

New York University School of Law



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

Jean Monnet Working Paper Series



JMWP 27/13

Matthias Ruffert

**Public Law and the Economy:
A Comparative View from a German Perspective**

Cover: *Upper East Side Family*, Diana Chelaru, USA



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director

Jean Monnet Working Paper 27/13

Matthias Ruffert

Public Law and the Economy: A Comparative View from a German Perspective

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2161-0320
Copy Editor: Danielle Leeds Kim
© Matthias Ruffert 2013
New York University School of Law
New York, NY 10011
USA

<p>Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]</p>

Public Law and the Economy: A Comparative View from a German Perspec-

tive

Matthias Ruffert*

Since the entry into force of the Grundgesetz (GG), the Federal Republic of Germany's constitutional law in the economic field oscillates around the idea of Soziale Marktwirtschaft (social market economy), which the GG does not explicitly include but which finds its way into the economic constitution via fundamental economic rights. Beneath constitutional theory, it is the concept of regulation that has found its way into German administrative law in a differentiated and interesting process of legal "importation" using European Union law as a means of transmission. Regulation in this sense poses great challenges at both the constitutional as well as the administrative level concerning basic theoretical and practical issues. Furthermore, its internal and external limits lead to the question of how to address the ever growing plea for a return of state activity to the economy.

I. Introduction: Constitutional and Administrative Law – and the Economy

In times of crisis – whether financial, Euro, state debt or general economic crisis – the relationship between public law and the economy is obviously highly topical. Taking a comparative (transatlantic) perspective, it is tempting to play off assumingly divergent socio-economic models against each other when scrutinizing their constitutional foundations (and, in this case, to consider whether the Channel was part of the Atlantic Ocean). In constitutional and administrative law, there are, however, far more interesting points to take a closer look at from a comparative perspective:

First, there is a traditional German debate on the *economic constitution* which was prominent in the past but which is somehow continuing on a Europeanized level and in the context of economic human rights (*infra* II.).

Second, the concept of *regulation* in Germany deserves a closer look. This concept was introduced into European public law during the last 25 years, and this process of legal introduction reveals conceptual convergences and divergences between the different jurisdictions. The profound changes caused by the concept will be considered from different viewpoints (such as expertise and accountability), and this variety of perspectives stresses

* Dr. iur., Professor for Public, European and Public International Law and holder of a Jean-Monnet-Chair for European Integration ("Administrative law in the integrated European administration"), Friedrich-Schiller-Universität Jena, Germany; Email: m.ruffert@recht.uni-jena.de. I am particularly grateful to my student assistant CHRISTOPHER P. HUNT for his linguistic and technical support.

the close interrelationship between constitutional and administrative law in economic matters¹.

II. The German Economic Constitution

1. The Traditional Debate

From the early 1950s, there has been a vivid debate on whether the Grundgesetz (GG) contains guarantees for a particular economic system. This discussion must be assessed against the historic background of (a) the general European trend of the late 1940s and early 1950s to promote the nationalization of core industries (particularly in Britain, but also in other countries)², (b) the strong influence of the neo- or ordoliberal school (*Eucken*, *Röpcke*, and *Böhm* in particular) on legal and political thinking, a school of thought, it must be noted, that had established itself in open resistance to the Nazi-regime in the late 1930s³ and (c) the enormous economic boom (*Wirtschaftswunder*) in the early Federal Republic of Germany which was generated by pursuing an economic policy against the general trend – the (re-)establishment of a market economy together with some distinct social safeguards, famously labeled *Soziale Marktwirtschaft* (social market-economy) and politically associated with the first cabinet minister for the economy, *Erhard*, who briefly succeeded *Adenauer* as chancellor.⁴

Consequently, some legal scholars such as the first president of the Federal Labor Court, *Nipperdey*, propounded the view that the concept of *Soziale Marktwirtschaft* was part of the constitutional framework of the GG⁵. Their core argument was drawn from an institutionalized combination of some fundamental rights' guarantees (free property, freedom to exercise one's profession, freedom of economic activity, Articles 14, 12 and 2 (1) GG) with the principle of the *social state* (Article 20 (1) GG). The Federal Constitutional Court (*Bundesverfassungsgericht*), however, rejected this institutional view in a major judg-

¹ The article draws its main input from (a) the author's article *Zur Leistungsfähigkeit der Wirtschaftsverfassung*, 134 ARCHIV DES ÖFFENTLICHEN RECHTS 197 (1999), and (b) a research project finalized in 2010: MICHAEL FEHLING AND MATTHIAS RUFFERT, EDS., REGULIERUNGSRECHT (2010), summarized in: DIRK EHLERS, MICHAEL FEHLING, AND HERMANN PÜNDER, EDS., BESONDERES VERWALTUNGSRECHT, Vol. I, para. 21 (2012).

² For Britain ALAN SKED AND CHRIS COOK, POST-WAR BRITAIN 29 *et seq.* (2nd edition 1984).

³ This is all made brilliantly clear by Christian Joerges, *What is Left of the European Economic Constitution*, EUI WORKING PAPER LAW No. 2004/13 p. 9 *et seq.*, in particular footnote 15.

⁴ WERNER ABELSHAUSER, DEUTSCHE WIRTSCHAFTSGESCHICHTE. VON 1945 BIS ZUR GEGENWART 283 *et seq.* (2nd edition 2004).

⁵ HANS CARL NIPPERDEY, DIE SOZIALE MARKTWIRTSCHAFT IN DER VERFASSUNG DER BUNDESREPUBLIK (1954); ID., WIRTSCHAFTSVERFASSUNG UND BUNDESVERFASSUNGSGERICHT (1960). For an insight into the vivid discussion cf. Ernst Rudolf Huber, *Der Streit um das Wirtschaftsverfassungsrecht* (1956), in: ID., BEWAHRUNG UND WANDLUNG 215 (1975); and PETER BADURA, WIRTSCHAFTSVERFASSUNG UND WIRTSCHAFTSVERWALTUNG, para. 14 (4th edition 2011).

ment⁶ with which the majority of scholars agreed⁷. The issue rose again in the 1970s when the matter of workers' participation in large companies was on the legislator's agenda. Instead of shaping an economic constitution as a separate institutional framework – as requested by the employers in their action against the relevant statute – the Court underlined the importance of the fundamental economic rights as such⁸. Within the scope of these rights, the legislature and the executive are deemed to be free to choose an appropriate economic policy – following the idea of economic neutrality of the constitution⁹.

2. A German Exportation to Europe?

With the second Court ruling in the late 1970s, a long and sometimes vivid debate had found its peaceful settlement. The market-state-dichotomy was less pertinent, and there were no real efforts to take up the traditional, institution-based discussion by scholarly means. It took until the elaboration of the constitutional treaty for the EU which ended up in the ratification of the Treaty of Lisbon that the old idea of an economic constitution oriented towards the idea of *Soziale Marktwirtschaft* arose again. The Treaty of Lisbon – like the preceding (draft) articles in the constitutional treaty¹⁰ explicitly entrenches “a highly competitive social market economy” (Article 3 (3), 2nd sentence TEU).

It is disputable – and disputed – whether the Treaty adopts a truly German concept and/or whether a concept which is debatable at the domestic level re-enters this same level via the supremacy of EU law and once and for all settles the old dispute¹¹. Obviously, decades after its foundation in 1958 and following a series of Treaty amendments, EU constitutional law is still in search of its general direction. At a theoretical level, scholars underline that historically, the influence liberal German economic ideas had upon the formulation and establishment of the Rome Treaties has been exaggerated, given the strong state-centered views on the economy that were predominant in Europe in the 1950s on the one hand and the considerable criticism towards European integration within the liberal school itself on the other hand¹². Nonetheless, the dominant view is that

⁶ 4 BVerfGE 7 at 17 *et seq.* (1954).

⁷ Reported in the leading work on the history of public law by MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, VIERTER BAND 1945–1990* 269–274 (2012).

⁸ 50 BVerfGE 290 at 336 *et seq.* (1979).

⁹ For a comprehensive overview see Reiner Schmidt, *Staatliche Verantwortung für die Wirtschaft*, in: JOSEF ISENSEE AND PAUL KIRCHHOF, EDS., *HANDBUCH DES STAATSRECHTS*, VOL. IV, paras. 92/11 *et seq.* (3rd edition 2006).

¹⁰ TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, O.J. (C 310) 1 (2004), article I-3 (3) in particular.

¹¹ This has been discussed in a very critical way by David Jungbluth, *Überformung der grundgesetzlichen Wirtschaftsverfassung durch Europäisches Unionsrecht?*, 45 *EUROPARECHT* 471 (2010).

¹² GIANDOMENICO MAJONE, *EUROPE AS THE WOULD-BE WORLD POWER* 128 *et seq.* (2009); MILÈNE

looking back on this development, ordoliberalism explains best how the economic constitution of the EU was shaped, albeit with elements of a command economy (such as in the field of agriculture). At a practical political level, the struggle of divergent views on economic policy continues, with an antagonistic setting contrasting the northern/German/liberal perspective on the one side with the southern (Mediterranean)/French/socialist (mercantilist) view on the other. Apart from the state debt crisis the treatment of which goes beyond the focus of this contribution¹³, conflicts arise mainly in the application of Articles 14 and 106 TFEU with respect to public undertakings¹⁴. All in all, the idea of the liberal economic constitution is severely challenged.

3. Economic Constitution and Economic Rights

This challenge is even visible at the domestic level. As explained, the *Bundesverfassungsgericht* replaced the institutional view of an economic constitution along the lines of the *Soziale Marktwirtschaft* by an emphasis on fundamental economic rights, the concomitant protection of social values made possible via legislation restricting those fundamental economic rights in a proportionate manner. In constitutional practice, however, this equilibrium is jeopardized by reasonably new case law in particular with respect to the free exercise of one's profession (Article 12 (1) GG). The Court enters profoundly into theoretical economic thought and views markets not as a procedural method to coordinate the economic interests of free subjects (and to be restricted by legislation which fulfills some basic formal and substantial requirements), but as institutions created by the state which are designed to allow for participation of citizens and companies according to state-generated norms¹⁵. The strong criticism brought forward by constitutional law scholars¹⁶ did not lead to a complete retreat of the Court from this economically somehow untenable

WEGMANN, FRÜHER NEOLIBERALISMUS UND EUROPÄISCHE INTEGRATION 297 *et seq.* (2002).

¹³ Cf. Matthias Ruffert, *The European debt crisis and European Union law* (2011), 48 CMLRev 1777–1805 (2011).

¹⁴ The latest legislation is Commission Decision of Dec. 20, 2011 on the application of article 106(2) of the Treaty on the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, O.J. 2012 L 7 p. 3; **Commission Regulation (EU) No 360/2012 of Apr. 25, 2012 on the application of articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest**, O.J. 2012 L 114 p. 8; Communication from the Commission — European Union framework for state aid in the form of public service compensation, O.J. 2012 C 8 p. 15. Cf. also the assessment of the measures during the 2008/2009 banking crisis by Michael Fehling, *Das europäische Beihilfenrecht in der Wirtschaftskrise*, 45 EUROPARECHT 598 (2010).

¹⁵ “Glykol”, 105 BVerfGE 252 at 265 (2002); 116 BVerfGE 202 at 221 (2006); 118 BVerfGE 1 at 15 *et seq.* (2007).

¹⁶ Indeed, most scholars are negative with respect to the limitations of economic freedom: Josef Franz Lindner, *Zur grundrechtsdogmatischen Struktur der Wettbewerbsfreiheit*, DIE ÖFFENTLICHE VERWALTUNG 185 at 188 *et seq.* (2003); Peter Huber, *Die Informationstätigkeit der öffentlichen Hand – ein grundrechtliches Sonderregime aus Karlsruhe?*, JURISTENZEITUNG 290 at 292 *et seq.* (2003).

position, but some modifications have already entered its jurisprudence¹⁷.

On the whole, the particular German debate on the economic constitution shows difficulties in finding its way to the European level and is called into question domestically, but it is far from over. The administrative law mirror of this constitutional law movement can be seen in the rise of the concept of regulation as a novel concept.

III. Regulation: Importing a Concept

1. Starting Points

a) The American Approach seen from Germany

To a U.S. audience, this must all sound rather curious, if not repugnant. What is on top of the legal and constitutional order is not power, the state or any other public institution but individual freedom. Any public intervention into private economic activity needs justification – ideally proof of some instance of market failure. It may certainly be called into question whether this idealistic view of a foreigner on the American concept of the relationship between law and the economy is free of distortion, but what is more certain is that the idea of *regulation* derives from such a view: Under such a perspective, regulation comprises any norm generation as well as norm-generated administrative action that influences economic activity¹⁸.

b) Law and Economics I: Market Failure

The theoretical background of these assumptions lies in the economic insight that markets are ideally designed mechanisms which are able to spontaneously create optimum allocation of goods¹⁹. Fundamental legal guarantees and the pragmatism of efficient allocation are therefore linked. Nonetheless, the economic model is aware of instances of market failure, i.e. when for once there is no optimum allocation by a market mechanism. These instances of market failure have been identified for a long time: (negative) external effects, public or collective goods, natural monopolies, moral hazard or asymmetries of information²⁰. All of them can justify regulation from an economics perspective.

¹⁷ Bundesverfassungsgericht, DEUTSCHES VERWALTUNGSBLATT 1440 (2009), with note by Anton Achatz.

¹⁸ Oliver Lepsius, *Regulierungsrecht in den USA: Vorläufer und Modell*, in: MICHAEL FEHLING AND MATTHIAS RUFFERT (*supra* note 1), § 1 paras. 11 *et seq.*; Johannes Masing, *Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 558 (2003); furthermore NORBERT REICH, STAATLICHE REGULIERUNG ZWISCHEN MARKTVERSAGEN UND POLITIKVERSAGEN 5 *et seq.* (1984); CHRISTIAN BERRINGER, REGULIERUNG ALS ERSCHEINUNGSFORM DER WIRTSCHAFTSAUFSICHT 94 (2004).

¹⁹ MICHAEL FRITSCH, MARKTVERSAGEN UND WIRTSCHAFTSPOLITIK 6 *et seq.* (8th edition 2011); *cf. also* Anne van Aken, *Vom Nutzen der ökonomischen Theorie für das öffentliche Recht: Methode und Anwendungsmöglichkeiten*, in: MARC BUNGENBERG ET AL., EDS., RECHT UND ÖKONOMIK 23 *et seq.* (2004).

²⁰ For a summary Martin Leschke, *Regulierungstheorie aus ökonomischer Sicht*, in: MICHAEL

2. Reception and Reconstruction

a) Receptive EU-legislation

If we take a look at the use of concepts of regulation in Europe, it is necessary to consider the British experience in the early 1980s, when the so-called Keynesian post-war-consensus came to an end and was replaced by a privatization program that was quite successful at the beginning. The Anglo-Saxon terminology of regulation was extended: a broad concept of regulation was used and complemented by the idea of self-regulation – meaning that beneficial results may be achieved if society establishes mechanisms for continuous survey and occasional remedy²¹.

The main impact upon German public law thinking, however, was made by EU-legislation, which somehow follows the American and British experience, but evolves in a different way as far as the issue of regulation is concerned. Three waves of legislation can be distinguished²²:

- (1) In the early 1990s, national monopolies in the telecommunications sector were abolished by EC-legislation based on Article 90 (3) E(E)CT (later Article 86 (3) ECT, now Article 106 (3) TFEU). Also, to establish the Open Network Provision, the power to harmonize within the internal market was used (now: Article 114 TFEU).
- (2) From 1996 to 1998, a series of internal market directives was passed in the fields of telecommunication and energy. While EU energy law is dominated by two directives (on electricity and gas respectively), the law of telecommunications is rather specialized. What is important is that these directives use regulation to create interoperability of networks, fair market conditions and an internal market for goods hitherto produced by state or state organized monopolies. Interestingly, there is a similar approach in the sector of rail transport which is generally considered to have failed.

FEHLING AND MATTHIAS RUFFERT (*supra* note 1), paras. 6/25 *et seq.*; and Martin Eifert, *Regulierungsstrategien*, in: WOLFGANG HOFFMANN-RIEM, EBERHARD SCHMIDT-ABMANN, AND ANDREAS VOßKUHLE, EDS., *GRUNDLAGEN DES VERWALTUNGSRECHTS*, para. 19/17 at footnote 39 (2nd edition 2012).

²¹ JOHN FRANCIS, *THE POLITICS OF REGULATION* (1993); MICHAEL MORAN, *THE BRITISH REGULATORY STATE* (2003); ROBERT BALDWIN AND MARTIN CAVE, *UNDERSTANDING REGULATION* (1999); TONY PROSSER, *LAW AND THE REGULATORS* (1997); Colin Scott, *Accountability in the Regulatory state*, 27 *JOURNAL OF LAW AND SOCIETY* 38 (2000); *id.*, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 *JOURNAL OF LAW AND SOCIETY* 56 (2002); On self-regulation in particular: Anthony Ogus, *Re-thinking self-regulation*, 15 *OXFORD JOURNAL OF LEGAL STUDIES* 97 (1995); Julia Black, *Constitutionalising Self-Regulation*, 59 *MODERN LAW REVIEW* 24 (1996).

²² The categorization is taken from Matthias Ruffert, in: DIRK EHLERS, MICHAEL FEHLING, AND HERMANN PÜNDER (*supra* note 1).

- (3) In a third wave since 2002/2003, the pursued policy is consolidated substantially and institutionally, in particular by granting more independent powers to independent regulatory agencies²³.

It is within this legislation that the concept of regulation is narrowed down. That the notion *regulation* was acquired from the U.S. and Great Britain cannot be denied, but what is at stake here is not the general influence rule-making or administrative functions of the state have upon the economy, but specific measures referring to network economies (telecommunication, energy, postal services, railway).

b) Law and Economics II: State Failure

Before going into further detail concerning these particular measures, we must remember the economic background. Institutional economics not only identify instances of market failure as mentioned above, but also designate cases of state failure²⁴. State intervention into economic cycles may diminish the resulting wealth not only in comparison with a Pareto-optimal distribution but also compared to the desired result as defined in decisions made following common democratic procedures²⁵. Public market intervention is prone to distort not only efficient allocation but also the implementation of the public will. The most important instance of state failure is the dependence of politics on the influence of interest groups²⁶. Beyond this and more generally, it is common economic knowledge that considering the creation of knowledge, decentralized decision-making procedures in spontaneous arrangements are superior to centralized decision-making²⁷.

In this context, it is submitted that the economic activity public authorities pursue via public companies bears high potential for state failure, and this exact problem arose in fields such as telecommunication or postal services in Europe and particularly in Germany. Such activity often does not serve the fulfillment of public tasks but perpetuates the encrusted influence of interest groups. The dynamics of the telecommunications sector in the last 15 years in Germany are brilliant empirical proof of what happens if state influ-

²³ Cf. below IV 2.

²⁴ MICHAEL FRITSCH (*supra* note 19) 370 *et seq.*; KARL HOHMANN AND ANDREAS SUCHANEK, *ÖKONOMIK: EINE EINFÜHRUNG* 187 *et seq.* (2nd edition 2005); ANDREAS KELLERHALS, *WIRTSCHAFTSRECHT UND EUROPÄISCHE INTEGRATION* 72 (2006); HEINZ-DIETER ABMANN, *WIRTSCHAFTSRECHT IN DER MIXED ECONOMY* 234 *et seq.* (1980) (headed: “failure of politics”).

²⁵ MARTIN LESCHKE, MATHIAS ERLEI, AND DIRK SAUERLAND, *NEUE INSTITUTIONENÖKONOMIK* 482 *et seq.* (2nd edition 2007).

²⁶ Seminal work: MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); *cf. also* GEOFFREY BRENNAN AND JAMES M. BUCHANAN, *THE REASON OF RULES* (1985).

²⁷ Laid down in FRIEDRICH AUGUST VON HAYEK, *DER WETTBEWERB ALS ENTDECKUNGSVERFAHREN* 7 *et seq.* (1968).

ence is considerably reduced²⁸.

3. A Novel Concept of Regulation

If the state withdraws from its own economic activity, the public interest in the relevant markets must be safeguarded, and this is exactly what is supposed to be achieved by regulation in a novel or narrower sense. Regulation can react to state failure: It can provide governments with administrative means to (a) create competition in a sector hitherto monopolized, (b) secure the proper fulfillment of public services at prices affordable for the general public and (c) provide risk-management to avoid any security threats in the relevant field²⁹. In this context, regulation can also counteract market failure that re-arises after privatization, as it might have justified the preceding state activity within the economy.

Taking all these issues into consideration, regulation shall be defined as any public administrative activity, as opposed to economic activity of the state itself, pursued in an economic sector that aims at establishing and safeguarding conditions for competition and at securing the achievement of the common good.

4. Modifications of Core Public Law Concepts

a) New Views of the State

This particular view on regulation would be impossible without a modified view on core public law concepts – above all, of the state. The most far-reaching concept is *Giandomenico Majone's* Regulatory state, which goes a lot further than what is considered in the context of regulation here³⁰, as it intends to shift substantial powers from central institutions of the state to independent regulatory institutions. Legitimacy in the Regulatory state is mainly achieved through decision-making by experts, so that (democratic) input legitimization is largely replaced by non-majoritarian means and democracy is mainly preserved by measures of accountability³¹. It is well known that *Majone* found structures of the Regulatory state particularly within the EU's (EC's) economic governance. Although

²⁸ See in particular JÖRN AXEL KÄMMERER, *PRIVATISIERUNG* (2001); and the contributions in KLAUS KÖNIG AND ANGELIKA BENZ, EDS., *PRIVATISIERUNG UND STAATLICHE REGULIERUNG* (1996).

²⁹ Cf. Matthias Ruffert, *Regulierung im System des Verwaltungsrechts*, 124 ARCHIV DES ÖFFENTLICHEN RECHTS 237 (1999).

³⁰ On this and the following Giandomenico Majone, *The Rise of the Regulatory state in Western Europe*, 17 WEST EUROPEAN POLITICS 77 (1994); id., *The future of regulation in Europe*, in: ID., ED., *REGULATING EUROPE* 265 (1996); see further Markus Müller and Roland Sturm, *Ein neuer regulativer Staat in Deutschland? Die neuere Theory of the Regulatory state und ihre Anwendbarkeit auf die deutsche Staatswissenschaft*, 9 STAATSWISSENSCHAFT UND STAATSPRAXIS 507 (1998); REINHARD RUGE, *DIE GEWÄHRLEISTUNGSVERANTWORTUNG DES STAATES UND DER REGULATORY STATE* (2004).

³¹ Cf. only Karl-Peter Sommermann, *Demokratiekonzepte im Vergleich*, in: HARTMUT BAUER, PETER HUBER, AND KARL-PETER SOMMERMAN, EDS., *DEMOKRATIE IN EUROPA* 191 at 203 *et seq.* (2005) giving further references; and Matthias Ruffert, in: CHRISTIAN CALLIESS AND MATTHIAS RUFFERT, art. 9 EUV, para. 11 (4th edition 2011).

nowadays criticism against such a concept might be nourished by the European Union's overt acceptance of the principle of representative democracy (Article 10 (1) TEU), one should bear in mind how deeply a regulatory approach could modify our view of the state. A more moderate reformulation of the state is achieved by the concept of the ensuring state. In this concept, the state, instead of fulfilling tasks for the benefit of the common good, assumes responsibility for initiating and guiding private actors in the fulfillment of those tasks³². If resources for fulfillment by the state itself are deficient, there is a need to establish structures that ensure the accomplishment of the common good (as democratically defined) by procedures within society. For this purpose, the state has to cooperate with the private sector and society as a whole. The state can withdraw from any *service public* or *Daseinsvorsorge*, it can encourage society to pursue goals of the common good (activating state) and it can enable private individuals to participate in such proceedings (enabling state)³³. According to this perspective, public tasks are not *per se* those of public authorities. The GG establishes such duties with respect to railways and telecommunication (Articles 87e (4), 87f (1) and 143b (2))³⁴. Regulation is part of administrative law within the ensuring state³⁵. A functioning ensuring state needs regulation and regulation supports the state in withdrawing to core activities³⁶.

b) New Approaches in Administrative Law

Along similar lines, the new law of regulation is part of the modifications within administrative law and cannot be explained without these modifications. In Germany, the proclamation of a *New Scholarship of Administrative Law* has caused a shift in perspective. Instead of applying the *juristic method* (i.e. interpretation of legal texts and their application to certain facts) to administrative law and adjusting it towards the protection of indi-

³² MARTIN EIFERT, GRUNDVERSORGUNG MIT TELEKOMMUNIKATIONSLEISTUNGEN IM GEWÄHRLEISTUNGSSTAAT 18 *et seq.* (1998); Gunnar Folke Schuppert, *Jenseits von Privatisierung und „schlankem“ Staat: Vorüberlegungen zu einem Konzept von Staatsentlastung durch Verantwortungsteilung*, in: CHRISTOPH GUSY, ED., PRIVATISIERUNG VON STAATSAUFGABEN 72 (1998); ID., VERWALTUNGSWISSENSCHAFT 400 *et seq.* (2000); Hans-Heinrich Trute, *Verantwortungsteilung als Schlüsselbegriff eines sich ändernden Verhältnisses von öffentlichem und privatem Sektor*, in: GUNNAR FOLKE SCHUPPERT, ED., JENSEITS VON PRIVATISIERUNG UND „SCHLANKEM STAAT“ 13 (1999); Wolfgang Hoffmann-Riem, *Verantwortungsteilung als Schlüsselbegriff moderner Staatlichkeit*, in: PAUL KIRCHHOF, ED., FESTSCHRIFT FÜR KLAUS VOGEL 47 (2001).

³³ Andreas Voßkuhle, *Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung*, 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER 266 at 311 *et seq.* (2003).

³⁴ Cf. on responsibility for infrastructure GEORG HERMES, STAATLICHE INFRASTRUKTURVERANTWORTUNG 323 *et seq.* (1998).

³⁵ Cf. Franz Jürgen Säcker, *Das Regulierungsrecht im Spannungsfeld von öffentlichem und privatem Recht*, 130 ARCHIV DES ÖFFENTLICHEN RECHTS 180 at 186 *et seq.* (2005).

³⁶ Josef Isensee, *Staat und Verfassung*, in: JOSEF ISENSEE AND PAUL KIRCHHOF, EDS., HANDBUCH DES STAATSRICHTS, VOL. II, paras. 15/75 *et seq.* (3rd edition 2004), quite illustratively uses the term “sektoraler Staat”.

vidual rights only – which is still the dominant perspective –, administrative law scholars are routed towards instructing administrative activity and decision-making³⁷. This must include extra-legal methods such as the analysis of reality or the consequences of activity and decision. Hence, administrative law maintains its controlling and protective function, but the function to provide government with instruments for effective administration is added³⁸. In this context, regulation provides for one particular method of steering, yet it can also be integrated into new concepts of governance that are more and more replacing the steering-approach³⁹.

IV. Public Law Issues of Regulation

1. Law of Regulation as Administrative Law

The Law of Regulation thus defined is part of administrative law, and it is not isolated from other areas and concepts within this field. In the light of traditional concepts of supervision of the economy (*Aufsicht*) and market steering (*Wirtschaftslenkung*)⁴⁰, regulation is best categorized as a pattern of supervision to optimize markets in creating and upholding competition and in safeguarding the common good⁴¹. In its function to enhance competition, the law of regulation is linked to general competition law (antitrust law). Some of its core concepts and instruments such as the essential-facilities doctrine or price-cap-regulation are drawn from general competition law. Generally speaking, the more competition is made possible after the abolishment of monopolistic structures, the less regulation is necessary and what regulation there is will be replaced by ordinary competition regulation⁴². And the less there is market failure, the more competition law suffices to safeguard the common good. Market failure always triggers the need for the fulfillment of economic tasks by the state – regulation can serve as an alternative, as it limits public activity to supervisory measures.

2. Organization: The Issue of Accountability

It is not only the concept of regulation as such that is imported from the U.S. via the UK

³⁷ Andreas Voßkuhle, *The reform approach in the German Science of Administrative Law: The "Neue Verwaltungsrechtswissenschaft"*, in: MATTHIAS RUFFERT, ED., *THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE/LA MUTATION DU DROIT ADMINISTRATIF EN EUROPE* 89 (2007).

³⁸ EBERHARD SCHMIDT-ABMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSDIEGE*, 1/30 *et seq.* and 1/33 *et seq.* (2nd edition 2004).

³⁹ In Germany, governance theories are best explained by Gunnar Folke Schuppert (e.g.: *Was ist und wozu Governance?*, 40 *DIE VERWALTUNG* 463 [2007]).

⁴⁰ Critical assessment by JAN HECKER, *MARKTOPTIMIERENDE WIRTSCHAFTSAUFSICHT* 21 *et seq.* (2007).

⁴¹ Similarly: PETER BADURA (*supra* note 5), para. 184; Peter Huber, *Öffentliches Wirtschaftsrecht*, in: EBERHARD SCHMIDT-ABMANN AND FRIEDRICH SCHOCH, *BESONDERES VERWALTUNGSRECHT*, chapter 3, para. 178 (14th edition 2008).

⁴² Cf. also JOSEF RUTHIG AND STEFAN STORR, *ÖFFENTLICHES WIRTSCHAFTSRECHT*, para. 22 (2nd edition 2008).

and EU to Germany – along with it comes a particular feature of administrative organization that is in a way ‘copied’: the idea of independent administrative agencies. Traditional German administrative bodies – like those in many European countries – are hierarchically integrated into government structures, be it at federal (*Bund*) or regional (*Länder*) level. Ideally, every administrative institution is ranked in a government department, headed by a cabinet minister who is accountable to Parliament. The new idea of independent regulatory agencies deviates from this view. According to the pertinent directives in telecommunications, postal, energy and rail transport law, there should be independence at least from the political sphere if the state still qualifies as an owner (i.e. is holding considerable assets) in the relevant network industry⁴³. New developments point at even more political independence⁴⁴.

For this purpose, Germany created the Federal Agency for Electricity, Gas, Telecommunications, Postal Services and Rail Transport (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*; in short: *Bundesnetzagentur*)⁴⁵. Although accountable to the Federal Government Department of Economics, measures were taken to assure its independence. Instructions by the Department must be published: this simultaneously provides for transparency as well as rarity of such instructions. What is more, the most important regulatory decisions are made in collegiate bodies (three members) that are rather similar to courts. It is submitted that independence is reached by combining the expertise of the deciding members, mutual control in decision-making and a deliberative culture of deciding⁴⁶.

So far, the measures to secure independence have not caused major constitutional problems. However, the latest EU-directives in the field of energy law are fostering political independence⁴⁷ and are, as a matter of principle, opposed to any hierarchical structure⁴⁸.

⁴³ Cf. only Gabriele Britz, *Organisation und Organisationsrecht*, in: MICHAEL FEHLING AND MATTHIAS RUFFERT (*supra* note 1), para. 21/50 with further references; Matthias Ruffert, in: FRANZ JÜRGEN SÄCKER, ED., *BERLINER KOMMENTAR ZUM TELEKOMMUNIKATIONSGESETZ*, paras. 116/8 *et seq.* (2nd edition 2009); in comparative analysis: JOHANNES MASING AND GÉRARD MARCOU, EDS., *UNABHÄNGIGE REGULIERUNGSBEHÖRDEN* (2010).

⁴⁴ Cf. below.

⁴⁵ Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Jul.7, 2005), *BUNDESGESETZBLATT* Vol. I 1970 (2005).

⁴⁶ Gabriele Britz (*supra* note 43), para. 48.

⁴⁷ Cf. only article 35 of Directive 2009/72/EC of the European Parliament and of the Council of Jul.13, 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, O.J. 2009, No. L 211 p. 55: “... 4. Member states shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member state shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority: (a) is legally distinct and functionally independent from any other public or private entity; (b) ensures that its staff and the persons responsible for its management: ... (ii) do not seek or take direct instructions from any government or other public or private

Some German scholars of constitutional law have detected a lack of democratic legitimacy in these new requirements of independence. Some would even go as far as claiming an infringement of the German constitutional identity⁴⁹. This is certainly too far-fetched. As a matter of principle, the German *GG* does not allow for any aspect of government power not to be democratically legitimated (see in particular Article 20 (3)). On the other hand, there has always been a need to interrupt the hierarchical chain of legitimacy – this is possible if a justification is drawn from the subject matters to be handled⁵⁰. It is submitted that the concept of regulation as presented here may justify such a deviance from the ordinary model of hierarchical legitimacy because of the need to make informed decisions due to the tension between state and market failure⁵¹. Parliamentary accountability can be preserved by guaranteeing the briefing of the *Bundestag* and by activating parliamentary control over the general political guidelines of regulation policy⁵². Furthermore, the new directives do not prevent a control of legality by the Department⁵³.

The situation becomes even more complex when the integration of the *Bundesnetzagentur* into the European context is considered. All national regulatory agencies in the aforementioned fields are part of the relevant networks or authorities at the European level, be it ACER for energy, BEREC for telecommunication or the weaker structures in the field of rail transport⁵⁴. Regulatory decisions are prepared after mutual exchange of information and according to common standards. Problems of legitimacy are aggravated when decision-making is detached from the usual national patterns⁵⁵.

entity when carrying out the regulatory tasks. ...”.

⁴⁸ On the following see Matthias Ruffert, *Die neue Unabhängigkeit: Zur demokratischen Legitimation von Agenturen im europäischen Verwaltungsrecht*, in: PETER-CHRISTIAN MÜLLER-GRAFF, STEFANIE SCHMAHL, AND VASSILIOS SKOURIS, *EUROPÄISCHES RECHT ZWISCHEN BEWÄHRUNG UND WANDEL. FESTSCHRIFT FÜR DIETER H. SCHEUING* 399 (2011).

⁴⁹ See in particular Klaus Ferdinand Gärditz, *Europäisches Regulierungsverwaltungsrecht auf Abwegen*, 135 *ARCHIV DES ÖFFENTLICHEN RECHTS* 251 at 283 *et seq.* (2010); and Markus Ludwigs, *Die Bundesnetzagentur auf dem Weg zur independent agency? Europarechtliche Anstöße und verfassungsrechtliche Grenzen*, 44 *DIE VERWALTUNG* 41 at 47 *et seq.* (2011).

⁵⁰ Cf. only Peter Lerche, in: THEODOR MAUNZ AND GÜNTER DÜRIG, *GRUNDGESETZ-KOMMENTAR*, Art. 87f, para. 112 (1996).

⁵¹ Gabriele Britz (*supra* note 43), paras. 32 *et seq.*, in particular 39.

⁵² Based on the Notes for the implementation of the Electricity Directive 2009/72/EC and the Gas Directive 2009/73/EC, The Regulatory Authorities http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_regulatory_authorities.pdf (last visited Dec. 5, 2012).

⁵³ It is submitted here that the situation is different than in ECJ, Case C-518/07, *Commission v. Germany* (Case concerning data protection authorities), [2010] ECR I-1885, where this was excluded by the court – a judgment vividly discussed in Germany.

⁵⁴ A comprehensive analysis of the agencies at European level can be found in Steffen Augsberg, *Europäisches Verwaltungsorganisationsrecht und Vollzugsformen*, in: JÖRG PHILIPP TERHECHTE, ED., *VERWALTUNGSRECHT DER EUROPÄISCHEN UNION*, paras. 6/50 *et seq.* (2011).

⁵⁵ But see the new and interesting approach (based on Weber) by ENRICO PEUKER, *BÜROKRATIE UND DEMOKRATIE IN EUROPA* (2011).

It is also through comparative legal studies that German concerns with respect to the particular model of accountability established by the GG are alleviated. Apart from recognizing the flexibility of a concept that is *prima facie* strict, scholars acknowledge the diversity of accountability concepts in the various constitutional systems of the EU⁵⁶. Accountability in the Anglo-American sense with its pluralist, public and political connotation is different from the legalistic forms of legitimacy required by the dominant German concept. What must be – and is – discussed is the range of flexibility that may enter the domestic sphere without causing infringements of the existing system⁵⁷.

3. Procedures and Instruments

The procedural novelties of the law of regulation are less troublesome. There is no general administrative law of regulatory procedures⁵⁸. Some procedural elements, however, have gained special importance. This is obvious for decision-making in special collegiate bodies (*cf.* above 2.). In such proceedings, fact-finding and exchange of legal arguments are formalized⁵⁹. Furthermore, there are particular procedures for the cooperation of authorities, be it at national or European level. This is basically related to fact-finding (analysis of markets) and the formulation of standards (for market analysis)⁶⁰. Finally, in some areas public procurement procedures are of high relevance⁶¹.

Decision-making in complex economic matters may require a particular margin of appreciation for the relevant agency. The Federal German Administrative Court (*Bundesverwaltungsgericht*), the highest court in administrative matters, even sought to create a particular category of regulatory discretion⁶². The reaction of administrative scholars towards such a shift in judicial assessment of discretion has, however, been guarded⁶³. Thus, the

⁵⁶ Matthias Ruffert, *Comparative Aspects of Administrative Legitimacy*, in: MATTHIAS RUFFERT, *LEGITIMACY IN EUROPEAN ADMINISTRATIVE LAW: REFORM AND RECONSTRUCTION* 351–360 (2011).

⁵⁷ See the very restrictive approach by Klaus Ferdinand Gärditz (*supra* note 49).

⁵⁸ Michael Fehling, *Instrumente und Verfahren*, in: MICHAEL FEHLING AND MATTHIAS RUFFERT (*supra* note 1), para. 20/138.

⁵⁹ Michael Fehling (*supra* note 58), paras. 105 *et seq.*

⁶⁰ Jens-Peter Schneider, *Telekommunikation*, in: MICHAEL FEHLING AND MATTHIAS RUFFERT (*supra* note 1), paras. 8/21 *et seq.*

⁶¹ See again Michael Fehling (*supra* note 58), paras. 154 *et seq.*

⁶² 130 BVerwGE 39 at 48 (2007); Bundesverwaltungsgericht, *ZEITSCHRIFT FÜR NETZWIRTSCHAFT UND RECHT* 141 at 144 (2008).

⁶³ *Cf.* Klaus Ferdinand Gärditz, *Regulierungsermessen und verwaltungsgerichtliche Kontrolle*, *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* 1005 (2009); Matthias Ruffert, in: HANS JOACHIM KNACK AND HANS-GÜNTHER HENNEKE, EDS., *VERWALTUNGSVERFAHRENSGESETZ*, para. 40/45 (2010); Friedrich Schoch, *Gerichtliche Verwaltungskontrollen*, in: WOLFGANG HOFFMANN-RIEM, EBERHARD SCHMIDT-ABMANN, AND ANDREAS VOßKUHLE, EDS., *GRUNDLAGEN DES VERWALTUNGSRECHTS*, VOL. III, paras. 50/291 *et seq.* (2009); Claudio Franzius, *Wer hat das letzte Wort im Telekommunikationsrecht? Zum behördlichen Gestaltungsauftrag für die Zugangs- und Entgeltregulierung nach §§ 21, 30 TKG*, *DEUTSCHES VERWALTUNGSBLATT* 409 (2009). For a more open view: Markus Ludwigs, *Das Regulierungsermessen als Herausforderung für die Letztentscheidungsdogmatik im Verwaltungsrecht*, *JURISTENZEITUNG* 290

concept of regulatory discretion has not been extended that far.

While core procedural elements in the administrative law of regulation appear to be somewhat concealed by other particularities such as the modifications in the law of administrative organization, the instruments of regulation and its law are easier grouped in a comprehensive typology⁶⁴:

- Access to networks: Competition can often not be created without guaranteeing access to particular network resources. This is obvious in the fields of telecommunications and energy (and also postal services) and is founded in the competition law doctrine of essential facilities.
- Universal service: Due to the high investment expenditures, some activities in network economies have hitherto mainly been undertaken by the state. To avoid withdrawal of private companies from vital activities, the imposition of a duty to provide a core service (universal service) avoids market failure, and the state fulfills its duty to guarantee the service (without providing it itself).
- Price control: Network structures generate natural monopolies, and even after privatization there is the considerable risk of monopolistic pricing – or predatory pricing – to avoid newcomers entering the market. Consequently, the law of regulation provides for several mechanisms of price control which also enable the state to fulfill its social duties.

V. Limits and Potential of the Law of Regulation

1. Limits of Regulation

The law of regulation as understood in this contribution provides an efficient mode of state supervision of the economy by integrating economic facts to the utmost possible extent and at the same time it is able to use the knowledge-generating effect of markets and the assurance of the common good by instruments that are close to market mechanisms. This is certainly one of the reasons for the boom the law of regulation experienced in the 1990s and the early 21st century. However, it is also necessary to keep the remaining challenges in mind.

Internal limits of the law of regulation become visible within energy law. It is extremely difficult to create competition in this field without bureaucratizing the whole market. This is certainly due to the factual scarcity of primary energy resources in Germany and the

(2009).

⁶⁴ The typology is taken from Matthias Ruffert, *in*: DIRK EHLERS, MICHAEL FEHLING, AND HERMANN PÜNDER (*supra* note 1).

whole of the EU. Furthermore, the conflict of interests is extremely difficult to handle using the law of regulation.

External limits appear when regulation is expected to achieve goals outside its scope. This applies to environmental protection or certain social aims. Regulation is not a concept beyond the social state: as explained, it is part of the concept to provide essential services to the general public at reasonable prices. The protection of employees in the relevant economic sectors, however, must be assured by general labor law. There is no workers' protection specific to regulation, but a race to the bottom which some fear may take place in regulated industries must be prevented by means of the general legal rules applicable to employment. If such external limits are not respected, there could be a substantial risk of the law of regulation somehow being perverted to bring about any beneficial aim whatsoever and for whomever in a eudemonistic way and without democratic control⁶⁵.

2. Potential of Regulation

Maybe because of the limits explained above, the potential of regulation is often underestimated. In economic terms, the application of the concept to sectors such as telecommunications, postal services, energy (within the aforementioned limits) and transport could be transferred to other sectors. Salient examples could be health and health insurance or the financial markets. Although regulation of financial markets is different from regulation as understood here, the urgent need to integrate the common good into financial market regulation is obvious.

Regulation also has a specific potential in EU law. The adoption of a common administrative concept by government sectors in the various member states could lead to integration through law⁶⁶, strictly speaking. Some member states may be more reluctant to adopt the novel concepts – if only for the sake of protecting their own industries. The French energy and transport sector has become (in-)famous in this sense, and this has also been revealed by comparative lawyers' efforts⁶⁷. Generally, however, the new instruments and procedures as enumerated in the typology above (IV. 3.) enter the administrative legal systems of the member states as common elements. Resilience and resistance may only be a temporary phenomenon. In the long run, the integrating effect of a common regulatory

⁶⁵ These dangers are appropriately formulated by Frank Schorkopf, *Regulierung nach den Grundsätzen des Rechtsstaats*, JURISTENZEITUNG 20 (2008).

⁶⁶ For the term and its history Antoine Vauchez, *Integration through Law, Contribution to a Socio-history of EU Political Commonsense*, EUI Working Papers, RSCAS 2008/10, http://www.eui.eu/RSCAS/WP-Texts/o8_10.pdf (last visited Dec. 4, 2012).

⁶⁷ Matthias Ruffert, *Europäisches Ausland*, in: MICHAEL FEHLING AND MATTHIAS RUFFERT, *REGULIERUNGSRECHT*, § 2, paras. 6 *et seq.*; In theoretical terms: Gérard Marcou, *La notion juridique de régulation*, ACTUALITE JURIDIQUE DROIT ADMINISTRATIF 350 (2006).

framework also reaches the constitutional level. It is not possible to operate a concept of regulation that intends to establish equilibrium between market efficiency and the pursuit of the democratically defined common good without constitutional repercussions that more or less mirror the overarching aim in Article 3 (3), 2nd sentence TEU and without being just a blueprint of the traditional German idea of *Soziale Marktwirtschaft*.

VI. The Overall Return of the State?

After the 2007/2008 financial crisis the tendency to “bring the state back in” (i.e. into economy) has been dominant in a sense that more state activity within the economy was called for⁶⁸. Some observers completely overlooked the complexity of reasons for financial crisis which combine market failure (e.g. information deficits in evaluating debts, creation of bubbles) and state failure (e.g. undue fixation of key interest rates by the Fed, inappropriate support for homeowners’ debts) and blocked out the latter. The mainstream is statist⁶⁹. Some scholars did not even change their view during the current European crisis which, beyond any doubt, is primarily a state debt crisis.

The assessment of economic and political developments is not the core task of constitutional and administrative comparative lawyers. Respecting this caveat, it is submitted that the concept of regulation as exposed here can offer a differentiated alternative to any “more market/more state-controversy”. It is a modern administrative law doctrine that can mirror constitutional law efforts to bring the demands of an efficient market economy into balance with democratic rule without playing them off against each other. If this constitutes the (albeit) late realization of the main thoughts behind the traditional German formula of the *Soziale Marktwirtschaft* at a comparative level, scholars should be less concerned about the deterioration of central public law values.

⁶⁸ Peter Michael Huber, *Die Renaissance des Staates*, in: CHRISTIAN CALLIESS AND KARL-HEINZ PAQUÉ, *DEUTSCHLAND IN DER EUROPÄISCHEN UNION IM KOMMENDEN JAHRZEHNT*, 25 (2010).

⁶⁹ Illustrative: ROLF STÜRNER, *MARKT UND WETTBEWERB ÜBER ALLES?: GESELLSCHAFT UND RECHT IM FOKUS NEOLIBERALER MARKTIDEOLOGIE* (2007).

