

BOOK REVIEWS

E. Stein, *Thoughts from a bridge: A retrospective of writings in New Europe and American Federalism*. Michigan: University of Michigan Press, 2000. 497 pages. GBP 37. ISBN 0-472-11059-4

When asked to review a book by an American professor, it is a nice surprise to find that the book is dedicated to an old friend and European colleague, Michel Gaudet, who played a leading role in the legal service first of the European Coal and Steel Community, then in the European Economic Community, in the 1950s and 1960s. One discovers – and vaguely remembers – that Eric Stein spent nearly a year as guest of the legal service of the Communities in Brussels in the early 1960s. “I felt that without an experience in Brussels I would not understand the microcosm of the Community institutions”, professor Stein told a group of academic friends on the occasion of his 75th birthday; fascinated, as a young American lawyer, by the “idea whose time appeared to have come after the second world war – the idea, or myth, of a new international order under law To see my old Europe attempting to shed its old ways for a new art of governance was an appealing prospect.”

One understands this all the better when reading Stein’s personal history. Born in Czechoslovakia in 1914, just before World War I broke out, he was raised there and graduated from the Charles University Law Faculty in Prague shortly before the Second World War benighted Europe again. He left the country of his birth in 1939, in the nick of time one must say. Another legal training, then another (the U.S.) army, and thereafter nine years in the U.S. Department of State where he dealt with the – then brand-new – United Nations affairs. Thus, in his thirties, Stein already held his third citizenship: having begun as a citizen of the Austro-Hungarian empire, he became a Czechoslovak citizen, and then a citizen of the United States where he pursued an academic career after his years at the state Department.

But his fascination with “my old Europe” shedding its old ways and building a new order under law brought him back to the old continent again and again, as Weiler says in his foreword: “utterly at home in America, utterly at home in Europe”. Thus it is perhaps not even surprising that the idea for the book originated not in the States, but in Siena, Italy. There, professor Mazzoni had a selection of Stein’s writings translated into Italian and published, with an introduction by Capotorti, then Advocate General at the ECJ. This illustrates Eric Stein’s exceptional standing in European academic circles dealing with the legal aspects of European integration. The director of the University of Michigan Press happened to come across the Italian volume and suggested an English version; professor Weiler, a pupil of Stein’s in earlier years, added his persuasive voice (and a sympathetic foreword).

So now we can benefit from this “retrospective of writings on New Europe and American federalism” in the original language. Benefit is the right term; the book makes for most interesting and at the same time pleasant reading. The retrospective covers a period of some thirty-five years of writing (some essays were co-authored by academic colleagues, professors Louis Henkin, Terrance Sandalow and Joseph Vining). Notwithstanding the long period of time covered, none of the essays gives the reader the feeling that it is “dated” and therefore lost its relevance.

The main focus of most essays is on divided-power systems of government and the role of the judiciary in the functioning of such systems. As the words in the sub-title indicate (“New Europe and American federalism”), fascinating comparisons are made between the Supreme Court of the US and the Court of Justice of the European Communities. Present at the creation (as a guest of the legal service of the European Commission), the author was struck at the outset by the existential importance of the first fundamental rulings of the Court of Justice. He recalls the famous *Van Gend en Loos* case, when the Court found that this transport company had the standing to sue the Dutch Government to obtain reduction of customs duties which had been levied in contradiction with the standstill clause of Article 12 EC. Although this case is well-known to the initiated, it is refreshing to recall the arguments used by the three governments which appeared in this case, the Belgian, Dutch – the culprit itself – and German governments. They argued that a charge against a Member State of treaty infringement as in this case might be brought before the Court only by the Commission or by another Member State. Had the Court followed this argument, it is unlikely that it could have developed the extensive case law on discriminatory State taxation. The Netherlands and Belgium, notwithstanding their reputation of staunch defenders of “supranationality”, would then have killed this development in the bud, leaving the burden of litigation mainly on the shoulders of the Commission since governments, involved in all kinds of trade-offs, do not particularly favour suing each other in the Community framework.

Had the Court followed the governments, Eric Stein wrote in the early 1980s, “Community law would have remained an abstract skeleton, and a great variety and number of Treaty violations would have remained undisclosed and unredressed.” He underlines the extreme importance of Article 177 which gives the Court jurisdiction to give preliminary rulings on the interpretation of the EC Treaty at the request of national courts faced with litigation instituted by individuals or companies against their governments, as in *Van Gend en Loos*. This allows individuals easy access, whose “vigilance in protecting their own rights adds to effective supervision”.

This *laudatio* of Article 177 was written well before the very success of this formula became a pressing problem, the Court now being inundated with such an enormous mass of 177 cases – often by national courts hardly aware of the extensive case law which can provide answers – that a real bottleneck threatens the normal flow of legal business in Luxembourg. (NB: Stein uses old EC Treaty numbering) He describes the process as “constitutionalizing” the Rome treaty: “tucked away in the fairyland Duchy of Luxembourg the Court has fashioned a constitutional framework for a federal-type structure in Europe”. And he adds: “, within its limited but expanding area of competence.” A useful precaution. Stein at the time could not know that much later, in Maastricht and Amsterdam, the then created European Union would expand its area of competence, but by steering clear of the European Commission and the Court in its so-called second and third “pillars” dealing with foreign and security policy, and justice and home affairs respectively. Only asylum and immigration policy, it was agreed in Amsterdam, will over time be integrated into the Community (the first “pillar”), and that until further notice, with a unanimity requirement in the Council. Thus, the new areas of competence of the Union do not participate in Stein’s “constitutionalizing process” ... or at least not yet.

Amongst the early fundamental rulings of the European Court, Stein also rightly singles out the *ERTA* case, “a worthy counterpart to the *Van Gend en Loos* case”. Eight years after that famous case, the Court dealt with the scope of Community power in foreign relations, beyond the area covered by international trade Policy. The Court found that each time “the Community adopts provisions laying down common rules, the Member States no longer have the right, acting individually or collectively, to undertake obligations with third countries which affect those rules.” Stein, analysing positions taken before and by the Court, observes that in these and the many subsequent similar cases, the Court nearly always followed the Commission “in the inexorable progression towards more legal integration and more community power.” This close alliance, he notes subtly, has probably alleviated some of the concern members of

the Court may have felt regarding the legitimacy and acceptance of its rulings – such concern has no doubt been fanned by the consistent opposition of Member States, as documented *unisono* by their positions taken before the Court.

Could there be a link between this fascinating legal history and, as we have seen, the total (in the case of the Court) and quasi-total (in the case of the Commission) elimination of these two fundamental Community institutions from the governance of the two new “pillars” of the European Union? And with – also much later – the rather timid interpretation the Court gave to the scope of “common commercial policy” falling under Community authority ex art. 113? It would have been interesting to have Eric Stein’s view on these questions.

But the book deals with many other interesting legal aspects of Community life. There is an excerpt from a 1971 book entitled “Harmonization of European company law”, dealing in detail with the legislative history (with all the numerous consultations underway) of the First Directive in that field. Stein uses the term harmonization, literally the same as the original French term in Article 100 EEC. The later official English term has become “approximation”, for reasons I never understood. As to “harmonization” in general (of provisions that directly affect the functioning of the common market), he recalls the fundamental change in approach following again a lead by the Court, to abstain from total harmonization and concentrate on mutual recognition of standards, subject only to recognized national limitations in defined public policy interest.

Then there is the excerpt from “Courts and Free Markets – perspectives from the United States and Europe” (1982), a collection of parallel European and American papers. The gist of this collection is defined in former Pescatore’s foreword: “To (the European participants) came the realization that they have been practising federalism on lines not unlike those of the United States, and that they, too, have a Supreme court of their own.... The striking thing is that all this was by no means a matter of imitation.... There was never on our side any question of taking American federalism and the experience of the Supreme Court as examples in European affairs How then shall we explain the many coincidences, which a comparative study of the case law of the Supreme Court and the court of the European Communities has enabled us to discern? This is the more striking as these developments have taken place at different periods of history and in contexts which vary widely from both a political and legal standpoint.... It would seem that federalism is a political and legal philosophy, which adapts itself to all political contexts,.... wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participating entities.” Pescatore’s introduction brilliantly illustrates the subsequent essay by Stein and Sandalow.

The next piece, co-authored with Vining, is about citizens’ access to Judicial Review of administrative action in a Transnational and Federal Context, the latter evidently concentrating on the US practice. We have mentioned before the importance Eric Stein rightly attached to the *ius standi* of private parties; here, he notes that it is “particularly important in the community, considering the complaints about the ‘democratic deficit’ in the working of its institutions” – a subject he deals with in detail in a later essay. The following chapter deals with European Foreign Policy, from the perspective of the United States constitution (co-author Henkin), consisting of excerpts from various articles” and lectures, *inter alia* an editorial in this *Review* (1992). Schermers, at the time director of the Europa Instituut of Leiden University, appears as one of Stein’s advisers in these matters. The text opens with a moving personal note; “For anyone who like myself grew up in Europe, the world beyond frontiers intruded into private destinies in ways unfathomable to most Americans. For this, if for no other reason, foreign affairs have been from the outset a natural area of my concern.” From a legal point of view, Stein makes an essential observation: only in the foreign affairs field did the Court clip the wings of its early, broad, implied powers doctrine ... the Court ruled, contrary to the Commission’s claim, that the conclusion of the World Trade Organization agreements was not within the exclusive treaty power of the Community and that the Member States must join as

parties. Indeed, the narrow interpretation of Article 113 EC, excluding trade in services from the Common Commercial Policy, is disappointingly timid. But even Stein himself is led astray by the constant use by member-governments of the term “mandate” when they deal with the exclusive negotiating power of the European Commission. The Commission has its negotiating monopoly directly from the Treaty, only subject to “such directives as the Council *may* issue to it”. No mandate, not even an absolute requirement of “directives”!

Moving from the traditional Common Commercial Policy to the second “pillar” of the Maastricht Treaty, Stein sighs: “... in Europe, diplomats and politicians of the Member States play their games not only against the so-called third States but also, at least on some occasions, against each other... what is it that keeps the Member States from bringing foreign policy fully within the Community system?” Since then, the Treaty of Amsterdam has indicated the limits to which the Member States of the European Union are ready to go, but also a serious effort at some real commonality in military matters.

The next essay is about the United States, Uniformity and Diversity in a Divided-power System, occasionally illustrating that in some matters there is more uniformity in the European Community than in the US. Then Stein deals with the “democratic deficit” in the working of the European Union observing *en passant* that “issues such as lack of citizen participation and accountability of public power loom large in any modern democracy, including the United States”. He could not know that the German foreign minister Fischer would make the opaque nature of Union decision-making the subject of a plea for clearer structures, like a real federation, in a public address on 12 May 2000 (curiously enough, General de Gaulle, nearly exactly fifty years earlier, spoke of “a federation of Europe, to include Germany”).

The two last essays in the book are of a different nature. One deals with the “Luschwitz Lie”, the struggle of the German body politic and the judiciary with the problem of the negation of the mass-murder of Jews in the second world war. Should special penal provisions be enacted to deal with this aberration? The answer finally was yes. Stein, in a remarkable dispassionate analysis, goes through all aspects of the legislative history of this development, contrasting it with the nearly total protection of free speech, however repulsive, in the US. It bears the appropriate title “History against free speech”, and contains a correspondence on the matter with some prominent Germans. The last essay is a somewhat melancholic account of the break-up of the Czechoslovak common State, which he witnessed as an adviser of the then common government. No divided-power system was found that could reconcile the two entities, although neither wanted the separation at the outset. Summing up: a fascinating book.

E.P. Wellenstein
Den Haag

S. Milacic (Ed.), *La Démocratie Constitutionnelle en Europe Centrale et Orientale. Bilans et perspectives*. Brussels: Bruylant, 1998. 629 pages. BF 2300. ISBN 2-8027-146-6.

This book is the collection of papers and verbal interventions made at the conference entitled “La construction de la démocratie constitutionnelle en Europe centrale et orientale, bilan et perspectives.” The conference took place in Bordeaux, 28–30 November 1996 and was organized under the auspices of the Centre d’études et de recherches sur les Balkans (“CEREB”) of the Université Montesquieu – Bordeaux IV. It is organized in two parts: the first deals with the state of the democratization process and is authored mainly by Western European (largely French) academics in the constitutional and political fields; the second part deals with the democratization of various States of Central and Eastern Europe, with studies for the most part written by local experts. The authors include such luminaries as Favoreu, Gautron and Luchaire from France together with Adam, Klima and Nikolic from the CEECs.

Before proceeding to deal with the substance of the book, there are a number of preliminary remarks which need to be made. The first matter is not in the nature of a criticism: it concerns the overall timescale surrounding the presentation, publication and review of the work. It is stated that one of the reasons for holding the conference was to conduct an analysis of the constitutional context of the systemic changes from the perspective of the first five years or so. This review is being written at a time when a ten-year period is now being considered. It can therefore be argued that the book suffers from the symptom common to many publications in the field of postcommunist studies, namely that they can become dated very quickly in view of the tide of events.

The second point concerns the geographic reach of the book. At first blush, it seems to be more focused on Central Europe and the Balkans and would appear to ignore Poland, Slovenia and the States of the former Soviet Union (this point is alluded to in the concluding synthesis written by Gelard). Such a focus may be readily understood since the remit of the CEREB would not of itself admit a consideration of the constitutional developments in the Russian Federation. Yet an authoritative essay on this issue, as a counterweight to CEEC development, would have been instructive. It would have helped to throw into greater relief the relative progress made in the constitutional developments in Central Europe and the apparent tardiness of the States in South East Europe.

A general criticism concerns the real lack of "bilan" in the second part. The weight of presentations from Bulgaria and the paucity of the contributions from Croatia and Slovakia, as well as the missing countries noted above, has had an impact on the effectiveness of the ability of readers by themselves to view developments and identify common issues between the various States. The comparative analysis is presented in the essays in the first part, but this does not necessarily follow through to the actual content of the country essays. Moreover, it appears from some country essays (e.g. Hungary, Czech Republic, etc.) that an agreed outline was provided to authors by the conference organizers. Such an outline has not been adhered to by all local authors. With the caveat that not all the contributions will be discussed in depth in this review, we now turn to the substance of the book. The first two essays deal with the respective roles of the EU (Gautron) and the Council of Europe (Claret). They provide a good overview of the actions taken by both organizations in the early years of the transition in order to consolidate democracy, the rule of law, and protection of human and minority rights in the CEECs. The ensuing verbal interventions (Luchaire and Furrer) discuss the juridical and political linkage between these organizations. Taken together, they constitute a sound exposition of the pan-European context of the transition from Western perspectives.

The next three groups of essays discuss the executive, constitutional justice, and political representation. There are a number of points to raise. Lesage's intervention, though brief, refers to the "triple distrust" in constitutions: distrust with regard to the President, to the Prime Minister *vis-à-vis* his Ministers, and to the Government itself in its dealings with Parliament. This useful, threefold distinction neatly summarizes the main areas of contention in matters of governance in the transition countries and are to a great extent addressed in some of the country essays later in the book. In his well-researched paper, Trautmann presents a discussion of the nature and powers of postcommunist presidents and governments. His ideas fall squarely within the then-current debate on the relative advantages and disadvantages of presidential, semi-presidential and parliamentary regimes.

Undoubtedly, one of the best essays is Massias' exposition of constitutional justice in the democratic transition from postcommunism. He furnishes a great tour de force of the variety of constitutional justice in the CEECs. However his overwhelming focus is on the jurisprudence of the Polish Constitutional Tribunal. Although the whole essay is properly researched, one gets the feeling that Massias is most at home with the Polish practice. In this sense, the shortfall in not having a country-specific chapter on Poland is somewhat redressed by this paper. Favoreu's intervention on the possible use of the American constitutional model for

the transition countries is apposite as are his remarks on the qualifications and the need for political awareness of the constitutional judges.

Of the remaining essays in this part, the one by Owen concerning the international community and postcommunist elections has lost none of its relevance, particularly in view of the fact that the Serbian Government refused permission for the OSCE (ODIHR) to monitor the 24 September 2000 elections. The position of minorities in the CEECs is dealt with quite comprehensively by Yacoub in a broad exposition, taking each country in turn. Pierre Caps deals further with the concept of "the people" in postcommunist constitutional law; for example he discusses the problems of plurinational States and their treatment of minorities.

The second part is less even in terms of quality or length of essays. The weakest contributions come from Albania, Croatia and Slovakia. This is indeed a shame as the democratization process in each of these countries has been marked by difficulties centred on the somewhat authoritarian tendencies of the main political actor (Berisha, Tadjman and Meciar, respectively). There could therefore have been an opportunity to compare the socialist/nationalist features of these regimes with those of Milosevic in Serbia/Yugoslavia and Iliescu in Romania.

The functioning and practice of the president, government, parliament, and constitutional court within a (transition) State under the rule of law are succinctly articulated in the essays by Adam (Hungary), Skaric (FYROM), Vasilescu (Romania), and Klima (Czech Republic). The aberrations found in the constitutional and party systems of the Yugoslav federation and republics are described by Nikolic and Goati. The section on Bulgaria elicited four essays: Popova's contribution provides a brief outline of the development of governmental power and political representation in the country.

In his synthesis at the end of the volume, Gelard attempts to pull together the rather disparate threads of the conference papers. His remarks revolve around cultural specificities, the existence of a European democratic model, and the European dimension.

In conclusion, the volume generally provides a good introduction to the themes and processes of postcommunist constitutionalization in the CEECs. However, in view of the criticisms above, the work fails to provide the comprehensiveness which the title implies. In view of the time lag between the conference and publication, there were adequate opportunities for writers to prepare more substantial contributions than those they made at the conference: this has contributed to a reduction in the usefulness of the work as has the passage of time. The book will prove to be more useful for students wishing to gain a knowledge of constitutional issues in the earlier period of the transition as well as those seeking an initial broad comparative overview of (most of) the CEECs. For well-established academics in the field and for those researching in more detail on country- or sector-specific topics, the book may be used as background reading. Indeed some of the issues raised in the essays, particularly in the first part, could of themselves form useful topics for further scientific investigation.

Finally, as a Community official, I should recall that the views expressed in this review are entirely personal and do not reflect the opinion of the European Commission.

A.F. Tatham
Budapest

Y. Lejeune (Ed.), *Le Traité d'Amsterdam. Espoirs et déceptions*. Brussels: Bruylant, 1998. 498 pages. BF 3500.

This book on the Amsterdam treaty was written by a number of professors from the Catholic University of Louvain and the Free University of Brussels after a symposium held in December 1997. All major aspects of the Treaty are discussed, and most chapters end with an interesting bibliography.

The first chapter recalls the reasons why an intergovernmental conference was held. As the heads of governments often repeated, the objective was to reinforce the political Union between the Member States. The author regrets that the governments did not choose the best means to reach this objective. They were mostly interested in the institutions and in the external policy, and failed to address the citizens. While explaining that a truly political Union could only be built through a more classical constitutional approach, the author does not expand on the content of such a constitutional change.

The other chapters are divided in five parts dealing with the organization of the Union, the citizenship, the policies, the external action and the future of the Union.

On the organization of the Union, the authors analyse the new "reinforced cooperations" from various points of view. This new device (Arts. 40 TEU and 11 EC) allows some Member States to develop projects together even though the other Member States are not ready to go along. It is supposed to prevent the Union from stopping its progress after enlarging. From a historical point of view, it is suggested that the "reinforced cooperations" follow the debates on the subsidiarity principle. Since the subsidiarity principle is very difficult to implement, the governments have preferred to focus on means to differentiate the Member States' liabilities. Ironically enough, the "reinforced cooperations" could become a new way of applying the subsidiarity principle. Relying on subsidiarity, some Member States might choose not to take part in a new action decided by the others. It should nevertheless be remembered that the scope of these "reinforced cooperations" is fairly limited. They are permitted only in some areas of Community law. They are forbidden in the external policy where they might have proved most useful. At the time being, there is not much to expect from these cooperations. Since the book was written, the governments seem to have become aware that the "reinforced cooperations" as they are provided for in the Amsterdam treaty are not very useful. The intergovernmental conference which will again modify the treaties has to discuss means of making the "reinforced cooperations" work. Two main proposals are currently discussed: simplifying the procedure and enlarging the scope. One chapter deals with the new Article 299 EC (ex 227) which allows the Council to adapt Community law to a number of overseas territories. The author stresses that the governments wanted to overcome the *Legros* and *Lancry* decisions of the ECJ (from 1992 and 1994). The Court had limited the power of the Council to adapt Community law. The Amsterdam Treaty extends it again.

The main aim of the Amsterdam Treaty was perhaps to change the institutions so that they become more democratic and so that they are adapted to 20 or 25 Member States. During the discussions preparing the treaty, it appeared that this aim could not be met. The Member States disagreed too strongly. The Treaty is therefore disappointing. The only true change is on the European Parliament. The codecision procedure has been extended to almost all the acts of the Community. The Parliament can thus contribute to the legislative process as the equal of the Council. Another important change was decided about the Court of justice. Since immigration and asylum policy entered the Community competence, the ECJ is now competent in these areas which were previously part of the third pillar. It should be noted that the inferior courts are not allowed to refer cases to the Court and that the Court can not deal with public order matters. One might regret that the author did not develop, and criticize, those limitations. A number of institutional problems have not been solved. Although the Maastricht Treaty provided that a hierarchy should be set up between the norms of Community law, the governments have apparently thought that this was not a priority. It is a pity because it would have helped to limit the powers of each institution and to make Community law clearer for everybody. The vote at the Council has not been modified either. Everyone knows that the current procedure will give a veto power to the smaller States, who will be in a majority after enlargement. Every government also wants to retain its own power and is reluctant to the slightest change. For the same reasons, no major change has been made to the composition of the Commission. The bigger the Commission will be, the less efficient. The current intergovernmental conference has to deal with these problems. It does not seem that the Member States are more eager to accept

institutional changes than in 1997, despite bold political commitments. About citizenship and fundamental rights, the authors regret that the Amsterdam Treaty did not give more weight to European citizenship by extending the freedom of movement of the right to vote. It only enables the institutions to adopt acts against discriminations (Art. 6 EC). The Treaty brings important changes to the protection of fundamental rights. It provides a basis for acts against discrimination, it gives the Court of Justice new competences on immigration and asylum, it creates a new suspension procedure against Member States who violate fundamental principles. The failure of the Member States to take efficient measures against the Austrian Government after extreme right ministers entered it shows that such a suspension procedure might be too stringent to work. On asylum rights, a protocol forbids the Member States from receiving applications from EU citizens. The Spanish Government wanted to prevent ETA members from seeking asylum in other European countries. The author shows that the protocol is contrary to international law. It is submitted that the changes introduced to asylum rights are not limited to the protocol and should have been dealt with as a whole. Now that asylum is part of Community law, one might wonder what the asylum-seekers might expect and how the new law will articulate with the Schengen agreements (by which the UK, Ireland and Denmark refuse to be bound).

One chapter deals with law and religion under the Amsterdam treaty. The eleventh protocol affirms that national law will be respected. The author wonders whether Community law will not have to deal with religion and ensure participation of religious bodies in the European debate. Why Community rules about religion would be necessary is still unclear to this reviewer.

As for the Union's policies, two chapters deal with security and justice. The first explains how the new rules on immigration, asylum and the third pillar will operate. The second concentrates on the "reinforced cooperations" in these areas. The author maintains that some flexibility is necessary but that it might lead to a legal puzzle. The third chapter is about the change in Community competence. It stresses that the Member States wanted to show their concern about employment (Art. 125 EC) but that on the whole the Treaty lacks transparency and unity. On services of general interest, whose importance is reaffirmed by the Amsterdam Treaty, the author shows that no rule can be established because nobody knows to what extent these services should be protected. The ECJ will again have to draw the line between general interest and competition. The same uncertainty is stressed about the new objective of "lasting development".

On external policy, the authors wonder whether the new procedures set up by the Treaty will make the Union more efficient and show that "reinforced cooperations" on internal affairs will affect the conduct of international negotiation. And on the future of the Union, the first author insists on the need for institutional change. He supports the extension of majority vote and of the Commission's and the Parliament's role. He suggests that their accountability could also be increased but fails to develop on this major issue. The chapter on enlargement stresses that it might not be a progress for the Union. On economic coordination, the author fears that the monetary institutions might control the political institutions.

The book gives a very complete view of the Amsterdam treaty and criticizes thoroughly the text. One might only regret that sometimes the criticism is not followed by proposals.

C. Haguenu-Moizard
Orleans

J. Beatson and T. Tridimas (Eds.), *New Directions in European Public Law*. Oxford: Hart Publishing 1998. 198 pages. GBP 35. ISBN 1-901362-24-8.

This short volume contains a collection of papers delivered at two conferences held at St John's College, Cambridge, in 1997. The theme of the first conference was "The Liability of

Public Authorities in Damages”, while the second dealt with the topic of “Cross-Fertilization of Concepts in European Public Law”. Accordingly, the essays presented in the book fall into two quite distinct groups connected only by the fact that both groups cover issues which come within what may be loosely described as “European public law” (and probably by the editorial consideration that neither group would have filled a volume by itself).

The first part of the book is made up of six essays and an epilogue. They all deal with the case law of the European Court of Justice on the liability of the Member States for damage caused to individuals by breaches of Community law, or with the implications of that case law for domestic (mainly English) law. The authors include Tridimas (who also wrote the Introduction together with Beatson and the Epilogue which covers developments subsequent to the conference), Van Gerven, Oliver, Eeckhout, Craig and Hoskins. As one would expect of such distinguished authors, the essays are of a very high standard. Their central theme, of course, is the *Brasserie du Pecheur* and *Factortame* judgment, which is analysed from every possible angle, although *Francovich*, which preceded it, and the series of cases which followed it, are also paid due attention.

The Court’s case law does not escape criticism. Thus, according to Van Gerven, the reference in *Brasserie* to the Article 288 (ex 215) case law is too limited both in breadth and in depth as, on the one hand, the Court focuses only on the *Schoppenstedt* part of that case law and, on the other, it makes insufficient efforts to search for general principles common to the laws of the Member States. Eeckhout would also like to see more uniformity in the assessment of State liability throughout the Community. This, he suggests, could be achieved either by the ECJ itself, by gradually determining more of the rules governing liability using its own case law on Community liability as a model, or by legislative action involving harmonization of national systems of liability remedies. Tridimas considers that the comparison drawn between the liability of Member States and the liability of Community institutions for legislative acts is not necessarily accurate as the discretion of Member States is not comparable to that of the institutions. One cannot but agree with all three opinions. While Oliver examines the interrelationship between the various remedies available before the national courts and the Community Courts, Craig and Hoskins analyse the impact of the *Brasserie* case law on English law. Although, inevitably, there is some overlap between the various essays, they are also complementary to one another and, taken together, provide a full and critical analysis of this important area of Community law.

The second part of the book deals with a rather different topic which may be broadly described as the “Europeanization” of public law by means of fertilization, cross-fertilization and transplantation of concepts and ideas. The contributors include Eivind Smith, Hare, Torchia, John Bell and John Allison. Smith and Hare concentrate on constitutional law and the judicial review of legislation. Torchia examines the influence, direct and indirect, of Community law on Italian administrative law. Bell provides an overview of the different European administrative law systems and traditions and identifies certain areas for convergence between them. He also examines the mechanisms for and the extent of cross-fertilization, pointing out the influences exerted by European Community law and the ECHR. Allison elaborates on Bell’s distinction between transplantation and cross-fertilization and argues that a process of cross-fertilization, which takes account of certain considerations, such as legal culture and institutional differences, will help avoid the hazards of transplantation. This second group of essays raise a number of extremely interesting and topical issues and their value is enhanced by the “dialogue” which often goes on between the various authors in the form of – sometimes critical – comments on each other’s contributions.

All in all, this is a valuable addition to the literature on European public law issues, charting “new directions” in this field in a highly competent manner. Although the topics covered are diverse, the book as a whole illustrates in a particularly clear fashion the increasing and irreversible interaction between the different supranational and national legal systems that

operate in Europe today. Hart Publishing should be congratulated not only on taking on the project but also on bringing it to fruition in the form of a neat and carefully produced volume.

A.G. Toth
Glasgow

J.L. Buendia Sierra, *Exclusive rights and State monopolies under EC law: Article 86 (former article 90) of the EC Treaty*. Oxford: Oxford University Press, 1999. 458 pages. GBP 95. ISBN 019829820.

F. Blum and A. Logue, *State Monopolies under EC Law*. Chichester: John Wiley, 1998. 402 pages. GBP 75. ISDN 0-471-94353-3.

These two books contribute a welcome addition to the literature on Article 86 (ex 90) EC, much of which has hitherto been scattered across journal articles and chapters in competition law books. The wealth of jurisprudence on this complex Treaty article, as well as the increased number of Commission directives and decisions interpreting its scope, amply justify comprehensive treatment. Blum and Logue approach the subject primarily from a practitioner's viewpoint. Buendia Sierra's manuscript is a translation of his doctoral thesis. The two publications can therefore complement each other well.

Blum and Logue analyse the principal regulatory measures and the case law up to the end of June 1997. They divide their analysis into two main parts – a discussion of Article 86 as such, followed by an examination of Regulatory measures complementing Article 86. In Part I they devote their first three chapters to analysing the basic provisions of Article 86(1) (2) and (3); Chapter 4 deals with State-related undertakings, and Chapters 5 and 6 examine the interaction between Article 86 and respectively, the rules on free movement of goods and services. Chapter 7 covers Article 295 (ex 222), the State aid rules and the Merger Regulation. Part II contains chapters on energy, telecommunications, broadcasting, post, and finally transport. This approach provides the specialist as well as the generalist with readily accessible material. The sector-specific regulatory chapters contain a brief overview of the relevant secondary legislation, preceded by a short introduction to the Commission's policy for each sector. Shortly after the book went to press the Court delivered its judgments in the gas and electricity cases – *Commission v. France, Netherlands, Italy and Spain*, as well as in *Franzen* and the authors were unable to integrate these cases into the main chapters. A short "stop press" explains the principal elements of these cases.

The chapters are well laid out and in Part I, a short analysis, based on relevant case law is presented for all the main elements of each part of Article 86. Chapter 2 contains an extensive discussion of the case law on Article 86(2) while Chapter 3 describes the existing measures adopted by the Commission under Article 86(3). Given the fundamental division of the book into a Treaty part and a "complementary part", these initial chapters do not deal in any depth with the relationship between the interpretation of the Treaty articles and secondary legislation. Furthermore, the analysis in Chapter 3 is directed at existing measures and relevant case law, including the Court's rulings on the Transparency and Terminal Equipment and Services Directive. There is little broader discussion of the possible scope and limitation of the Commission's powers nor any attempt to anticipate developments which are now current such as the latest proposed amendments to the Transparency Directive – amendments which had already been proposed in 1997. A further result of the authors' practical approach is that they devote relatively little attention to the issue of reconciling the often bewilderingly diverse interpretations of Article 86 in the rulings of the Court. Perhaps the jurisprudence is irreconcilable, but some of the underlying policy issues merit discussion. The authors appear

in the main content to highlight the discrepancies. This same observation can be applied to Chapters 5 and 6.

Chapter 4, which deals with the interrelationship of Article 86 and Articles 81 and 82 provides a useful, concise and clear guide to the case law, but given that the focus of the book is practitioner oriented, it is to be regretted that the authors did not pay closer attention to some of the procedural issues relating to these Articles. What precisely is the relationship between Article 81(3) and Article 86(2)? How should the Commission apply these articles in cases where both exceptions are raised? Another perhaps surprising lacuna is the issue of remedies: this is not touched upon at all, and yet several cases such as *Rendo* and *Ladbroke* have illustrated the difficulties which complainants have had to deal with when they try to question the legality of a measure which confers privileges on an undertaking, but the existence of which can be attributed to State action. These cases are also illustrative of procedural issues which are not further dealt with in this book.

The regulatory or sector specific chapters are based on roughly the same formula: a short description of the relevant sector-specific legislation followed by a synopsis of case law and Commission practice arising in the sector. These chapters provide useful introductions into the increasing complexity of regulatory practice in the Community, and once again, the information is clearly presented and analysed. Given the length and scope of each chapter, detailed analysis, especially of the relevant Community legislation is not to be expected. It is perhaps unfortunate, however, that the authors did not attempt to unite a few of the horizontal themes which run through this legislation. Again, and given the focus of the book, one might have expected to see a short chapter on the role of national regulatory authorities and the relationship between regulatory norms and more general competition-law based principles.

These minor criticisms aside, "State Monopolies under EC Law" serves a very useful purpose: it brings a clear and concise analysis to complex and indeed rapidly changing subject-matter. It should be a welcome addition to a practice library and will provide students of competition law with a helpful guide through the regulatory maze as well as the seemingly conflicting jurisprudence.

Buendia Sierra's book has as its main object to examine the case law and Commission decisions with a view to establishing the extent to which the EC Treaty requires liberalization of sectors subject to monopolies. The main thread of the book is the concept of exclusive rights and their treatment under EC law, although other related restrictions on competition receive analysis. The original doctoral thesis on which this book was based was awarded *cum laude* and gained the Special Doctorate Prize by the University of Zaragoza. It is an extensive and thoroughgoing analysis, not only of the case law and practice but also of the underlying legal and theoretical concepts. The book examines not only of Article 86 EC but also Article 31 (ex 37) – a subject which has a chapter of some 60 pages dedicated to it. The book is further divided into five Parts, chapter one and two of Part I dealing with the concept of exclusive rights and the differentiation between such rights and other related concepts, including special rights, regulated access activities and intellectual property rights. Part II looks at the limits to the creation and maintenance of exclusive rights, with *inter alia* chapters on the rules addressed to undertakings and the rules addressed to Member States. Part III deals with the justifications of certain exclusive rights, while Part IV focuses on the choice of the holder of the exclusive right and as such deals with the selection of the identity of the monopolist and Article 43 and examines the creation of an exclusive right and its grant to a given operator. Part V contains a wide-ranging treatment of a variety of institutional issues, with an extensive discussion of the issue of direct effect. The book is extremely well laid out and the various chapters divided into useful sub-headings and numbered paragraphs. The language is clear and accessible – a tribute to the translator as well as the writer – and the analysis provocative and often innovative.

By taking the nature, scope and potential purposes of exclusive rights as his point of departure, Buendia Sierra is able to offer an often novel and always rewarding approach to his subject matter. Buendia Sierra is not shy of confronting many of the seeming inconsistencies

in the Court's rulings on Article 86 (1). He deals extensively with controversies in academic literature surrounding all aspects of his chosen subject. It is difficult to do justice to the richness and comprehensiveness of his analysis in a short review. Some examples may suffice. In the opening chapter on the concept of exclusive rights, he contrasts the formalistic approach to the existence of exclusive rights in the *Spanish Electricity Case* with its earlier judgment in *La Crespelle* and the Commission's decision in *VTM*. He argues strenuously and convincingly for a non-formalistic approach. His discussion of the definition of "undertaking" for the purposes of Article 86 and his development and deployment of a distinction between the diffuse and specific services offered by the "body" or "entity" in question as a useful means of approaching this controversial issue, especially in the context of partial privatizations. His proposal to drop the "solidarity financing" approach as posited by the Court in *Poucet*. One must surely agree with his statement that the very existence of the exception contained in Article 86(2) presupposes that there are economic activities which involve solidarity financing. The addition of such criteria renders Article 86(2) superfluous. Case law and academic writing on Article 31 are treated with similar scrutiny. Unlike Blom and Logue, whose book preceded his by a year, Buendia Sierra was able to include an extensive analysis of the *Electricity* cases and *Franzen*. I hope I can do justice to this book by saying that not only has the author picked over and commented on all the existing controversies surrounding this controversial subject matter, but also he manages to create some new ones along the way. This approach is refreshing and offers many new insights into the debate on the scope of the EC Treaty rules on exclusive rights and State monopolies. I found his discussion of the differences between the concepts of monopoly, exclusive rights and regulated access in the context of the *Baby Milk* case (see chapter 6, part F) and the rules on free movement of goods, particularly interesting.

The possible link between the concept of exclusive rights as explored and developed in the first four Parts with the institutional topics dealt with in Part V was for this reader a particularly worthwhile point of departure. Article 86 is primarily about combatting distortions to competition which exclusive rights create; but in how far can it continue to be applied to a sector such as telecommunications, when over the last decade, the Commission has systematically set about removing these very rights. Is the Commission "digging its own grave"?

The final Chapter 10 devotes some 50 pages to the many complex but important procedural issues surrounding Article 86. The author's primary thesis is that Article 86 provides a special procedure intended not only to bring an end to infringement of Article 86 but also as a basis to adopt general measures. Although the major focus of the book is on substantive matters, Buendia Sierra rightly states that the relationship between procedural and substantive rights is particularly close. The chapter explores the question of the interpretation of Article 86(3) and its delimitation with respect to the other procedures provided for in the Treaty, highlighting the advantages of this special procedure, and concludes that the Commission should opt for it rather than the conventional Article 226 (ex 169) procedure. The chapter further analyses some 11 formal decisions adopted by the Commission, as well as one under the equivalent procedure under the EEA, concerning Finish gaming machines. He then turns to the rights of complainants and examines the judgments in the *Ladbroke* and *German Accountants* cases, and conducts a useful comparison with the case law under Article 88 (ex 93). Turning to Article 86(3) directives, he suggests that these should have two functions, that is the creation of additional but accessory obligations and to specify obligations. A historical survey of the use made of these directives reveals that the Commission first intended to put Article 86(3) to use as early as 1972 in respect of procurement. The chapter then proceeds to a detailed examination of three specific directives and the unsuccessful challenges mounted against them in the Court. The author then contends that the proper scope of an Article 83 directive should be limited to defining the scope or specifying obligations incumbent on both Member States and undertakings. Thus these directives can have direct effect in their own right. Unfortunately the latest Cable directive was adopted too late to be included in this analysis. One may well take

issue with the suggestion that an Article 86(3) directive could specify far-reaching obligations directly to be borne by undertakings, given that the Court expressly annulled provisions in the telecommunications equipment and services directive requiring undertakings to terminate certain forms of contract. As with the Blum and Logue book this work does not analyse the relationship between the procedures under Article 86(3) and their relationship to Articles 81 and 82.

The two books reviewed here undoubtedly offer quite different perspectives on Article 86 and provide a useful complement to one another and as such both form a useful addition to the literature. While the Blum and Logue analysis may appeal more to practitioners, Buendia Sierra's work is likely to be indispensable for all those wishing to dive deeper into the murky waters of the existing case law and practice. The last word on this complex article has still not yet been confined to print.

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D.A. Levy, *Europe's Digital Revolution: Broadcasting regulation, the EU and the nation State*. London: Routledge, 1999. 208 pages. GBP 55.

Levy presents us with an informative and insightful overview of regulatory regimes concerning analogue and digital television developed by the European Union (EU) and three EU Member States: France, Germany and the UK. The main premise of the book is that although technological change is often assumed to promote policy convergence and globalization and to erode the importance of national policy-making, broadcasting policy has resisted this trend due to the cultural and political significance of the industry at the nation level. Levy argues that, as cross-national broadcasting is not yet a reality and legislation remains national, attempts by the European Commission to legislate the broadcasting market have thus far been unsuccessful. His analysis takes on board an intergovernmentalist approach wherein Commission policy has been steered and often prevented by three dominant EU Member States: France, Germany and the UK.

The book is divided into four parts. The first presents an overview of the technological changes in the broadcasting market that Levy views as driving legislative change. The second part covers the regulation of analogue television by the European Commission and the three Member States studied, focusing on the different ways in which cultural and political factors have shaped national legislations. Part Three examines the regulatory response of the European Commission and the three Member States to the advent of digital television. Levy argues that widely differing policy styles continue to persist at the nation level despite Commission attempts at harmonization due to diverse regulatory traditions. Part Four examines the reasons for the resistance of broadcasting policy to Commission attempts at regulation. Levy challenges conventional belief that technological change is promoting deregulation at the national level, arguing that Member States shall continue to hold jurisdiction over this very sensitive policy area of the broadcasting industry.

Chapter One gives an overview of the technological innovations of digital compression and convergence. Levy details the ways in which these are challenging existing regulatory frameworks through problems of conditional access, applications programming interfaces and electronic programming guides. Chapter Two gives an overview of the regulation of analogue television since the 1950s in the three States. This chapter covers the regulation of licensing, content, advertising, media ownership, industry subsidization and the role of regulatory bodies, focusing on how each State differs in its approach to regulation due to traditional policy styles (French dirigisme, German federalism and British marketization). Levy's conclusion is that

cultural and political concerns have dominated the formation of media policy in these Member States and that economic concerns have taken a lesser role. Levy argues that Germany has created “the most detailed, complex and intrusive regulatory framework of any of the three countries”, France has been able to keep “at bay the free market assumption of EU policies” and the UK has taken a “more market-based approach to broadcasting”. Chapter Three looks at European Commission regulation of analogue broadcasting. The Chapter discusses three Commission initiatives: the two Television Without Frontiers (TWF) Directives and the media ownership draft Directive. Levy provides a very comprehensive and thorough overview of the policy processes leading up to 1989 TWF (during the years 1984–1989), 1997 TWF (1994–1997) and the media ownership draft directive (1992–1997). Of particular interest is his insider insight into the policy process leading to the 1997 TWF Directive. Chapter Four details the formation and implementation of the EC’s MAC and Advanced Television Standards Directive. Based on Levy’s earlier work (“The regulation of digital conditional access systems: a case study in European policy-making” *Telecommunications Policy* (1997) 661–676), this chapter details the regulatory issues raised by conditional access and bottlenecks and includes an overview of the key Member State market players and their choice of set-top boxes. Levy makes the important point that leaving technical decision-making to standardization bodies (CENELEC, CEN and ETSI) did not pre-empt politicization of decision-making, and outlines the role of the European Parliament in balancing liberal proposals made by DVB group. Chapter Five details European Commission competition policy in the regulation of digital television. The Chapter covers the Commission’s handling of programming rights, conditional access, public service broadcasters and provides a detailed overview of the negative decisions taken in the field of digital broadcasting. Levy makes the interesting point that these negative decisions have mostly taken place in national markets. Chapter Six, based on an earlier article (“Regulating digital broadcasting in Europe: the limits of policy convergence” *WEP* (1997) 24–42), covers the UK 1996 Broadcasting Act, the German 1997 Interstate Treaty on Broadcasting and the France 1996 Law on Information Superhighways. Levy covers these national responses to conditional access, media ownership, and the licensing of digital television, singling out the differences between the three laws and the policy processes leading to them. Chapter Seven looks at the European Commission’s information society agenda: specifically its attempts at internet regulation, the 1996 Convergence Green Paper and the 1998 Transparency Directive. Levy concludes that while the Commission was successful in raising the level of debate on convergence between telecommunications and media industries, it was unable to put through its agenda due to the resistance of national governments and pressure groups.

Chapter Eight outlines present regulatory concerns arising from issues of convergence, content, access, and pluralism. Levy concludes that national regulation will “adapt rather than whither away” because of the importance of the social, political and cultural dimensions of media. Chapter Nine relates the literature on European integration to the empirical evidence presented in the book. Levy claims that the Commission has been unsuccessful in broadcasting policy due to the resistance of Member States “to keep control of such a politically sensitive area”.

Levy’s book shows the stamp of an experienced media practitioner, and is valuable for its insider insight into policy processes at national and European levels. However, his analysis of the empirical evidence presented is not convincing. Levy’s main premise that the European Commission has been unsuccessful in broadcasting policy is contestable as the Commission (considering the sheer amount of its media Directives and Merger Decisions) could rather be seen to be highly successful, particularly in a policy which the EU Treaties still treat as a grey area. His related argument that the impact of the EU is marginal, due to differences in institutional structures that produce national modes of adaptation is also questionable. It is important to note distinctions between different countries, but Levy plays down the influence of the EU. A more widely held view in the academic literature is that EU industrial policy has been the driving motive of liberalization and convergence of broadcasting policies at the national

level. Levy comes to the very different conclusion that cultural policy and politicians are still determining media policy. How, in this case, does Levy justify the extent of liberalization at national levels, and, in particular, the weakness of governments in the face of increasing media concentration?

In his analysis of the length of time it took Member States to adopt and implement of EU policy, it might have been interesting to compare this to other EU policies – the results might not have been so surprising. In this respect, it might have also been interesting to see how far Member States have been successful in implementing their own media policies.

In his analysis of national policies, Levy concludes that the UK has held a liberal policy, whereas the French and Germans traditionally had very restrictive policies. There is a difference of course between market and content regulation. Levy seems to amalgamate the two. Many other authors have come to the opposite conclusion: French and German economic policy relating to the media industry has been very liberal, whereas the UK has traditionally been more restrictive in regulating concentration in the industry.

Levy argues that EU competition decisions have mostly dealt with national markets because media markets remain essentially national in nature. This is also contestable because cross-national media mergers are very common. In this respect, Levy's evidence is highly selective. It would have been interesting to mention that the European Commission, although having blocked 5 (this author actually counts 8) media mergers in a ten-year period, a further 50 or so media mergers were indeed approved. Indeed, would it not be more logical to argue that the European Commission has seen the promotion of cross-European merger activity and the prevention of media concentration in national markets? This has in turn led to the erosion of national legislations and the encouragement of regulatory competition between the Member States.

The book primarily focuses on the activities of the European Commission. One would have liked mention of the importance of other European institutions in shaping broadcasting policies at national and European levels. In particular, the involvement of the European Court of Justice in the media sector (with over 50 decisions) and its effect on national policies should not be overlooked.

Disappointing also is that Levy simply adopts rather than clarifying or redefining concepts which have thus far been ill-defined in the literature. In particular, Levy adopts Collins' definition of advocates of the pluralist argument within the European Commission as "dirigistes". French dirigisme and the protection of pluralism are very different ideas.

The book is useful for media practitioners and academics interested in the detail of day-to-day policy-making. However, Levy assumes much knowledge of the functioning of the European institutions on behalf of the reader. The book is therefore not easily accessible to students. A simple explanation of the fundamentals of European decision-making and EU competition policy (the MTF, Merger Regulation thresholds, and Treaty Articles) would have helped. On balance, a thought-provoking book, but questionable in the use of some concepts and the conclusions drawn from the empirical analysis.

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P. Pohlmann, *Der Unternehmensverbund im Europäischen Kartellrecht*. Berlin: Duncker & Humblot, 1999. 460 pages. DM 148.

How to define an undertaking and its role within the meaning of EC competition law? Faced with this question, many competition law practitioners might define this concept as a company or group of companies represented by the ultimate controlling legal entity of that group.

Whilst such a rather rough and ready definition may provide an adequate day-to-day guidance for cartel and merger control law practitioners, it does not, however, meet the standards of legal analysis required to understand the more intricate demarcation of behavioural control under Articles 81 and 82 EC and structural control under the EC Merger Control Regulation ("EMCR"). The merit of Pohlmann's *Habilitationschrift* is to guide the reader through a comprehensive analysis of the notions of undertaking and group, respectively, in virtually all conceivable situations of competition law.

In the substantive application of Articles 81 and 82 EC, the notion of undertaking is not necessarily construed as a legal entity, the case law suggests that an economic entity without a clearly identifiable legal person may also be liable for misconduct under Articles 81 and 82. An enforcement procedure under Regulation no. 17, however, must always be addressed to a legal entity, which constitutes an unwarranted discrepancy in the application of substantive and procedural law. In her analysis, the author recommends applying a uniform test whereby the respective misconduct under Articles 81 and 82 EC must be imputable to the legal entity which holds material control over the industrial or business resources involved in the anti-competitive behaviour.

The most prominent part of the thesis is dedicated to the fundamental distinction between behavioural control under Articles 81 and 82 EC and structural control under the EMCR. Under economic theory, the privileged treatment of concentrations as against behavioural restrictions of competition can only be justified by the anticipated synergies flowing from the regrouping of economic resources under a single controlling entity. Therefore – the author demonstrates – the definition of a concentration under Article 3 of the ECMR should be limited to the elements of one party gaining control over the resources of another party to the effect that this latter party rids itself completely of the economic freedom it enjoyed prior to the merger. In order to comply with this axiom, the author suggests the legislator should withdraw the definition of a merger as a particular company law situation and rely solely on the concept of single or joint control. Rightfully, the author also recommends closing some unintended lacunae in the merger definition contained in Article 3 of the Regulation.

If loss of economic independence and acquisition of control are the most distinctive features of a concentration, clearly the acquisition of minority shareholdings and the establishment of joint control generate the most significant problems in the demarcation of behavioural and structural control. Although both phenomena are caught by Article 81 EC, Article 81(3) EC does not provide for the elements of analysis required to control the anticipated structural impairments of the competitive situation brought about by the establishment of a joint venture or the acquisition of a minority stake. Therefore, the author advocates the application of a twofold control of joint ventures under both, Article 81(3) EC and the EMCR as brought about by the 1997/1998 reform of the EMCR. This two-tier approach should be extended to the acquisition of minority shareholdings. The author also expounds upon the more practical questions as to how the parent companies of a joint venture should be treated with regard to the calculation of turnover and market shares. No overlap, however, occurs between Articles 82 and the EMCR. The author demonstrates the extent to which *Continental Can* constitutes a misconstruction of Article 82 as an instrument of structural control which was clearly not the intention of the founding fathers of the Treaty of Rome.

Having provided a thorough analysis of the establishment of a group of companies, the author devotes the last part of the thesis to the imputation of anti-competitive market behaviour within an existing group. Here, the author shows at length the overriding principle of imputation, i.e. to avoid situations where, under competition law, the allocation of tasks to different companies within a group (e.g. production and marketing) would privilege the single entities of the group against companies within which these tasks remain united in one single entity of control.

The review provided by Pohlmann is profound in legal analysis, and with regard to the possible practical implications it is nothing less than complete. The thesis covers the whole ambit of competition law in the sense of antitrust law enforcement to include merger control.

An extension of the analysis to cover the position of a group subject to State aid rules, especially recovery of illegal State aid, might have been possible but may have gone beyond the purpose of scrutinizing the role of a group of companies as an actor and factor in competition.

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S. Ulrich, *Kontrollen der EG-Kommission bei Wirtschaftsbeteiligten zum Schutz der finanziellen Interessen der Gemeinschaft*. Europäische Hochschulschriften Vol 2742. Frankfurt am Main: Peter Lang, 1999. 315 pages. SFR 79. DM 98.

The European Community's fight against fraud affecting its budget has initiated quite a number of publications in recent years. While the discussion initially focused mainly on the problem of whether the Community itself is in fact responsible for imposing (quasi-criminal) sanctions on perpetrators of fraud, the attention has recently shifted to more detailed questions: What kind of sanctions can or should be taken? What is the proper procedure for establishing the guilt of the alleged perpetrators? Do the persons accused of fraud have procedural rights ensuring a fair trial in the course of a Community investigation? Which rights do or should they have? What is the impact of the Community's activity on national criminal law?

Ulrich's doctoral thesis is a detailed resource of information with regard to the first and the following questions. He first describes the gradual development of the legal sources that provide for Community activity, from the first "sectoral regulations" ("sectoral" since their application is restricted to certain areas such as agriculture, regional aids, etc.) to the recent general regulations, Reg. (Euratom, EC) 2988/95 and Reg. (Euratom, EC) 2195/96. This includes references to political disputes as well as a discussion of the authority and impact of primary legislation (especially Art. 308 (ex 235) and Art. 280 (ex 209a) EC o.V.) as a basis for the Community's fight, as well as relevant jurisprudence of the ECJ and relevant national (German) legislation.

Rightly, the author emphasizes the impact of the adoption of Reg. 2988/95 and Reg. 2195/96, which set out a general frame for spot-checks conducted by EU inspectors. Accordingly he divides his book into a first part that deals with "sectoral" controls and a second part that explores the circumstances and consequences of European spot-checks. In his explanation of these investigations, the author firstly shows the possible impact of Reg. 2195/96 on the monitoring of the various financial resources of the Community. He subsequently explores the widely discussed question as to whether EC controls must be regarded as "criminal investigations," with the necessary consequences for the procedural requirements and the rights of alleged perpetrators, or whether these checks are actually only "administrative procedures," leaving the Community a rather free hand in their implementation. The first stand is taken by those who emphasize the fact that (a) EC inspectors are given authority comparable to that of national criminal investigators and (b) Article 8(3) of Reg. 2195/96 stipulates that reports prepared during a Community spot-check shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national inspectors. Advocates of the second opinion mainly stress the wording of the relevant legal acts (always referring to "administrative controls" and explicitly stating that the Member States' authority in criminal law shall not be infringed on) and claim that Community checks are mere preparations of a proper criminal trial at national level. Ulrich favours the second opinion. Whether he is correct in his assumptions, remains to be seen. It will take further legislation, case law and precedents (through executive practice) to determine whether the fear that so-called administrative Community checks will in fact infringe the standards of fair trial shared by the Member States' criminal procedures is unfounded.

The book concludes with an analysis of legal remedies for the individuals in regard to (measures taken during an) EC spot-checks, which might be filed either before the ECJ or national courts depending on the circumstances of the investigations conducted. Copies of Regulations No. 2185/96 and No. 2988/95, as well as a synopsis of Article 209a EC (Maastricht version) and Article 280 EC (Amsterdam version) are included in the appendix.

With its well-founded and well-presented information on the various aspects of the legal development of the EU's fight against fraud affecting its financial interests, Ulrich's work is a valuable source for all those who wish to know about the foundations of the struggle to shape the future of European investigations. This potential readership consists of quite a number of people with very different interests and ideas, as the author rightly points out when referring to the ambition of some commentators to harmonize criminal procedure everywhere.

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J. Pakaslahti, *La dimension sociale de l'Union européenne: L'impact de l'élargissement et de l'approfondissement*. Bruxelles: Presses Interuniversitaires Européennes, 1999. 132 pages. SFR 38.

This book considers the future of the social dimension of the EU in the context of broader developments currently taking place at the European level, most notably EMU and enlargement. Pakaslahti argues that too little attention has so far been paid to the social implications of these developments and that, in general terms, a greater synergy is needed between the economic and social aspects of European integration.

Pakaslahti begins by outlining the historical development of European social policy, from its basis in the original EEC Treaty up to and including the recent IGC and the entry into force of the Amsterdam Treaty. He characterizes the changes made at Amsterdam as a significant step forward in the field of social policy. In particular, he notes that the Amsterdam Treaty goes some way to rectify the failings of the Maastricht Treaty in this area. He then moves on to consider the social dimension of the enlargement process and of EMU. Concerning enlargement, the question is asked whether the existing Member States will be able to maintain their raised level of social protection and its finance when they have to compete with other countries with much lower norms in an internal market. Pakaslahti argues that there has been a failure to adequately address this risk of social dumping posed by the next round of accessions. He calls for the reduction of social inequalities to be put at the heart of the accession strategy, alongside economic integration.

In relation to EMU, it is argued that the Community institutions have so far oversimplified the debate, paying insufficient attention to the possible negative social consequences of EMU and instead concentrating on trying to persuade the public of its perceived benefits from an economic point of view. Although in the long term EMU is seen as stabilizing the economy and improving the employment situation, Pakaslahti notes that, in the short term, many of the Member States have been forced to cut social expenditure to meet the convergence criteria, thereby having a negative social impact.

In conclusion, Pakaslahti calls for a horizontal approach to be taken towards social policy, with all key decisions made by the EU being evaluated for their social, as well as economic, impact. It is contended that the failure in the past to adequately address the social dimension of issues such as EMU has given a blow to the political legitimacy of the EU. By reinforcing the social dimension in all the EU's policies, on the other hand, EU citizens will have the feeling of being part of the EU and will therefore give their support to the objectives and activities of the Union. By focusing on the need for a horizontal approach to social issues within Europe,

this book provides an interesting new angle on the debate over the future of European social policy. It will be interesting to see to what extent Pakaslahti's ideas are taken up in practice.

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J. Zielonka (Ed.), *Paradoxes of European Foreign Policy*. The Hague/London/Boston: Kluwer Law International, 1998. 171 pages. NLG 115, USD 62, GBP 39.

This book examines a number of inter-related paradoxes. Five in particular are examined over the course of ten chapters. The paradoxes involved are: the gap between the European Union's (EU) normative power of attraction and its weak empirical power to do things; the EU's ability to address the challenges of modernity which proves to be a weakness when faced with the challenges of pre-modern politics; the Union's balancing act between straight-forwardness and ambiguity; the logic of deepening and widening are plausible, but not in harmony; and the interplay between the EU's external and internal agendas.

The contributors to the book, including Zielonka himself, are all well-known scholars and this accordingly creates high-expectations from the reader. The contributing authors represent divergent approaches to international relations and therefore to the feasibility, or desirability, of a European foreign policy and, in particular, security and defence policy. If there is a paradox to the book itself, it is that in the two years since the appearance of the volume the security and defence aspects of the EU's external relations have developed in a manner that few could have predicted. Zielonka comments that the Union faces a paradoxical situation "with which it can only cope in a paradoxical manner" – little did he realize how correct he would be! The task that Zielonka and his contributors set themselves was to identify and explain the EU's "peculiarities and paradoxes" in the context of world politics. Does it succeed? By and large, the answer would have to be affirmative.

Rosecrance notes that it is a paradox that "the continent which once ruled the world through the physical impositions of imperialism is now coming to set world standards in normative terms"; while Guéhenno observes that "the weakness of the European polity is no proof of the strength of national politics". Christopher Hill reminds us that the EU's policy-making culture is multi-level and mixed actor in character and foreign policy-making revolves around a dialectic of solidarism and fragmentation. This, in turn, is a form of "pluralism writ large" which cannot but increase transparency and participation.

Rummel and Wiedemann consider the institutional paradoxes of CFSP and conclude the only way to improve the situation is to "define the issues that can be resolved by the Union as a whole". Accordingly, as a first step, they advocate the establishment of a centre for analysis and coordination of Member States' positions on all issues facing the EU. Karen Smith continues in a similar manner considering the instruments of EU foreign policy, and urges that the EU re-examine the use of the instruments it has already. Such a reappraisal, Smith argues, could be facilitated by the removal of the divisive issue of a common defence policy.

Knud Erik Joergensen considers how the success or shortcomings of the EU's performance in world politics should be measured. In a chapter that could usefully have been placed earlier in the volume, he rightly questions many of the existing measures of success or failure. In a constructive spirit, he forwards a six-stage approach, the last of which urges readers to consider how to construct "an issue and time differentiated framework for analysis, and then conduct in-depth systematic cross-issue, cross-temporal comparative analysis".

Lenzi notes at the start of his chapter that "events tend to unfold faster than the human ability to foresee and steer them". Events have certainly unfolded since 1998, but Lenzi's observation that pan-European security must be built from the bottom up by interlinkage and interaction

of organizations and national efforts is as pertinent as ever, especially as we consider the Capabilities Commitment Conference (at the time of writing this review, planned to be held in the autumn of 2000).

Barbé examines the paradoxes behind the EU's "dual affection" for Central and Eastern Europe and the southern Member States. Barbé notes that the EU's policy of balancing its Eastern and Southern concerns have been more a matter of pragmatism than long-standing policy. Zielonka focuses his attention on Eastern Europe and argues that ambiguity in EU policy to the region has helped achieve "the necessary consensus across Member States, but it has also prevented the Union from acquiring a minimum degree of strategic purpose". Barbé and Zielonka's thoughtful contributions have perhaps dated least and both still deserve careful reading.

Finally Kupchan revises his familiar advocacy for an Atlantic Union (AU). The AU would sacrifice "depth for breadth" by the extension of the EU single market east to Central Europe and west to North America. NATO would become the defence area of the AU. Kupchan's imaginative contribution is perhaps the most dated (especially since the formation of Euroland). This aside, the chapter seems to down play internal American misgivings regarding its own willingness to assume international obligations or, in some cases, to abide by rules other than its own. The suggestion the AU should be guided by a directorate of major powers to "prevent the sequential entry of new members from making the body unwieldy" may well have some smaller States reaching for the pistol.

This book is clearly written and refreshingly jargon-free. Although it has dated in some respects (a constant danger in this area!) it is nevertheless a provocative and stimulating book that offers much to think about. Many of the paradoxes remain with us and some of them will be here for a while yet.

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N.K. Humphreys, *Historical dictionary of the International Monetary Fund. Second Edition.* Lanham, Maryland, & London: Scarecrow press, 1999. 330 pages. USD 48. ISBN 0-8108-3659-9.

To achieve a second edition within six years seems a rare feat for any historical dictionary requiring sustained interest on the part of readers, and renewed incentives for the publishers. In the case of the International Monetary Fund (IMF) the growing importance of the entity may have helped. But in view of the mass of writings dealing with that body in any respect imaginable, the book under review supposedly had such undeniable merits from its very first edition that it could cope with the numerous competitors and thus entail a further edition half a dozen years later. Several factors contributing to that end call for acknowledgement.

The familiarity of the author with his subject after having served the IMF for 23 years (1964–1987) certainly remains indubitable. But his tenacity in collecting facts and opinions, including legal ones, the accurateness of his account when setting forth developments and their distinctive traits in the Dictionary proper (pp. 37–272), and the courageous effort of rounding up that main element with well-chosen statistical and bibliographical data invite recognition. Assuming that the layout of the book follows a pattern applied by the editor of the whole series on historical dictionaries of international organizations, it seems worth noting that the scheme suits the IMF particularly well. The chronology (pp. XV–XL) preceding the substantive parts bears out already the opening phrases of the Introduction (pp. 1–35): "In its more than fifty years of existence, the International Monetary Fund has evolved from a small, obscure international agency, with new and uncertain responsibilities, into a powerful

institution that today has assumed centre stage in the international monetary system. This evolution has occurred even though twenty-five years ago, when the Bretton Woods system had collapsed, the Fund would seem to have lost the central purpose of its existence. It is a remarkable story of how an institution has developed and adapted itself to an evolving world and a changing membership in a way that perhaps no other agency has been forced or able to do.”

One may add that such transformation has occurred despite sustained criticism both from industrial and developing countries, rather frequent exploitation by national governments and politicians as a convenient means of turning away disapproval from their own unfortunate policies at home, serious controversy and bad opinion in the academic community, extensive distrust in the trade union movement, hardly veiled opposition on the part of non-governmental entities, i.e. charity, relief, and church organizations, and a disdainful denial of interest generally for a corporate body exercising a remote and complicated function.

After such a list of grievances ensuing from a lack of understanding by the public due in a large part to the technicality of each and every element of conduct by the IMF and under its responsibility, the alphabetical line-up of entries on its constituent bodies, its programs and rules, its action in crucial member countries, those who have played an important part in managing it, finally many of its problems and crises (pp. 37–272) strikes as refreshing. It also provides rewards as the author’s perspicacious pen joins solid knowledge of each item in his dictionary with a very readable English which not only facilitates the perusal of his text but gives incentives to those using the book as a starting point for further reading and research on the basis of the useful bibliography. In sum, therefore, the book calls for some well-deserved applause. The author, a former Chief Editor of the IMF, has rendered an undeniable service to the interested public and to the Fund.

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