COMPETITION AND NATIONAL RULE-MAKING

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Competition law in the conventional sense, dealing with regulation of competition between enterprises, has become such a specialist subject that it is easy to forget (though Claus-Dieter Ehlermann would not forget) that much else in the Treaty is about competition. In particular, the four freedoms (originally given pride of place as the “Foundations of the Community” 1) were intended to have a double effect: to promote free movement of economic activity from one country to another and, in consequence, to expose economic operators to the wind of competition from other countries.

Protection against outside competition can take many forms. Sometimes it will be easy to identify a protectionist intention and a protectionist effect. But in Europe, to a much greater extent than in the United States, protection of a domestic market may be the natural consequence of laws and practices whose origins go back centuries and have become deeply embedded in the national culture. Seen in their national context, these laws and practices may be entirely comprehensible, and indeed laudable. To say “We have always done it that way and we prefer it that way” is not protectionism but a claim for subsidiarity.

Nevertheless, the economic operator will find it less attractive to enter a new market where its rules are complicated and unfamiliar, especially where they involve additional and unpredictable costs in terms of time and money. Worse is the situation where the rules as written seem straightforward, but the way in which they are applied is opaque. In the case of self-regulating professional bodies, those who apply the rules may themselves operate on the market they regulate and, in some cases, they are also those who have most to lose from outside competition.

Even where those who apply the rules are formally separate from those who operate on the market, there may be such a close working relationship between them that they are, in effect, the supply and demand sides of a cosy “market for regulation”. The economic operators ask for regulation and the regulators provide it. Few of them would accept that their rules, or the way they apply them, are protectionist. They may none the less deter the outsider from seeking to enter the market they control.

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1 This description was removed by the Maastricht Treaty.
Such barriers to competition are more serious for the small operator than for those big companies whose activities are the primary focus of competition policy. Big companies can afford to employ lawyers, consultants and local people to advise on the rules of other markets – how to comply with them and how to get round them. They can afford, where necessary, to challenge them in court. For the small operator, frequently based in a small provincial town, access to suitable advice may be difficult and expensive. The cost of litigation may be prohibitive not only in cash terms but also because successful litigation requires a personal commitment from the client as well as the lawyer. The small businessman frequently cannot afford to give the time that this commitment entails.

Even worse for the small operator is the situation where, having entered a new market with inadequate understanding of the rules, he finds himself faced with administrative or even penal sanctions for breach of them.

There are numerous examples in the case law. The facts of two very recent cases will suffice to illustrate the point: Corsten and Mazzoleni.

Mr Corsten was a German architect who employed a Dutch firm to lay composition floors in Germany. The reason he did so was that the Dutch firm charged considerably less per square metre than would have been charged by a German firm. But the Dutch firm was not registered in the German Skilled Trades Register (Handwerksrolle). Mr Corsten was fined DM 2000 for breach of the German legislation against black market work.

The system of trade apprenticeship on which the German Handwerksordnung is based goes back to the Middle Ages. It has been claimed to be (or at least to have been) a crucial element in German manufacturing efficiency. Certainly, from the point of view of an observer from Britain, where the apprenticeship system was abandoned some time ago, a system that might ensure the competence of those who ply their trade as electricians, plumbers and motor mechanics will provoke nostalgic longings.

Nevertheless, for firms offering cross-frontier services, a requirement to be registered on the trades register of the host country before undertaking work there will entail costs in terms of time, administration and, if fees are involved, money. Even before the contract is won, they will have to consider whether it is worth incurring those costs (particularly if there is no guarantee that they will get further work in the country concerned) and, if so, how those costs should be reflected in their tender for the work.

Application of host country rules to cross-frontier provision of services therefore directly affects the basic economics of cross-frontier competition. But assessment of the true economic effect is liable to become confused by the

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pressure of two conflicting arguments. On the one hand, it is said that application of host country rules involves no unfairness or anti-competitive effect because the cross-frontier service-provider is not being asked to bear any costs that are not also borne by the home supplier. On the other, it is said that the cross-frontier provider has to bear similar or equivalent costs in his country of origin which do not fall on the home supplier.

In Corsten, the defendant was neither the provider of cross-frontier services (the Dutch firm) nor the ultimate recipient of those services (the German client) but an intermediary who, as architect for the project, was responsible for organising the work and getting it done at the most economic cost. The risk of personal exposure to penal sanctions must clearly be a disincentive for an intermediary such as an architect to look for competitive tenders from suppliers in other countries. The result then is, not simply that the cross-frontier supplier is deterred from entering the market, but that he is never invited to enter it in the first place.

Mr Mazzoleni was the manager of a French security firm established at Mont-St-Martin which lies at the intersection of the frontiers of France, Belgium and Luxembourg. The firm employed 13 workers as security officers at a shopping mall at Messancy in Belgium. Messancy is about 7 kilometers by road from Mont-St-Martin. Some of the workers concerned were employed full-time at Messancy, while others were not.

Mr Mazzoleni and his firm were prosecuted for failure to pay their employees working at Messancy the minimum hourly rate of pay fixed by the Belgian Collective Labour Agreement relating to private security services.

All member states now accept the principle of the minimum wage and many of them accept that the minimum wage for a particular sector can be fixed by collective agreement between employers and unions which then has the force of law. The Court of Justice has held that a member state’s collective labour agreements may in principle be applied to employers providing services within that state regardless of the country in which the employer is established.4

Nevertheless, the net return to the employee at the end of the day will depend, not only on the rate of wages, but also on tax rates, pension and social security contributions and other elements which vary from country to country. In a frontier region, a plumber or electrician may cross frontiers several times in the course of a week or even a day. Even away from frontier areas, mobility is now such that there are many employees who move across frontiers in the course of their work and who will, during a single pay or salary period, be brought within the potential scope of different wage, tax and social security regimes.

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In such circumstances, is the minimum rate of pay of each country to be applied as soon as the worker crosses the frontier? If so, is it relevant to enquire whether, at the end of the day, he is better or worse off under the wage, tax and social security regime of the home or the host country? From the point of view of the small operator at least, the logistics of keeping records and accounts to comply with the host country rules whenever an employee crosses a frontier could become such a nightmare that it would be preferable not to accept cross-frontier work.

Taking the facts of Corsten and Mazzoleni as examples, it is easy to see the potentially chilling effect on cross-frontier competition of strict application of host country rules. On the other hand, in both those cases, the host country rules at issue were neither manifestly protectionist nor manifestly unreasonable. How then is healthy competition to be maintained without interfering with legitimate choices of social policy or laying an axe to the sacred tree of subsidiarity?

Legislation, particularly in the form of harmonising directives, was the preferred route in the 1960s and 1970s. Initially, in relation to free movement of goods at least, harmonising legislation was relatively successful. Nevertheless, even in that field, Cassis de Dijon was needed to point the way to mutual recognition as an alternative solution to extensive and detailed harmonisation. The never-ending series of cases on labelling requirements illustrates the problems that can still arise.

The legislative approach was significantly less successful in the field of free movement of persons and services, not least because wide differences in national structures made it difficult to devise a system that took account of all national peculiarities. Solutions that involved adopting the methods or approach of one country or group of countries at the expense of the others were rarely successful. The long saga of the lawyers’ services and establishment directives illustrates the difficulties.

In many cases, proposals for harmonising legislation ran into the sand. Alternatively, legislation was adopted which purported to resolve a problem but used words that, in truth, concealed an inability to agree what the solution should be. An obvious example is the preservation in banking and other financial services directives of national rules conceived for the “general good” —

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words that had been used by the Court of Justice as a basis for preserving national legislation in the absence of harmonising Community legislation.

Another example, closer to the subject of this article, is the directive on posting of workers. The aim of the directive is to define the scope of application of host country rules to the situation of workers “posted” from one country to another in the course of provision of services by their employers. However, the directive contains no definition of the word “posting” beyond saying that a “posted worker” means a worker who, “for a limited period” (hours? days? weeks?), carries out his work in the territory of a Member State other than the State in which he “normally” works. Even more confusingly, in some language versions as compared with others, the word equivalent to “posting” in English seems to connote a more significant degree of severance of the worker from the employer’s base of operations and over a longer period.

As tends to be the case nowadays, the task of filling the gap of non-existent or imprecise legislation has been left to the judiciary, and in particular to the Court of Justice. On the whole, judicial solutions have proved effective and durable as a means of achieving a reasonable degree of fair competition (the “level playing field”) in the internal market.

They have centred on four basic concepts, none of which were to be found in the original treaty:

- exigences impératives;
- mutual recognition (or equivalence);
- objective justification; and
- proportionality.

The doctrine of exigences impératives, which appears for the first time in Thieffry" (before Cassis de Dijon) recognises that there are social, fiscal, environmental and other considerations which do not figure expressly in the Treaty but which cannot be ignored by member states.

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9 Article 2, paragraph 1.

10 Udstationering/ustationering in Danish and Swedish, détachement/distacco/distacamento/desplazamiento in French, Italian, Portuguese and Spanish, Entsendung in German, terbeschikkingstellen in Dutch.

In *Corsten*, the Court accepted that the objective of guaranteeing the quality of skilled trade work and of protecting those who have commissioned such work is an *exigence impérative* capable of justifying a restriction on freedom to provide services. Similarly, as regards *Mazzoleni*, the Court has held that minimum wage rules can be applied to workers engaged in cross-frontier work because protection of workers is an *exigence impérative*.

In effect, recognition of *exigences impératives* has made it possible to apply the Treaty in a way that corresponds to political and social reality. Mutual recognition, objective justification and proportionality then operate as the counterbalance to legislative and administrative discretion on the part of the member states. The tests are complementary and strike a balance between the competing objectives of fair competition and subsidiarity.

The obligation of mutual recognition (or equivalence) – applied, as regards professional qualifications, by *Vlassopoulou* and, as regards services, by *Webb* – prevents member states from blindly applying their own rules without considering whether compliance with the rules of the state of origin is already sufficient. The test of objective justification makes it possible to view the rule in question from a Community perspective, abstracted from the particular historical or political circumstances in which the rule has come about. Within that context, the test of proportionality allows a degree of fine-tuning according to the circumstances of the particular case.

Thus, in *Corsten*, having accepted that the rule requiring entry in the Skilled Trades Register could in principle be justified, the Court drew a distinction between applying that rule to undertakings established in the host state and applying it to undertakings which intend to provide services in the host state only on an occasional basis, indeed perhaps only once. The procedures envisaged in Directive 64/427 for mutual recognition of occupational experience could be used to verify the competence of those concerned, and any procedure of prior authorisation should not be so lengthy or expensive as to make the contract economically unattractive. The Court left open the question whether

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12 *Corsten*, see note 3, para. 38.
13 See *Mazzoleni*, see note 4, para. 27.
16 *Corsten*, see note 3, para. 45.
18 *Corsten*, see note 3, paras 46 and 47.
compulsory entry in the Register on the host state could ever be justified in the context of provision of services.\textsuperscript{19}

In \textit{Mazzoleni}, the Court pointed out that the case concerned an undertaking established in a frontier region and referred to the argument that, overall, employees subject to French social law and French taxation are in a position similar to, if not more favourable than, those subject to Belgian rules. So, it said, "Even if it be accepted that the rules of the host member state imposing a minimum wage have the legitimate objective of protecting workers, the national authorities of that state must, before applying them to a service provider established in an adjacent region of another member state, consider whether the application of those rules is necessary and proportionate for the purpose of protecting the workers concerned". If a prosecution has been brought, this obligation falls on the court seised of the case.\textsuperscript{20}

It should be noted that, on this approach, the ultimate responsibility for striking the balance between acceptance of the national rule and maintaining effective competition falls on the courts. There are, however, grounds for questioning how far courts can go in striking this balance.

By their very nature, courts exist to decide cases. The facts of a particular case may suggest to the judge that a national rule is being applied in an unreasonable and oppressive way, or that the person to whom it is being applied is attempting to get round the underlying public interest purpose of the rule. An employer may quote a lower price for a contract because he is more efficient than his competitors or because he intends to employ unqualified labour and pay subsistence wages. Judges cannot but be influenced by the apparent merits of the case before them and may, in consequence, be blind to wider considerations.

Moreover, it is difficult for courts, especially at first instance, to be properly informed as to the policy considerations that may or may not justify strict application of a particular rule. In some cases the judge will be unduly influenced by official insistence that the rule be maintained, in others by the inadequacy of the justifications offered for maintaining it. In the Community context, it may be difficult for a national judge, familiar with national rules and structures, to assess the countervailing importance of the Community interest in ensuring economic inter-penetration and effective cross-frontier competition.

There is, in short, a limit to the extent to which courts can be expected to make policy choices. Policy choices – giving greater weight to one policy rather than another – are all the more difficult if the legislator is unclear as to what the relevant policies may be and what is their relative importance.

\textsuperscript{19} \textit{Ibid.}, para. 48.

\textsuperscript{20} \textit{Mazzoleni}, see note 4, paras 31-40.
The Maastricht and Amsterdam Treaties have not helped in this respect. The Maastricht Treaty changed the structure of the EC Treaty so that the four freedoms no longer form a separate Part and are no longer the “Foundations of the Community” with pride of place in the hierarchy of Community norms. They are now only the first in a series of “Policies” whose precedence inter se is not specified. The EC Treaty is in danger of passing, if it has not already passed, from being a programme for action to a incoherent political wish list. From the point of view of judges called upon to ensure that, in the interpretation and application of the Treaty, the law is observed, the message is uncertain.

It is true that Article 15(2) of the Charter of Fundamental Rights has reasserted the fundamental importance of two (but only two) of the four freedoms – free movement of persons and services – at least as far as citizens of the Union are concerned. But, here again, the message is uncertain. The Charter is “addressed” to the Community courts as institutions of the Union, but it is not clear what they are to do with it. Is it to be perceived, if not as a programme for judicial action, at least as a touchstone of what is acceptable and what is not? Or was it intended, like Community citizenship, to be no more than a soothing palliative for democratic disquiet?

Meanwhile, the internal market remains incomplete and one cannot sit for long in the Court of Justice without becoming uncomfortably aware of how much remains to be done. Yet the pressure for subsidiarity and a clearer demarcation between Community and national competences discourages further legislation.

It is sometimes said that the experience of the United States demonstrates the case against “federal” regulation as a way of creating an effective internal market and overcoming barriers to cross-frontier competition. It is certainly true that uniformity is neither necessary nor desirable for the creation of a working internal market. Moreover, competition between regulatory regimes, leading economic operators to prefer one country to another as their base of operations, can itself act as a corrective to the protectionist effect of national rule-making.

But the experience of the United States is misleading for a reason already mentioned. The constituent states of the European Union have, over the centuries, developed social, political, economic and legal systems which are different, not only in the results they produce, but in the assumptions on which they are based. These assumptions – for example, in favour of social regulation or against it – depend both on the experiences of the country concerned and on that of other European countries with which they see themselves as competing as well as co-operating.

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Indeed, at a very fundamental level, protection of the nation and its economy is still regarded as the natural and virtuous function of the self-determining nation state. Readiness to accept the merits and long-term advantages of vigorous cross-frontier competition is not the natural European condition.

At the moment, Community competition policy, in its pure form, focusses on the abusive or anti-competitive conduct of large private undertakings. Although careful attention is paid, as background, to the economic context in which these undertakings operate, similar attention is not paid to the potentially anti-competitive impact of national rules and regulation on the small operator. A true Community competition policy, which can only come from the Commission and not (as is the current vogue) from inter-governmental co-operation, must address the more fundamental attitudes of governments and other national rule-makers, the rules they make and the way they are applied.

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I cannot end this contribution without acknowledging my deep personal debt to Claus Dieter Ehlermann. It was above all from him that I, like many other lawyers of my generation, learned that the practice of Community law can be both creative and exciting.