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Perspectives on Competition Law: Problems and Solutions

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Abstract

This essay suggests that it does not follow that competition between jurisdictions is good merely because competition between economic operators in pursuit of economic goals is a good thing. The result, as the discussion on television indicated, may simply be a jurisdictional mess, as Dr. Markus Wagemann put it. You end up with all sorts of people seeking to pursue their own values: cultural values, regional values, and linguistic values; and the economic operator simply does not know where he or she stands in this jurisdictional competition. This point can perhaps be completed by simply mentioning a remark made to me by Klaus Dieter Ehlermann, the former Director General of Competition and of the legal service of the Commission: ‘It is the lawyers who make the good distinctions; politicians only make the distinctions that are convenient for them.’ It is important to begin by making sure what we are talking about. My second point arises out of Professor Dr. Friedl Weiss’s paper. From the vantage point of a judge, we are increasingly faced, not with a hierarchy of norms, but a competition between norms of apparently equal value. This essay then reflects that this is not the first time we have experienced a world in which there was the fullest competition between lower level jurisdictions. Third, this essay considers the importance of taking state aid into account. This essay concludes that greater jurisdictional autonomy leads to greater barriers to trade.

PERSPECTIVES ON COMPETITION LAW: PROBLEMS AND SOLUTIONS

*Judge David A.O. Edward**

I can only offer you the reflections of a non-specialist European Union (or "EU") judge. I begin with two general points. The first comes from what I was taught when I studied philosophy: it is important to avoid categorical mistakes. We are talking here in the context of competition. Professor Dr. Wolfgang Kerber has spoken about competition between individuals, between firms, and now between jurisdictions as if we were talking about the same thing. He has equated taxes with prices. But is the price for the economic operator of being regulated in a particular way simply being subjected to a particular tax or to a more or less rigid regulatory regime?

Now, I am not taking issue with Dr. Kerber on the desirability of allowing lower level jurisdictions the greatest measure of autonomy. But I do not think it follows that competition between jurisdictions is good merely because competition between economic operators in pursuit of economic goals is a good thing. The result, as the discussion on television indicated, may simply be a jurisdictional mess, as Dr. Markus Wagemann put it. You end up with all sorts of people seeking to pursue their own values: cultural values, regional values, and linguistic values; and the economic operator simply does not know where he or she stands in this jurisdictional competition.¹ That is my first point and perhaps I can complete it by simply mentioning a remark made to me by Klaus Dieter Ehlermann, the former Director General of Competition and of the legal service of the Commission: "It is the lawyers who make the good distinctions; politicians only make the distinctions that are convenient for them." So I think it is important to begin by making sure what we are talking about.

My second point arises out of Professor Dr. Friedl Weiss's paper. From the vantage point of a judge, we are increasingly

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1. I will come back to that, because I think that this discussion must take into account that there are rather specific features of Europe, and specifically, the problems of many languages, many legal systems, many traditions and a vast amount of history.

faced, not with a hierarchy of norms, but a competition between norms of apparently equal value. There is the norm of competition, which on World Trade Organization² ("WTO") terms, is raised to a global level. But that is set against the norm of environment, the norm of third world development, the norm of social improvement, the norm of cultural identity, the norm of protection of minorities, and, even within the EU, the conflict between EU-norms and constitutional norms, particularly the constitutions of federal Member States.

The difficulty is, that instead of a situation where the judge is in a position simply to operate an on/off IO switch, and say, "This is the norm that prevails and you win and you lose," the judge is to an increasing extent operating a synthesizer with multiple bands, which, of course, must be made compatible. In one case it will be the human rights norm that prevails, in another case it may be the environmental norm, and in yet a third case it may be the competition norm.

From the regulator's point of view, of course, this problem is, or at least may be, removed, because the regulator may be invited simply to apply one norm, the norm of competition. And similarly in the WTO, the WTO panel may simply be asked to access the particular problem by reference to the WTO rules, but not to continue and say, "Well, if we apply these rules, what is the consequence for the development of underdeveloped countries, what is the consequence for the rain forest, what are all the consequences?" It seems to me, therefore, that one must bear in mind that what we may be talking about is both competition between legal norms and competition between values. More importantly, it is for the politicians to resolve the competition between values, and for the lawyers to resolve the competition between norms once the values have been translated into norms. It is for the politician to say which value is to prevail, and it is for the judge to say which norm is to prevail.

My view is that this is a problem of which we are only just beginning to become aware, far less to analyze, because traditional legal teaching is still in terms of the hierarchy of norms. Even in EU law, the traditional teaching is in terms of supremacy and so on, so that you have a clearly defined hierarchy and you

2. Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter WTO Agreement].

will be able to solve your problem by appeal to that hierarchy. I am not sure that that is still an adequate way of analysis.

Coming back then to Professor Kerber's competition between jurisdictions, perhaps the more appropriate question is, what do we want jurisdictions to compete about? When we are talking about autonomy at a lower jurisdictional level, is competition between values, legal norms, or implementation of specific policies in specific ways more favorable? Here I think we have to bear in mind another fact, which was mentioned yesterday again, which is the reduction of the possibilities of government intervention. There are in fact fewer and fewer opportunities for jurisdictions, at whatever level, to operate in an entirely autonomous way. That was illustrated by Karl Messen's remark that media law is the only sexy subject left to the Länder. You can have as much autonomy as you like, but what is left for you to legislate about? This is a debate which is now going on in my country, in Scotland, because there is great excitement concerning the new Scottish Parliament. But what is the Scottish Parliament in reality going to be able to legislate about? This is a point that has not been fully discussed.

My next reflection is this, and it arises out of something of Professor Weiss's paper. Have we not been here before? Have we not experienced a world in which there is the fullest competition between lower level jurisdictions? Did we not precisely have that under the name of self-determination between 1918 and 1939? Is that not precisely the only socially and politically unhappy experience, but also the economically unhappy experience of the years when the nation-state was perceived as having a full right to total autonomy in deciding policies? What is the difference then between doing what Professor Kerber is advocating and the full autonomy of the nation state?

Even then, if you take the situation up to 1985-86 and the Single European Act,³ we had a situation that seems in theory to correspond to Professor Kerber's model. This act laid down rules of free mobility, and free circulation of goods, persons, services, and capital. But what did we have? We had what Mr. Decker of Philips called "the cost of non-Europe." You had the

3. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

theory but not the practice. So it was necessary for Lord Cockfield to propose 530 legislative measures in order to achieve the abolition or the avoidance of the cost of non-Europe. That was what was perceived as necessary.

The difficulty is that in the meanwhile the Member States rediscovered (because it was always there) the notion of subsidiarity and shied away from the necessary legislation. The consequence is that the Single European Act's banking and insuring directives put in place a theoretically perfect internal market, but leave half the really crucial questions to be decided later. Is a company account to be drawn up on the true and fair view basis or on the rather more straight profit and loss basis that is characteristic of some countries? That question simply is avoided. You have a banking directive, which dictates a harmonized system, but then says, Member States can maintain rules conceived for the general good.

The above example simply puts off the resolution of the problem rather than solve it. And I must admit that you cannot sit in the European Court of Justice ("European Court") for more than ten minutes without realizing that the Internal Market is not complete. The reason for this incompleteness, it seems to me, is because Europe's problems are specific. Europe's problems are, as I have said, characterized by many languages, many traditions, many legal systems, and many different ways of approaching things as mundane as company accounting. Simply, you start from a different place.

Another reason why Europe's problems are specific is that because the process of self-determination, as it has manifested in Western Europe and is still being worked out in Eastern Europe, tends to produce Member States, which correspond to ethnic blocks or people who perceive themselves as belonging to an ethnic block, these states therefore have particular reasons for adopting a particular solution or a particular protection. This is valuable in their terms but constitutes a technical barrier to trade for everybody else. Forget the comparison between Europe and the United States. You do not have the specificity of the nation states of Europe in the United States. It is a categorical mistake to make a direct comparison.

I do not intend to criticize anything, I am just looking at facts. And one of the facts is that personal mobility is necessarily

limited. People find it more difficult to go and live in a country where they cannot speak the language, and where their view of the way life should be conducted does not correspond to the view of the people of that country. It is perfectly legitimate that people should have their own view as to whether you should mow your lawn on Sunday afternoon, but for a person who comes from another country, it may be a great culture shock not to be allowed to mow lawns on a Sunday afternoon.

What I am saying was focused upon by Douglas Hurd, the British Foreign Secretary, who said, "We do not want Brussels poking into the nooks and crannies of national life." True, but your poking into crannies is my technical barrier to trade. Your desire to have your language used on labels, puts a restraint on me as a producer, in deciding how I label my products generally for the market. So you must have some central authority, which dictates that it is enough if you use, for example, the official language of the country where you are going to trade. You do not have to use Catalan as well as Castilian, or Basene as well as Castilian. But regional autonomy, lower level autonomy, might impose such a requirement.

Another issue, I think that we must take into account is state aids. The whole economy of Europe was one in which the notion of state aids was ingrained in a way not found, for example, in the United States. The idea that a nation not only can but should support and protect its own industry is one that has always existed and lurks still today. When Mr. Helmut Kohl and Mr. Jacques Chirac sent a letter before the last summit, saying that there should be greater subsidiarity, one has a strong suspicion that Mr. Chirac wanted to continue to subsidize Air France and that Mr. Kohl wants to subsidize Volkswagen. That is what it is really about. John Temple-Lang and his regulators are getting in the way of this "cultural autonomy."

And so, for me, the short point is that the greater the jurisdictional autonomy, the greater the technical barriers to trade. Technical barriers to trade are not necessarily the same as forced protectionism. They exist naturally. It is problematic to trade between countries that have different legal systems, simply because the legal systems are different. You do not have to have an intention to create a barrier. When a trademark in one country is not recognized as a trademark in another country, that is a

technical barrier to trade without any protectionist intention on the part of either country involved.

My personal view is that the original Treaty establishing the European Community⁴ (the “EC Treaty”) went a long way towards the correct solution of the problem, namely laying down the basic “foundations”. It is rather significant that the Treaty on European Union⁵ took that word out. In the EC Treaty the four freedoms, of free movement—goods, persons, services and capital—were said to be the “Foundations of the European Community.” That, in a sense, really is what Professor Kerber is saying: that we must have mobility as a condition of autonomy.

My difficulty is that I do not believe the mobility has yet been achieved. A great myth is being circulated that we have completed the Internal Market and so now we can dismantle it. This is a myth that we should contest rather than accept. You must have the rules of free movement and they must be legally binding, and legally enforceable. Accordingly, you must have some means of dispute settlement, which defines at what point a particular jurisdictional option becomes a technical barrier to trade.⁶ You must have some authority that dictates what should be treated as a technical barrier to trade, and what falls outside. In the European system, this authority is the European Court.

The EC Treaty actually put a system in place capable of achieving the maximum degree of jurisdictional autonomy. The difficulty, and I confess this quite openly, is that we are now being faced not simply with the rules of the EC Treaty, but also with a wish list of other things which everybody has to take into account. I have enumerated them before—environment, third world, everything. You take all of these issues into account and the difficulty, I think, is that we do not know which of them in any given case is to prevail.

So my plea to you really is to lift your eyes from pure compe-

4. Treaty establishing the European Community, Feb 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573, *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union (“TEU”) amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* SEA.

5. TEU, *supra* note 4.

6. For example, the European Court has pondered whether a rule preventing shops from opening on Sunday is a technical barrier to trade, a political option, or a cultural option of a member state.

tition. Within a regulatory framework, that may be sufficient because you simply ask the regulator to apply that criterion. But at the judicial or political level you must go further and define which are the values you want to pursue, what are the norms that flow from those values, and which norms are to take precedence.