a shift of the governmental position toward compliance with the ECJ rulings. Party political preferences played a role, too. A pioneer like the SBK (Siemens-Betriebskrankenkasse) went so far, between 2001 and 2003, as to reimburse health care costs incurred abroad for its voluntarily insured customers for out-patient and in-patient health care without prior authorization (p. 182). In England and Wales, the Administrative Court of the Queen's Bench Division of the High Court with its *Watts* decision was the main driving force (p. 161). Several hundreds of British patients were reimbursed by the NHS (National Health Service) for treatments abroad outside the coordination regulations (p. 182).

Obermaier comes to the conclusion "that national courts are a key variable for understanding and explaining national implementation: they are able to kick-start and accelerate implementation." In his view, the role of the ECJ as a motor of progress is over-emphasized, since it restrained itself with the rulings that followed *Kohll/Decker* until 2007 (p. 142 et seq.). On the other hand, this self-restriction was, he writes, a prerequisite for the implementation of the rulings into national law (p. 171).

This is not the place to go into the details of Obermaier's final results. The study is highly recommended to all those who want to be informed about how the *Kohll/Decker* jurisprudence of the ECJ and the decisions which followed until 2007 were implemented into health care provision in Great Britain (England and Wales), France and Germany, to what extent and at what time, and – in his view most important – which other factors were relevant for reforms. Obermaier describes his impressions very vividly and fascinates both the informed and the less informed reader in a very comprehensible way. He appears a very well informed author, thoroughly equipped with much material from both the national and EU level, he does not omit details, and at the end of the book answers all the above questions.

Günther Lorff
Munich

Anne-Lise Sibony, *Le juge et le raisonnement économique en droit de la concurrence*. Paris: L.G.D.J. Montchrestien, 2008. 883 pages. ISBN: 978-2-275-03199-6. EUR 87.

One rarely comes across a competition law book which is both a pleasure to read and opens up a truly new perspective on the understanding of this complex and still somewhat obscure subject. This is such a book. Its main theme is how economic reasoning is, can, and should be integrated in the legal framework and the process of the application of the competition rules. This starting point is important. Many of the innumerable publications which, over the past few decades, have addressed the issue of the relationship between competition law and economics take quite a different, and ultimately sterile, approach. They argue, or imply, what economic goals competition law should pursue. They then try to show that the law does in fact pursue those goals, or that it does not and, therefore, is a bad law. But this approach is oblivious of the fundamental truth that our law is the embodiment of values taking absolute precedence over any economic policy or belief which happens to be supported, from time to time, by economists, policy makers, and business quarters who are better than others at making their voices heard. This does not mean that economics has no role to play in competition law. On the contrary, as Sibony's book demonstrates, EU competition law is open to economics and may be enriched and clarified by the contribution of economic theories and economic analysis. With clarity of language and rigour of reasoning, Sibony shows how this happens, mastering the substantive and procedural law of the EU as well as French law, which allows her to draw

comparisons which will be instructive to all students of competition law even beyond those legal systems. Nor is the author any less confident in dealing, in a crystalline prose, with economic concepts, thus providing a truly joined-up discussion of all the main economic problems of competition law, from the noble quest for the objective of the law to the technicalities of market definition.

The substantive analysis starts with a discussion of the obstacles to the adoption of economic reasoning by the courts. She examines three types of obstacles: 1) obstacles relating to the objectives of competition law; 2) obstacles relating to the structure of economic reasoning; 3) obstacles relating to the legal framework. This analysis already reveals one important feature of this book. While the aim of the author is to discuss how economic reasoning is taken into account by the courts, the book achieves much more than this. Without ever losing its main focus, it discusses the key elements of competition law, offering views which are interesting and well argued and in themselves constitute a contribution to the clarification and development of the law. For instance, when dealing with whether the objectives of EU competition law constitute an obstacle to the adoption of economic reasoning by the courts, it presents an extremely interesting analysis of those objectives. Or, to give but one more example, still in the context of the examination of the obstacles to the adoption of economic reasoning, it discusses the perceived tension between economics and the presumption of innocence and the principle of legal certainty, and how economic reasoning interacts with the rules of evidence and the process of evaluating evidence. Not surprisingly, the author argues that the obstacles to the adoption of economic reasoning in competition law are perceived and not real.

If there are no obstacles to the courts' adoption of economic reasoning, it becomes necessary to explain how the courts have approached economics in interpreting and applying competition law. The author gives two examples: the interpretation of "restriction of competition" and the definition of the relevant market. Here too, the contribution of the book to legal scholarship and development is two-fold. Not only does the author explain, in a historical, doctrinal, and inter-disciplinary perspective, how economic concepts have been used in legal reasoning, but she also writes valuable pages on the concept of "restriction of competition" and the definition of the relevant market which are in themselves a significant contribution to legal thinking on these subjects.

The central theme of the book is addressed in its second part. Economic reasoning is relevant at different stages of the legal process. First, it informs the identification of the applicable legal rules. For instance, the concept of abuse of a dominant position is general and undefined under Article 102 TFEU. Economics provides the categories under which a specific type of abuse, say, predation, may be defined and further classified as financial predation, reputational predation, and signal-jamming predation. Much to the delight of the Anglophone readers, the author explains the role of economics in the identification of legal rules by relying on the concept of "test de qualification", defined as "a structured answer to a legal question". The development of the collective dominance test or the predation test shows how economic reasoning has provided substance for vague legal concepts by identifying a number of material elements of fact which are either necessary or sufficient to establish the relevant qualification. Second, economics provide arguments to the parties to shed light on the material facts. For instance, when intention is a constituent element of abuse, economic arguments may tend to show that a dominant undertaking could not possibly intend to exclude a competitor, because it did not have any plausible or rational reason for doing so. Third, because only contested material facts must be proven, economics may have an impact on the burden of proof, because it contributes to the identification of material facts and provides the parties with arguments to challenge those facts. And, finally, economics is relevant at the stage when the court evaluates the evidence. The author deals with these issues in depth before going on to discuss the ways in which economic evidence and knowledge may be obtained in the proceedings, including expert evidence, intervention of an *amicus curiae*, and appointment of specialist judges. Finally, the author discusses the extent of the powers of the EU and French courts to review

economic reasoning, including both the review of the decision of a competition authority and the review of the legality of the decision of a lower court.

This is a thoughtful and original book which is to be recommended without hesitation to academics and students of competition law as an extraordinarily rigorous and insightful piece of scholarship. Not only does it deal with the relationship between competition law and economics adroitly but it also contains many pages on key aspects of competition law, from abuse of dominance to market definition, which are valuable in their own right. Because of its scholarly approach, it is not intended to be the kind of book that practitioners can use in advice. But any lawyer who wishes to understand more about the development of EU competition law in the past forty years would benefit enormously from reading it.

Renato Nazzini
Southampton

Laurence Gormley, *EU Law of Free Movement of Goods and Customs Union*. Oxford: OUP, 2009. 637 pages. ISBN: 978-0-19-922900-0. GBP 145.

This book by Gormley is a new addition to the Oxford legal textbook series. The book surveys key aspects of the legal framework governing the movement of goods into, out of, within, and passing through the European Union. This area of regulation forms part of the inner core of EU law and is at an advanced stage of development. In this important new work, Gormley brings increased clarity and coherence to this complex and highly technical field of European market integration.

Following its title, the book examines two aspects of EU law: the Customs Union and the intra-EU movement of goods. Starting with the Customs Union, Gormley guides the reader in chapters 1–9 through the numerous EU instruments regulating, for customs purposes, the movement of goods across the external border of the Union. The approach adopted is extremely logical. Following a brief introduction, the book begins with the definition of key terms and discussion of the rules on the origin of products and their valuation (chapters 1–3). Thereafter, the author reviews in turn the EU rules regulating the entry of products into the territory of the Union (Chapter 4), the processing of goods for entry into, exit from or transit through the Union customs territory (Chapter 5) and the export of products from the EU market (Chapter 6). Chapter 7 deals with specific privileged operations. Chapters 8 and 9 then examine, respectively, the liability and settlement of customs debts and the procedure for appeals against decisions of the customs authorities. Finally, chapter 15 completes the review of EU customs law by returning to examine the system for cooperation and mutual assistance in this field. This covers both co-operation between Member State authorities and also between the latter and the Commission.

The analysis of the legal framework of the EU Customs Union is concerned primarily with unpacking the detailed rules contained within a vast array of EU legislation. In this task, Gormley works the footnotes hard and to considerable effect to ensure that overall ease of comprehension is not compromised by the technical and (often) exhaustively regulated nature of the legislation concerned. Of the various EU legal instruments, Council Regulation 2913/92/EEC, establishing the Community Customs Code (CCC) is examined in particular detail. As the author notes, this core instrument in EU customs law has been recently recast as the Modernised Customs Code (MCC) through Regulation 450/2008/EC. Gormley's work examines the legal regime as it applied at the date of publication. This, of course, includes earlier amendments to the CCC, but not the MCC, which is yet to be fully implemented. However, in anticipation of the pending transition from the CCC to the Modernised Customs Code (scheduled for June 2013 at the latest), the author includes a useful table of correspondence in the Annex.

In chapters 10–14 of the book, attention turns to the law governing the free movement of goods within the Union. As with the analysis of the Customs Union, Gormley brings considerable expertise to the examination of this core area of EU free movement law. The review of the law on the intra-EU movement of goods begins in Chapter 10 with an examination of the EU rules abolishing, between the Member States, customs duties and all measures having equivalent effect. Chapter 11 then addresses the complementary provisions addressing non-fiscal measures. This chapter also covers the EU framework for derogations in this area. Chapters 12 and 13 deal briefly with the position of state monopolies and the internal market for nuclear products. Finally, Chapter 14 sets out the detail of Directive 98/43/EC on the prevention of the emergence of new obstacles to intra-EU trade in goods.

The author's analysis of Union law governing the free movement of goods within the Internal Market is remarkably comprehensive and accessible. Gormley brings together neatly an evolving set of (mainly) judicial principles regulating the intra-EU movement for goods. In a confident move, the author also correctly anticipated the outcome of a series of key decisions on the compatibility with Art 34 TFEU of national measures regulating the 'use' of products that were pending at the date of publication (pp. 435–436). In addition, the decision in Chapter 11 to discuss the case law thematically is also particularly refreshing. In this chapter, Gormley analyses the case law governing the definition of a "measure having equivalent effect to a quantitative restriction" in Art 34 TFEU by "category" of prohibited measure (e.g. "important licences", "prior authorization requirements", etc.) (pp. 413–449). This approach to the review of the case law departs from the more traditional framework, which tends to favour the concepts of discriminatory and non-discriminatory obstacles as analytical tools. However, in a book that consciously seeks primarily to examine the practice rather than the theory of free movement law, the author's chosen approach makes a great deal of sense.

Overall, Gormley's book is highly commendable. This new work complements and advances significantly the existing body of legal scholarship in this field. The decision to link the analysis of the Customs Union to that of EU free movement law on goods is a sound one. These are not discrete areas of law and Gormley's book reflects the reality that both areas form part of the same continuum. This is not only true from the perspective of economic operators trading in, out of, and within the European market. It is also true of the legal framework. The two substantive areas examined in the book are linked broadly through the Internal Market objective of the Treaty on the Functioning of the European Union and also more specifically through particular legal rules regulating, for example, the determination of the origin of products.

In his analysis of both EU customs law and the law on intra-EU movement for goods, Gormley makes light work of a complex and highly regulated legal framework. The author succeeds in bringing the same degree of clarity to the analysis of technical provisions of EU legislation and the more "fluid" judicial principles formulated by the European Court of Justice. Throughout the book, there is also a clear attempt to avoid engaging excessively in theoretical and historic debates. This approach works well in view of the book's intended readership, which targets, in particular, practitioners and the judiciary, as well as academics and students of EU law. However, in addition to the above, Gormley's new work is also likely to appeal directly to economic operators. The latter will find in this book an extremely clear guide to the practical procedures governing the movement of goods into, within and out of the EU market. Indeed, for all those seeking to further their understanding of EU customs and free movement law, this work will prove an invaluable resource.

Thomas Horsley
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Martin Ebers, André Janssen and Olaf Meyer, *European Perspectives on Producer's Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*. Munich: Sellier, 2009. 600 pages. ISBN: 978-3866-53-055-3. EUR 98.

A hasty reader, seeing its title without paying attention to its subtitle, might think that this book deals with what is commonly known as product liability. Yet, this is not the case. As the subtitle indicates, this quite robust work is concerned with producers' liability for non-conformity. Seen from an EU law perspective, it is not therefore Directive 1985/374/EEC on product liability that lies at the heart of the matter, but Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. That producers' liability should be so divided in two separate branches comes as no surprise, since this reflects a classic distinction in most legal systems: compensating damage caused by products to persons or things other than the damaging products themselves is not the same thing as providing remedies for the non-conformity of products which have been sold and bought. In the first case, it is a matter of putting things back as they were, and hence rather a tort law issue, whereas in the second case the aim is to provide what did not yet exist but had been promised, this being typical of contract law. This difference has significant effects on the potential liability of producers: whereas it is usually not seriously questioned nowadays that they should bear the costs of physical or material damage caused by their products, even when they have no direct contractual relationship to the victims (cf. Dir. 85/374), the traditional rules of contract law prevent their being made liable to the end-buyers of their products, with whom they have normally no direct contractual relationship, when these products do not meet these buyers' expectations. To put it more bluntly, non-conformity is a matter of contract law, and the latter is a field where privity of contract (known as relativity of obligations in most legal systems) reigns supreme, thus protecting producers from claims initiated by buyers with whom they have not dealt directly.

That it should be so, however, is not self-evident. As is quite well known, a few legal systems, French law being foremost among them, have long taken a rather relaxed view of privity of contract and have allowed the end-buyer of a product to bring a direct claim (known as *action directe* in French) for any breach of a warranty attached to the contract of sale against any seller up the chain of sales, including the producer. Besides, when the European Community decided to regulate warranties and remedies in the sale of consumer goods, the introduction of direct producer's liability was suggested at some stage, but not retained in the end. Dir. 99/44 thus sticks to the privity of contract principle. The claim it grants to the buyer of a consumer good, absent a specific commercial guarantee, can only be directed toward the professional from whom he bought the product. Only at Article 4 does the Directive open the door to a relaxation of the privity requirement. Under this provision, the national legislator may entitle the final seller, when he is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, to pursue remedies against the person or persons liable in the contractual chain, even if he has not direct contractual relationship to that person.

Taking Dir. 99/44, and especially its Article 4, as a starting point, the book edited by Ebers, Janssen and Meyer is a very thorough study of producers' direct liability for the non-conformity of their products, in the context of the current discussions about the possible adoption of a Directive on Consumer Rights. The originality of this book lies in the diversity of angles through which the issue is approached. While it clearly takes sides in the debate about the opportunity of introducing a direct claim against producers on a European scale, it is also and first of all a major scientific contribution to the debate which ought to take place on that subject.

As is now often the case, the book contains country reports on nearly all national legal systems within the European Union, plus a few other ones (Norway, Switzerland, Turkey). These country reports are usually very comprehensive. They describe the state of national law before the introduction of Dir. 99/44 and the way in which the latter was transposed. While a

majority of Member States did not make use of the faculty provided by Article 4, a few ones did; but they regulated the direct claim of the final seller in different ways (the Directive does not organize this claim), and it is very interesting to see how some countries introduced an extra-contractual claim while others chose a direct contractual claim. Besides, many national reports are not purely descriptive. Some reporters clearly advocate the introduction of a direct claim against producers in countries where no such claim exists (see e.g. Augenhof for Austria, Twigg-Flesner for England). This might not reflect the mainstream academic view in these countries but illustrates the open-mindedness that pervades the book.

This is also clear in the second part of the work, which takes “horizontal perspectives” on producers’ liability. Setting free from pure legal dogmatics, four chapters look at the issue from very different angles: comparative legal history (Schermaier), behavioural psychology (Standorp and Grunwald), economics (Van den Bergh and Visscher) and private international law (Sendmeyer). This ecumenical approach is most welcome, especially for those lawyers who, like the reviewer, are not so familiar with non-legal social sciences. The various authors do not pretend to say what the optimal legal rules in the field of producers’ liability are in all circumstances, but their contributions are actually all the more interesting as they distinguish various hypotheses, which do not always fit into the current distinctions made by the law. They thus point to the limits of a uniform rule. This may weaken the case for an introduction of direct producers’ liability on a European scale, but it also makes clear the shortcomings of a refusal of such a liability grounded solely on privity of contract.

The comparative report of the three editors is a confirmation of that. Ebers, Janssen and Meyer do of course summarize, very thoroughly, the various national reports. They also synthesize the solutions of the various legal orders, both before and after the transposition of Dir. 99/44. This allows the reader to get an immediate picture of the solutions prevailing in the various legal orders. Most importantly, the editors gather the arguments for and against a direct claim against producers. To make a long story short, their conclusion is that a direct producers’ liability for non-conformity caused by manufacturing defects or public statements should be introduced on a European scale. This, they argue, would both enhance consumer protection and distribute risks more fairly among the producer and the other sellers along the contractual chain. The precise features which should be given to this claim are also dealt with in some details, with the idea of maximizing its effectiveness and avoiding negative side-effects as far as is possible.

This book is therefore a very strong and authoritative plea in favour of direct producer liability for non-conformity and of its codification on a European scale within the Directive on Consumer Rights. The comprehensiveness of the work is impressive and the conclusions reached by the editors, though of course open to debate, cannot be easily dismissed. It remains to be seen, however, if they will receive the attention they deserve. The current uncertainties concerning the Directive on Consumer Rights, combined with the shyness of many Member States when it comes to loosening the grip of some well-established legal dogmas such as privity of contract, might well result in the issue of direct claims being set aside. One can only wish that this book will help avoid that.

Jean-Sébastien Borghetti
Paris

Julia Iliopoulos-Strangas: *Soziale Grundrechte in Europa nach Lissabon*. Baden-Baden: Nomos, 2010. 1.221 pages. ISBN: 978-3-8329-4984-6. EUR 178.

The academic discourse on the legal character and subsistence of fundamental social rights is vivid. The constitutions of many Member States of the European Union contain provisions on the right to social security, the right to work, the right to decent living, health, education or

equal opportunities as these rights are accepted and protected in the context of international law. However, legal questions on these issues are not entirely resolved insofar as the contents and the binding force of such provisions are still in question. Ten years after editing her first comprehensive study, *La protection des droits sociaux fondamentaux dans les Etats membres de l'Union Européenne*, Iliopoulos-Strangas has made anew a considerable contribution to the ongoing debate.

After a summary of the historical development of the welfare State, the opus provides 15 national reports on the protection of fundamental social rights in the “old” Member States of the European Union. The editor has succeeded in enlisting outstanding experts of the legal situation in the different countries – ranging from academics to practitioners like judges, lawyers and politicians – who examine not only the differing concepts of social rights and their historical localisation, but also reflect the legal sources of such rights, whether they are directly stipulated in a country’s constitution – as is the case in Ireland, France, the Netherlands, Luxemburg and Germany – or the outcome of jurisdiction, common law or legal practice as in Belgium, Italy and Great Britain. The personal scope of application is attentively and deeply examined just as the addressees of the social rights. Finally, the legal contents of the different national law provisions are clearly elaborated. The uniform structure makes the national reports easily readable; it therefore provides a good basis for comparing the national structures. The remarks referring to the legal traditions and concepts are of special importance in this regard, enabling the reader to leave his/her national focus when reflecting the different passages and thus providing the necessary information for a special “European perspective” on the issue.

In a second part, Iliopoulos-Strangas subjects the findings of the national experts to a comparative analysis in the light of the new legal fundament of the European Union, the Lisbon Treaty, which has been approved in November 2009 and incorporated a range of social rights as well. The legal situation in the EU Member States does not offer a consistent picture. Social standards are diverging strongly. There is nothing like a common European tradition of social fundamental rights, not even of fundamental rights as such. The concepts range from defending state interventions in private interests to measures for inclusion as a right of taking part in a state’s social system. The differences result from the conventional legal sources in the Member States and are thus historically determined.

The author relates all national provisions to parallel European regulations and comes to the conclusion that due to the strong integration and merging of national and international law, the different concepts, terms and relevance of the fundamental social rights have become intrinsically tied, are interacting and thus promoting the further development of the concept. She also succeeds in explaining the various expectations and concerns of political actors in the European process of law-making, which has become clearly visible in the controversial debate about the implementation of fundamental social rights into the Charter of Fundamental Rights of the European Union. This discussion has been biased between British reluctance and French advocacy, which had to be brought into concordance.

Despite the still prevailing differences in national law, the author states in her concluding remarks that – even though legal competences of the EU have always been and still are limited – the EC has undoubtedly contributed substantially to the development of strong social rights of the European citizens. The most important tools so far result from the anti-discrimination clauses and the fundamental freedoms that are laid down in the treaties. They have broadened the radius of workers and their families, students, pensioners but also of unemployed persons and thus considerably influenced their perception of and their willingness to claim social rights – not only when migrating within the European Union but also in their home countries. Conventional legal concepts like the principle of territoriality or the granting of social rights according to the citizenship of the claimants are overcome. The inclusion of the Charter of Fundamental Rights of the European Union into EU primary law might have an additional positive impact on the strengthening of social rights. This affects in particular those Member

States with a low protection mechanism for social rights as they might be forced – politically though not legally! – to adapt their regulations to the prevailing European standards.

Finally, Iliopoulos-Strangas states that in the age of globalization the “legalization” of fundamental social rights is an inevitable necessity despite all the discussion and discourses: the commitment to social protection is considered as a fundament to a humane policy and law-making.

The work is a compendium for those involved with studying the constitutional law of the European Member States in its special implementation as regards rights to social security and social inclusion. It gives a broad overview on the legal history and tradition of the Member States and thus makes a valuable contribution to the mutual understanding and appreciation of the difficulties in supra-national law-making.

Constanze Janda
Jena

Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law*. Cambridge: CUP, 2009. 510 pages. ISBN: 978-052-1881-500. GBP 110.

“In developing public procurement policy, governments are often concerned not only with value for money but also with promoting their social and environmental objectives”. Right from the presentation of the book the focus is quite clear. Forty years of EU (and previously EEC and EC) procurement law have seen the emphasis squarely placed on best value for money as an instrument to open public procurement markets to competition. The past decade stands to show that this cannot be the all story and Arrowsmith and Kunzlik have edited what is the first comprehensive study on the other – and too often hidden – side of public procurement. Environmental and social aspects shapes what is now referred to as sustainable procurement.

The book is divided into twelve chapters. The first four are penned by the two editors or by Arrowsmith alone. They deal with the more general issues, while the rest is mainly due to other contributors and is devoted to more specific problems or areas of interest for sustainable procurement. The first chapter outlines the boundaries of green and social policies, exploring the space left to the Member States to pursue these policies. Chapter 2 is more a general outline of EU public procurement rules – both Treaty principles and directives – providing the normative setting for sustainable procurements. Chapter 3 differentiates between horizontal policies, in particular according to whether they merely comply with or go beyond existing general legal requirements on the one hand, and on the other whether they do or not do go beyond contract performance. Chapter 4 investigates the place of green and social considerations at the different stages of the procurement process.

Chapter 5 deals with the interferences between sustainable procurement and State aids. In Chapter 6 McRudden pleads the case for fostering equality through public procurements. Chapter 7 and 8 focuses respectively on disability and SMEs. Chapter 9 analyses the procurement of green energy while in Chapter 10 Wilsher offers a guide into the complex world of eco-labelling. Chapter 11 considers the wider space for corporate social responsibility – CSR left under the utilities Directive. Finally Chapter 12 opens a window on the new relations between procurement and criminal law made possible by the provisions on the exclusion of candidates and bidders for serious criminal offences. Case index and tables of legislative provisions are added. Case C-346/06 *Rüffert*, decided by the European Court of Justice when the book was already in print, is analysed in an editors’ note.

As the preface declares, the book is built from what were originally papers presented at the 2006 Nottingham Global Procurement Revolution. A lot of work has however be done to rewrite the different contributions in a way to give a coherent picture. Different chapters

cross-refer to each other making it easy to spot the links between the different topics and how they interrelate. The effort to elaborate an encompassing theory of green and social procurement is particularly clear from the first four chapters, even if some extra work would have probably helped in making the book more concise.

The book is very rich and covers many aspects, a few of which can be recalled here. The editors rightly stress that talking of green and social considerations in procurement as 'secondary' consideration is mistaken. This conveys the idea the green and social policies are less relevant than best value for money concerns. They convincingly argue that European law is not about best value for money; it is about opening up public procurement markets and avoiding discrimination of bidders from other Member States. European law is for the creation of a competitive procurement market. Best value for money may be useful as a transparent tool for the proper working of the procurement market, but green and social considerations do not *per se* distort the competition. Hence the editors prefer to write about "horizontal" policies or considerations. At the same time as they underline the freedom Member States enjoy in deciding what weight if any to give to "horizontal" considerations in their purchasing decisions, the editors stress that both principles and rules limit this freedom. This is well illustrated by the editors' note on *Riiffert*. The judgement by the ECJ has met with fierce criticisms. The editors quite convincingly show that no other solution was possible in the circumstances of the case given the presence of EU harmonization measures laying down the conditions applicable to workers posted from other Member States which bound national procuring entities.

The editors also rightly point out that the European legal framework for green and social procurements goes well beyond Directive 2004/17/EC and 2004/18/EC on the utilities and public sector procurements. It includes a growing number of secondary law instruments, both regulations and directives. What is peculiar about this legislative outcrop is that it does not only allow Member States to pursue horizontal policies. National procuring entities are often enlisted to use procurements to attain sustainability ends, and this is especially so in the field of the environment (such as for instance Directive 2006/32/EC on energy efficiency). The editors however entertain some doubts as to whether a proper legal base exists in the now EU Treaty for some of these measures.

Different contribution take issue with the stance the Commission has taken on various aspects of sustainable procurement. Through different communications the Commission has elaborated a doctrine of what can be done and what cannot under internal market rules. The authors convincingly point at some logical shortcomings in the reasoning of the Commission. In particular, they show that the pretended illegality of referring to production processes is simply inconsistent with the case law favourable to the purchase of green energy, that is an energy manufactured in a specific way. Kunzlik in particular is very sharp in exposing the inconsistency of the arguments advanced by the Commission.

The editors insist a lot on a perceived parallelism between the behaviour of all market participants, whether private individuals and undertakings or procuring entities. They stress that private market actors may well pursue CSR buying policies, which are not restricted by the EU. From this they argue – and the argument is here somewhat simplified – that Member States and procuring entities should be left free to do the same unless it is proven that they favour national firms under the pretence of purchasing in a sustainable way. Further they argue that discrimination would rather breach Treaty provisions and principles when Member States act as regulators rather than purchasers, and that as purchasers they should be given – and here I am simplifying again – a comparatively freer hand. It is submitted that this approach fails to perceive the real difference between private and public market actors and why the purchasing decisions made by the latter are ruled by "public" (and there must be a reason for introducing a restriction through this adjective) procurement law. In my view, the point is that private actors do not have wired-in incentives to buy national and their ability to pursue CSR or similar policies is anyway restrained by the forces of competition. Public actors have strong motives to buy national and can easily finance this policy through taxation and budget

expansion. This requires rules specific to public procurement, and of course it is debatable if any given rule is appropriate or not to the end.

Maybe UK writers tend to rely too much on private law means (and, as the opposite, Continental writers tend to overstress the specificity of public law). This is a general theme that deserves further research, and sustainable procurements which will benefit from further attention. Indeed the European case law on the matter is very limited and some cases, such as for instance Case 31/87 *Beentjes*, are too old and possibly do not really represent the law as it stands now. The doctrinal elaboration by the Commission, on the other hand, is highly artificial and much in need of revision. What is certain is that the comprehensive book edited by Arrowsmith and Kunzlik is the starting block upon which all future and much needed works on sustainable procurements will have to be built.

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Beata Dziechciarz, *Rechtliche Integration der nationalen Zentralbanken in das Europäische System der Zentralbanken und in das Eurosystem*. Baden-Baden: Nomos, 2009. 417 pages. ISBN: 978-3832-9422-36. EUR 98.

Written under the supervision of Häde, the doctoral thesis submitted in 2008 by Dziechciarz at the Law Faculty of the European University Viadrina Frankfurt (Oder) deals with the legal integration of national central banks into the European System of Central Banks (ESCB) and into the Eurosystem. This integration is a good subject for a doctoral thesis as it represents an unprecedented quantum leap in legal and organizational terms. For the first time in history, national institutions of such importance for determining the economic and political fate of a nation have been required by law to transfer their monetary policy prerogatives to a supranational body, the European Central Bank (ECB). Even though Europe's monetary union did not follow word-for-word Friedman's suggestion with regard to the central banking structure necessary for a truly unified European currency (namely "eliminating all central banks in Europe except one", cf. *Financial Times*, 18 December 1989, p. 21), primary Union law has made national central banks an "integral part" of the ESCB (which comprises the ECB and the central banks of all 27 Member States) and of the Eurosystem (which comprises the ECB and the central banks of all the 16 Member States whose currency is the euro). In addition, primary Union law has subjected the national central banks of the 16 Member States whose currency is the euro to the guidelines and instructions (!) of the ECB. This subordination of national central banks in the Eurosystem to the ECB goes substantially further than the legal relationship that normally exists between national authorities and the Union institutions. The Eurosystem thereby follows a clearly federating design and even has led some legal commentators to ask whether it is still justified to qualify national central banks as "national" authorities. In any event, the integration of national central banks into the ESCB and into the Eurosystem has had significant consequences for their tasks, organization and legal nature.

That this integration is now dealt with in a detailed legal analysis should be welcomed. It is certainly true that since the entry into force of the Maastricht Treaty, a number of legal articles, books and commentaries have fostered a preliminary understanding of the new legal situation of national central banks following the introduction of the euro. However, so far, most of these analyses have been written from the perspective of national central banks or even by lawyers working in or for their legal departments. During the early years of Europe's monetary union, where central banking was still a rather new field of Union law, drawing on the expertise of national central bank lawyers was certainly justifiable and to a certain extent unavoidable. However, the integration of national central banks into the ESCB and into the Eurosystem is a process which deserves substantially broader attention and discussion. In many instances, the

ESCB and the Eurosystem reflect the most far-reaching step of integration which Union law has brought about during the last 60 years. It is therefore high time for an analysis from a Union law perspective.

The doctoral thesis of Dziechciarz does exactly that. It has three main parts. The first part (33–218) deals with the supranational legal requirements for central banks, as set out in the Maastricht Treaty and in the Statute of the ESCB and of the ECB (the Statute), and elaborates on the multiple provisions which ensure comprehensive central bank independence with the purpose of guaranteeing price stability. The second part (219–327) analyses the adaptation of the statutes of national central banks to the supranational legal requirements. It focuses mainly on the changes in central bank legislation in the Central and Eastern European Countries which joined the EU on 1 May 2004. The third part (329–368) discusses changes introduced by the Nice and the Lisbon Treaty which are of relevance for the ESCB and the Eurosystem. The author concludes by summarizing the main results of her thesis in 36 points.

Dziechciarz arrives several times at Treaty interpretations which merit being highlighted because of their particular relevance for the legal practice of monetary union. Dziechciarz correctly characterizes the process of decision-making within the Eurosystem as centralized in the hands of the ECB (p. 47) and states that the principle of subsidiarity does not apply within the Eurosystem in view of the exclusive Union competence for monetary policy (p. 48 et seq.). It is fully in line with these conclusions that she qualifies (p. 50) the national central banks as “operating arms” of the ECB (and not of the ESCB, as suggested by some authors). It is also true, as she writes (p. 81), that following their integration into the Eurosystem, national central banks still exercise “classic” central banking tasks only to a very limited extent in an independent capacity.

Dziechciarz’s conclusion (p. 107 et seq.) that the requirement of central bank independence also applies in the relations between national central banks and the ECB, deserves to be supported, in view of the broad wording and comprehensive spirit of Article 108 EC (now 130 TFEU). In other words, the governor of the German, French or Polish central bank is also prohibited from following instructions of the decision-making bodies of the German, French or Polish central bank when participating in meetings or decisions of the Governing Council or the General Council of the ECB. With Monetary Union, national central bank governors have thus been transformed into members of a European decision-making body where they are required to take a solely European perspective when making monetary-policy decisions for the single currency.

The author shows (p. 142) sympathy for the idea of developing a kind of template for national central bank statutes (“*Mustersatzung*”). Since the Maastricht Treaty, the legal requirements included in the Treaty and the Statute with regard to the organisational and financial structure of a national central bank have been developed and specified in several Convergence Reports of the Commission and of the ECB as well as in numerous ECB Opinions. It would indeed be useful to summarize this “central banking *acquis*” in a comprehensive document which could guide the drafting of future national central bank statutes in Europe, notably in countries which would like to join the EU.

Dziechciarz argues (p. 195 et seq.) that all national central banks in the EU, including those of Member States with a derogation (at present the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Sweden), would be bound by the primary objective of price stability, as Article 2 of the ESCB Statute applies to all national central banks. In addition, also the central banks of Member States with a derogation (such as the Polish or the Hungarian central bank) would have to be independent from instructions (cf. Art. 108 EC/now Art. 130 TFEU). Combined with Article 2 of the ESCB Statute, this leads, in Dziechciarz’s understanding, to a rather broad requirement of central bank independence also for the Member States which have not yet introduced the euro. The sole exception to this is the Bank of England, as the United Kingdom explicitly excluded the application of the independence provisions of the Treaty and the Statute by the UK Protocol of 1992. This interpretation by the author appears to be the right

one. It reflects best the spirit of the Treaty and the Statute, which also makes the central banks of the Member States with a derogation an integral part of the ESCB. Only strict adherence to the principle of central bank independence and to the primacy of price stability justifies the participation of governors of central banks of Member States with a derogation in the General Council, the ECB's third decision-making body. It is also the basis for the participation of central banks of Member States with a derogation in the European Exchange-Rate Mechanism which needs to follow the primacy of price stability in order not to prejudice that the euro, as its anchor currency, obeys this primacy. As the author shows in the second part of her doctoral thesis, this interpretation was also followed by the Commission and the ECB when they assessed the central bank statutes of the Central and Eastern European Countries prior to their accession on 1 May 2004 (p. 296 et seq.).

Another of the author's conclusions merits a more critical response. She argues (p. 181) that under the Treaty, it would be difficult to entrust the ECB with tasks related to the prudential supervision of credit institutions as such supervision could not apply in Member States outside the euro area. While Dziechciarz accepts that the legal basis for a transfer of supervisory powers to the ECB – Article 105(6) EC (now Art. 127(6) TFEU) – does apply to all Member States, she considers that the limitation of the ECB's regulatory powers to the Member States which have introduced the euro (Arts. 110, 122(3) EC/now Arts. 132, 139(2) TFEU) could prevent the ECB from regulating credit institutions outside the euro area even after a transfer of supervisory powers. This is not the case. If the "transfer clause" of Article 105(6) EC (now Art. 127(6) TFEU) is to make sense, it should also include the possibility of transferring to the ECB the corresponding regulatory power with regard to all EU Member States, including those outside the euro area.

The author's view that Article 14.4 of the Statute should be interpreted as applying only to the national central banks of the Member States whose currency is the euro (p. 184), though certainly not impossible to defend, should not be followed. Article 14.4 of the Statute allows the Governing Council of the ECB to prohibit a national central bank from performing functions other than those specified in the Statute in case such functions interfere with the objectives and tasks of the ESCB. Certainly, in practice such a situation is more likely to arise with regard to central banks of Member States whose currency is the euro. However, it is also possible that national central banks outside the euro area interfere with ESCB-related tasks, notably in the field of statistics, interventions on the foreign exchange markets or in their international relations. As there is no indication in Article 43 (now Art. 42) of the Statute that such a limitation was warranted by the draftsmen of the Treaties (only the UK Protocol excludes the application of Art. 14 as a whole to the Bank of England), Article 14.4 of the Statute does apply to all central banks in the ESCB with the exception of the Bank of England. The fact (mentioned by the author herself) that the ECB had proposed, during the recent Treaty reform negotiations, to include Article 14.4 in the list of Article 42 of the (revised) Statute and that this proposal was not taken up in the Treaty of Lisbon, confirms this conclusion.

Particularly interesting is the second part of the doctoral thesis where Dziechciarz analyses the process of central bank legislation in the Central and Eastern European Countries. She describes well (p. 219 et seq) that the socialist planned economy, which dominated Central and Eastern Europe after the Second World War, led to the dissolution of central banks or to their transformation into "mono-banks", which united the function of State bank and of nationalised commercial banks in one single institution. Central banks with the power to decide and implement monetary policy and to give credit to commercial banks could therefore only be re-introduced after 1989, together with the systemic change to the market economy. All the central banks of the "newer" EU Member States are thus rather young central banks.

Remarkably, as a result of the political and economic reform process of the early 1990s, most of the statutes of these young central banks already included, from the beginning, significant references to central bank independence. The author shows how strongly central bank statutes in the "newer" EU Member States were influenced by the models of the German

Bundesbank and of the Austrian National Bank, but also by the provisions of the Maastricht Treaty, the professional consensus of economists and policymakers in favour of central bank independence in the 1990s and the political interest of the Central and Eastern European Countries in a swift accession to the EU. Long before accession, most central bank statutes in the Central and Eastern European Countries ensured legally the personal independence of their governors by providing for a term of office of between five and six years. In most of them, the role of the central bank with regard to exchange rate policy was also strong, and the central banks of the Czech Republic and of Slovakia even had sole competence over exchange rate policy. Most of the Central and Eastern European Countries also decided to entrench the most important features of their central bank in their Constitution. The Czech Constitutional Court, even described in a judgement of 29 June 2001, the constitutional anchoring of central bank independence as a characteristic of “modern constitutionalism”, while the Polish Constitutional Court, in a judgement of 22 September 2006, made use of Articles 108, 109 EC (now Arts. 130, 131 TFEU) and of Article 7 of the Statute to defend the constitutional independence of the Polish central bank against the establishment of an investigative committee by the Polish Parliament. With these examples, the author shows that in many ways, the spirit of the Maastricht Treaty regarding central bank independence was much more present and accepted in the “newer” Member States than in many of the “older” Member States.

This “Maastricht-spirited” orientation in Central and Eastern Europe may partly explain, as the author shows (p. 234 et seq.), why all Member States which joined the EU on 1 May 2004, accepted without reservations the *acquis* concerning Economic and Monetary Union, including the obligation to make all reasonable efforts to meet the legal and economic convergence criteria in order to be able to introduce the euro as soon as possible. Legally, the date of accession was the decisive moment for these Member States to bring their national central bank statutes completely in line with the Treaty and the Statute. The author demonstrates well (p. 264) that already, during the accession process, the Commission and the ECB ensured that the assessment of central bank independence took place not only *de jure*, but also *de facto*, and thus extended beyond the letter of the law to the application of the central bank statute in practice, including amendments introduced in the national Parliaments that could have undermined central bank independence. This approach proved to be rather effective. While the first examination of the legal convergence of the “newer” Member States in autumn 2004 still revealed a number of shortcomings, the Convergence Reports of May and December 2006 showed that Slovenia, Lithuania and also (with certain limitations) Estonia met the legal requirements for introducing the euro, whereas Slovakia joined the group of legally convergent Member States in May 2008. In view of the progress made in parallel in the field of economic convergence, Slovenia was able to introduce the euro on 1 January 2007 and Slovakia on 1 January 2009. Estonia will introduce the single currency on 1 January 2011.

The author mentions a number of interesting examples from the process of adaptation of national central bank statutes in the Central and Eastern European Countries:

- In the Czech Republic, the inclusion of the primacy of price stability in the central bank statute was initially declared to be unconstitutional by the Czech Constitutional Court on 20 June 2001, in view of the requirement of the Czech Constitution itself to ensure (more broadly) “currency stability”. As the Maastricht Treaty does not allow for such a broad term to determine the objective of a national central bank, the Czech Constitution had to be brought in line with Article 2 of the Statute.
- In the same judgment, the Czech Constitutional Court declared an obligation for the central bank to set an inflation objective only after agreement with the government, to be incompatible with the constitutionally entrenched independence of the central bank.
- A judgement of the Polish Constitutional Court of 24 November 2003 concerned personal independence. A provision in the Polish central bank statute allowed a vacant position on the central bank’s monetary policy council to be filled for the remainder of the term of

office. This would have allowed for an appointment of a member of this council for a period shorter than the six year period prescribed by the Polish Constitution. The Constitutional Court declared this provision to be incompatible with the Polish Constitution, which it interpreted in the light of the high standards resulting from the Maastricht Treaty and the Statute.

- In Latvia, the central bank statute included a provision (probably modelled on a similar article in the former statute of the German Bundesbank) which allowed the Minister of Finance to suspend decisions of the Central Bank Council for a period of up to ten days. This provision had to be changed prior to Latvia's accession to the EU.
- In all Central and Eastern European Countries, the central bank statute included provisions ensuring a strong accountability of the central bank towards the national Parliament. This was partly a reaction to experience gained during communist times where the central bank had been fully integrated into the government. Only in some cases, these provisions went too far when assessed against the independence requirements of the Maastricht Treaty which also ensures independence of the central bank with regard to the national Parliament. In Poland, the central bank statute initially only allowed the central bank to propose the guidelines for monetary policy to the Polish Parliament, which had to authorise these guidelines; this was changed in 1997. In Lithuania, the parliament had to authorize the budget of the central bank, which was seen as incompatible with the required financial independence of the central bank and therefore was changed in 2001.

All in all, the thesis of Dziechciarz is very readable, thanks to a plain structure and the use of clear language. In addition, the author illustrates her legal conclusions by many examples from the decision-making practice of the ECB and the recent developments in the statutes of national central banks. While the literature on Economic and Monetary Union thus far has focused mostly on the legal situation of national central banks in the "older" Member States of the EU, it is to be particularly welcomed that this doctoral thesis now completes the picture by offering the reader an analysis of legal developments and academic doctrine from the "newer" Member States, notably from Poland, the Czech Republic and the Baltic States.

The practical relevance of the thesis is considerable. In the years to come, the Commission and the ECB will repeatedly have to assess, under Article 140 TFEU, whether Member States outside the euro area have sufficiently progressed on their path to convergence and whether they should be allowed to introduce the euro. In addition, countries which want to join the EU (such as Croatia) will have to ensure that their national central bank statutes are fully in line with the Treaties and the Statute. In this context, it will be important to underline, as Dziechciarz does in her doctoral thesis, that legal convergence of national central banks is as important as economic convergence (page 158). This holds true in particular in times where the "stability culture", as envisaged by the Maastricht Treaty for the single currency, is being called into question. The doctoral thesis of Dziechciarz should therefore be compulsory reading for all those interested in safeguarding and strengthening this "stability culture".

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Anna Herold, *European Film Policies in EU and International Law: Culture and Trade- Marriage or Misalliance?* Groningen: Europea Law Publishing, 2010. 436 pages. ISBN: 978-90-8952-002-9. EUR 89.

In this book Herold investigates European film policies and evaluates how and whether European film policies in the EU and international fora adequately balance the cultural and economic values intrinsic to film production, distribution and consumption. The dominant

idea that cultural objectives are subordinate to economic goals is countered by Herold. She convincingly and consistently argues that instead European film policies in the EU have contributed to both economic and cultural objectives. The core of the EU's initiatives are to be situated within industrial and competition policy. This has not been a deliberate choice of the EU institutions. It is rather the result of the competence divisions drawn up by the Member States. So far, the latter have reserved cultural policy as an exclusive national policy – as repeatedly stressed by Herold throughout the book (e.g. p. 13).

The structure of the book is straightforward. It consists of three parts subsequently addressing sector-specific film policies in the EU, competition policy in the European film markets and film policies within an international law context.

The book starts with a discussion of European sector-specific film policies in the EU. Herold places these policies within the overall field of audiovisual policy. She elucidates how initiatives to realize a common market for film were taken since the 1960s. They have been the subject of a dynamic process of negative and, to a lesser extent, positive integration. She forcefully illustrates that this process has been tough and that both political and legal initiatives have more often than not provoked fierce Member State resistance. Initiatives within the common market framework have been notably more fargoing and successful (and furthered significantly by the ECJ as illustrated by the *Fedicine* and *UTECA* cases Herold refers to from p. 36 onwards) than those taken within the framework of cultural policy. Herold admits that the cultural competences of the EU are legally speaking rather weak. Her position on this point remains rather ambiguous though as she also argues that the EU institutions have become more involved with designing some sort of cultural policy and concludes – without satisfactory empirical foundation – that “a positive impact of the Treaty cultural provisions on the action by EU institutions in the audiovisual field can be discerned” (p. 47). A similar remark can be made with regard to Herold's subsequent discussion of European film support schemes. Although she acknowledges that European support schemes merely complement Member States' massive investments in film production, she also asserts that Community action is enhancing or at the very least attempting to enhance the circulation of film products within the common market (p. 47). The legal basis for such a policy is unclear and seems, moreover, rather difficult to realise given Member States' limited enthusiasm about European film support schemes (p. 55) and the latter's limited financial means. The last point should have deserved more attention; when trying to make outstanding content, money matters. Next to film support schemes, content quota are also an important instrument to support European film markets. Herold's discussion of the Television without Frontiers and Audiovisual Media Services Directives' quota regimes (pp. 68 et seq.) is meticulously executed and dynamically ties the legal, political and economic aspects of the quota.

The book's second part is comparatively longer than the other parts in the book, which already a priori seems to suggest the relatively bigger relevance of competition policy for film (*vis-à-vis* the Community's sector-specific initiatives and international law as discussed in parts one and three respectively). Part two consists of two chapters of which the first deals with State aid law and the second with anti-trust and merger regulation.

The State aid law chapter provides a well-structured analysis of public film support and EU State aid law. The concept and scope of State aid are addressed first, after which a highly interesting discussion on the ways for film aid to comply with the State aid rules follows. Naturally this discussion focuses on the contents of Article 107(3)(d) TFEU and the further elucidation of this provision in the Cinema Communication (pp.131 et seq.). Herold extensively reflects on all points of criticism on the application of State aid rules to public film support schemes and, although (commendably) not always decisively choosing one side or the other, formulates a number of interesting recommendations for the European Commission when applying criteria relating to territorialization or the definition of the cultural goals and criteria underlying film support schemes (p. 141 et seq.). Although this chapter could have devoted more attention to the industrial policy objectives (often of a merely protectionist nature) underlying Member States' opposition in particular State aid cases dealing with public

film support schemes, Herold's recommendations are thought-through. They deserve further debate – albeit taking into account the *Realpolitik* that often underlies Member States' rhetoric on the tension between the economic and cultural aspects of film products.

Anti-trust and merger policies are addressed in the second chapter of part two. The discussion of the application of the relevant rules is preceded by a brief – but nevertheless comprehensive – overview of the specific characteristics of film markets and the concerns that can arise in relation to fair competition. In her assessment of the application of the anti-trust and merger rules to the 'curious' European film markets, Herold first of all emphasizes that there are no cultural specifications to be observed in Articles 101 and 102 TFEU. This contrasts with the State aid framework (cf. *supra*). After that, it is persuasively shown how the definition of relevant markets (given the difficulty of establishing the substitutability of films and the media used to distribute them) and proving the existence of a dominant market position are extremely difficult to align with the specificities of the film markets. Subsequently, Herold methodically discusses the application of the anti-trust rules with regard to diverse issues such as restrictive agreements, access of exhibitors and broadcasters to films, theatrical exhibition, access of films to screens, Internet delivery, abuse of dominant position, etc. This overview is complete and shows compellingly how difficult it is to apply basic anti-trust rules in the film markets and, simultaneously, make sure that this application strikes a balance between economic objectives and public interest considerations (like cultural diversity). However, the section on anti-trust could have benefited from a more in-depth study of specific cases in which often several aspects of the abovementioned issues interrelate. This could have made the assessment more accessible and concrete for readers who wish to use this book as an introduction to this subject. The part on mergers that follows is considerably more concise than the discussion of anti-trust law. Among others the *Sony/BMG*, *AOL/Time Warner*, *Newscorp/Télepiu* and *Vivendi/Canal+/Seagram* cases (pp. 251 et seq.) are discussed and provide ample evidence of the complexity associated with mergers in the film market as besides competition considerations also wider concerns on pluralism come into play.

In part three Herold reflects on European film policies within an international law context. In doing so, she focuses on the WTO agreements (e.g. GATT, GATS, TRIPS and the framework on e-commerce) that might have an effect on European film policies. This assessment is – in analogy with the other parts – contextualised within broader historical and political reflections on the treatment of film in the WTO. Herold devotes considerable attention in outlining the possible future(s) of enhancing film policies at the international level. Again interesting policy recommendations are made (e.g. the development of stronger subsidy rules in the WTO). Giving her earlier emphasis on the importance of the Unesco Convention on Cultural Diversity (in part one) this part could benefit from a more extensive discussion of the Convention (pp. 334 et seq.).

This book is definitely an asset to current literature on the topic of EU film policies in EU and international law. First of all, it puts forward an argument that is not commonly shared by academics or national policy makers and, hence, challenges dominant assertions on EU film policy. Secondly, the book provides an up to date and comprehensive account of the discussed domain whereas other contributions – all valuable in nature – are less recent, more focused on one particular aspect of film policies or concerned with the field of cultural policies in the EU at large. Thirdly, this book can be situated within a so-called law-in-context approach. It goes beyond the mere description and analysis of case law and legal documents. It puts them in a historical and political perspective. This is given the background of the author (i.e. legal advisor in the European Commission's DG Information Society and Media) not surprising. Nevertheless, it consistently adds to the quality of the book that is irrefutably expressing a passion for European cinema and the policies accompanying it.

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Ronald van Ooik and Ramses Wessel, *De Europese Unie na het Verdrag van Lissabon*. Deventer: Kluwer, 2009. 210 pages. ISBN: 978-90-13-06966-2. EUR 50.

This book provides an overview of the main legal changes introduced by the Treaty of Lisbon. It contains updated versions of contributions that were first published in *SEW, Tijdschrift voor Europees en economisch recht* (Dutch journal on European and economic law) and were initially presented at an expert-meeting on the Lisbon Treaty organized by the universities of Amsterdam, Utrecht and Twente in December 2007. In addition to an introductory (Van Ooik) and concluding chapter (Van Ooik and Wessel) summarizing the main features of the Treaty and the findings of the various authors respectively, the book is divided into two parts. The first part deals with constitutional and institutional issues and comprises chapters on the EU's new institutional structure (Eijsbouts and Rood), decision-making procedures (Beukers), judicial protection (Parret) the mandate of national parliaments (Senden and Vandamme), legal instruments (Van den Brink) and the specific role of Ireland in the process that has ultimately led to the entry into force of the Treaty (Curtin). The second part focuses on substantive issues and includes chapters on democracy and Union citizenship (Schrauwen), fundamental rights (Claes), competition policy (Steenbergen, Ambtenbrink and van de Gonden), environmental policy (Douma and Vedder), the Area of Freedom, Security and Justice (Reestman and Goudappel) and external relations (Ott and Wessel).

The book meets its main objective of providing concise overviews and legally sound analyses of the main features of the Lisbon Treaty. Virtually all, if indeed not all, contributions are written by authors who have both a clear legal mind and the power of the pen. In addition, various contributions contain thought-provoking reflections on the future institutional functioning of the EU. "Lisbon", as the editors point out, is a treaty with many faces. It contains various elements that hint at a further supra-nationalization ("Community method") of the EU (e.g. formal abolition of pillar structure, extension of co-decision and majority voting to areas like asylum and criminal law, social security and agricultural policy, treaty status conferred upon the Fundamental Rights Charter, new Treaty revision procedures), but also new elements (e.g. Permanent President of European Council, inclusion of national parliaments in the EU framework, withdrawal from the Union) that reveal a firmer foundation of the EU in its Member States. Eijsbouts views these developments as complementary, as part of the EU's constitutionalization and its evolution as a unique federal-like entity. Rood is more careful. Focusing on the relationship between the European Council, the High Representative for Foreign Affairs and the European Commission, he does fear a shift towards more intergovernmentalism. In her chapter on the "Irish problem", Curtin sees the tendency to root the EU more firmly in national soil above all as inevitable. The EU's legitimacy crisis requires European decision-making to be embedded in national political and constitutional processes.

The breadth of the topics covered by the book does not allow them all to be addressed in this review. Suffice it to say that the book is highly recommended to academics, students, policymakers and legal practitioners working in the field of EU law. An English version would be more than welcome so as to increase the number of readers that may benefit from it.

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Paul Magnette and Anne Weyembergh, *L'Union européenne la fin d'une crise?* Brussels: Editions de l'Université de Bruxelles, 2008. 250 pages. ISBN: 978-2-8004-1420-1. EUR 25.

The European Studies Institute of the Université Libre de Bruxelles is a prolific research centre on EU studies. More than forty academic publications in twenty years. Founded by Ganshof van der Meersch, and currently chaired by Dony, it is one of the major research

centres able to take part in the setting of the EU studies' research agenda. The book under review can be situated in that way. Edited by Magnette, political science professor and former Belgian minister, and Weyembergh, law professor, and stemming from a symposium held in April 2007, the present book is about the constitutional crisis context in which the EU seemed to sink during the last years. Triggered by the rejection of the Constitutional Treaty in May 2005 by the French people, one might think that it ended up with the coming into force of the Lisbon Treaty in December 2009. Four or five years of troubles and unrest for the future of the political system of the EU.

The book, published in 2008 before the Irish Yes vote – though the authors seem to have been quite confident in its outcome –, question the common idea that with the Lisbon Treaty the road is still hard and long, but at least we are out of the last turbulence and all safe. The book's editors, in their introductory chapter, start with the current situational paradox: the European Janus-faced mood composed by the post-2005 existential fears and the celebration for the 50th anniversary of the Rome Treaty. Europe sounds schizophrenic, torn between its confidence in the historic success of the integration project and its worrying about its political legitimacy and institutional efficiency. On one hand, the crisis might be more structural than contingent. Indeed, the Lisbon treaty does not solve at all the so-called legitimacy deficit of the EU. Nor does it give a final answer about its political nature. But on the other, on the *longue durée*, what a compelling story!

But here ends the six pages introductory reflexion about the question raised by the book's title; and here lies the main criticism. This collective book cruelly lacks a proper and global introductory chapter encompassing the general puzzle about the main title's terms. The two editors stress pluridisciplinarity, but they do not offer any real global and coherent vision. Costa and Magnette raise two causes of the crisis. A *longue durée* cause: the growing discrepancy between the efficient power and the symbolic power. And a short-term cause: the conventional process. But literally speaking, the book does not give any articulated answer to the title's question. The question mark remains. Whereas the editors also claim an alliance between intellectual acuity and civic motivation, what we have found there is more about a good set of samples of the current research works of a brilliant EU research centre. A kind of presentation of the best of Brussels' production. So what we get from the book is an impressionist painting on the European crisis made by several hands and using different angles and techniques. The truth is you cannot know from it whether the impression is warm and hopeful or gloomy and anxious.

But we can still get some general insights from the chapters. Some are bright and sparkle beneath the surface. Institutionally speaking, the Lisbon Treaty does well. It truly improves the EU's political system and its institutional efficiency and clarity which becomes more coherent and understandable. The European Parliament, the Community method, the protection of fundamental rights – not that much according to Bribosia, but still – and many other things are reinforced. In this vein, Lagrou puts the "European crisis" in inverted commas. Is it really a European crisis or before all the post-war welfare state model crisis? If he judges the Monnet method outdated since 1989 and the 2004-2007 enlargement, he gives us a true positive view of the 2000 years. A historic dynamism, according to him. In the same spirit, Castabheira sees in the diversity of the EU its main resource to face the globalization. Diversity allows Europe to eschew paths of dependency or statu quo. To make the most of that diversity, communicative tools are needed to share experiences, as the Lisbon strategy does. Scheeck and Barani are focused on the European Court of justice and the legal integration. They see a constant activism by the Court, despite the constitutional crisis. And the legal integration, still ongoing, has changed in its very core, from primacy and harmonization to integration by fundamental rights. Goestchy takes stock of the European social policy. And the EU's action in those areas is deemed quiet honourable. The same goes for judicial and police cooperation, although the price paid is more variable geometry, according to De Biolley and Weyembergh. On the institutional and the public policy angles, the EU seems out of the crisis and promised to some better future.

But things do not go the same on a deeper ground. Behind the reassuring institutional face, the EU position remains uncertain and fundamentally unsteady. Lacroix approaches the European crisis at the level of political philosophy. The European construction is caught by a fundamental borders paradox. On one side, the EU is about opening national frontiers, be they territorial or legal ones. But on the other side, the EU reshapes frontiers at an upper level and creates new categories of exclusion, more unfair. The first trend falls under the critics of a *kratos* without *demos* argument. The legally-opened EU is politically void, representing no real political community. The second trend is tackled by philosophers like Balibar who points the very failure of its promise: a post-national system purged of the principle of exclusion intrinsically attached to sovereignty. Foret, adopting an anthropologist approach, is more critical on the last years' constitutional process. Its purpose, less functional than of legitimation, did not really meet the promised outcome. "L'Europe par les projets", the functional way, no longer fits – though Costa and Magnette claim for a relaunching of the functional approach. Europe by legitimation must replace the former. But on that stage, it is a relative failure. The territorial and sociological distinctions between European elites and national peoples is more accurate than ever. Besides, the national level should be – but is not – understood as the tipping point between several allegiances. Moreover, the European message is undermined by the inertia of national reception frames. On a discursive stage, Schmidt, following its discursive institutionalist approach, understands the European problem not as a "being" or a "doing" one, but as a "saying" one. One structural element is that the EU relies on Members states to deliver its legitimation discourse. This leads to a fragmented European democracy, torn between its output side (European level) and its input side (national level). This structural bias allows "blame-shifting" and "credit-taken" behaviour by Member States on the expense of the EU. In the same vein, Delcourt stresses the growing discrepancy between a post-modernist discourse and a modernist way of doing, taking the EU management of the Kosovo crisis as the perfect illustration. The European Union, in its very core, appears to be weak; and its future fundamentally uncertain.

Last but not least come a couple of magisterial variations. Telo thinks of the EU in the global order: he proposes a four-fold scenario about the world future and raises the question of a new multilateralism in a post-hegemonic order. Louis, in the "postface", takes an overview of the last fifty years of European construction and highlights the positive contribution of the European Coal and Steel Treaty, the notion of Rule of Law Community, and the notion of a divisible sovereignty.

What the book shows is that the European constitutional crisis drama is closed for now, but its actors are still confused and wondering. And the stage, despite its new fresh painting, still hides major and worrying cracks in its foundations.

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Book notices

Yves Bernaerts, *The 2010 VAT Directive and the case law of the Court of Justice of the European Union*. Antwerpen: Intersentia, 2010. 776 pages. ISBN: 978-90-5095-897-4. EUR 117.

This compilation of texts links the provisions of the current VAT Directive with the relevant ECJ case law.

Abdelkhaleq Berramdane and Jean Rossetto, *Droit de l'Union européenne – Institutions et ordre juridique*. Paris: Montchrestien, 2010. 612 pages. ISBN: 978-2-7076-1595-4. EUR 38.

One of the first detailed text books to take account of the Treaty of Lisbon, including references to case law and other (French) literature.

Nigel Foster and Satish Sule, *German Legal System and Laws*. Fourth edition. Oxford: Oxford University Press, 2002. 548 pages. ISBN: 978-0-19- 923343-4. GBP 37.99.

The latest edition of this book, which gives a full and comprehensive overview about the German Legal System, is worth noting.

Bob Hepple, *The Making of Labour Law in Europe*. Oxford: Hart publishing, 2010. 248 pages. ISBN: 9781841138206. GBP 40.

A reprint of the book originally published in 1986, this is a comparative study of nine countries (all now EU member States) going up to 1945. It is organized thematically.

Jürgen Keßler, Hans-W Micklitz and Norbert Reich, *Institutionelle Finanzmarktaufsicht und Verbraucherschutz*. Baden-Baden: Nomos, 2010. 283 pages. ISBN: 978-3-8329-5441-3. EUR 68.

This contains country reports on Germany, Italy, the UK and Sweden, as well as on the EC/EU, as well as a comparative chapter.

Dirk Van Gerven, *Cross-Border Mergers in Europe, Vol 1*. Cambridge: Cambridge University Press, 2010. 359 pages. ISBN: 9780521483278. GBP 85.00.

The book discusses the cross-Border merger Directive and its implementing legislation in each of the EU member States.

Jörg Michael Voß, *Pluraler Rundfunk In Europa – Ein Duales System Für Europa?* Bruxelles: Peter Lang, 2008. 283 pages. ISBN: 987-3-631-57077-7. EUR 52.80.

Broadcasting regulation in Germany (in some details) and in the other Member States (briefly) forms one part of the book. Thereafter is an analysis of EC broadcasting policy and other relevant issues.

Periodicals

New Journal of European Criminal Law NJECL, Mortsel: Intersentia. Volume 0 (2009).

This book reviews section starts with a quotation “EU criminal law is one of the fastest growing areas of Union law”. A new journal in the field confirms this.