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Financial Crisis, Globalisation and Regulatory Reform

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Introduction

Carsten Gerner-Beuerle

The essays offered in this book are based on presentations at the International Conferences on Law, organised by the Athens Institute for Education and Research (ATINER) and held in Athens, Greece. The book is divided into four parts: (i) Financial Crisis and EU law; (ii) International Law & Regulation; (iii) Domestic Regulation; (iv) Dispute Resolution & Judicial Attitude; and (v) Legal Theory. Each chapter contains essays that approach relevant issues pertaining to the financial crisis, globalisation, and regulatory reform.

The financial crisis has affected the European Union, reinvigorated the debate on international regulation, and invited us to revisit the regulation of certain financial products. Regulatory reform is the ring of the time both domestically and internationally. This volume touches upon all of these issues and is, therefore, at the forefront of the debate on controlling market forces.

Financial Crisis and EU Law

This volume commences with Michael Malloy's essay *Zone Defence: The Euro Zone and the Crisis in Financial Services Markets*. Malloy's essay raises the question whether the eurozone adequately resolves the systemic crisis, or current policies rather exacerbate the distress experienced by many national economies. It also addresses the pertinent issue of a geographical adjustment of the eurozone, or a possible dismantling of the monetary union all together.

After Malloy's gambit, Anke Leen in *A European Tax. The Fiscal Sovereignty of the Member States vs.The Autonomy of the European Union* takes on the next political hot topic: harmonisation of European tax legislation. For most commentators, it was only a matter of time before the monetary union would meander towards a fiscal union. After all, it may be said that there cannot be a common monetary policy without a common fiscal policy. This essay, therefore, is acutely timely and proposes two types of possible EU taxes. Since the Treaty of Lisbon, the European Union has legal personality and is capable of entering into debt instruments. Naturally, raising taxes would be an answer to the necessity of repaying the fresh debt. Leen skilfully unmasks the interplay between the autonomy of the EU on the one hand and the diminishing fiscal sovereignty of the Member States, plagued with political rhetoric, on the other hand.

Another recurring issue that divides the EU, workers rights, recently came under attack by the Court of Justice of the European Union (CJEU). Stefanie Ripley in *The Posted Workers Directive: A Critical Study of its Applicability in Today's European Union* discusses the Posted Workers Directive and argues

that the CJEU in *Laval* signalled that the Directive is out of touch with the current economy. In the Laval case, Swedish workers were replaced by cheaper posted workers from Latvia. The Swedish trade unionists' social rights were quashed in the interests of securing the economic freedom to provide services. The implication of the CJEU's jurisprudence seems to be that property rights and business interests trump the rights of trade unions. We might see the first cracks in the bastion of employee rights advocates. Ripley's article reviews the seismic changes in the EU in the wake of the crisis and the relevance of the EU's Charter of Fundamental Rights.

International Law & Regulation

The interdependence of supranational regulation, international trade and finance does not only pose the question of fiscal sovereignty within the EU, but also globally. Elfriede Sangkuhl's essay *Global Tax Shifting Requires Global Solutions* discusses the challenges faced by states in taxing Transnational Corporations (TNC). TNCs declare profits in multiple jurisdictions, often of their choice through transfer pricing mechanisms. This essay evaluates previously made suggestions of establishing a supranational Currency Transactions Tax Organisation and a Currency Transactions Tax, which would improve the ability of nation states to impose democratically legitimated policies.

Michael Malloy returns in this Part with *The International Financial Crisis and Nation-Based "Prudential Regulation"*. He assesses the extent to which the crisis, with its broad international repercussions, has prompted cooperative, coordinated, and/or harmonised responses among affected states, and whether such experience may lead to more pervasive cooperation in financial regulation in the future.

David R.A. Caruso concludes Part II by explaining in *Market Economy Status for Viet Nam: Comparative Lessons on the Force and Effect of Policy in Determining Trading Classification* the challenges faced by Vietnam in securing market economy status. Comparing Vietnam's classification to the treatment of China and reviewing underlying data, the essay highlights the political nature of such determinations and their impact on protecting US financial interests with their second largest trading partner.

Domestic Regulation

This Part continues to have a global outlook on regulation, with articles on Brazil's real estate market, asset securitization in China and insurance law in the UK.

The financial crisis has been caused in part by the widespread use of certain financial products including securitization. Pengcheng Gao's essay *The Issue of True Sale in Chinese Asset Securitization and Beyond: A Critical*

Analysis of Trust Transfer takes a closer look at asset securitization in one of the largest economies of the world – China. The article reveals the inadequacy of Chinese property laws, which have been strongly influenced by US law. It also highlights the necessity of reforming Chinese securitization rules for the sake of a sound financial system.

Financial products remain the theme in *Duty of Disclosure, Both for the Insured and Insurer* by Mahfuz. He argues that the current principle of *uberrima fides* in insurance contracts remains one-sided. Analyzing legislation and jurisprudence, the author explains that the current state of the law allocates the insolvency risk of the insurer to the insured. His policy proposition is to increase disclosure obligations on behalf of the insurer.

The final article in Part III, *Market conditions may lead to application of Consumer Protection Code in typical leasing contracts? Study on the real estate market for student fraternities in the City of Ouro Preto, Brazil* by Edgar Gastón Jacobs Flores Filho and Mariana Sousa Faria, also contains an insightful analysis of a practically relevant issue. The authors argue that an extreme level of demand for lease agreements ought to lead to its subsumption under consumer protection laws. They propose a legal reform in Brazil to increase protection for rent payers in this emerging economy.

Dispute Resolution & Judicial Attitude

This part is dedicated to assessing judicial attitude in the USA and globalisation of dispute resolution rules in international arbitration in a Least Developing Country (LDC) such as Bangladesh.

Separate legal personality is one of the pillars of modern-day economies, but it has also contributed to excessive risk-taking and social irresponsibility. It is therefore of importance to assess judicial attitudes in piercing the corporate veil to establish accountability when required. The essay *Common Law Veil Piercing in the USA: An Empirical Examination* by John H. Matheson publishes unique empirical data of US courts decisions. Interestingly, the essay concludes that courts pierce twice as often to hold individuals liable than they do to hold entities liable, such as corporations. Moreover, entity plaintiffs are almost twice as likely as individual plaintiffs to successfully pierce the corporate veil. A trend seemingly favouring corporations that is embedded in judicial culture is a different challenge to regulatory reform from lobbying for a policy change as part of the regular legislative process.

Globalisation also permeates legal methods and the principles used. *Reception of Evidence in International Commercial Arbitration: A Bangladesh Perspective* by Assaduzzaman Khan envisages a real developmental leap for Bangladesh through the importation of the IBA rules on evidence and their dissemination among local lawyers. The reception of such foreign law concepts would enable Bangladesh to compete on the international arbitration market and ensure legal certainty for foreign direct investments.

Legal Theory

The final essay in this book is devoted to the theory of law and economics. *Understanding Economic Law Using the Methodologies of Law and Economics: A Suggested Framework and Related Implications* by Andrew Chen aims to understand the relationship between the various branches of regulation of economic law. Chen takes the view that economic law can be considered as an independent body of law comprising various sets of rules to redress market failures. According to Chen, competition law is placed at its centre to describe a general theory concerning the advantages and limitations of an ideal market. Each branch of rules then either substitutes or complements competition law to correct market imperfections. Chen suggests a framework to understand this inter-branch relationship of economic law.

Until the financial crisis abates, many of the issues discussed in this collection will continue to be high on the policy agenda and shape the public debate. It is hoped that the essays will contribute to this debate and, in addition, make interesting and insightful reading.