REVIEWS AND ANNOTATIONS

Tomášek, Michal – Týč, Vladimír et alii, Právo Evropské unie, Praha: Leges, 2013, 496 s. [Law of the European Union, Prague: Leges 2013, 496 pp.]

INTRODUCTION

The book entitled "Law of the European Union" is far from being the first textbook on European law available on the Czech market. However, in many respects it has brought in new perspectives on the topic, as it attempts to introduce interested readers to issues of the law of the European Union in its complexity along with its links to national as well as international law. The comprehensive nature of the book is, to a certain extent, determined by a diversified and large team of authors and their different professional backgrounds; what is even more relevant, on the other hand, is its emphasis on an innovative methodology of the research of European law. Before we begin evaluating the content of the book itself the team of authors should be briefly introduced, as well as the methodological basis chosen for presenting European law to Czech readers.

One factor should be considered in the very beginning, namely that Professor Michal Tomášek and Professor Vladimír Týč as editors of the book have been successful in constructing a quality team of authors geographically spanning Prague and Brno in the Czech Republic, and Luxembourg. The members of the team are not only renowned academics from the Charles University Law Faculty in Prague and the Masaryk University Law Faculty in Brno, but also experts with lengthy practical experience in the application of Union law and the functioning of EU judicial bodies. The team includes Czech judges in EU courts – Professor Jiří Malenovský in the Court of Justice of the EU ("CJEU") and Professor Irena Pelikánová in the General Court, and Martin Smolek acting as the Czech Government Agent before the CJEU. However, it should be noted that dividing the team of authors into academics and practitioners makes only a little sense as the background of many specialists contributing to this book is a combination of highly valued academic performance and extensive legal or judicial practice. A large team composed of respected authors may be, on the one hand, a basis promising the creation of a quality specialist publication; on the other hand, it poses high demands on the final editing along with terminological and stylistic unification of the whole text. This task undoubtedly turned to be a challenge for David Petrlík in his capacity as the secretary of the team, who serves as a Legal Secretary (*Référendaire*) at the CJEU and whose engagement in the team is another proof of the "*Luxembourg Connection*". I would maintain that the final text is a compact whole where individual styles and approaches of authors can be identified (there was no intention on the part of the editors to conceal the authorship of authors of individual chapters, see p. 5), but the whole book shows a clear concept and the structure of a monograph, not of a collection of individual texts.

In addition, the chosen and applied methodology should be appraised as it approaches the classification of European law in a manner different from that used in former textbooks of European law. The authors intentionally avoided the traditional division of European law into general and special parts, and the latter into substantive and procedural, as the arrangement of national law may suggest. Instead, the "General Part" is subdivided into two titles. Title One (The Legal Order of the Union) introduces the historical development of EU law, its subject-matter and scope, its relationship with national and international law (including constitutional law), and the sources and system of EU law (including the position of international treaties within the Union legal order). Title Two (The Law of Institutions) deals with the institutional structure of the EU, the nature of membership in the EU, relations arising from liability, division of powers between the EU and Member States, and the rules of the EU rule-making (legislative procedure). The "Special Part" begins with an extensive portion of "Substantive Law" composed of Title Three (Legal Relations with Economic Elements) and Title Four (Legal Relations with Civil Elements). I would argue that particularly this subdivision rightfully reflects the gradual development of the EU: an initial, purely economic, grouping establishing

the Internal Market with four basic (economic) freedoms (free movement of goods, workers, services and capital) transformed into a deeper form of integration represented by the Union, constituting its own citizenship derived from the citizenship of individual Member States, and introducing extensive rules for cooperation in the area of justice and home affairs. Such development has naturally been linked with an emphasis on the protection of fundamental rights and freedoms of EU citizens primarily within the contexts of legislative and administrative practices of EU institutions, culminating in the adoption of the legally binding Charter of Fundamental Rights of the EU. The final part of the book – Title Five (Procedural Law) – is devoted to EU judiciary and provides a detailed description and analysis of its role and performance. The depth of the final part corresponds to the significance of proceedings before courts of the Union not only for Member States, but particularly from the perspective of the judicial protection of rights of individuals. As is expected from publications of such type, the book contains a table of relevant legislation, a table of relevant case law of EU and national courts, references and index. As a bonus, the book is appended with a sample form of a court resolution referring a case for preliminary ruling, and a sample form for an action for annulment.

Title One - The Legal Order of the Union

Chapter 1 of this Title provides a general outline of the European integration project. The integration concept of Czech King Jiří (George) from Poděbrady from the 15th century begins the overview, but more space is logically provided to integrating attempts after WWII. Federalist and functionalist approaches, and their tensions, in the outset of the whole process are thus outlined. The European integration was initially based upon the Treaty Establishing the European Coal and Steel Community (1951) and later developed in the Treaty Establishing the European Economic Community (1957). Subsequent milestones in the development of the Community in the economic, institutional and political areas and human rights are lucidly described, including the policy of enlargement, which reached its peak in 2004 with unprecedented enlargement of the Union by 10 new Member States primarily from Central and East Europe. The Chapter is concluded by the Lisbon Treaty (2007), which brings us almost to the present, since changes established by the Lisbon Treaty, and their consequences, have recently been a subject-matter of interpretive disputes between the EU institutions and individual Member States, or among the EU institutions themselves (the European Parliament, European Commission and the Council).

Chapter 2 defines the concept, subject-matter and scope of Union law. The authors offer a useful working definition of Union law, representing *"a body of directly or indirectly applicable legal rules, adopted between the Member States or at the level of the Union for the purposes, or in consequence, of transferring certain competences from the Members States to the European Union*" (p. 56); this should be distinguished from European law which may include the law of other international organizations, such as the Council of Europe. The subject-matter and nature of Union law is explained at three levels: (i) from the structural perspective (the origin of rules); (ii) from the perspective of the hierarchy of rules (i.e. primary law, the law of external EU treaties, and secondary law); and (iii) from the perspective of its content (institutional law, substantive law, procedural law). The third level, as suggested earlier, determines the structure of the whole book. The Chapter concludes with an explanation of the subject-matter, personal, territorial and temporal scope of Union law.

Chapter 3 is devoted to the relationship between Union law and national and international law, which is a key factor in understanding the system of Union law. The first part explains the basic principles of the functioning of Union law, among which the authors include the autonomy of Union law (with respect to both national and international law), its direct applicability, primacy and direct and indirect effect. Regarding direct applicability, Section 3.1.2, on page 62, states: *"All binding Union legal norms are directly applicable, i.e. all norms of primary and secondary law, although only some of them have a simultaneous direct effect. Thus norms contained in directives are directly applicable too, as they may give rise to legal consequences in national legal orders, for example, as a result of the duty of a Member State to compensate damage caused by violation of those norms.*" Should we understand "direct applicability" so extensively, a question arises of where the difference is between

a "binding in its entirety and directly applicable" Regulation and a Directive "binding as to the result to be achieved" in the sense of Art. 288 of the Treaty on the Functioning of the European Union ("TFEU"), and what is the distinction, within such extensive approach, between direct applicability and binding nature of Union legal norms. This concept is subsequently explained in Section 3.1.4.1 (p. 66) regarding direct effect: *"... unlike direct applicability, direct effect is primarily a legal quality of a norm of Union law."* The authors appear not to recognize that direct applicability may be a legal quality of a Union legal norm in a sense that such norm does not require its transposition into national law (unlike a directive, for example, which always requires transposition into a national system). The authors extend their explanation of the difference between direct applicability and direct effect as follows: *"Although direct applicability is a presumption of the existence of direct effect, it still may be claimed that not all directly applicable laws have direct effect. In order to acquire direct effect, the legal norm must fulfil requirements listed below."* (i.e. the norm creating a right or an obligation for an individual must be clear, precise and unconditional). I would argue in this context that direct applicability as a general quality of a Union legal act (Regulation) *presumes* a direct effect in a particular case of application in both vertical and horizontal relations (including those among individuals). This general quality is absent in Directives; however, they may still have a vertical direct effect, providing the above-mentioned requirements have been fulfilled. In this respect, I differ with the authors of the book in our understanding of "direct applicability": I would argue that direct applicability is not a general quality of all binding norms of Union law since a provision of an EU act (Directive) which, in general, is not directly applicable, may still have direct effect.[1]

Section 3.2 explains an international law dimension of the fundamental principles of Union law since the European integration originally stems from international law. This can be seen in the landmark judgment *Van Gend en Loos*,[2] where the CJEU declared the principle of direct effect, and subsequently in its judgment *Costa v. ENEL*,[3] where the principle of unconditional primacy of Community law was inferred. As is recalled on p. 79 of the book: *"Quite paradoxically, the necessary background and persuasive arguments were supplied to the Court of Justice by the theory of international law, shared by a significant number of expert jurists since the inter-war period with Hans Kelsen at the forefront, which was widely applied by international judicial and arbitration bodies."* The paradox subsists in that the judgment in *Costa v. ENEL*, as is rightly emphasized in the book, emanates from "sacrificing" international law and Community law was declared a new autonomous legal system different from international law. Such position allowed for the development of Community/Union law and its effects in national legal orders without limitations by rules for reception of international law.

Section 3.3 elaborates on a highly interesting and topical issue of the relationship between Union law and constitutional law of individual Member States. A thesis is explained here that despite the initial attempt of the CJEU to set Union law as a genuine system of supranational law (standing above constitutional systems of individual Member States), the development arrived at the *"primacy of a constitution over Union law"* (p. 87). The Union case law of the German Federal Constitutional Court has significantly contributed to such development (its case law is outlined in Section 3.3.2.1).

[1] The concept of "direct applicability" may be understood in a different sense within EU law with regard to the jurisdiction of the CJEU in the context of so-called 'mixed agreements' (besides the EU, Member States are also parties to such agreement), which have been incorporated into the legal order of the EU. "Direct applicability" then means the quality of a provision of such agreement to be applied in proceedings before the CJEU within the competences of the Union (i.e. as a provision falling under the jurisdiction of the CJEU). See C-240/09 *Lesoochranárské zoskupenie*, where the CJEU, in two steps, examined (i) the applicability of Art. 9 (3) of the Aarhus Convention within EU law; and (ii) only then, having inferred that the respective provision was within the scope of EU law, i.e. that "it may be applied", the Court analysed its direct effect in the concrete situation of a national dispute.

[2] Judgment from 5th February1963 in case 26/62 *Van Gend en Loos* [1963] ECR.

[3] Judgment from 5th July 1964 in case 6/64 *Costa v. ENEL* [1964] ECR 585.

The approach of the Federal Constitutional Court has had a substantial impact upon the case law of the Constitutional Court of the Czech Republic with respect to the effects of Union law, as is described in Section 3.3.2.2). The Constitutional Court has based the effects of EU law upon "two-way" Article 10a of the Czech Constitution (allowing for the transfer of sovereign powers to the Union and simultaneously opening the legal order of the Czech Republic to the application of Union law). A part of the doctrine (represented particularly by J. Malenovský) subjected such approach to a relatively persuasive criticism: an appropriate basis for the application of Union law was seen in Article 10 of the Czech Constitution, i.e. a general incorporation clause for international agreements. The latter position can be traced in the reviewed book. The Constitutional Court has been inspired by the doctrine of review of *ultra vires* Union acts, i.e. acts derogating from the limits of delegated powers which, in an extreme case, may be declared as non-applicable due to their conflict with the constitutional order. As the historically first constitutional court within the EU, the Czech Constitutional Court used the *ultra vires* doctrine in its judgment Pl. ÚS 5/12 from 31st January 2012 (*Slovak pensions XVII*): in its reaction to the judgment of the CJEU C-399/09 *Landtová*[4] the Constitutional Court declared that *"there was an excess by a Union institution, a situation where an act of the European Union derogated from powers delegated to the European Union by the Czech Republic under Article 10a of the Constitution, the entrusted competencies were exceeded, the procedure was ultra vires."* As the authors of the book diplomatically mention the judgment of the Constitutional Court *"gave rise to general embarrassment in both the Czech Republic and the Union*" (p. 99); the reason was that the Czech Constitutional Court, in its implementation of the *ultima ratio* step, ignored strict procedural and material requirements set for such *ultima ratio* step by the German Constitutional Court in its judgment *Honeywell* from 2010.[5] The requirements included a reference for preliminary ruling so that the CJEU had a chance to take a position regarding the conflicting issue of an excess by a Union institution. In its *Honeywell* judgment, the Federal Constitutional Court emphasized that the CJEU may not be denied its power to interpret Union law, which was, in essence, wretchedly and expressly denied by the Czech Constitutional Court in its judgment Pl. ÚS 5/12.[6]

Chapter 4 explains the sources and system of Union law. Section 4.1 reminds of the fact that the supreme sources on the top of the hierarchy of primary law encompass not only the establishing Treaties of the EU[7] and accession treaties within the process of EU enlargement, but also the Charter of Fundamental Rights of the EU and general legal principles serving as an unwritten source (4.1.4). Section 4.2 provides a clear description of the sources of secondary law (in particular, regulations, directives, decision, recommendations and opinions in the sense of Art. 288 TFEU) along with explanation of differences between individual types of acts. Section 4.3 focuses on international agreements within Union law. The importance of international agreements within EU external relations is emphasized; issues of (non-)existence of external powers of the Union in various areas, and their nature (exclusive or shared) are analysed, as well as relevant types of agreements derived therefrom (whether within exclusive competences of the EU, or so-called mixed agreements also covering areas under the competence of Member States). A description of the procedure of negotiating and con-

[4] Judgment from 22nd June 2011 in case C-399/09 *Landtová* [2011] ECR I-5573.

[5] BVerfGE 126, 286.

[6] A dissenting opinion by Justice Jiří Nykodým should be recalled here, who disagreed with the majority opinion of the plenary session of the Constitutional Court, and who did not consider the decision of the CJEU as an excess of a Union authority.

[7] Section 4.1.1 on page 102 states that *"Protocols, and/or appendices, form a component part of the Treaties (Art. 51 TEU); thus they have the same legal force. They govern partial or very specific issues and may be amended in a more flexible way than the Treaties themselves."* However, it appears unclear what particular protocols are meant here, since protocols are generally negotiated and amended in the course of an ordinary revision procedure under Art. 48 TEU in the same manner as the founding Treaties. If the authors mean the mode of changing of Protocol No. 3 on the Statute of the Court of Justice of the EU, or Protocol No. 12 on the excessive deficit procedure, they should have explicitly mentioned them.

cluding international agreements follows, which is governed by Art. 218 TFEU, including the required voting majority in the Council (qualified majority vs. unanimity); the issue of provisional application is also briefly mentioned. Section 4.3.5 explains the position of international agreements of the EU within the Union legal order (under Art. 216 (2) TFEU, such agreements are binding on the Union institutions, thus having a higher legal force than secondary EU law); the binding nature of EU international agreements with respect to Member States is dealt with in Section 4.3.6. In this context, and with regard to the position of Member States, the authors specify on p. 119 as follows: *"These [international] agreements are binding on Member States in the sense of international law although formally they are not parties thereto and did not participate in the process of their negotiation and conclusion."* I would argue that this statement is not entirely precise, since the binding nature under Art. 216 (2) TFEU is not stemming from international law, but is the binding nature of external agreements within Union law; thus it is a duty of Member States owed to the Union (not to third parties) to ensure the implementation of an agreement (similar to the duty of Member States to ensure the implementation of a directive). Generally speaking, agreements concluded only by the Union do not give rise to obligations for Member States from the perspective of international law. Accordingly, the example of an Agreement on extradition between the European Union and the United States of America[8] is not relevant here to illustrate the issue as the Agreement determines only uniform rules and requirements for extradition, but extradition itself is carried out under bilateral agreements on extradition made between individual Member States and the USA, not as the actual implementation of a Union agreement by Member States.[9] The final Section 4.3.7 concentrates on international agreements concluded by Member States before their accession to the EU, and the conditions under which such agreements, should there be a conflict with Union law, enjoy protection under Art. 351 TFEU so that the international law principle *pacta sunt servanda* be preserved.

Title Two - The Law of Institutions

Title Two of the book is devoted to institutional law of the Union, i.e. primarily to the nature of, and requirements for, the membership in the Union, its institutions, defining their competences, rules of the Union legislative procedure, and last but not least, relations constituted by liability in the case of violation of Union law and damage caused to an individual. Before readers of the book get to the Special Part – A. Substantive Law (Titles Three and Four), they are acquainted with who forms substantive law and how it is formed, and who is responsible for its violation and how.

Liability within the Union is dealt with in detail in Section 5.3. In this context I would only add complementary information with respect to holders of responsibility in special cases of violation of an international agreement concluded by the EU (5.3.1 on p. 132). The fact that it is always the Union which is responsible towards a third party / international organization, not a Member State having committed a violation, applies generally with regard to external agreements concluded only by the Union (within its exclusive competence). This need not apply in the case of so-called mixed agreements where Member States, in addition to the Union, are parties to the agreement and as such they may be holders of responsibility under international law. As far as the relationship with national legislation is concerned, and the requirements for applying State liability for damage caused to an individual, a summary of case law of the Czech Constitutional Court (case No. IV ÚS 1521/10) and the Czech Supreme Court (28 Cdo 2927/2010) aptly illustrates the whole issue; it allows to directly invoke

[8] OJ L 181, 19.7.2003, p. 27 ("Agreement").

[9] See Art. 1 of the Agreement which reads: *"The Contracting Parties undertake, in accordance with the provisions of this Agreement, to provide for enhancements to cooperation* ***in the context of applicable extradition relations between the Member States and the United States of America*** *governing extradition of offenders."*; and Art. 3 (1) of the Agreement, stipulating that the European Union and the United States *"shall ensure that the provisions of this Agreement* ***are applied in relation to bilateral extradition treaties*** *between the Member States and the United States of America, in force at the time of the entry into force of this Agreement, under the following terms..."* (emphasis added).

the State liability under the case law of the CJEU if relevant national legislation does not contain sufficient regulation to claim damages (5.3.6, pp. 144–5).[10]

Chapter 6 deals with the competences of the Union, which is a topic on which one could write a separate and large monograph. The principle of conferred or entrusted competences is taken as a certain background for a more precise definition of the scope of competences of the Union; Section 6.2 summarizes relevant case law of the CJEU which had a significant impact on defining competences (for example, through a theory of so-called implied powers or parallelism of internal and external competences). Section 6.3 describes categories of competences (exclusive, shared, coordinating, supporting and "specific" in the area of common foreign and security policy) recognized and confirmed by the Lisbon Treaty. The end of the Chapter, in its Section 6.3.3, explains the restriction on competences by the principle of subsidiarity and proportionality and related strengthening of the controlling role of national parliaments.

Chapter 7 introduces institutions and bodies of the Union[11] with a more detailed description of the main institutions of the EU defined in Art. 13 TEU (the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the EU, the European Central Bank and the Court of Auditors). I consider as very useful the relatively detailed description of the organizational structure of the Council with its individual formations (7.2.1), as well as an explanation of the structure and activities of auxiliary bodies of the Council – the Committee of Permanent Representatives (COREPER I/II) and working groups of the Council, both playing an important role in the legislative procedure and formation of Union policies (7.2.2). The closing part of the Chapter (Section 7.9) contains an illustrative excursion into the labyrinth of languages as, with Croatia acceding to the European Union on 1st July 2013, the European Union has 24 official languages in which all EU legislation (and not only the legislation) must be available.

Finally, the last chapter of Title Two (Chapter 8) is aimed at the legislative procedure or rule-making. Section 8.1 describes mechanisms for amending primary law; the ordinary revision procedure for changing Treaties under Art. 48 (2)-(5) TEU may be included in rule-making in a wider sense of the term (unless we consider rule-making to be just acts adopted by the Union institutions). A simplified revision procedure for changing Treaties under Art. 48 (6) TEU (8.1.2) is a borderline procedure since it covers acts of the European Council (i.e. an EU institution), but amends provisions of the founding Treaties. It would have been useful to include the form of an adopted amendment (i.e. a decision of the European Council) in the text on p.192-3; it would also be appropriate to add the scope of review powers of the CJEU, which has *"jurisdiction to examine the validity of Decision 2011/199 in the light of the conditions laid down in Article 48(6) TEU*".[12] The issue of national approval of the application of so-called evolutive clauses (general and specific transitional clauses (*passerelles*), as well as the flexibility clause in Art. 352 TFEU, see Section 8.1.2), is also an interesting problem. As is rightly stated on page 194: *"It is possible to precisely determine in advance all concrete and potential types of application of such clauses, and the Czech Parliament could precisely evaluate and consider the impact of such acts upon the scope of conferred competences from the perspective of their compliance with the constitutional order."* Despite this fact the Czech Parliament considered it necessary to introduce the so-called binding mandate imposing a duty on the Government to submit in such cases an application to both chambers for expressing their consent with the adoption of a draft decision of the European Council or the Council; without such consent the Czech Government may not support

[10] The authors of the book consider this to be a reaction to the fact that Act No. 82/1998 Coll., governing the liability for damage caused by exercising public powers through a decision or maladministration, as amended, does not cover the full range of liability resulting from joint cases C-6/90 a C-9/90 *Francovich and others* [1991] ECR I-5357.

[11] The terms "institution" and "body" are not synonymous in the Union terminology. The main *institutions* of the Union are defined by Art. 13 (1) TEU; the *advisory bodies* of the Union under Art. 13 (4) TEU in conjunction with Art. 300 (1) TFEU are the Economic and Social Committee and the Committee of the Regions.

[12] Judgment of the Court of 27th November 2012 in Case C-370/12 *Pringle* (not yet published in ECR), paragraph 37.

the draft decision. Thus the Czech Parliament retains a rather extensive control over the application of so-called evolutive clauses.[13] The remaining section of Chapter 8 explains the legislative procedure of the Union, the types of adopted acts, the coordination of Union policies at the level of the Czech Government, and the inclusion of the Czech Parliament into the formation of positions within the Union legislative procedure (8.4).

Title Three – Legal Relations with Economic Elements

The special part of the book dealing with substantive law focuses in Title Three on legal relations with economic elements. The extent of this Title clearly indicates that the Union integration process was built upon economic grounds and that the core objective was to construct a functioning internal market. Introductory Chapter 9 analyzes the fundamental economic freedoms (free movement of goods, services, persons and capital) as the pillars of the internal market; their limitation is permissible only in compliance with exceptions stipulated in primary law or case law of the CJEU and under the observance of the test of proportionality (i.e. proportionality of achieving the aims set). In addition to the scope of fundamental freedoms of the internal market, individual harmonising policies (consumer protection, tax policy and public procurement) closely linked with the internal market are described in Section 9.6. The authors, providing a list of Union laws and their interrelations in Section 9.6.1, clearly illustrate the fragmentation and absence of coherent system of Union consumer law; however, the subsequent list of basic principles of consumer protection on pages 251-2 allows for better orientation in the whole area. Section 9.6.2 explains the limits of harmonisation in the area of taxes (including indirect taxes and essentially excluding direct taxation with minor exceptions, such as income taxes on deposit interest). Section 9.6.3 is devoted to public procurement; its significance is emphasised with respect to the volume of public funds as well as impacts upon economic competition. Relevant directives are mentioned, namely (general) Directive 2004/18/EC, (public sector) Directive 2004/17/EC, and (military) Directive 2009/81/EC governing procurement in the area of security and defence.

Chapter 10 deals with the protection of competition. In its introduction (10.1) it places relevant legislation in the respective economic context and explains the principles of European competition law including the powers of the European Commission to conduct investigation and impose sanctions. Section 10.1.6 explains the basic concepts of competition law with references to relevant case law of the CJEU and the General Court. Individual sections in the remaining part of the Chapter deal with particular segments of competition law, namely prohibited (cartel) agreements (10.2), abuse of dominant position (10.3) and a merger control over undertakings (10.4). The final section (10.5) deals with state aid, control mechanisms at the level of the Union and requirements for their permissibility, i.e. under what circumstances a state aid can be compatible with the internal market.

Chapter 11 concentrates on the recently widely debated topic of an economic and monetary union *"whose objective would be to intensively coordinate economic policies of Member States and, simultaneously, to unify monetary policy."* (p. 292). So-called Maastricht (convergence) criteria are explained, which include both monetary and budgetary (fiscal) criteria. The main elements of economic policy are emphasized (11.1), namely (i) the regulation of public budget deficits; and (ii) the regulation of public debt as well as tools implemented within the Stability and Growth Pact. A special section (11.3) is devoted to joining the monetary union and the adoption of a single currency.

The economic aspects of the Union are present not only in the functioning of the internal market, but also in external relations, where they are reflected in the common commercial policy or foreign trade of (the Member States of) the Union with third countries. As a result, the common commercial

[13] It should be noted in this context that the regulation of the 'binding mandate' in relation to Art. 352 TFEU (flexibility clause) may lead to some quite interesting absurdities, such as the situation when the Government had to submit for preliminary consent of the Czech Parliament a draft Regulation of the Council amending Regulation No. 354/83 concerning the opening to the public of the historical archives of the EEC and the Euratom. This duty resulted exclusively from the legal basis of the act (Art. 352 TFEU), irrespective of its content, which was absolutely marginal and insignificant regarding the position of the Czech Parliament and its controlling powers.

policy *"is closely related to the functioning of the customs union and represents one of its external expressions – those towards third countries. Its object, from the material perspective, is particularly the regulation of exports and imports of goods and services, adoption of protective measures and regulation of direct foreign investments."* (p. 304). Section 12.1.3 mentions, with respect to the definition of the competence of the Union, the quite topical and significant issue of the status of bilateral agreements on the support and protection of investments and describes the Regulation No. 1219/2012 of the European Parliament and the Council (EU) of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.[14] Section 12.2 provides a detailed description of individual tools of the common commercial policy built upon a basic division into autonomous and contractual tools, or tariff and non-tariff measures.

Title Four – Legal Relations with Civil Elements

Title Four departs from the economic dimension of the Union and focuses on legal relations with civil elements. Chapter 13 begins with explaining the specificity of Union citizenship as a type of citizenship derived from, and complementary to, the nationality of a particular Member State. As a result, EU citizens acquire significant rights, in particular the right to free movement and residence in the territories of Member States, the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections, and the right to consular and diplomatic protection in certain cases in territories of states outside the EU. Section 13.3 deals with requirements for exercising the right of free movement and residence within the context of consolidated legislation under Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[15]

Chapter 14 describes the system of protection of basic human rights and freedoms within the EU. As is rightly noted at the outset, the Union protection is built upon three sources under Art. 6 TEU: (i) the Charter of Fundamental Rights of the EU ("EU Charter"); (ii) the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"); and (iii) general principles of Union law resulting from constitutional traditions in the area of basic rights common to Member States (p. 325). Section 14.1 provides a historical outline of the development of human rights protection through general legal principles contained in the case law of the CJEU. Section 14.2 then analyses in detail the content and applicability of the EU Charter as a core catalogue of human rights of the Union. The opinion of Advocate General P. Cruz Villalón in Case C-617/10 *Fransson* should be noted with regard to the scope of applicability of the EU Charter and its application by the Union institutions (under Art. 51 (1) of the EU Charter *"only when they are implementing Union law"*), which the authors of the book denote as problematic in its interpretation (Section 14.2.3.1, p. 331). The Advocate General, considering potential differences in terms, namely "the implementation of Union law" (as a category of the EU Charter) and "within the field of application of EU law" (as a category of CJEU case law), concludes as follows: *"At this juncture, I believe that it would be helpful to view the different formulations used as expressions* ***which are not qualitatively different****. It is clear that nuances may be identified between them. However, the boundaries are always blurred. In particular, as I understand it,* ***the two formulations concerned point to a situation where, since there is always a discretion on the part of the Member States****, meaning that any infringement of a right cannot correctly be attributed to the Union, the* ***presence of Union law in the scenario concerned is sufficiently strong*** *to warrant an assessment of the scenario in the light of Union law, and therefore by the Court of Justice."*[16]

Section 14.2.5 deals with the Protocol on the application of the Carter of Fundamental Rights of the European Union to Poland and to the United Kingdom, whose objective is to make the imple-

[14] OJ L 351, 20. 12. 2012, p. 40.
[15] OJ L 158, 30. 4. 2004, p. 77.
[16] Opinion of Advocate General Cruz Villalón delivered on 12 June 2012 in Case C-617/10 *Fransson*, paras. 26 and 27 (emphasis added).

mentation of the EU Charter more precise, and its interpretation clearer, within the territory of the two Member States (p. 337). This is also significant for the Czech Republic as the Government seeks to extend the application of this instrument in the form of a Protocol on the application of the Charter of Fundamental Rights of the EU in the Czech Republic, which was promised to the Czech Republic in the European Council conclusions on 29-30 October 2009.[17] Further, an undoubtedly interesting question is whether, and to what extent, the EU Charter may be used as the frame of reference for considering constitutionality in proceedings before the Czech Constitutional Court (see Section 14.2.6, p. 338). In compliance with its case law (in particular Pl. ÚS 19/08 *Lisbon I*)[18] the Constitutional Court does not intend to use the EU Charter as a frame of reference when it considers the constitutionality of national legislation. The issue is whether such approach is appropriate, for example, in situations when national transposition or implementation laws are subject to review, i.e. when the implementation of Union law in the sense of Art. 51 of the EU Charter occurs.[19] The final part of the chapter – Section 14.3 – briefly summarizes the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is fully sufficient for this type of book.

The concluding part of Title Four – Chapter 15 – deals with "delimitation" of the area of freedom, security and justice. The term "freedom" in Section 15.1 includes so called Schengen *acquis*[20] which was incorporated in the Union framework under the Protocol of the Amsterdam Treaty, as well as asylum policy and common immigration policy. The term "security" (15.2) systematically encompasses police cooperation and, in addition to the direct police cooperation among individual Member States, the section is aimed at cooperation through the European Police Office (Europol).[21] Section 15.3 is devoted to "justice", namely (i) judicial cooperation in criminal matters (including evaluation of relevant case law of the CJEU significantly contributing to the definition of the scope of competence of the then Community in criminal matters)[22] and the functioning of Eurojust in cooperation with national authorities in investigating and prosecuting serious crimes, and (ii) judicial cooperation in civil and commercial matters. Section 15.4.1, aimed at the so called Brussels I Regulation[23] and other legislation, contains an interesting note on the distinction between the terms "ju-

[17] This is a fulfilment of the condition set by President V. Klaus with respect to the ratification of the Lisbon Treaty. President Klaus was not motivated by general concerns relating to extensive interpretation of the EU Charter, but by rather concrete (absolutely unjustified) concerns relating to potential non-compliance of the so called 'Beneš decrees' (i.e. property ownership titles based on the decrees of President Beneš from 1945–1946) with the EU Charter, thus endangering the ownership rights of Czech nationals. This is exactly what he stated in his declarations of 9 October 2009 and 30 October 2009 (after the meeting of the European Council). However, such interpretation was not adopted by the Government and the Protocol does not have such purpose.

[18] Judgment Pl. ÚS 19/08 of 26 November 2008 *Lisbon I*, promulgated under No. 446/2008 Coll.

[19] An entirely opposite approach by the Constitutional Court of Austria may be recalled in this context; in its judgment in joint cases U 466/11-18 and U 1836/11-13 of 14 March 2012 the Court inferred the position of the EU Charter as the frame of reference for the review of constitutionality of national legislation if the implementation of Union law is at issue, referring to the same "constitutional" position of the ECHR to which the EU Charter is closely linked (see paras. 31-35 of the judgment).

[20] Although it may exceed the scope of this book, I would include a note on certain acts such as Regulation (EC) No. 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13. 4. 2006, p. 1, which repeals Articles 2-9 of the Convention implementing the Schengen Agreement of 14 June 1985.

[21] In this context, it should be noted that Art. 88 TFEU presumes a Regulation of the EP and the Council to establish Europol; however, a pre-Lisbon Decision of the Council of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) is still effective, which replaced the original Europol Convention and its Protocols.

[22] See judgment of 13 September 2005 in Case C-176/03 *Commission v. Council* [2005] ECR I-7879 and subsequent case law.

[23] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1. 2001 p. 1). *Brussels I* was repealed and replaced (with effect as of 10 January 2015) by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12. 2012, p. 1).

risdiction" and "competence" (in Czech language version "příslušnost" and "pravomoc" respectively). It can be argued that EU legislation deals with the determination of courts' competence, not of jurisdiction of a particular national court (*cf.* the definition of jurisdiction [příslušnost] of civil courts as *"the determination of the scope of competence among courts against each other. One may distinguish functional, territorial, and subject-matter jurisdiction."*).[24] It depends on the approach and perspective used; however, the terminology used in EU legislation has its own logic if we see the territory of Member States as a common judicial area within which actual "jurisdiction" of an individual court is determined by an EU law in connection with national procedural legislation.

Title Five - Procedural Law

The final Title analyzes the Union judiciary, since the system of judicial protection and effective enforceability of Union law are elements distinguishing the Union from other international organizations. Chapter 16 describes the judicial system of the Union formed by Union and national courts, whose interrelations are not strictly hierarchical, but based upon cooperation, decentralization and subsidiarity (16.1). As explained in Section 16.1., the system of courts of the Union is crowned by the Court of Justice of the EU, which is the official title of one judicial body composed in fact of three Union courts (the Court of Justice, the General Court and the Civil Service Tribunal). The system of nominations to judicial posts is described, as well as the composition and activities of individual courts.[25] Section 16.3 defines the basic features of the Union's system of judicial protection, such as specific methods of interpretation, procedural principles and procedural autonomy of national courts, which are restricted by the principles of equality of procedural requirements (between proceedings with a Union element and purely national proceedings), and the principle of effectiveness.

Chapter 17 mentions in its beginning (17.1) types of measures of national courts to be taken for the protection of subjective rights from Union law (interim measures, immediate remedy of unlawful situations and removal of consequences of the violation of Union law, in particular through actions for damages against authorities of a Member State). In relation to my previous partial reservations regarding the concept of "direct applicability" presented in this book, Section 17.1.23 deserves attention, since the modes of application of Union law by national courts are commented as follows (p. 384): *"Within such proceedings, a national court is obliged to protect the affected subjective rights particularly in three possible ways: by direct application of a Union law, by conforming interpretation and by direct effect (see 3.1.6)."* I would argue that such description, resulting from Section 3.1.6, may raise tensions with the previous definition of direct applicability (see 3.1.2).[26] The extensive Section 17.2 deals with a detailed description of the reference for preliminary ruling procedure under Art. 267 TFEU, whose main aim is to ensure a uniform application of Union law. Well-grounded and extensive explanation contains many practical comments along with reference to a sample resolution of a national court referring an issue for preliminary ruling (in the appendix), and to the guidelines of the CJEU for referring cases for preliminary ruling.[27] In this context, the position of the Czech Con-

[24] HENDRYCH, Dušan et al. *Právnický slovník*. 3rd edition. Prague: C. H. Beck, 2009.

[25] There is an interesting note in Section 16.1.2.1 on p. 369 that the President of the CJEU has a right to assign cases within his own discretion to individual judges-rapporteurs, who apparently have certain influence upon the final judgment in the respective case. This fact may somehow collide with the continental legal tradition and its principle of right to a lawful judge; however, considering the common law tradition, such approach is not exceptional, and it may contribute to a more adequate distribution of case load according to specialisation of judges.

[26] If we understood direct applicability as a wide category covering all Union legal norms, then the concept of "direct application" in this context could mean both the application of directly applicable EU laws, and the application of, for example, provisions of directives with direct effects; thus the division between "direct application" and "direct effect" seems not to be fully justified. However, the division makes sense if we consider "direct application" (i.e. direct applicability) to be different from a "direct effect".

[27] *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (OJ C 338, 6 November 2012, p. 1).

stitutional Court seems to be quite interesting (17.2.2.2, p. 390), namely with respect to the issue of whether it is a court obliged to refer an issue for preliminary ruling.[28] However, the fact is that the Czech Constitutional Court, unlike some other Constitutional Courts of EU Member States[29], has initiated no reference for preliminary ruling yet, although there have been certain signals that it is not necessarily excluded in the future.[30]

Chapter 18 describes the extensive system of judicial protection through Union courts in various types of proceedings. Due and deserved attention is paid to actions for failure to fulfil an obligation under the Treaties, so called infringement proceedings (18.2), whose objective is to ensure proper and timely transposition and correct application of Union law by Member States, and as such, it becomes one of the most significant features of enforcement of Union law. Relevant space (in 18.3) is devoted to actions for annulment, including requirements for natural and legal persons to bring such actions which were changed, to a certain extent, as a result of the Lisbon Treaty. Other types of proceedings are described in brief, e.g. actions for damages (18.6) or request for an opinion (18.9). The final part deals with proceedings for appeals, in particular appeal against a decision of the General Court.

The final chapter summarises the course of proceedings before Union courts and explains its individual stages (e.g. written procedure, oral procedure, judgements and orders, binding effects and enforcement of a decision), with an emphasis on the specificity of individual types of procedure.

Conclusion

The reviewed book "Law of the European Union", published by the *Leges* Publishing House, should be recommended as an appropriate and highly topical handbook for all students of law schools preparing for their examination in European law.[31] The book may also serve many others: a clear and transparent explanation of the system and basic principles of Union law, including judicial protection through procedure before the Court of Justice of the European Union, could be useful for attorneys-at-law, civil servants or judges. Unfortunately, even almost ten years after the accession of the Czech Republic to the EU it may still happen that Union law is not taken into consideration and is not fully applied in legal, administrative and judicial practice, which results from insufficient knowledge of the content of Union law, but also from insufficient understanding of the principles of functioning of the Union law system, as well as of its potential effects within national law. The reviewed book may, at least partially, contribute to remedying such undesirable situation.

Emil Ruffer*

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[28] See Judgment II ÚS 1009/08 of 8 January 2009, para. 19, under which *"the Constitutional Court has repeatedly determined that it is not part of the system of general judiciary. (...) Distinguishing between the function of general and administrative courts on the one hand, and the Constitutional Court on the other, is fully within the competence of national legislature."* The CC does not seem to consider itself to be a court in the meaning of Art. 267 TFEU which has a duty to refer an issue for preliminary ruling (see also its previous resolution Pl. ÚS 12/08 of 2 December 2008, paras. 30 and 31).

[29] Recently, for example, the judgment of the CJEU of 26 February 2013 C-399/11 *Melloni* , referred to by the Constitutional Tribunal of Spain.

[30] *Cf.* dissenting opinions of the President of the CC P. Rychetský and Justice J. Fenyk in Judgment Pl. ÚS 10/13 *Church Restitutions* of 29 May 2013; both required that the CC should have referred the issue to the CJEU for preliminary ruling, namely whether a financial settlement with churches represented prohibited state aid under Art. 107 TFEU, and whether the European Commission should have been informed under Art. 108 TFEU.

[31] I should better use "Union law" since we know now that the term "European law" is wider and may include the law of other international organizations, such as the Council of Europe.

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