

Peter-Christian Müller-Graff / Erling Selvig (eds.)

Regulation Strategies in the European Economic Area



BWV • BERLINER WISSENSCHAFTS-VERLAG

Deutsch-Norwegisches Forum des Rechts
Skriftserie for Tysk-Norsk Rett
German-Norwegian Law Forum

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Redigert av Peter-Christian Müller-Graff / Erling Selvig
Edited by Peter-Christian Müller-Graff / Erling Selvig

Band 7
Bind 7
Volume 7

ISBN 978-3-8305-2005-4

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Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

ISBN 978 3 83052005 64

Dieser Band wurde gedruckt mit freundlicher Unterstützung
des Stipendienfonds E.ON Ruhrgas.

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Markgrafenstraße 12–14, 10969 Berlin
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Foreword

Regulation is one of the intensely debated big issues in developed market economies in general and within the European Economic Area in particular. To which extent regulation is reasonable and legitimate in this context and whether regulation is supported by strategies in the European Economic Area was the overarching topic of the Sixth German-Norwegian Seminar on European Law which took place on Mainau Island (Bodensee) between October 11 and October 15, 2006. Its topic continues the analysis of issues which were raised at the precedent Seminar on the enlarged European Economic Area under the aspect of the role of public powers in the economy in 2006.

This volume comprises the written and annotated versions of lectures given at the Seminar and is supplemented by an additional text. The editors express their sincere gratitude to the German-Norwegian E.ON-Ruhrgas scholarship scheme which made both the seminar and the publication of this book possible.

May 2008

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The Role of Regulation in the European Economic Area

Cordula Stumpf

The Interdependence between Internal Market Law and Regulation

I. Introduction

An examination of “the interdependence between Internal Market law and regulation” should start with a first thought on the two notions of “Internal Market Law”, on the one hand, and “regulation” on the other; both may require a little explanation.*

1. The Notion of Internal Market Law

“Internal Market Law”, here, first of all means “law”, as our agenda already indicates. We have heard about the economic approach, as well as about regulation strategies in a Europe of multi-level governance, terms that are taken from political science. So, I take it as my part to concentrate on the law in this first set of contributions to this seminar.

I am not going to discuss now in full length the question what “law” really is. But since the Ten Commandments of the Bible, the Babylonian Code of Hammurabi, and the Roman Law from the Twelve Tables to Iustinian’s *Corpus Iuris Civilis*, up to modern days, law has always been meant as a means to regulate relations between human beings as well as between political bodies; by regulating natural conflicts of interests into a fair balance of needs, its purpose always is to avoid mental or physical aggression which otherwise would be used in their pursuit.

Therefore, it is very deliberate that one of the specific characteristics of the European Community is that it is based on law. Despite its first name it has, since its very beginnings, never confined itself to a mere European Economic Community. The Roman Treaties and their subsequent amendments by the Treaties of Maastricht, Amsterdam and Nice are undoubtedly legal instruments as well as the ever growing amount of secondary law, and the European jurisdiction has always been playing an active part in enforcing these legal regulations in real life. Its direct applicability, its large direct effect, its precedence over national law, and the Member States’ liability for breach of Community law are well-known milestones. So let us agree for the moment that – as a system of normative provisions – law has regulative qualities.

The Internal Market, in the European context that we are talking about here, is defined in Article 14 of the EC Treaty as “an area without internal frontiers in which

* This publication is based on the oral version of 12 Sept 2006. References, citations and annotations are brought up to date of 6 Nov, 2007.

the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty". Thus, "Internal Market Law" in a strict legal sense means European Community law aimed at ensuring the fundamental freedoms of the EC Treaty. However, in a wider understanding, due to the EC's roots in the Common Market of the early European Economic Community, "Internal Market Law" is often used in the public discussion more or less as a synonym for the EC Law as a whole.

2. The Notion of "Regulation"

"Regulation" cannot be not understood here as a technical term for a binding Community Act with general application, as classified in Article 249 of the EC Treaty. Its general meaning in Webster's Online dictionary¹ is described as "an authoritative rule"; more specifically, a regulation (as a legal term), according to Webster, is a rule created by an administrative agency or body that interprets the statute(s) setting out the agency's purpose and powers, or the circumstances of applying the statute. In the context of government and public services regulation (as a process) is the control of something by rules, as opposed by its prohibition.

According to this, "law" and "regulation" have a lot in common. To distinguish "law" from "regulation", therefore, we should bear in mind the freedom-guarding and peace-keeping function of law, which is usually, but not necessarily, inherent to regulation. On the other hand, the ruling characteristic of "regulation" as a governing instrument of some authority is often, but not necessarily, a characteristic of law.

Therefore, in legal as well as political theory "regulation" is also widely used as an opposite to private autonomy when describing the driving elements of a legal system.² And in legal practice, activities subject to a specific administrative regime of control

¹ <http://www.webstersonline.com/definition/regulation>.

² For the present state of discussion see e.g. Baldwin/Cave, *Understanding Regulation: Theory, Strategy and Practice*, 1999; Black, *Rules and Regulators*, 1997; Cafaggi, *Le rôle des acteurs privés dans le processus de régulation*, *Revue française d'administration publique*, 23 ff.; Cafaggi (ed), *Reframing Self Regulation in European Private Law*, 2006; Coen/Heritier/Thatcher, *Refining Regulatory Regimes in Europe – The Creation and the Correction of Markets*, 2005; Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, (1997) *VVdStRL* 56, 235; Eberlein/Grande, *Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State*, (2005) *Journal of European Public Policy* 12(1), 89 ff.; Escher Wein gart, *Reform durch Deregulierung im Kapitalgesellschaftsrecht*, 2001; Fox, *Securities Regulation in a Globalizing Market: Who Should Regulate Whom?* (1997) *Michigan Law Review* 95, 2498; Freedland/Auby, *The Public Law/Private Law Divide*, 2006; Frison Roche (ed), *Les risques des régulations*, 2005; Muir Watt/Radicati di Brozolo, *Party Autonomy and Mandatory Rules in a Global World*, (2004) *Global Jurist* 4(1); Ogus, *Regulation*, 1994; Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes Oxley Act of 2002*, (2002) *The Journal of Corporation Law* 28, 1; Schmidt