

Economic Law of the European Union revisited. A review of *BERNHARD NAGEL – Economic Law of the European Union*

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Bernhard Nagel, Wirtschaftsrecht der Europäischen Union. Eine Einführung, 3. Auflage, Baden-Baden; NOMOS Verlagsgesellschaft 2001. 35,20 Euro.

[Bernhard Nagel: Economic Law of the European Union]

[1] Economic Law of the European Union is a very important chapter in the process of integration. The European Union itself is the result of economic cooperation once started with the European Coal and Steel Community back in 1951. Although the political cooperation starts to get in shape nowadays, and the creation of the EURO may be one important step not only for economic but maybe for political reasons, economy remains the driving force and the core of the Union. Accordingly jurists have to be guided through the structure of economic law of the European Union. One main goal of the Community in general is stated in Article 2 EC (Treaty establishing the European Community): The establishment of the common market and an economic and monetary union. The Economic Law of the European Union has the duty to create and preserve the surrounding framework of both, common market and economic and monetary union. The EC-Treaty contains provisions designed to eliminate various forms of obstacle to imports and exports, to facilitate the free move of workers from one Member State to another, the abolition of restrictions on the freedom of establishment and the quite similar rule to abolish restrictions on providing services within the European Union. Moreover the EC-Treaty contains provisions to facilitate a system of undistorted competition and last but not least provisions concerning the approximation of laws.

[2] The introduction by Nagel (1) gives some important advice in that field. In addition it is, so far, the only book written after the signing of the Treaty of Nice focusing the economic law sector of the European Union even if the Treaty is not yet ratified by all Member States. Besides, the changings coming with the Treaty of Nice are one of the main reasons for the 3rd edition of this book – although the Treaty of Nice does not contain many changes to the Economic Law sector. The second should be the continued presentation of the "genetic view" of the Economic Law in the European Union which means the evolution of law-making and law-interpretation. The ongoing dynamic development is shown with examples. Some parts of the book appear even more like a structured casebook. But this should not be a fault when presenting the Economic Law of the European Union, which is in many areas mainly based on the decisions of the European Court of Justice. Some points of the topics Nagel deals within the book could be underlined and presented in this review, but its up to the expected reader to get the "full story" of the book.

[3] The border between public and civil law is nearly erased in the field of European Law. The European Union is a public law - based construction which should set the (institutional) surroundings to facilitate the cooperation between states. The European Union has enumerated competences and shall act within the limits of the powers conferred upon it by the Treaty as stated in Article 5 EC. On the first view the European Union has no particular competence to change private law of the Member States. An exception is Article 65 EC where judicial cooperation in civil matters is laid down by law.(2) But apart from that, the Treaties contain provisions enabling the European Union to set rules which gain access even into private law of the member states. That is, in general, the method of approximation of laws, a topic Nagel deals with in the last big chapter of the book. In the past few years, initial changes of the Member States' private law took place through european directives, mainly based on competences in the field of consumer protection. The last enormous change for the german private law was the complete revision of the contract law which goes back to three european directives focusing certain aspects of the sale of consumer goods and associated guarantees, electronic commerce and the problem of late payment in commercial transactions.(3) But also the changings for the company law of the member states could be mentioned: The "*CENTROS*" (4) ruling is a part of the described development.(5)

[4] According to the wide scope of action of the European Union, Nagel considers questions of labour law and rules of competition just as questions of environmental law. His primary accent certainly lies on the linking between european and private law. Nagel's examination is divided in ten chapters which range from the beginning of the European Coal and Steel Community to the expected future development. In between he discusses the free movement of goods, persons, services and capital, the competition law, environmental law, the monetary union, labour and social law, education and research policy, foreign trade law, and the approximation of laws, regulations or administrative provisions. Included is also a short but interesting bibliography in the front and a short bibliography at the end of each chapter, too. The book itself is a compromise between a complete overview and the necessity to write an introduction in a compact style. Nagel succeeded in doing it.

[5] Meanwhile for example Nicolaysen in his "Economic Law in the Common Market" directly starts up with the economic foundations and aims of the European Union, Nagel differs in his approach: beginning with a short introduction into European (Institutional) Law in general, the book manages to present the basics, which one needs to get an overview, on the first 65 pages. The description includes the institutional structure of the European Union as well as the discussion of the relation between the European Union and their Member States including the doctrine of primacy and direct effect and questions of liability. One could ask if it is necessary to deal with general questions in a specialized book. But with this Nagel presents a book which is also readable and comprehensible by people who did not get in contact with the fundamental public law side of the European Law so far.

[6] Leaving the short introduction of the basics of European Law and the institutional system behind, Nagel considers the free movement of goods, persons, services and capital. In fields like these, which are dominated by the decisions of the European Court of Justice, Nagel examines every important part of the Courts judgments step by step but also the legislative history of each area. Nagel's method has the advantage to offer an competent overall view of the Courts' decisions and also the secondary legislation of Commission and Council. But at the same time it is not always easy to grasp the dogmatic structure of every norm, what could be very important for students who have their exams in European Union Law.

[7] The so called "Freedoms of the market" (*Marktfreiheiten*) have all in common, that they are only relevant in cases with cross-border implications. In terms of free movement of goods, the reader learns, that, looking at the rulings from *Dassonville* (7) to *Keck* (8), the Court has had considerable difficulty in pursuing a clear and consistent policy towards the interpretation and application of provisions like Articles 28-30 EC which were concerned with the elimination of quantitative restrictions on imports and exports between Member States and all measures having equivalent effect. And Nagel underlines that with the new *Preussen-Elektra* (9) ruling from 2001, the free movement of goods - usually taken as the nearly unimpeachable essence of the common market - has lost its priority in relation to environmental protection. The provisions concerning the free movement of persons, Articles 39 to 43 EC, must be seen in connection to the provisions for "Visas, asylum, immigration and other politics related to free movement of persons", Articles 61 to 69 EC – the former "Schengen"-Treaty. Both addresses persons wanting to cross the border of a Member State. Nagel doesn't go further in explaining the difference in this chapter but revisits the issue later in the chapter regarding the approximation of law. Differentiation is necessary in view of the motivation and the origin. The worker wants to move freely from one Member State to another. The person from a so called "third country" wants to get into the European Union from abroad. For Nagel the freedom of movement for workers has yet become a basic law of the European Union after a great list of rulings from the European Court of Justice. And, as stated in Article 62 EC, the (final) aim is the absence of any controls on persons between two Member States, may they be citizens of the Union or nationals of third countries.

[8] The most extensive chapter is dedicated to Competition law of the European Union. According to the practical but also theoretical importance and the wide field of legislation and judgments, the competition law is presented in greater detail. Seeing a system of undistorted competition as an essential element of the common market, competition law has the duty to prevent private undertakings from erecting barriers to inter-State trade. The well known Regulation No.17 gave the Commission extensive powers to investigate, determine the existence of, and penalize infringements of Article 81 and 82 EC. But at the same time this system imposes an enormous administrative burden on the Commission. In addition the responsibility for policing the application of the provisions concerning the Treaty rules on state aid, Articles 87 to 89 EC, belongs to the Commission. The basic test for the Commission is "whether the recipient undertaking receives an economic advantage which it would not have received under normal market conditions".(10) But the latest development is characterized by the attempt to decentralize the application of the Treaty competition rules. Nagel discusses some possible perspectives of the future development on the anti-trust sector like the establishment of a separate European Anti-trust Commission or the attempt to delegate the anti-trust cases which are only of national importance to the national Anti-trust Commissions. For this book is written for the German market, it includes in addition an introductory part about the German anti-trust law where Nagel presents some important decisions of the Federal Court of Justice (*Bundesgerichtshof* – BGH). With this Nagel refers to the fact that the area of anti-trust law is characterized by the enormous linking between the German law and the European law. But Nagel also has an eye on the competition and anti-trust law of other member states regarding again the linking to the European law.

[9] After dealing with the basics of the European environmental law in the fourth chapter, the fifth chapter examines the European Monetary Union which recently led to the introduction of the EURO. The main question behind the monetary union is, if a monetary unity would require political union and, for consequence, is there already a political union or is the monetary union an important part of the (expected) political union? This question could not easily be answered – especially in a book about the Economic Law of the European Union. But the answer to the legal framework of the European Monetary Union could be given. Nagel presents the European System of Central Banks and the European Central Bank including their objectives as well as a very interesting discussion of the pro and cons of the single currency, the effects on the financial market and the connection between the Monetary Union and the

Economic Union. The connection of Monetary Union and Economic Union is again a fundamental issue of the relation Member State and EU. The responsibility regarding monetary policy and exchange-rate policy is transferred from the national level to the EU-level. But the power regarding domestic economic policy stays at the national level. A typical problem of the EU as a system of multi-level governance.(11) And also the status of the convergence criteria will remain a problem as one could see in the latest dispute between Germany and the Commission. According to Nagel one of the greatest deficits in the European Union is the absence of a standardized tax system.

[10] The sixth chapter deals with the labour and social law. The main focus of this chapter lies indeed on the labour law side, the social policy side of Title XI EC is neglected. Beginning with an introduction to the historical context, Nagel considers questions of the equality between men and women and general questions of discrimination shown with well known rulings of the European Court of Justice from "*Defrenne II*"(12) to "*Kalanke*" (13) , "*Draehmpaehl*"(14) and "*Kreil*"(15) . The pursuit of gender equality is one area which could clearly be identified as one prime mover of the EU. With the Amsterdam Treaty this idea has been pushed forward by implementing Article 13 EC in the Treaty which provides a general non-discrimination clause. Another reason for the justification of EU social and labour policy becomes apparent reading Nagels remarks on the social and labour law of the EU: the need to take protective measures to ensure that a "race-to-the-bottom" between the Member States does not occur – an issue Nagel raises also in the chapter regarding the Monetary Union. In addition one extensive part of the labour law chapter is dedicated to the European Factory Committee and the regulation thereon.

[11] The last two parts of the book are dedicated to the Foreign Trade Law and the question of the approximation of laws, regulations or administrative provisions. The Foreign Trade Law and with it the relation to the WTO gets more and more important nowadays. The Community legal system depends on an interaction between different legal orders, the Community legal order, the different national legal orders and of course international law and obligations. There are multiple external competences of the EU stated in the Treaties, especially in Article 133-135 (Common Commercial Policy), 182-188 (Overseas Association), 302, 303 and 310 (External Relations to International Organisations) EC. One main question raised by this is the location of authority in external affairs and the need of the EU to represent itself to the rest of the world as a unified system. Regarding competences in foreign affairs, the ECJ ruled that, even in absence of express Treaty authority, the Community might have implied powers to conclude agreements with third states and international organisations.(16)

[12] After presenting the principles of Foreign Trade rules and competences of the EU and the relation between European Law and International Law, Nagel dedicates a chapter to the relation EU-WTO/GATT. Problematic remains the mixed membership of the EC and its Member States which leads to joint competences in different matters. The relevance of the relation EU-WTO to the current situation becomes clear in the latest safeguard-measure cases, with the USA and the EU as opponents. With regards to the idea of an introduction to Economic Law, this book could not contain an in-depth discussion of all problems. But (again) Nagel provides an instructive overview on the theme. And, as mentioned above, there is a short bibliography at the end of the chapter dedicated to the more interested reader. The last chapter which is focusing the field of harmonization could be valued as a kind of summary of the most important parts of secondary legislation and also a round up of some problems discussed in earlier chapters of the book.

[13] Besides presenting the present level of Economic Law, Nagel has also an eye on the further development of the European Union and the economic surroundings. In his conclusion and outlook at the end of the book, Nagel offers two scenarios for the future development of the European Union: an optimistic and a pessimistic one. The optimistic scenario follows the idea of a "centre of gravity" by seeing the financially strong member States as role-models for the weaker ones and moreover the strengthening of the democratic structure respectively the status and competences of the European Parliament. The pessimistic scenario draws a picture of a subvention – based economy in the weaker (Nagel writes: "southern") Member States resulting in a wrong financial policy and a stagnation of the integrational process in general. But Nagel concludes, that the future may bring a mix of these two scenarios. Nagel himself pleads for an ongoing process of integration without the chains of national covetousness.

[14] To conclude, the book is a primarily case-based examination of the Economic law of the European Union. It is very instructive and written in a comprehensive manner which fulfills the expectations of an introduction in a compact style.

(1) *Bernhard Nagel*, *Wirtschaftsrecht der Europäischen Union. Eine Einführung*, 3. Auflage, Baden-Baden 2001, NOMOS Verlag.

(2) For the latest development see the new Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 12 , 16/01/2001

pages 1 – 23.

(3) Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, Official Journal L 171 (1999) pages 12 - 16; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 ("Directive on electronic commerce"), Official Journal L 178 (2000) pages 1 - 16; Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000, Official Journal L 200 (2000) pages 35 - 38.

(4) ECJ Case C-212/97, (*Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*), ECR 1999 I-1459.

(5) See *Barbara Trefil*, European Company Law: Comments and Meta-Comments on Centros, German L.J. 2001 No18 (1 December 2001), available at: (http://www.germanlawjournal.com/past_issues.php?id=117).

(6) *Gert Nicolaysen*, Europarecht II, Das Wirtschaftsrecht im Binnenmarkt, Baden-Baden 1996.

(7) ECJ Case 8/74 (*Procureur du Roi v. Benoit and Dassonville*), ECR 1974, 837.

(8) ECJ Joined Cases C-267 & 268/91 (*Keck and Mithouard*), ECR 1995 I-6097.

(9) ECJ Case C-379/98 (*PreussenElektra AG and Schleswag AG*), available at: <http://europa.eu.int/cj/en/cp/aff/cp0110en.htm>; see the commentary in German L. J. No. 7 (15 April 2001), available at: http://www.germanlawjournal.com/past_issues.php?id=66.

(10) Case C-39/94 (*SFEI and Others*), ECR 1996, I-3547, para 60.

(11) See *Paul Craig*, The Nature of the Community, in: THE EVOLUTION OF EU LAW 1-54 (*Paul Craig/Gráinne de Burca (Eds.)* 1999), 16 ff. See. for an assessment of "Multilevel Constitutionalism" as „legal pendant": *Ingolf Pernice*, RETHINKING THE METHODS OF DIVIDING AND CONTROLLING THE COMPETENCIES OF THE UNION, WHI-Paper 6/01, Oct. 2001 pp. 13 et seq., available at: <http://www.whi-berlin.de/> (go to WHI papers 2001, last visited 1 April 2002).

(12) ECJ Case 43/75 (*Defrenne v. Société Anonyme Belge de Navigation Aérienne*), ECR 1976, 445.

(13) ECJ Case C-450/93 (*Kalanke v. Freie Hansestadt Bremen*), ECR 1995 I-3051.

(14) ECJ Case C-180/95 (*Nils Dreahmenpaehl v. Urania Immobilienservice*), ECR 1997 I-2195.

(15) ECJ Case C-285/98 (*Tanja Kreil v. Bundesrepublik Deutschland*), ECR 2000 I-69.

ECJ Case 22/70 (Commission vs. Council), ECR 1971, 263; this decision is well known as the „ERTA"-ruling, or „AETR" in Germany.