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**Competition and the Law – Where are we going?**

The title I chose several months ago – “Competition and the law – Where are we going?” – has acquired a resonance that I did not foresee when I chose it.

Twelve years ago we saw the fall of the Wall and what one commentator called the “bonfire of certainties”. But one thing seemed certain – that we had seen the victory of the western market system, of which legal regulation of competition is an essential component.

In the last two months we have seen a new, unexpected and more violent bonfire of certainties. One casualty of this bonfire has been the unqualified belief in the soundness of the western market system as a universal panacea for the world’s ills. We now have to recognise, if we did not already recognise after Seattle, that the values of western democratic liberalism are not universally accepted and that “globalisation” is not just a market phenomenon. There can be globalisation, amongst other things, of terror.

So it is appropriate, as we celebrate the fiftieth birthday of *Wirtschaft und Wettbewerb*, to reflect on the question “Where are we going?” And it is useful in that context to begin by asking “Where have we come from?” As Alistair Cooke, that great commentator on America, has said, it is good to remind ourselves of history lest through ignorance we repeat it.

Where have we come from? In the 1950s there was in Europe no general system of competition or antitrust law. On the contrary, there was a strong culture of protectionism, stemming both from post-war mistrust and from the belief (which has not entirely gone away) that protection of the national market is not just a natural activity but a virtuous and proper prerogative of the nation state. In my country and in many others, price-fixing and restrictive agreements were an accepted part of the economic scene and dominant monopolies had been deliberately created through nationalisation. When the United Kingdom took the first hesitant steps towards regulation of competition in 1956, this was vigorously opposed by business lobbies and by certain sections of the Conservative Party. The regulation of competition in the Federal Republic of Germany was, at that time, exceptional.

During the same period, the success of the Coal and Steel Community was followed by a wave of Euroscepticism. This led to a new approach at the Conference of Messina based on the Spaak Report and so to the EEC Treaty. The Spaak Report began by identifying Europe’s problem as one of diseconomy of scale: European markets were simply not large enough, by comparison with the United States, to achieve a better division of labour (*eine bessere Arbeitsteilung*). Those words take us straight back to Adam Smith and *The Wealth of Nations*. Let me quote the opening sentences of the first three Chapters:

[Chapter 1] The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity and judgment with which it is anywhere directed or applied, seem to have been the effects of the division of labour. ... [Chapter 2] This division of labour, from which so many advantages are derived, is ... the necessary, though very slow and gradual consequence of a certain propensity in human nature ...; the propensity to truck, barter and exchange one thing for another. ... [Chapter 3] As it is the power of exchanging that gives occasion to the division of labour, so the extent of this division must always be limited by the extent of that power or, in other words, limited by the extent of the market.

Thus, the idea of the common market set out in the Spaak Report is based on an insight that goes back to the Enlightenment. Economic efficiency, and consequently economic prosperity, depends on the extent of the market. That is what

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the common market, based on the free movement of goods, persons, services and capital, was designed to promote. The four freedoms were described in the Treaty as “The Foundations of the Community". (For reasons never explained, that description was removed at Maastricht but the right of free movement of persons and services, though not of goods and capital, has been reasserted in the Charter of Fundamental Rights.) The aim was to open the door for goods, skills and services to a hitherto protected range of national markets, the key to the door being the principle of non-discrimination or equal treatment.

Put shortly, the aim of the common or internal market is, in the broadest sense, to promote competition.\(^1\) Within that scheme, the purpose of Articles 81 and 82 (formerly 85 and 86) regulating competition between undertakings - competition in the narrow sense - is to avoid a situation in which the private sector can partition the market which the rules of free movement, primarily addressed to states, are designed to open up.\(^2\) The Treaty’s “Rules on Competition" also include rules addressed to the member states, including the prohibition on unauthorised state aids and the rules relating to nationalised industries and enterprises entrusted with special rights and obligations.

So it is important always to remember that competition law in the narrow sense (antitrust law) is simply one aspect of a much wider scheme to promote Europe-wide competition.

Against that background, we can ask, Where are we going? I will speak first about competition in the narrow sense - regulation of competition between undertakings - and then about competition in the broad sense.

As regards competition in the narrow sense, it is natural that a parallel should be drawn between European competition law and United States antitrust law. Indeed, the Spaak Report opens with a comparison of the economic situations in Europe and the United States. The parallels are strong and they are important. But there are also important differences that we should not forget.

The first difference is that, as I have said, the competition rules of the Treaty must always be seen as part of the wider scheme for breaking open protected markets and establishing the basic principle of equal treatment. The aim of the rules is not simply to ensure a level playing field for competition between undertakings but also to provide a stable platform for market integration. By contrast, much of what the Treaty set out to achieve in post-war Europe had already been achieved in the United States many years before by the Commerce Clause. The American antitrust laws were introduced to meet quite different economic problems and, of course, the United States did not have monopolies deliberately created through nationalisation.

The second difference lies in the technique of antitrust enforcement. The United States’ system depends almost entirely on judicial enforcement with draconian sanctions for violation of the antitrust rules. Private litigation is one of the main tools of enforcement and the public antitrust authorities need the help of the courts to enforce binding orders and impose sanctions. In the most important federal courts, there are experienced judges, prosecutors and defence lawyers well versed in antitrust law. The system for teaching students about the economic implications of antitrust law is well developed and the procedural system makes it possible both to present expert economic evidence and to test its soundness by cross-examination.

By contrast, the European system established by the Treaty and Regulation 17 depends substantially on executive enforcement through binding orders and sanctions imposed directly by the Commission subject only to “light" judicial control.

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1) Even within the realm of social policy, the genesis of Article 119 lay in France's insistence that her policy of equal pay for equal work should not put French business at a competitive disadvantage.

The Court of Justice has, on the whole, insisted that economic assessment is a matter for the Commission and confines itself to the question whether the Commission has complied with the requirements of administrative law in reaching its decision.

Of course, as the Court of Justice said in Van Gend en Loos, the vigilance of individuals concerned to protect their rights through litigation is also an important tool in enforcing the Treaty rules. The prohibitions in Articles 81(1) and 82 are, and always have been, judicially enforceable in the courts of the member states. But these prohibitions are expressed in absolute terms, so that judges can apply them as legal prohibitions without being required to consider the economic merits of enforcing them in any particular case. With limited exceptions, the Commission and the Court have set their face against a "rule of reason" approach to Article 81(1).

Article 81(3), on the other hand, involves a balancing test. The issue is whether the agreement or practice in question will improve production or distribution, promote technical or economic progress and allow consumers a fair share of the resulting benefit, while not imposing unnecessary restrictions or allowing a significant elimination of competition. These are economic, social and sometimes political considerations, assessment of which, up to now, has been left to the Commission. Consequently, even before the Court of Justice, pure economic arguments are relatively rare and the courts of most European countries (though not, of course, of Germany) have very little experience of applying economic considerations to competition regulation.

Perhaps most importantly, in making its assessment, the Commission must take into account the "Community dimension" of ensuring equal treatment and avoiding partitioning of the market. This dimension can easily be overlooked by a national judge faced with a problem of competition law in a national context. It is now proposed that competition law should be decentralised and that, to a considerable extent, competition regulation should no longer be a matter for the Commission. There should be a much greater involvement of national courts and national lawyers - not simply in controlling the lawfulness of administrative or executive decisions, but in balancing the economic, social and political considerations mentioned in Article 81(3) and, necessarily also, taking account of the Community dimension.

Decentralisation may well achieve more effective enforcement of the competition rules, although strong opinions have been expressed to the contrary. My concern here is not to take sides in the argument but simply to suggest that, when we are considering where we are going in an increasingly uncertain world, we must be realistic about what will be necessary to make decentralisation work efficiently. There are at least five points that should be kept in view.

First, it will be necessary to train national lawyers and judges in what, for most of them, will be a quite new dimension of legal thought - economics applied to the law. This has been well developed in the universities of the United States but relatively little in Europe.

Second, we must ensure that our procedures are adequate. National judicial procedures must enable judges to understand the economic implications of the cases they have to decide and, in making their decision, to distinguish between sound and unsound economic arguments. Given the wide differences in national procedure, we cannot adopt a uniform approach to the presentation and testing of eco-

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4) In the United Kingdom, until the Competition Act 1998, British courts were not required to grapple with issues of economic assessment. The approach of its predecessor, the Restrictive Trade Practices Act 1976, was formalistic.
nomic evidence. But we must, as far as possible, try to ensure that different national procedures do not produce different results.

Third, national judges must understand, and be in a position to take account of, the Community dimension. That will involve the co-operation of the Commission. That means, in turn, that the Commission must have suitable and sufficient manpower. Staffing of the Commission has been a problem for many years\(^5\) and will continue to be a problem, even if control is decentralised.

Fourth, apart from the Commission, there must be efficient and well-informed national authorities. I wouldn't dare to suggest that there are not efficient and well-informed competition authorities in Germany, but other member states, particularly the candidate countries, have much less experience than Germany.

Fifth, if there is to be Community enforcement through national courts, then enforcement must take place on a tolerable time-scale. Overload is a problem for the courts of most countries as well as for the Court of Justice. In the case of the Court of Justice, decision-making will not be speeded up by the linguistic complications of enlargement, and with the accession of, say, ten new judges, the size, composition and character of the Court will be radically changed. The magnitude of the task of maintaining the Court as a unifying element in the development of competition law and avoiding inconsistent rulings should not be underestimated.

Turning to the problem of competition in the broad sense, I go back to the point that the ultimate aim is the better division of labour through the opening of national markets to the wind of competition. The internal market has been substantially opened, though not completely, for goods. But there are still many cases before the Court of Justice about the different ways in which, intentionally or unintentionally, the free flow of goods can be impeded by state regulation (for example, through labelling rules or environmental legislation) or by private action (for example, enforcing trade mark rights). In addition, there are new considerations to be taken into account which affect the free movement of goods but which were almost unknown, and certainly politically unimportant, in the 1950s – environmental protection, consumer protection, biodiversity, drug-trafficking and so on. If the internal market for goods is largely complete, the market for skills and services is not. A major reason for this is the disparity of the legal and regulatory regimes of the member states. The need to tackle this disparity was recognised in the Treaty. Articles 94 and 95 (formerly 100 and 100A) provide for the approximation of laws of the member states (“harmonisation”) so far as necessary to achieve the common market and the Single European Act gave the impetus to passing the necessary legislation for that purpose. But the wave of enthusiasm generated by the Single Act and the 1992 programme was met by two counter-currents.

The first counter-current was the demand for subsidiarity – the demand that the Community should keep out of certain areas and be prepared, in others, to leave it to member states to go their own way and not try to impose a uniform system. The second counter-current was the desire – mentioned today by Count Lambsdorff – to maintain and enhance national systems of social protection.

These counter-currents of opinion are not in themselves objectionable. The problem lies in striking the right balance between subsidiarity, social protection and a working internal market. To illustrate the point, I take three examples of recent cases in which I have been involved as Judge Rapporteur.\(^9\)

\(^5\) The House of Lords pointed out in 1985 that the staff of lawyers and economists in the Competition Directorate represented one-tenth and one-half respectively of the number available to the federal anti-trust authorities of the United States and the German Cartel Office – see 14th Report of the Select Committee on the European Communities, Session 1984-85, European Union, paragraph 51, page xxi.

In the first case, a German architect employed a Dutch firm of tile layers whose price was half the price quoted by German firms. He was prosecuted and fined DM 2000 for employing black market labour because the Dutch tile layers were not enrolled in the Handwerksrolle.

Applying the principle of subsidiarity, each member state should be able to decide for itself whether to have a Handwerksrolle to protect workers and consumers and, in one sense, there is no discrimination in requiring cross-frontier providers of services to comply with the same conditions as nationals of the host state. On the other hand, from the point of view of the internal market and the desire to achieve a better division of labour, such a requirement may reduce, if not eliminate, the incentive for an architect to look outside the frontiers of the state for a contractor who is willing to carry out work at a cheaper price.

The second case concerned a firm providing security services in the part of France adjacent to Belgium and Luxembourg. It supplied security guards to a Belgian art gallery 7 km away and was prosecuted for failing to pay them the minimum wage laid down in the relevant Belgian collective agreement.

From the point of view of social protection, it is legitimate to impose a minimum wage. But what really matters to the worker is not the minimum wage as such but the net amount he receives at the end of the week. This will depend, not only on the amount of the wage, but also on the social security and tax regimes that apply. From the employer’s point of view, if workers are crossing frontiers several times a week, or even several times a day, the complications of calculating the appropriate wage for each hour of employment could be a nightmare. From the point of view of the internal market, the question is whether such rules, blindly applied, remove the incentive to provide cross-frontier services.

In the third case, a Portuguese construction company was required to contribute to the German funds for holiday and bad weather pay for workers employed on German construction sites. From the point of view of social protection, it is perfectly reasonable to have a system to ensure that construction workers receive holiday pay and payments to compensate for bad weather. From the economic - internal market – point of view, the relevant point is not whether it is desirable to have such a system, but whether the employer providing cross-frontier services should be required to contribute twice – once in the home state and again in the host state.

Another and final example – pensions. Why is it still difficult to promote cross-frontier provision of pensions? The main problem is quite simply that the member states tax pensions differently: some tax the premium paid, some tax the pension received and some tax the capital assets of the pension fund. You cannot insist, as my country tends to do, that the Community must not trespass on the fiscal policy of the member states and at the same time call for greater freedom of movement for financial services. One or the other but not both.

Unwillingness to harmonise by legislation places a greater responsibility on the courts which the courts are not always well placed to fulfil. In my three examples of labour regulation, the Court of Justice could only say to the national court: you must decide whether it is necessary for social protection to have this particular rule and to apply it in this particular case. And of course, in so doing, we are really asking the national court to assess the Community dimension – to balance the interests of subsidiarity and the benefits of consumer or social protection against the impact on the internal market of applying national rules.

It seems to me that these problems can only become more extreme with enlargement. I leave you with three questions.

First, are the candidate countries ready for decentralised enforcement of competition law and policy? Do they have judges, lawyers and a system of training that
are adequate for the challenge? Second, in a broader sense, are they ready to com­pete with us, accepting the disciplines of the internal market?

But third, and most important, are we ready to accept competition from them? In particular, if for reasons of social protection we do not allow them to compete on price, on what basis are they to compete in the market for skills and services? If we create barriers to competition from the new member states, particularly price competition, then from their point of view the internal market will be a sham. Ultimately, neither they nor we will enjoy the advantages of a more efficient division of labour in an enlarged market.7)

As lawyers, we are faced with problems on a scale that we have not really begun to appreciate. In order to cope with them, we should not forget where we came from. We should remember that what we are talking about is the fundamental right of individuals to sell their labour and their skills where there is a market for them, and that allowing them to do so is likely to produce the greatest degree of prosperity for us all.

To that extent, at least for me, the bonfire has not eliminated one certainty. In that spirit, I wish Wirtschaft und Wettbewerb good fortune for the next fifty years.

7) For an economist's thoughts on this problem, see Samuel Brittan, "Let the huddled masses go free", Financial Times, 26 October 2001.