REZENSIONEN / REVIEWS

"Economic Regulation and Competition: Regulation of Services in the EU, Germany and Japan"

Edited by
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This is a very useful, interesting, but somewhat perplexing book. Academics and a few practitioners present *useful* analyses of regulation of banking, investment, insurance and telecommunications services in Europe, Germany and/or Japan, supplemented by some private international law issues arising from these jurisdictions' globalising markets for financial services. *Jürgen Basedow* begins by outlining mainly political forces towards more regulation, beyond levels justified by specific market failures, followed by deregulatory initiatives especially over the 1990s. *Klaus Hopt* concludes by identifying common problems in the four main sectors covered: regulatory goals; competition; types of risk, market participants, and regulators; and enforcement. *Harald Baum*, a third colleague from the Max Planck Institute for Foreign Private and Private International Law in Hamburg, adds further value to the book with a "Summary of Discussions" from the conference in October 2001 where the analyses were originally presented and debated. It is rare to find this breadth of coverage in books on regulation, which tend to focus on specific sectors,[1] or in books on services, with either a similar narrow compass or a focus on the regime slowly evolving particularly through the World Trade Organisation framework.[2] The book is also helpful in providing quite up-to-date summaries of the fast-moving law and practice in each jurisdiction, and through some global institutions. Enjoying remarkable economies of scale, the five co-editors wrote their Preface in August and the volume was published in November 2002.

The book is *interesting*, too. First, the book highlights oddly weak theoretical foundations for generating what *Basedow* identifies as "the new regulatory mix" (p. 15), as opposed to the now less contentious case for reining in rampant over-regulation. He

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1 See, *e.g.,* J.R. BARTH / R. D. BRUMBAUGH / G. YAGO, Restructuring Regulation and Financial Institutions (2001); C. MCCRUDDEN, Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries (1999); I. VOGELSANG / B.M. MITCHELL, Telecommunications Competition: The Last Ten Miles (1997).

2 See, *e.g.,* S. LAIRD / A. TURRINI / L. CERNAT, Back to Basics: Market Access Issues in the Doha Agenda (2003); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Trade in Services: Negotiating Issues and Approaches (2001).

contrasts "general or constitutive regulations" (such as general rules of criminal or contract law) with "specific or restrictive regulations" (usually applied only to specific groups). *Basedow* argues that this distinction is premised on "individual freedom as the basic rule that characterizes the economic order" (p. 3), which has become a more popular principle since the collapse of highly controlled socialist economies, in turn underpinning more awareness of the robustness of markets and corresponding risks in regulatory intervention even to correct their "failures". However, he correctly acknowledges that deregulation to "less restrictive alternatives" (pp. 16-8) can lead ironically to more legislative intervention, for example to bolster competition law or a civil justice system to enforce private law remedies.[3] This may be particularly important in "network industries" (pp. 20-2), such as telecommunications, with a powerful incumbent in a key sector for a country's entire economy. Another observed tendency is towards providing better information to private actors through more regulation of intermediaries, such as brokers (pp. 18-20) – what *Hopt* later summarizes as "a trend away from substantive regulation to procedural regulation" (p. 315). These problems seem to create their own complexities, involving short-term tradeoffs or ongoing tensions, with conventional theory only able to recommend a general impetus towards deregulation, without specifying where "re-regulatory" lines should be re-drawn. Another complexity identified by *Baum* in his Summary, also agreeing that comprehensive theories and concepts of regulation remain "in the process of formation" (p. 321), is the shift towards "self-regulation" rather than regulation generated and directly enforced by states.[4] *Hopt* agrees and adds another important dimension (pp. 317-8): "regulation at what level"? This is an obvious and pressing question for anyone in Europe nowadays, but an increasingly universal problem due to the growing "globalisation of risk".[5]

Related and very interesting issues identified, but not resolved, in the book are the meanings and tensions associated with globalisation. *Christoph Engel*'s chapter, "European Telecommunications Law: Unaffected by Globalization?", provides a very theoretically sophisticated framework, compared to *Yasuo Horibe*'s perceptive treatment of

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3 This tendency has also been apparent in Finland and New Zealand since at least the late 1990s: L. NOTTAGE, New Zealand Law through the Internet: The Commonwealth Law Tradition and Socio-Legal Experimentation, 6 E Law: Murdoch University Electronic Journal of Law <*http://www.murdoch.edu.au/elaw/issues/v6n1/nottage61.html*> (1999).

4 *Baum* reports that self-regulation theory was discussed particularly in relation to Germany, but reference can now be added to an important analysis of Japan by a German political scientist based in the US: U. SCHAEDE, Cooperative Capitalism: Self-Regulation, Trade Associations, and the Antimonopoly Law in Japan (2000).

5 L. NOTTAGE / M. TREZISE, Mad Cows and Japanese Consumers, in: 14 Australian Product Liability Reporter (forthcoming, 2003), developing C. JOERGES, Law, Science and the Management of Risks to Health at National, European and International Levels: Stories on Baby Dummies, Mad Cows and Hormones in Beef, in: 7 Columbia Journal of European Law (2001). See also generally L. NOTTAGE, Product Safety and Liability Law in Japan: From Minamata to Mad Cows (2004).

Japan (pp. 253-64) and especially a very brief "Statement" by a practitioner (pp. 265-8). *Engel* points out a key dividing line among globalisation theorists (p. 221): those who adopt a "rational choice" approach (looking at interests or "individual actors maximizing some utility") and those who tend towards a "constructivist" approach (focusing on ideas or "the social context into which individual action is embedded"). A similar dividing line appears in theories of regulation, with most of the contributors to this volume implicitly preferring the former (rational choice) approach. *Engel* applies these different approaches to investigate globalisation, interacting with "Europeanisation" to generate a complex system of "multi-level governance" (pp. 223-6). Intriguingly, he finds little evidence that European regulators have responded to fairly clear globalisation of the telecommunications industry through two responses expected by either of these approaches: "mitigation" (to reduce globalisation's impact), or "adaptation" (to a globalising regulatory environment). Nor is there much evidence of a third reaction, "preference change". Instead, he perceives "a pervasive Euro-centricity", aimed at promoting a true internal (EU) market for telecommunications services. Because this market is no longer protected from global competition, and globalisation has been perceived as an issue in other fields of commercial regulation, *Engel* concludes that there has been "strategic neglect" – especially by the European Commission, determined not to see telecommunications regulation escalate into a issue hammered out in global fora like the WTO or OECD (pp. 238-48).

It is somewhat *perplexing* that *Engel*'s innovative theoretical lens or other thought-provoking views are not picked up and developed by other contributors. More conceptual work along these lines seems a promising way forward. It also has nice parallels with attempts to reconceptualise regulatory theory more generally, particularly in a globalising world. Much of that work comes from the United Kingdom, especially the London School of Economics, and especially "Regnet" at the Australian National University.[6] That also illustrates the need to bring together better the "multiple worlds of

6 See, *e.g.,* J. BLACK, Rules and Regulators (1997), H. COLLINS, Regulating Contracts (1999), B.M. HUTTER, Regulation and Risk: Occupational Health and Safety on the Railways (2001), C. SCOTT, Analysing Regulatory Space: Fragmented Resources and Institutional Design, in: Public Law 329 (2001) and generally <*http://www.lse.ac.uk/collections/CARR/*>. Compare*, e.g.,* I. AYRES / J. BRAITHWAITE, Responsive Regulation: Transcending the Deregulation Debate (1992), P.N. GRABOSKY, J. BRAITHWAITE / AUSTRALIAN INSTITUTE OF CRIMINOLOGY, Business Regulation and Australia's Future (1993), J. BRAITHWAITE / P. DRAHOS, Global Business Regulation (2000), and generally <*http://regnet.anu.edu.au/*>. Such work also creates links to some interesting studies in the US (*e.g.,* J. FREEMAN, Collaborative Governance in the Administrative State, 45 University of California Los Angeles Law Review 1 (1997)), despite its distinctive administrative tradition (K.-H. LADEUR, The Changing Role of the Private in Public Governance – The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation: A Comparative Approach, EUI Working Paper Law No. 2002/9 (2002)). Many of these writers are public law specialists with an interest in commercial affairs, rather than commercial lawyers with an interest in competition law, who seem to make up the bulk of contributors to this book.

Japanese law".[7] For this book, we had presentations from Japan which tended to involve more "black-letter law" analysis (such as *Hideki Kanda*'s round-up of recent legislation on securities regulation, pp. 153-61), compared even to the contributions from German academics. An Anglo-Australian-American dimension could have offered more theoretical and contextual perspectives on this otherwise useful source material. Another way of creating or further emphasizing links among the wide-ranging sectoral analyses might have been to shift the chapter by *Hopt* from the end to the start of the book, following the introductory chapter by *Basedow*. At the least, the brief Preface (p. v) could have been expanded to signal some of the highlights of the synthesis by *Hopt* (and *Baum*), and indeed of the main contributions, to readers unfamiliar with the original conference material. As it is, we really only begin to appreciate key guiding themes for this work – to see the wood as well as the trees[8] – only towards the end, when *Hopt* for example mentions that the conference was designed "principally to bring experts together from different regulatory sectors … and to have them exchange their views on why their sector is regulated, what could or should be de-regulated, and whether they face common problems in the age of globalization" (p. 307). To a similar end, the short Index (pp. 327-9) could have expanded, for example for references to "ex-ante" versus "ex-post monitoring" (an issue referred to not just by *Hopt*, and *Takashi Kubota*'s detailed description of Japan's regulation of banking services). Without such extra help and guidance, readers of this book may tend just to dip in and out of the sectoral reports, or read those on particular jurisdictions, defeating the purpose of developing a cross-sectoral and global perspective.

Still, this book is a very valuable and rare contribution to three major issues in business, law and policy-making world-wide – services, regulation and globalisation – especially in the major inter-linked economies and legal systems of the EU, Germany and Japan. Generated more by jurists and some practitioners, not political scientists or professional economists, the book will be of most use to legal researchers, business people, and regulators. However, it also offers rich source material to be mined by other theorists, as well as some incipient theory-building. Hopefully, also, this book will generate further meetings, publications, and more sustained research projects[9] into these three hot topics.

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7 See, generally, The Multiple Worlds of Japanese Law (T. GINSBURG / L. NOTTAGE / H. SONO, eds., 2001), partially reproduced in volume 12 of ZJAPANR / J.JAPAN.L.

8 Compare M. IBUSUKI, Why Do We Miss the Wood for the Trees? A Response from a Nihon-hô Scholar, 12 ZJAPANR / J.JAPAN.L 43 (2001).

9 Over 2004-6, the Australian Research Council has provided Discovery Grant funding for myself and the other two ANJeL Co-Directors (*Kent Anderson* from ANU and *Leon Wolff* from the University of New South Wales) for a project researching " 'Traction' or 'Turbulence' in Japanese Regulatory Style? An Empirical Analysis of Japanese Commercial Law Reform since the 1990s". We look forward to drawing further on comparisons with German and European law and theory.