JÜRGEN BASEDOW

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Über Deregulierung und Wettbewerb

Mohr Siebeck

Prof. Dr., Dr. h.c. *Jürgen Basedow*: Geboren 1949; Studium in Hamburg, Pavìa, Genf und an der Harvard Law School; 1979 Promotion; 1986 Habilitation; Assistententätigkeit am Institut de droit comparé, Paris und am Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg; 1986–95 o. Prof. an der Universität Augsburg, 1995–97 an der FU Berlin; seit 1997 Direktor am Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg; Mitglied mehrerer Sachverständigenkommission und Beiräte der Bundesregierung, darunter der Deregulierungskommission (1988–1991) und der Infopostkommission (1992); seit 2000 Mitglied der Monopolkommission.

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Vorwort

Die deutsche Wirtschaftspolitik ist seit mehreren Jahren und nicht erst seit dem Regierungswechsel von 1998 durch eine zunehmende Verwässerung wettbewerblicher Prinzipien gekennzeichnet. Dominante Geschehnisse sind die publikumswirksame Rettung insolventer Unternehmen, die eigentlich aus dem Markt ausscheiden müssten, damit das Angebot der schrumpfende Nachfrage in Sektoren wie der Bauwirtschaft oder dem Waggonbau angepasst werden kann. Prägend sind auch zahlreiche Eingriffe in den Arbeitsmarkt und das Regime mehrerer Berufe, die allesamt darauf ausgerichtet sind, Bestandsschutzinteressen zu wahren. Auch fiskalische Belange des Staates setzen sich, wie die Verlängerung des Briefpostmonopols zeigt, gegenüber den grundsätzlichen Bekenntnissen zum Wettbewerbsmodell spielend leicht durch. Gegenüber Brüsseler Deregulierungstendenzen pocht man – entgegen der Rechtsprechung des Europäischen Gerichtshofs – auf die Gegenseitigkeit der Marktöffnung; da das Bekenntnis zum Wettbewerb auch in anderen europäischen Staaten eher halbherzig ist, entsteht so manche Wettbewerbsverhinderungskoalition unter den Mitgliedstaaten. Last not least dient das Streben nach Weltgeltung deutscher Unternehmen oft genug als Rechtfertigung für staatliche Eingriffe, die den Wettbewerb tendenziell eher behindern. Weit verbreitet ist offenbar der Glaube, dass die nationale Protektion und nicht die Konkurrenz im eigenen Haus den *global player* fit für den Weltmarkt macht.

Wer demgegenüber von der überlegenen Problemlösungskapazität des Wettbewerbs und der dezentralen Entscheidungsfindung überzeugt ist, tut gut daran, an das vergangene Jahrzehnt der Deregulierung zu erinnern, an die Beweggründe, Einwände und politischen Durchsetzungsprobleme. Diese Debatten haben in einigen Bereichen der Wirtschaft zu tiefgreifenden Veränderungen und zu einer nachhaltigen Durchsetzung des Wettbewerbs geführt, während sie in anderen weitgehend wirkungslos blieben und in wieder anderen eine Anpassung der Regulierung nach sich zogen. Charakteristisch für jene Jahre der Deregulierung war eine umfangreiche wissenschaftliche Vorbereitung der wirtschaftspolitischen Entscheidungen, an der ich mich als Mitglied der Deregulierungskommission der Bundesregierung und der Infopost-Kommission des damaligen Bundesministeriums für Post und Telekommunikation sowie mit zahlreichen Aufsätzen, Vorträgen, Buchbesprechungen, Zeitungsartikeln und Urteilsrezensionen beteiligt habe. Viele von ihnen sind an disparaten Stellen publiziert, einige auch unveröf-

fentlicht; ihre Zusammenfassung mag einerseits als Rückblick dienen, andererseits aber auch als Appell für eine stärkere Hinwendung zur Ordnungspolitik, dies gerade in den Bereichen, die nach wie vor von wirtschaftlichen Regulierungen geprägt sind. Auch soweit die Beiträge nur in Fremdsprachen erschienen sind, ist die Originalversion beibehalten.

Für die Vorbereitung des Druckes, das Lesen der Korrekturen sowie die Anfertigung der Register danke ich Herrn Olaf Lenschow und Frau Jutta de la Fuente.

Hamburg, im März 2002 Jürgen Basedow

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I. Allgemeines

Economic Regulation in Market Economies

Conference on »Regulation in Germany, the European Union and Japan«, Ringberg Castle, 24–27 October 2001

When market regulation came under attack in the 1980s, it was still tight and comprehensive in many areas, in particular in the services sector. Market access and exit, prices and market behaviour were heavily regulated in sectors such as telecommunications, rail and road transport, postal services, the supply of electricity and gas, labour and many professions. The rising criticism of the resulting inflexibility of large parts of the economy brought about a very thorough theoretical discussion about the concept (infra 1) the political reasons for regulation (infra 2), its justification in a market economy (infra 3), and its compatibility with binding rules of the various constitutions, of international and European law (infra 4). These discussions keep their basic theoretical significance and they may also remain important in practice insofar as the former regulations have not been modified. But speaking in general terms one has to take into account that a broad deregulation movement has taken place all over Europe, starting in the United Kingdom in the 1980s, and continuing in countries such as Sweden, the Netherlands and Germany in the 1990s. In many instances, deregulation was only partial creating a delicate mix of regulatory interventions and competition (infra 5). The resulting situation is very often unclear and confusing: while governments affirm their resolve to deregulate and enforce competition policy they use the remaining regulatory powers for purposes of fiscal or industrial policy.

1. The concept of regulation

Like every concept the definition of »regulation« is linked to its purpose and context. There are different conceptions of regulation in constitutional law, in administrative law, in economic law etc. Thus, in many legal systems of English speaking countries the term regulation is used in a formal or technical way to indicate measures of a general purview adopted by government as opposed to parliament, although the executive usually acts under special powers conveyed by an act of parliament. In an equally technical sense European Community law reserves the

notion of regulation to secondary enactments which have direct effect within all Member States. It is clear that the concept of regulation is used in a much wider and non-technical sense in this paper which deals with their role in market economies; it includes all types of provisions irrespective of their formal origin. The way they are enforced is equally immaterial. The enforcement may be entrusted to administrative agencies such as the Regulatory Authority for Post and Telecommunication in Germany or to self-regulatory bodies which survey the activities of the members of a profession, but it may also be left to the judiciary; thus the regulation of the labour market is to a large extent enforced by courts of law.

Another terminological clarification relates to the contrast between what may be called general or constitutive regulations on the one side and specific or restrictive regulations on the other. The cohabitation of human beings requires rules protecting the lives, the freedom and the property of others, and concerning the relation between the sexes, the transfer of economic resources from one generation to the next and the binding force of promise. Without general rules of criminal law, on contracts and torts, on property and family relations, autonomous individuals cannot live and work together and prosper. The less a society relies on kinship relations and the more it is constituted by the exchange between anonymous individuals, the greater is its need for common constitutive regulations of the said kind.

While constitutive regulations affect everyone, the specific or restrictive regulations usually apply only to certain groups. An important part of them aims – for specific areas – at securing satisfactory results from work based on a division of labour and coordinated via markets. They essentially restrict the freedom of contract, although sometimes at a very early stage, e.g. by prohibiting certain economic activities altogether. It is this type of regulation, i.e. the restrictive regulation that is discussed in this context. Thus, economic regulation is here understood as meaning any restriction decreed or enforced by the state on people's possibilities of action.[1] It affects their powers to dispose over themselves, over their property and rights, through legal transactions and contracts in particular.

The preceding definition presupposes individual freedom as the basic rule which characterises the economic order. Starting from that premise economic interchange is brought about by decentralised decisions on production and consumption, on offer and demand which meet on the market place. In this perspective the restrictions effected by economic regulations are an alien element, an exception which somehow requires explanation and justification. It should however be recalled that a different overall conception of the economy would entail a different view on economic regulation, too. Where the responsibility for economic prosperity is vested in a central planning authority economic regulations would not be regarded as an exception, but rather as the general rule, i.e. as a necessary and natural instrument which serves to enforce the central plan. The collapse of the so-

[1] *Deregulierungskommission*, Marktöffnung und Wettbewerb, Stuttgart: Poeschel 1991, no. 2.

cialist systems after 1990 has given evidence of the superior efficiency gains which are to be expected from a decentralised economic order. The following analysis will therefore focus on the role of economic regulations in market economies.

2. *Political explanations*

The existence of economic regulation and its steady growth has been ascribed to a great variety of reasons. Some of them explain why economic regulations are adopted and some of them explain why they should be. The explanations of the former type focus on the motivation of people acting in the political and regulatory process; they are sometimes summarised under the heading of the »positive theory of regulation«. Explanations of the latter type do not claim to describe social reality but try to give reasons which justify state interventions by means of economic regulation in a market economy; they form part of the so-called »normative theory of regulation« and will be discussed below in section 3.[2]

Economic regulations are adopted by the legislature, by government or by special agencies as the result of procedures which usually involve a great number of people: politicians, regulators and representatives of group interests. Their regulatory activities are usually unleashed by market results which are deemed to be unsatisfactory. But it should be clear that this assessment does not flow from unequivocal or objective criteria of market failure. To a large extent, it is a political opinion formed in the course of the said procedures and subject to the influence of the afore-mentioned actors. It is therefore important to become aware of the incentives of all participants which have an impact on that process.[3]

Politicians are not merely agents of the common welfare. They are also pursuing particular interests and in doing so, drawing on the assistance of the machinery of state power. These particular interests are also interests in regulation which inevitably favour specific interest groups. In this way politicians win friends among those who gain by regulation: owners of companies, managers, the employees, their suppliers. If politicians succeed to pass the whole off as serving the general welfare they do not run the risk of loosing much on other fronts. The friends they win are voters, they give donations and information and they have influence. The losers – often the consumers – are very numerous and hardly affected directly and individually; they are therefore not very articulate and so they keep quiet.

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[2] For this dichotomy of the theory of regulation see *Jürgen Müller / Ingo Vogelsang*, Staatliche Regulierung, Baden-Baden: Nomos 1979, pp. 101 seq.; *Michael Fritsch / Thomas Wein / Hans-Jürgen Ewers*, Marktversagen und Wirtschaftspolitik, 2nd ed., München: Vahlen 1996, pp. 296 seq.; *Rolf Weber*, Wirtschaftsregulierung in wettbewerbspolitischen Ausnahmebereichen, Baden-Baden: Nomos 1986, pp. 90 seq.

[3] The following assessment draws upon *Deregulierungskommission*, supra n. 1, no. 21.

The *regulatory bureaucracy* also has its own interests relating to its budget, its competence, its power and prestige. These are better served if the number of regulations to be introduced, supervised and enforced is bigger. So bureaucrats ultimately become advocates of regulation. Their interests meet those of the regulated. They work with them to differentiate regulation further and further. While the regulated market actors are increasingly protected from competition, the regulators gain in influence and budget. An initiative to remove obsolete regulations can hardly be expected from the regulatory authority.

Group interests can be organised in various ways. Interests that have particular weight for each member of a group and that are concentrated in small groups can be more easily organised and thus more strongly represented than very disparate interests. It is easier for the individual member of the group to see that the group depends on him and that his input is worthwile. That explains why producer interests can be so much more effectively transmuted into regulations that are favourable to them than consumer interests or other widely disparate interests. In addition, the particular incentives of group representatives must be taken into account. They are the intermediaries between the individuals and the political and regulatory system. The more complicated the latter the more important is the role of the intermediaries. While the individual members of the group may be interested in deregulation, their representatives will rather act in the opposite direction.

The following conclusions can be drawn from these observations:

- The various actors pursue interests which are not necessarily identical with the common welfare and which in some instances are in outright contradiction to the public good.
- Given the wide margin of discretion which regulators have under most regulations and given the even wider discretion of politicians the assessment of unsatisfactory market results which is the starting point of all regulations tends to be distorted by private interests.
- This risk is increasing as the interests of the different actors coincide and form tacit alliances which apparently they do in many instances.

It follows that a basic assumption of public law has to be questioned: the mere fact that members of parliament and officials of state authorities get their income from the tax payer does not by itself guarantee that they promote the public good when it is in conflict with their private interests. Additional safeguards are required to attain that objective.

3. Justifications of economic regulation

In the first place, a theoretical reflection on the need for economic regulations in a market economy is necessary. If society shares the general belief in the su-

perior ability of competition to efficiently allocate resources, to enhance innovation and the problem-solving capacities, to extend the choices available in all situations etc. there must be valid reasons for each and every restriction of competition brought about by regulation.[4] It is not sufficient to invoke the public good as the supreme guideline of all public action. There must be strong evidence that the effects which are generally expected from competition are foreclosed by structural peculiarities of the specific market, i.e. by market failures. Five main reasons can indicate such failures:

(1) The possibility of positive or negative external effects of production and consumption;
(2) inevitable market power, in particular in the case of a natural monopoly;
(3) destructive competition;
(4) asymmetric information;
(5) opportunist behaviour in the making and execution of contracts.

Some of these points merit some further clarification.[5]

a) External effects

It is by no means uncommon that by producing or consuming goods we may hurt or benefit others. A satisfactory market result is, however, not jeopardized if those affected can themselves ensure the internalisation of such external effects by means of contractual arrangements or by remedies provided by the general legal system, for example by claims for compensation. Thus, the residents in many legal systems are required to contribute to the costs of development of a local road which will benefit them anyway.[6] And a landowner who is harmed by pollution originating from his neighbour's premises may claim damages to compensate his losses and will thereby re-establish an economic balance which also might have been achieved on the basis of a contract.[7] In both cases externalities are internalised, in the former positive and in the latter negative externalities.

However, there are cases where even the best possible rule designed to achieve internalisation fails. This is particularly so with regard to positive externalities in the case of public goods, i.e. goods from the consumption of which nobody can be excluded because their use by one person does not prevent their use by another. Thus, the production of safety or clean air benefits everybody who is living in a given area, irrespective of whether he takes his share in the cost or not. It is

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[4] *Michael Krakowski*, Theoretische Grundlagen der Regulierung, in: *idem* (ed.), Regulierung in der Bundesrepublik Deutschland, Hamburg: Verlag Weltarchiv 1988, p. 19, 25.

[5] The following discussion draws upon *Deregulierungskommission*, supra n. 1, nos. 9–13; see also *Weber*, supra n. 2, pp. 98 seq., *Fritsch / Wein / Ewers*, supra n. 2, pp. 74 seq.

[6] See in German law §§ 127 seq. of the Construction Code (Baugesetzbuch).

[7] See in German law § 906 para. 2, 2nd sentence of the Civil Code (Bürgerliches Gesetzbuch, BGB).

obvious that the design and the enforcement of appropriate property rules which limit the inhalation of clean air or the use of safety to certain persons is either impossible or too expensive. Knowing this, nobody would contribute to the production of clean air and safety; instead everybody would wait for others to invest and hope that he gets a free ride. In the final outcome no clean air and no safety would be produced. External effects of this kind which cannot be internalised form a theoretical and compelling reason for special regulatory intervention by the state.

These considerations also have some bearing on financial markets. For the ability of a market to function can also be a public good, i.e. a problem of external effects. The collapse of a major bank or a large insurance company not only affects those directly concerned but many others as well, indeed everyone, if it causes a crisis of confidence in other banks or insurance companies. Indifference on the part of depositors regarding the standing of their bank may be acceptable, but »competition in laxity« in the banking business would not be. It is not covered by the principle of consumer sovereignty. The same applies to insurers.

b) Natural monopolies

We speak of a natural monopoly if the production to meet the entire market demand for a good can be achieved at most favourable cost in a single plant and with the sale carried out by a single enterprise. This is called a »natural« monopoly for two reasons: first, monopoly production is appropriate because, for technical organisational reasons, it generates lowest costs for the economy as a whole. Second, if one started with several plants operated by several companies, competition would inevitably cause all of them except one to leave the market. Examples of this are the railway network, gas pipelines, harbours and airports, and the so-called local loop in telecommunication, i.e. the connection of the private user with the next switchboard.

Monopolies must be rejected because they are inefficient with regard to optimising supply and minimising costs. While a regular monopoly will usually get under attack very soon in open markets and may therefore be left to the general control of abuses of a dominant market position under competition law[8] this is different in case of a natural monopoly. Here, competitors will not change the basic structure of the market, the potential competition is no valid instrument to curb monopoly power. Since the incentive to abuse that power is unrestricted in every single transaction the regulation of prices and market behaviour is the only viable solution. It must, however, be borne in mind that such regulation suggests

[8] See art. 83 EC Treaty and, in German law, § 19 of the Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), Bundesgesetzblatt (BGBl.) 1998 Teil I, p. 2546.

itself only with regard to those segments of the market which are characterised by a natural monopoly. In the supply of gas for example only the transport network can be regarded as a natural monopoly, while the production and distribution may very well be left to competition.

A related argument to justify regulation is the danger of »cream skimming«. If the conditions for a natural monopoly are met for some sections of a market while others would allow for competition the resulting prices would be much higher in the former than in the latter. Take for example the collection and delivery of mail in rural areas which has the characteristics of a natural monopoly, and in metropolitan districts where competition by new entrants (»cream skimmers«) would be possible and force down prices. Such differentiation being regarded as socially undesirable it is argued that the whole market including the competitive segments should be left to a single supplier. He would charge uniform rates which would not cover the high costs of the rural operations while they would exceed the costs of urban collection and delivery. It follows that the plea for a regulatory monopoly which would allow cross-subsidization cannot be explained in these markets by their *economic* characteristics but rather results from the *political* objective of charging uniform prices irrespective of the relative costs. Given the wide price-margins that exist for all kinds of goods and services between the cities and the countryside the objective of price uniformity for certain services may be called into question. But this is a political and not an economic issue.

c) Destructive competition

Competition always implies the exit of the weaker market actors. In this sense competition is always destructive. It follows that the mere possibility of market exit cannot justify regulation. This is different where suppliers of production factors (labour and capital goods) cannot adjust to changes in market conditions within a relatively short period of time. This may occur in sectors where production factors are difficult to be used elsewhere or in another way. Firm-specific skills of workers and the acquisition of ships for inland navigation are often-cited examples for such non-recoverable investment. Here it can happen that the suppliers, as the demand is weakening, hope to be able to force their rivals off the market by price-undercutting which allows them to stay in the market without loosing their investment.

In practice, the argument of destructive competition is of a very limited use. On the one side cases of irreversible costs are much less frequent than it is generally assumed. Thus, the investment in aircraft requires very high investment at the initial stage of the airline business, without creating irreversible costs; there is a very workable market for used aircraft. On the other side, market actors are usually aware of the long-term commitment which is required in certain sectors

of the economy. A farmer cannot expect his investment to pay off each single year; it is the long-term balance which counts. The length of the relevant term changes from sector to sector, and regulation may only be justified where a response to changing market conditions is lacking even after the sector-specific period of time has elapsed.

d) Asymmetric information

Unequal information is a particularly important rationale for regulation. The main concern here, though not the only one, is consumer protection. In general, consumers are much less informed about the products and services they purchase, and about the risks related to the contracts they conclude, than the producers and sellers. A consumer could of course improve his knowledge by acquiring information, asking experts etc. But this would require expenditures in terms of time and money which would not be rational in many cases.

Why should the purchaser of a car bother about standard clauses of the contract on jurisdiction, the prohibition of set-off or sanctions for late payment if such clauses become relevant only once in ten thousand cases? It is very rational that he concentrates on some relevant purchase criteria such as speed, comfort, fuel consumption, colour or the power of the engine which he appreciates at every occasion. If it is rational for him to disregard the standard conditions of contract in this process, no efficient allocation of contractual risks can be expected from them, and it would be up to state regulation to prevent inefficiencies in this sector.

Similar reasons could be given for sectoral regulations relating to financial services. Consumers cannot effectively monitor the investment practices of banks and insurance companies nor is competition able to provide the necessary information as crashes of the financial systems in the past have shown. Similar considerations apply to the capital markets. The bias of information created by insider trading apparently cannot be coped with by the competitive process; if it is not excluded by appropriate regulation the whole market will be threatened, see above.

As a justification for regulation, asymmetric information is difficult to handle. In practice, it exists almost everywhere but it can be overcome by the market process in many sectors. Thus, asymmetric information can support regulation only with regard to those single aspects of markets or individual contracts where remedies cannot be expected from the competitive process.

e) Opportunistic behaviour

Many contracts in general and all long-term or relational contracts in particular are incomplete. They establish a certain balance of rights and duties as perceived at the time of conclusion, but they do not provide a solution for every problem

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Stichworte