

PUBLIC LAW AND ECONOMY

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1. INTRODUCTORY REMARKS

The Public-Private Law Divide² is important also in the field of regulating the economy. Whereas Commercial Law, the Law of Business Association, Company Law, Labour Law, Competition Law and Anti-Trust Law³ are traditionally regarded as Private Law, Trade Law, Finance Law, Tax Law, and a host of other subdivisions of the Law concerning the economy are part of the expanding field of the Law of Economic Administration, i.e. Public Law. Consumer Protection Law (perceived as a new field in spite of the existence of many consumer protection provisions for the last 150 years) partly falls within the ambit of Private Law (e.g. Law of Obligations), partly within the scope of Public Law (e.g. Trade Law). The difference is not as much one of substantive principles (for private autonomy as the underlying concept in Private Law is not dissimilar to freedom of trade as the traditional principle in the Law of Economic Administration) as it is one of enforcement (private players v. state agencies) and competent judiciary (ordinary courts v. administrative courts). Equally, the field of State Liability is, for historic reasons, a mixture of Public and Private Law provisions (still waiting for codification). Accordingly, Private Law and Public Law can be seen as “mutually supportive reciprocal models”⁴ also in the field of regulating the economy.

² Cf. Ulrich Stelkens, The Public-Private Law Divide, Annual Report 2010 – Germany.

³ For an outline of this fields, cf. Nigel Foster & Satish Sule, German Legal System and Laws, 4th ed. 2011, pp. 535 seqq.

⁴ Wechselseitige Auffangordnungen“ (an expression coined by Wolfgang Hoffmann-Riem, Reform des allge- meinen Verwaltungsrechts – Vorüberlegungen, DVBl. 1994, 1381, 1386 f., translation by Ulrich Stelkens, n. 1, p. 16/7).

Following the German legal technique of prescinding and collecting general doctrines of the respective field of law, the Law of Economic Administration is conceptualized as one of the branches of Particular Administrative Law (codified for instance in the Trade Act dating back to 1869,⁵ or the Banking Act dating back to 1961⁶, as opposed to General Administrative Law (codified mainly in the Law of Administrative Proceedings of 25 May 1976⁷). Applying Administrative Law therefore regularly means applying both the specific codification(s) and the subsidiary Law of Administrative Proceedings. Moreover, in times of intense Europeanization,⁸ applying German Law very often amounts to applying EU Law (at least by interpreting the German provision in conformity with the respective directive, or indeed the Treaties). It should, in addition, be stressed that important fields of Particular Administrative Law, in spite of their enormous economic relevance, such as Tax Law, and Social Security Law, are treated as quasi-autonomous fields of Public Law, represented not only by

⁵ Cf. infra 3.1.

⁶ „Kreditwesengesetz“; for an (unofficial) translation cf. http://www.bundesbank.de/Redaktion/EN/Downloads/Core_business_areas/Banking_supervision/PDF/banking_act.pdf? blob=publicationFile (14.5.2013).

⁷ „Verwaltungsverfahrensgesetz“; for an (unofficial) translation cf. Mahendra P. Singh, *German Administrative Law in Common Law Perspective*, 2nd ed. 2001, Appendix II, pp. 286 seqq.

⁸ The prediction by Jacques Delors that 80 % of all business law rules in the Member States will have a Europe- an background seems, in Germany, to have come true for the field of environmental law only, cf. Thomas König & Lars Mäder, *Politische Vierteljahresschrift* vol. 49 (2008), p. 438 at 442.

own codifications⁹ but also separate chairs, associations, and guilds. In sum, German Public Law concerning the economy is characterized by codification, expansion, Europeanization, and fragmentation.

2. THE CONSTITUTIONAL FRAMEWORK

2.1. Does the Basic Law codify the Social Market Economy?

Since the Basic Law does mention the Social State (Art. 20 I and Art. 28 I) but refrains from explicitly enshrining the market economy, the 1950s saw an intense controversy about the economic neutrality of the German Constitution. Bundesverfassungsgericht stated that the Basic Law did not prescribe a particular economic policy and left a wide margin of appreciation to the legislative as long as Parliament respected the fundamental rights.¹⁰ This truism was erroneously taken as a confirmation of “economic neutrality” of the constitution. In effect, the economic rights granted in the Basic Law (infra, 2.2) do not allow Parliament to introduce a command economy, and even the nationalization clause (Art. 15) turned out to be a bulwark against

⁹ E.g. Abgabenordnung (Fiscal Code), cf. http://www.gesetze-im-internet.de/englisch_ao/index.html, and Sozi- algesetzbuch (Social Security Code). For a sketch of Social Law in Germany, cf. Foster & Sule (n. 2), pp. 310 seqq. – The economic relevance of Social Law in Germany is highlighted by Stephan Rixen, *Sozialrecht als Öffentliches Wirtschaftsrecht*, 2005.

¹⁰ BVerfGE 4, 7, 17; 50, 290, 338.

nationalization given its unambiguous compensation requirement. Consequently, the task in interpreting the constitutional framework is “to combine the general freedom of economic and social design (which must remain with the legislator) and the protection of liberty which every citizen is entitled to not least in relation to the legislator.”¹¹ The Treaty between the Federal Republic of Germany and the German Democratic Republic establishing a Monetary, Economic and Social Union of 18 May 1990 in its Art. 1 (3) characterizes the economic system of Germany as “the Social Market Economy”. This formula correctly sums up the constitutional and statutory law as it stands but is not, in the prevailing view, part of constitutional law itself.

2.2. Fundamental Economic Rights.

The free choice of occupation or profession (Berufsfreiheit) is granted by Art. 12 I Basic Law which reads:

All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.¹² Bundesverfassungsgericht sees the two distinct sentences as describing a single and uniform liberty. In consequence, the limitation clause (second sentence) is understood to concern both sentences, i.e. already the choice of occupation or profession.¹³ In its famous Pharmacists case

¹¹ BVerfGE 50, 290, 338 (translation by F.R.).

¹² Translation (as of all articles of the Basic Law cited here) by Christian Tomuschat and David P. Currie, http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0060 (14.5.2013).

¹³ BVerfGE 7, 377, 401 – „Apotheke“.

(“Apothekenentscheidung”) of 1958, the Court decided that limitations are restricted according to their respective type: On the first stage, regulations as to the practice of an occupation or profession can be justified by reasonable considerations of the public interest. The second stage pertains to so-called “subjective limitations of admissibility” (i.e. qualification requirements); they must be justified by the protection of important public interests. On a third stage, “objective limitations of admissibility” (criteria such as quotas) can only be justified by the need to ward off grave dangers to an outstanding vital public interest.¹⁴ Art. 19 III makes it clear that the occupational freedom, like all basic rights, „shall also apply to domestic artificial persons to the extent that the nature of such rights permits.“ In other words, companies can equally refer to this freedom – and, after the ordinary proceedings in the judiciary, file a constitutional complaint to Bundesverfassungsgericht under Art. 93 I No. 4 lit. a of the Basic Law. However, the Court has rarely interfered with legislation concerning the economy on the grounds of Art. 12, stressing the legislator’s margin of appreciation.

A further cornerstone of the constitutional framework for the economy is the guarantee of property and inheritance in Art. 14:

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

¹⁴ Cf. the illuminating presentation in Foster & Sule (n. 2), pp. 261-263.

Again, companies are entitled by this article by virtue of Art. 19 III (vide supra). “Property” is given a wide meaning, including claims in the social security system. While the scope of Art. 14 covers everything a person has acquired, Art. 12 (i.e. occupational freedom) protects the process of acquisition. And again, Bundesverfassungsgericht is reluctant to interfere with legislation restricting property, justifying Parliament’s margin of appreciation with the explicit public good clause in Art. 14 II.

In the jurisprudence of the Bundesverfassungsgericht, Art. 2 I GG (“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”) is seen as a subsidiary right also in the field of economic activities, i.e. applicable if no other rights (such as Art. 12 I or 14) apply. Accordingly, the right to enter into contracts can be located here. However, the limitation clause gives Parliament wide powers to restrict this general freedom. Of course, in German Constitutional Law all restrictions of personal freedoms are subject to the proportionality test. In other words, the state interference must

- have a legitimate purpose,
- be suitable (i.e. capable of achieving or at least promoting this purpose),
- be necessary (i.e. there must not be a less serious means which is equally suitable),
- be proportionate (i.e. appropriate in a balance of all interests concerned).

Finally, mention should be made of Art. 3 I (“All persons shall be equal before the law.”) which again applies to artificial persons such as companies (Art. 19 III). This provision of equity before the law has proved to be an ubiquitous constitutional criterion. Of course, it is in particular referred to in proceedings about state promotion of the economy.

2.3 Competences and Institutions in the Federal System

Germany being a Federal Republic, the allocation of competences is of enormous economic importance. While the basic rule is contained in Art. 30 GG (“Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.“), the legal and political situation is inverse. For the area of legislative competences, this is illustrated by the long lists of matters in Art. 73 and Art. 74 of the Basic Law for which the Bund (i.e. the federation as opposed to the Länder) is competent. Virtually all fields of economic life fall within the scope of the Bund. As a symbolic concession, the Federalism Reform of 2006 has slightly restricted the competence for matters of the economy. The provision (Art. 74 I Nr. 11) now reads:

Concurrent legislative power shall extend to the following matters: ... the law relating to economic matters (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges and private insurance), except for the law on shop closing hours, restaurants, game halls, display of individual persons, trade fairs, exhibitions and markets; ...

Still, the federal legislature is in charge of most areas of economic relevance.

As far as the executive is concerned, the picture is different. According to Art. 83, the Länder (States) are responsible for the execution of the Law irrespective of its nature (federal or otherwise). In other words, state control of the economy is mainly in the hands of the Länder. Amongst the most notable exceptions are, as specialized federal authorities,

- Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur),

- Federal Office of Economics and Export Control (Bundesagentur für Wirtschaft und Ausfuhrkontrolle), which has, contrary to its somewhat misleading name, specific competences in the fields of foreign trade, promotion of economic development, and

energy (only),

- Federal Financial Supervisory Authority (Bundesanstalt für
Finanzdienstleistungsaufsicht), and

- Federal competition Authority (Bundeskartellamt).

3. THE LAW OF ECONOMIC ADMINISTRATION

3.1. Regulation of Products

The “Law of Products” is, for obvious reasons, an almost entirely Europeanized field. The central codification, Produktsicherheitsgesetz,¹⁵ serves as an implementation of (at present) 13 European directives and as the legal basis for ministries to issue ordinances (Rechtsverordnungen). At the moment, there are 11 ordinances in force, covering products from toys to recreational craft. The ecological requirements as set out by the ecodesign directive¹⁶ and the respective implementing measures are transformed by a separate Act (Gesetz über die umweltgerechte Gestaltung

¹⁵ Gesetz über die Bereitstellung von Produkten auf dem Markt (Produktsicherheitsgesetz – ProdSG) of 8.11.2011, official translation: http://www.gesetze-im-internet.de/englisch_prodsg/index.html (15.5.2013).

¹⁶ Directive 2009/125/EC of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L 285 of 31.10.2009 p. 10.

energieverbrauchsrelevanter Produkte¹⁷).

3.2 Regulation of Services

Services are traditionally regulated by the Trade Act (Gewerbeordnung)¹⁸ which is the refined codification of 1869. Its leading principle is freedom of trade (sec. 1), i.e. the right to take up a trade without prior permission, restricted by a number of provisions for trades which are regarded as hazardous, such as running hospitals, or amusement halls, and combined with a statutory basis for a ban in case of unreliability (sec. 35). Conversely, the Crafts Code (Handwerksordnung) states a general permission requirement, the permission being granted in case of personal competence, thereby codifying the traditional German guild model. The Federal Law on public houses and restaurants (Gaststättengesetz) can be replaced by the Länder on the basis of the amended Art. 74 I Nr. 11 Basic Law (cf. supra 2.3), and indeed some Länder (e.g. Hessen, Niedersachsen) have taken the chance to replace the permission requirement with a mere duty of disclosure. Persons running a trade, business, or craft are by law members of the respective chamber (local Chamber of Industry and Commerce, Chamber of Crafts etc.) which Bundesverfassungsgericht has frequently held to be in conformity with constitutional law (namely, Art. 2 I Basic Law). The liberal professions are subject to separate codifications as well as mandatory membership in their own chambers (medical association, bar association, architectural association etc.). Accordingly, the European Services Directive (2006/123/EC) has been implemented by way of amendment of the various acts and statutory instruments.

¹⁷ Gesetz über die umweltgerechte Gestaltung energieverbrauchsrelevanter Produkte of 27.2.2008 (no official translation apparent at the moment).

¹⁸ Gewerbeordnung as published on 22.2.1999 (apparently no official translation).

3.3 Regulation of Infrastructures

While the construction of buildings is in general subject to a building permit pursuant to the Building Law of the respective Federal State, hazardous facilities can only be erected and run on the basis of a permit issued in accordance with the Federal Immission Control Act (Bundes-Immissionsschutzgesetz). This instrument ensures the observance of the manifold environmental requirements enshrined in diverse acts.¹⁹ Bigger facilities such as airports, highways, waste dumps (etc.) are subject to the complex “plan approval procedure” (Planfeststellungsverfahren) under sec. 73 et seq. of the Law of Administrative Proceedings.²⁰ The intricate procedural rules including mandatory participation of the public in general contribute to acceptable conflict resolutions. Recent projects such as the reconstruction of Stuttgart Central Railway Station (known as “Stuttgart 21”), however, have raised doubts as to the adequacy of the provisions.

4. CONCLUSION

As indicated above, the regulation of economic activities (in particular in the fields of services and infrastructures) is intense in Germany. While some see this as a drawback in the international competition, the administrative law framework appears to be a safeguard of reliable and sustainable decisions. Attempts to decrease or “liberalize” regulation in the last two decades (e.g. in the field of building law) have brought new problems and doubtful overall outcomes.

¹⁹ Cf. Andreas Glaser, German Environmental Law in a Nutshell.

²⁰ Cf. supra n. 6.

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