1. Why regulation?

We found a continent scarce in natural but rich in human resources and their produce!

That or the like might be the first report of a discoverer of modern day Europe. No matter how glowing that earliest account might be – it would most likely disregard that humans are not ‘resources’ but ‘the source’ of well-being, and that human dignity is an end in itself. At first sight, our pioneer would also not notice the cultural, religious and philosophical roots of the old continent, and that it rose to wealth through centuries of wars, strife, revolutions and toil. Voyaging deeper into the continent, the discoverer would learn that most of its nations are united in a political and economic union which is founded on the assumption of the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Our voyager’s second and more enlightening report might then say that the essence of Europe’s wealth is rooted, to a large extent, in intelligent supranational governance and public regulation.

‘Regulation’ is more tangible than ‘governance’: in the broader sense, it prescribes official methods and standards to which market and non-market behaviour must adhere. Since this book will focus on regulation in the pursuit of economic justice and welfare, we address regulation, in the narrower sense, as any state or supranational intervention in market allocations of resources in order to direct market behaviour towards the public interest. The knee-jerk reaction of economic players subjected to regulation is to ask for justification. Hence, justification of regulation is this book’s guiding theme, its ‘leitmotiv’. Justification implies legitimacy. After all, it is the citizen for whom regulation is made, namely to promote his or her welfare. Here, ‘governance’ comes into play. ‘Governance’ is an elusive concept: it encompasses both, the normative aspects of regulation as well as aspects related to public coordination, guidance, surveillance and transparency.1 Governance is regulation’s fashionable

1 EU-law refers to ‘Governance’ as a principle only in specific contexts: The Treaty on the Functioning of the European Union (TFEU), Article 15, refers to ‘Governance’ in the context of an administrative and legislative transparency: ‘In order to promote good governance and ensure the participation of civil society,
and capricious cousin. This lesser cousin, though, can still bring a tiny sense of legitimacy to regulation where fragmented political institutions, both national and supranational, fail to do so.

The art of successful national and supranational regulation to reach sustainable wealth under terms of economic justice and inclusiveness is invoked in Pope Francis’ frequent exhortations to overcome an economy of exclusion. In his highly debated Apostolic Exhortation, Evangelii Gaudium (The Joy of the Gospel), the Pope does not rely on any God-made or God-given terms of economic justice. By contrast, his Jesuit down-to-earth approach calls for better man-made regulation:

In this context, some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market, will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naïve trust in the goodness of those wielding economic power and in the sacralized workings of the prevailing economic system. Meanwhile, the excluded are still waiting. [Evangelii Gaudium, para. 54]

While the earnings of a minority are growing exponentially, so too is the gap separating the majority from the prosperity enjoyed by those happy few. This imbalance is the result of ideologies which defend the absolute autonomy of the marketplace and financial speculation. Consequently, they reject the right of states, charged with vigilance for the common good, to exercise any form of control. A new tyranny is thus born, invisible and often virtual, which unilaterally and relentlessly imposes its own laws and rules. (...) The thirst for power and possessions knows no limits. In this system, which tends to devour everything which stands in the way of increased profits, whatever is fragile, like the environment, is defenseless before the interests of a deified market, which become the only rule. [Evangelii Gaudium, para. 56]

the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible.’ ‘Governance’ in the context of ‘EU Economic Governance’ consists in monitoring, preventing and correcting problematic economic trends, see e.g. the EU’s broad economic governance framework http://ec.europa.eu/economy_finance/economic_governance/index_en.htm, 06.07.2016; see also Conclusions of the European Council of 17.06.2010, points 9–13 on enhancing economic governance; and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 02.03.2012, i.e. ‘to improve the governance of the Euro-area’. The European Commission considers regulation as ‘an essential part of modern society and good governance’, Communication of 02.10.2013 COM(2013) 685 final, Regulatory Fitness and Performance (REFIT): Results and Next Steps.

2 Released on 26.11.2013.
Why regulation?

Regulation is the key to overcoming the tyranny of the marketplace in the pursuit of economic justice and welfare: it can prevent the abuse of both capital and economic dominace. Such abuse undermines a functioning market as the economic motor to produce welfare, sustainability and inclusiveness. Pope Francis voices concern over a new tyranny of private capital, but does not appropriately address the public cause of abuse. Neither did Karl Marx before him. Those who criticise the public cause of abuse of capital are too often attributed to the dingy school of libertarianism. Abuse of public capital, however, is as omnipresent as the abuse of market dominance by private capital. The state has vast resources at its command and can use them to intervene in the market: it can make major investments or compete with the private sector, or pick winners and subsidise them. Such interventions may be necessary e.g. to provide infrastructure and services of general economic interest, or to give incentives to industry in situations where the market alone would not deliver a desired outcome. The wasteful allocation of public monies, however, can do immense harm: it can crowd out private investments, distort private incentives, and help foreclosing markets. In any case, it deviates scarce funds from those who need them most. The abuse of public capital thus undermines sustainability and inclusiveness, the very values the state shall protect. Examples of the abuse of public funds abound, ranging from idle airports out in the sticks and FIFA-standard mega stadiums where only third-league teams play, to operating aid to ailing industries that are plagued by overcapacity. Political megalomania may sink a mega-investment just to create a monument to the decision maker himself. The negative outcome of wasting public capital may be even more abusive and detrimental to welfare than the abuse of market dominance by private capital. Therefore, regulation of state aid and public procurement is just as essential as regulation against the abuse of market dominance by private capital.

States’ monopolies have been another public cause of economic exploitation until the recent past. Besides poor quality of service, consumers’ bondage within state monopolies used to entail much higher prices for services compared to liberalised markets in other jurisdictions. A quarter of a century ago, the liberalisation of telecommunication markets acted as an ice-breaker for the modernisation of other politically embattled network industries, such as energy, postal, and railway services. Only the grid-based water supply, still incarcerated in municipal monopolies in some EU Member States, is yet to be released. In particular, in one of the rainiest countries worldwide (Germany) water...
supply is among the most expensive in the world. Even taking high-quality and environmental standards into account, municipal monopolies of grid-based water supply tend to excessively exploit consumers.

After liberalisation though, complex and well-adjusted regulation is crucial to induce functioning competition and to allocate the welfare benefits from liberalisation. In concrete terms, those are higher quality of services at affordable prices. Following liberalisation, former monopolists, i.e. *incumbents*, tend to obstruct newcomer access to their network infrastructure. Hence, any newcomer to the market, or at least the financing of such an undertaking, would be deterred in the absence of a special regulatory regime. So an independent regulator is needed to ensure market entry via access to the incumbent’s physical networks under non-discriminatory and fair terms. Otherwise the release of consumers from the monopolies’ bondage would be foiled.

Another area where regulation serves as ‘the’ key to safeguard welfare is the financial sector. The global financial crisis was the perfect laboratory for refining the art of regulation: financial key players, above all big banks as lenders, are systemic pillars in the relevant financial markets and the economy as a whole. At the same time, they are subject to principles and dynamics of the market. Refined regulation does justice to both roles. Since the financial crisis, the universal lack of adequate *ex-ante* supervisory powers, regulatory rules and institutions has been remedied, in particular in the European Union. Europe has done a lot to counter reckless voracity, e.g. in derivatives markets, which had decoupled from the performance of the ‘real’ economy. The now established regulatory framework also allows remediying the most harmful effects from the pre-crisis absence of a seismic regulatory and supervisory system.

Even in the absence of a seismic *ex-ante* supervisory system, the Commission had powers – and used them – to instantly authorise state aid as the last resort to prevent financial institutions from collapsing. Imagining the effect of disparate state interventions in a Europe without a strong supranational competition regulator is gruesome.

This book will give an overview of the European Union’s toolkit of regulation for sustainable and inclusive wealth in an internal market. That overview will at times go into detail, but endeavours to be comprehensible. It points to the strengths of European regulations and criticises its weaknesses. This discussion must be seen against the backdrops of failing markets, challenged regulators and economic globalisation. This book will cross the borders of the legal community and address the wider public, especially the ‘Eurocritics’ in and outside Europe. However,
the authors tried to avoid a euro-centric perspective, striving to provide a narrative that contributes to the universal art of regulation instead.