COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website http://www.kluwerlawonline.com/toc.php?pubcode=COLA

Sven Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*. Tübingen: Mohr Siebeck, 2016. 352 pages. ISBN: 9783161541599. EUR 89.

At every turning point of the European integration process – be it the signature of a new Treaty, the announcement of a new programme by the European Central Bank or a landmark decision by the ECJ – the eyes of the political, economic and judicial elites turn naturally, and anxiously, to Karlsruhe: to what extent will the German constitutional court accept the Lisbon Treaty, the Outright Monetary Transactions programme or a certain innovative principle relied on by the ECJ? Admittedly, the *Bundesverfassungsgericht* is not only the constitutional court in Europe that enjoys the strongest authority within its domestic legal order. It is also the court that influenced the path of the European integration the most. By way of an array of famous judgments – from *Solange* to, thus far, *OMT* – it has set clear and detailed limits to the integration process and has proven to be ready to make these limits effective by watching both the German and the EU institutions. The former cannot confer excessive powers to the EU, the latter are not allowed to exercise powers they have not been entrusted with by the Member States. But is this extremely influential role of the *Bundesverfassungsgericht* consistent with the task and the limits the German Constitution bestows on the constitutional court?

Simon's book extensively and properly deals with this question. It aims at defining the constitutional limits the *Bundesverfassungsgericht* itself must respect when it sets the limits to European integration. To the question whether the *Bundesverfassungsgericht* always respected these boundaries the author answers in the negative. Simon argues in essence that in its jurisprudence on European integration, the German constitutional court has sometimes overstepped the borders a constitutional court should respect and impinged on the freedom of appreciation of the democratically legitimized legislature. More precisely, the author develops two main points of critique in chapters 3 and 4. Chapters 1 and 2, by contrast, are shorter and mainly descriptive. The former touches upon, from a German perspective, the classic dilemma between jurisdiction and politics in constitutional adjudication. The latter provides for a short but clear overview of the principles concerning European integration in the German constitution and their case law development by the *Bundesverfassungsgericht*. Readers not familiar with this jurisprudence can here find a useful gateway to this case law contrasted with the German legal scholarship's main opinions.

In Chapter 3, the author discusses the jurisprudence on the *Identitätskontrolle*, i.e. the *Bundesverfassungsgericht*'s power to monitor whether the Parliament's acts that confer powers to the EU do not affect what the Constitution considers as not transferable (*integrationsfest*). In the author's view, the constitutional court has set too strict limits to the legislature's freedom to decide at which level, national or European, certain powers are better exercised. The criticism targets in particular the catalogue of specific areas that cannot be transferred to the EU that the constitutional court set in its *Lisbon* judgment. In the author's view, such a rigid list of competences that have to remain with the State is neither to be derived from the Constitution nor could it find its basis in concepts like statehood, sovereignty or in the democratic principle (p. 139). Quite the opposite: by establishing a link between the democratic principle and a specific catalogue of State competence, the constitutional court paradoxically ends up disregarding the same principle democracy it aims to protect. Indeed, it withdraws from the democratic legislature the power to decide whether a certain task can be better performed at the domestic or at the European level. By doing so, the *Bundesverfassungsgericht* overstepped the boundaries of its jurisdiction and curtailed the freedom of appreciation of the democratically legitimized legislature. Instead of rigidly excluding certain matters from the integration process, the constitutional court should rather confine itself to a less intrusive review by ensuring, in particular, that no autonomous power of constitutional amendment is transferred to the EU (pp. 161 163). This would be the case if the EU institutions had the power to decide on their own on the Treaties' revision.

Chapter 4 deals with the *Ultra-vires-Kontrolle*, through which the *Bundesverfassungsgericht* monitors whether EU institutions act beyond the limits of the powers conferred by the Member States. In Simon's view, in this second line of case law, too, the constitutional court has gone too far and overstepped its constitutional boundaries. More precisely, the author considers as acceptable the *Ultra-vires-Kontrolle* when an EU act is claimed not only to be in violation of the division of competences established by the Treaties but also to impinge on the German constitutional identity. But when such a threat to the constitutional identity does not exist, the constitutional court should rather refrain from reviewing the mere compliance with the division of competences. The Member States have conferred the task of reviewing respect of the competences established by the Treaties to the ECJ, whose jurisdiction and judgments the *Bundesverfassungsgericht* is obliged to accept and respect, as long as the German constitutional identity is not involved (p. 267 and pp. 291 293).

Simon's book does not radically question the *Bundesverfassungsgericht*'s approach to European integration. In particular, it does not doubt the constitutional court's most fundamental assumption that the EU derives its power and legitimacy from the Member States, which therefore remain the "Masters of the Treaties". It rather criticizes in a clear and well-argued manner certain excesses in this case law by demanding a higher degree of self-restraint by the constitutional court, in order to respect the freedom of the democratically legitimized legislature. In supporting a more respectful stance by the constitutional court toward the legislature, the book fits into an established stream in German legal scholarship, championed by the famous book of 2011 by Jestaedt, Lepsius, Möllers and Schönberger, the title of which is fairly telling: *Das entgrenzte Gericht* (The unlimited court).

The German constitutional court's case law on the European integration process consists of an array of decisions, each of which refines a certain concept or clarifies a point that was previously left open. It is therefore simply impossible for a monograph to keep pace with this quickly evolving case law. The recent important decision on the *Identitätskontrolle* the constitutional court handed down in December 2015, for example, could not be considered in this book. Similarly, while, in Chapter 4, the author extensively discusses the *Bundesverfassungsgericht*'s first preliminary reference to the ECJ concerning the OMT program, legal scholarship focuses now on the final judgment the constitutional court delivered on the subject-matter after the preliminary ruling by the ECJ. This decision represents now the last chapter of this open-ended book, but it is to expect that soon another decision will take its place. However, thanks to its doctrinal approach, the book overcomes the risk of being quickly outdated. Its reflections on the concepts of statehood, sovereignty and democracy and their

impact on the constitutional limits to European integration go beyond the specific issues the constitutional court is called to decide time by time and offer an interesting perspective to understand and critically evaluate this jurisprudence.

The book aims at defining the limits of the *Bundesverfassungsgericht* in the European integration process that can be derived from the German constitution. However, the same topic can be addressed under a different perspective, to which the book only incidentally refers (see e.g. p. 210 and p. 213). Indeed, it cannot be overlooked that the *Bundesverfassungsgericht* is not the constitutional court of the Member States, but only of one of them. It is then reasonable to ask to what extent it enjoys the legitimacy to take decisions that affect the entire EU and, more generally, whether the integration process could still progress at all if all the other constitutional courts of the Member States put such strict constraints on it as the German constitutional court did. In that respect, the influence that the German constitutional court exercises on its European homologues cannot be underestimated. Such a perspective can only confirm the claim for more self-restraint by the *Bundesverfassungsgericht*, which Simon precisely and convincingly grounds in German constitutional law.

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