
Every year a “Europarechtstag” is held in Austria. During this conference, current developments in the field of European law are discussed by Austrian scholars and practitioners. In 2005 the “Europarechtstag” was organized by the “Johannes Kepler Universität Linz” and issues related to EU internal market law were explored. The present book was published as a result of this conference.

The volume consists of 5 parts. The first part deals with current developments at the heart of the internal market. The second part discusses recent case law related to the internal market. The third part is about corporate and capital law. The fourth part of the volume is about public procurement law but includes only one article on this subject. The fifth and last part explores issues of competition law and State aid. From this list of subjects it is apparent that according to the editors the concept of internal market should be interpreted broadly and encompasses – basically – all fields of European economic law. The main aim of the contributors is to highlight, describe and analyse current developments. In their articles, a wide variety of law areas are examined in great detail.

The book starts with contributions on the Services Directive (which was still a draft at the time of the “Europarechtstag” of 2005), “Advertisement Law” (“Werberecht”) in the EU and the consequences of the enlargement of the EU for the internal market. Apparently, in the view of the editors of the book, these three themes should be regarded as core issues of the internal market. This is remarkable in my opinion, as law areas such as public procurement law, competition law and corporate law also considerably contribute to the establishment and the proper functioning of the internal market of the EU. In any event, the first three articles concern important subjects of the internal market and are of good quality. Important concepts are well explained and critical remarks are put forward. For example, in his article on the draft Services Directive, Bauer raises the interesting issue of the relationship between this directive and Services of General (Economic) Interest (p. 7-11). In this respect, it should be noted that the Directive does not cover Services of General Interest (SGI) but does apply to Services of General Economic Interest (SGEI). Bauer contends that the wording of the relevant Directive provisions gives no indication on how a distinction between the first and second category of these services should be made. Furthermore, in his view the Commission’s White paper of 2004 on SGIs fails to shed much light on this issue too. In my view, under the Services Directive, SGIs are not of an economic nature, whereas SGEI do constitute economic activities. This implies that a distinction between these two types of special services should be based on...
the settled case law of the ECJ on the concept of undertaking (e.g. the well-known Höfner case, where the ECJ held that every entity engaged in economic activities is an undertaking). It goes without saying that Bauer also pays attention to the controversial country of origin principle that was laid down in the draft Services Directive. It is a well-known fact that eventually this principle was removed from the final version of the Services Directive (after Bauer had completed his contribution to the present book).

In his article Röttinger contributes to the development of a coherent “EU advertisement law” by analysing bits and pieces of primary and secondary internal market law that somehow relate to advertising. He concludes by pointing out that this area of law is situated in a legal triangle of internal market law, consumer protection and public health (p. 41). Furthermore, he argues that in this field the process of decision making is subject to political opportunism. Therefore, one could only get a good understanding of the EU rules governing advertising, if the actors operating at EU level, such as the Commission, increase transparency with regard to the process of adoption of the relevant EU directives and regulations. In the words of Röttinger (p. 42): “Er würde die Kommission transparenter und menschlicher machen und zeigen, dass auch dort mit Wasser gekocht wird.”

In Isak’s contribution the impact of the enlargement of EU on the internal market is addressed. It is inevitable that he discusses several safeguard clauses that the “old Member States” may invoke in order to cope with the (alleged) negative effects of the accession of the “new Member States”. The technical matters are clearly described and explained. In this respect one of the most significant issues is migration law. Isak argues that the special rules dealing with free movement of nationals of the “new Member States” are very extensive and “innovative” (p. 52). These complex sets of rules “inspire” him to make one of his few critical remarks: he calls into question the fear of the “old Member States” for the overcrowding of their domestic markets with nationals of the “new Member States” (p. 56). At the end of his article Isak presents brief but good conclusions concerning the consequences of the enlargement for the internal market. He argues that in general, the economic balance is positive and the control mechanisms imposed on the new Member States in order to comply with the acquis communautaire are adequate.

The most important article of the second part of the volume (current case law of the ECJ) is the contribution of Karollus. A great deal of her paper is devoted to the landmark decision of the ECJ in Pfeiffer. She argues inter alia that this ruling makes the requirements of consistent interpretation stricter. According to Pfeiffer, a national court must do whatever is within its power to prevent a result contrary to the directive at stake and to ensure its full effect. In the view of Karollus this approach is more stringent than the position taken by the ECJ in earlier case law, according to which a national court must interpret national legislation as far as possible in the light of the relevant Directive (p. 84). This implies that the choice of methods of interpretation is determined by the Community principle of effectiveness. As far as consistent interpretation is concerned, a national court must use all possible methods to the maximum in order to achieve the objectives envisaged by the directive involved. So, Pfeiffer is another step in the Europeanization of the duty to interpret national law in the light of directives (p. 91).

Karollus argues that on the one hand, this development undermines the trust of citizens in the normative value of provisions of national law, but on the other hand it contributes to the effective functioning of the internal market.

Unlike Karollus, Frischhut and Kumin do not discuss matters of institutional EU law in the second part of the book, as one might have expected. Frischhut explores a rather specific subject matter: the influence of recent case law on the access of foreign students and teachers to Austrian universities. In Kumin’s article the recent judgments of the ECJ (and an opinion delivered by an Advocate General) dealing with the application of the Treaty provisions concerning the free movement of goods on health care and environmental protection are recounted and described.
The third part of the book is about European corporate and capital law. Ratka addresses the primary and secondary EU law on establishment and corporations. He discusses cases like Inspire Art and draws the conclusion that the case law of the ECJ is leading to the full liberalization of the transfer of seat of corporations (p. 136). The Member States must accept not only that the “principle of country origin” applies to the legal form of corporations but also that they can impose obligations on corporations of other Member states only in highly exceptional circumstances. Furthermore, Ratka discusses several aspects of the Societas Europaea (SE). Quite remarkably, he finds that the seat of the SE cannot easily be transferred to other Member States. It is, therefore, not a surprise that Ratka makes the following statement on p. 155: “In der EU wurde vom EuGH lautstark der ‘Wettbewerb der Gesellschaftsrechtssysteme’ ausgerufen – aber die SE das sog ‘Flaggschiff’ des Europäischen Gesellschaftsrecht, darf genau daran nicht teilnehmen…” (The ECJ calls for competition between company law systems, but the SE which is the flagship of European company law, should not take part in that).

In his contribution, Lewisch presents a multidisciplinary approach to corporate law by examining whether judgments like Centros give rise to a race to the bottom – the so-called Delaware effect – in corporate law. In his interesting analysis it is inter alia pointed out that the success of the US state of Delaware cannot merely be explained against the background of the corporate law legislation of that state. Delaware is also successful because it has courts that deliver well-reasoned judgments in the field of corporate law and law firms that are highly specialized in this law area (p. 183). Lewisch moves on to argue that competition between several legal systems will not lead to market failures, provided that the management of corporations are not able to take decisions in their own interest (p. 184). As long as effective supervisory mechanisms are in place, such decisions are not likely to be taken and, as a consequence, competition between legal forms will lead to efficiency, and – at the end of the day – to spontaneous harmonization (p. 185). Lewisch stresses rightly the significance of supervisory mechanisms, but cases like the USA mortgage crisis and the bankruptcy of Enron, show that the application of such mechanisms may be very problematic in practice.

Rauter’s contribution is about the experience of one year with the SE. Notwithstanding the fact that only a few cases are available he discusses several complicated and interesting questions. In his article, Lukas addresses the Takeover Directive. His contribution focuses on the protection of the minority shareholders. It contains detailed and specific comments on the relevant provisions of the directive and is, therefore, of importance for practitioners. However, it is a little bit disappointing that no connections are made to other issues closely related to the Takeover Directive. For example, he mentions Article 11(7) of this Directive, which aims at protecting the golden shares that Member States hold in companies carrying out strategic activities, but does not evaluate this provision in the light of the well-known case law of the ECJ on golden shares and the free movement of capital (just mentioning this case law in a footnote).

As already mentioned, part 4 of the book dealing with public procurement law consists of only one article. Here, Schwartz recounts significant cases like Stadt Halle, Coname and Parking Brixen. His article contains an adequate overview of the important cases but fails to provide a thorough analysis of the evolving principles of EU public procurement law. This is a missed opportunity because a case like Coname, where the ECJ extended the scope of EU public procurement law by deriving the principle of transparency from the Treaty provisions on free movement, is much debated in legal doctrine.

The last part of the book is devoted to competition law and State aid. Eilmansberger explores the new system of EU competition law introduced by Regulation 2003/1. He concludes that this Regulation has failed to improve legal certainty, when it comes to the interpretation of Article 81(3) EC. However, he mitigates this conclusion by pointing out that many agreements, especially those containing vertical restraints are exempted from the cartel prohibition. In his contribution, Mair discusses the consequences of the new system of EU competition law for the Austrian competition rules. He finds inter alia a process of spontaneous harmonization:
the Austrian Act on competition has been aligned with the approach laid down in Regulation 1/2003, because this act provides for a legal exception to the cartel prohibition (like Regulation 1/2003 does). The last article of the volume is about State aid. Here, no general developments in the field of State aid are discussed, but the recent decision of the Commission in Ryanair and the follow-up (guidelines for State aid and regional airports) are analysed. This article quite clearly explains which financial measures related to regional airports are allowed and which measures are forbidden. Nevertheless, it is regrettable that the present book does not provide for a contribution dealing with general developments in the field of State aid.

To conclude: It may not be expected that in each chapter of the present book a similar approach towards recent developments of EU internal market law can be found, as this book contains the proceedings of a conference. Nevertheless, it is a pity that some authors confine themselves to merely describing the current developments and the law as it stands, whereas other authors – luckily – are more ambitious in explaining the background of some developments and in relating the topics of their subject to important concepts, doctrines or case law. In any event, the articles of the latter authors contribute considerably to the understanding of the EU internal market rules discussed. Furthermore, the total volume provides the reader with interesting and useful information about a wide variety of issues related to the internal market of the EU.

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