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Josef Drexl (editor)

The Future of Transnational Antitrust – From Comparative to Common Competition Law

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Foreword

In June 2002, a group of academic antitrust specialists from the United States, Japan, France, Switzerland and Germany met on Frauenchiemsee, a small island in the middle of the largest lake in Upper Bavaria, in order to discuss current developments of international competition law. This volume includes the papers presented at this conference. The conference was triggered by the 2001 initiative of the United States antitrust authorities and the European Commission for the International Competition Network (ICN) as well as the Doha Ministerial Declaration of the same year envisaging WTO negotiations on competition policy and possibly leading to a future international agreement on competition law.

The conference can be seen as another step in a series of academic initiatives and symposia during the last decade. In 1993, on the initiative of *Wolfgang Fikentscher* from the University of Munich, a group of academics submitted a first coherent draft of an international agreement, the so-called Draft International Antitrust Code (Munich Draft), which proved to be very influential also on the diplomatic level. This group met from time to time, with changing participants, to discuss and comment on new developments.

By 2001, it had become clear that states, the United States included, were convinced of the need for action in the field of international antitrust. Whereas the European Commission still supports the agreement approach in its Doha initiative, albeit with considerable moderation, the ICN is designed to establish a forum in which national antitrust agents can discuss current problems of enforcement and cooperate and coordinate their policies without binding international rules or harmonization of the law. There is considerable hope that the ICN might "spread antitrust culture" and bring about common antitrust rules over time.

In light of the ICN approach, the question needs to be answered whether there is only one competition culture or rather different domestic approaches to the concepts of antitrust, competition and the goals of competition law. Due to the importance of this issue, the reader will find the papers of *Kiminori Eguchi* and *Wolfgang Fikentscher*, dealing with cultural aspects of competition law, at the very beginning of this volume. The contributions in Chapter 2 look at the issue of whether a common law of antitrust can be established by mere cooperation. In this context, *Harry First* develops a network approach to be preferred to any centralized international system of antitrust enforcement. *Laurence Idot* and *Ulrich Immenga* analyze the experience of international cooperation in the important field of merger control. *Eleanor Fox*, with comments by *Ulrich Ehricke*, underlines fundamental differences between basic

concepts of restraints of competition in the United States and Europe by analyzing the law on exclusionary practices. New issues of antitrust concern, Internet-related problems and competitor cooperation, taking place nowadays especially in the field of research and development, are dealt with by *Andreas Heinemann*, *Theo Bodewig*, *Hanns Ullrich* and *Andreas Fuchs*. In Chapter 4, *Warren Grimes*, *Clifford Jones* and *Mark Jamison* analyze the Microsoft litigation, highlighting the experience of multi-level antitrust enforcement by federal and state agents in the United States. Their research is accompanied by the ideas of two economists, *Wolfgang Kerber* and *Christian Kirchner*, on an international multi-level system of competition laws. Basic legal principles of enforcement, both international and supranational, are discussed against the background of European experience by *Josef Drexl* and *Peter Behrens*. The volume ends with a contribution by *Jean-François Pons*, bringing in the practitioner's perspective from the European Commission on a future international agreement on antitrust law.

The conference was organized by the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich, the Institute for International Law of the Munich Law Faculty and the Gruter Institute for Behavioral Science (Munich Office).

This volume is the first in a new series of law books, the Munich Series on European and International Antitrust Law, marking the Max Planck Institute's new engagement in antitrust law at large.

Apart from the authors, a number of people deserve the editor's special gratitude for their contributions to the successful conference and to this publication of the papers. Over several months, Allison Felmy did a wonderful job of revising the articles in English. As a completely new member of the staff at the Max Planck Institute she was thrown into the deep sea of legal terminology without having much time to learn to swim. In editing the footnotes, she was helped by Beatriz Conde Gallego and Mark-Oliver Mackenrodt. Beatriz Conde Gallego will publish a German report on the conference in the Max Planck Institute's law journal Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR Int.). Together with Michael Hassemer from the University of Munich, she was extremely helpful in the organization of the conference. In addition, Mark-Oliver Mackenrodt, Ruppert Podszun and Florian Jofer rendered efficient and last-minute assistance in translating one of the contributions into English. Finally, the editor would like to thank Françoise Marcuard-Hammer at Staempfli for her very friendly and patient support for the publication of this volume.

Munich, January 31st, 2003

Josef Drexl

Contents

Chapter 1

International Antitrust and Diversity of Competition Cultures

Cultural Implications in the Framework of Basic Issues of Competition Policy

Kiminori Eguchi*

Contents

I. The First Implication

In December 2001, when the offer to take part in this meeting came to me, I was living in Berlin, in the former East Berlin (Ostberlin). At the time I was, of course, concerned at the heavy responsibility that was to be borne within a couple of months. In my room near the station Friedrichstrasse I was indeed fairly helpless, though I could enjoy dreaming of the wonderful landscape of the Chiemsee. At that time, however, an angel whispered to me the first passages of my speech: The angel's name is Marlene. In December 2001 in Germany, especially in Berlin, they always spoke of Marlene Dietrich, who was born just one hundred years ago in Berlin, Germany. Every morning and every evening I saw a "wunderschönes" photograph of her on the wall of the room, because I had cut it from a newspaper in order to decorate my lonely room and to stabilise my psychology in this far western country far from Japan. What did the angel tell me about my theme relating to the cultural

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implications in the framework of basic issues of competition policy? Now I would like to reconstruct the first implication:

Not only the blue angel, Marlene Dietrich, but also many other German personalities of cultural significance left their mother country, the Third Reich of Germany. And where did they go? As we all know, most of them arrived in the United States of America, the country of freedom at that time. On the other hand, many Japanese liberals were compelled to go underground, to be silent or to be converted. The difference lies only in the fact that the Japanese liberals, unlike their German colleagues, could not escape over the border – or did not have to do so. So in this way Germany and Japan suffered serious damage in the field of culture, which is even now to be perceived. To sum up, a country should have a political and social system that is based on freedom and justice if it would not like to lose its most precious cultural personalities and other cultural properties.

In this connection it is very impressive that the United States of America (and Canada) already had antitrust legislation before the end of the nineteenth century. Some decades later, in 1914, World War I began in Europe and in the same year the antitrust legislation was reinforced with the Clayton Act and the FTC Act in the United States. Now we might assume that roughly at that time it became clear that the United States of America was the political, economic and cultural leader in our world during the twentieth century.

II. The Second Implication

There are many cultures on the earth. We are now going to inquire about the relationship between competition policy and various cultures. I have a few materials to be discussed. First I am going to talk about an implication from my country:

As to the prohibition of cartels in the Japanese Antimonopoly Act, there were obvious difficulties because of our cultural background, namely because of our tradition in Japanese society. Now we have to examine old Japanese history: In the year of 604 the old Japanese government with Ten-no as its leader carried into effect the so-called "Constitution with Seventeen Articles" which, unlike constitutions in the modern sense, proclaimed seventeen norms for governmental officials and aristocrats. The first norm of the Constitution told them to highly respect *wa* (which means harmony, unity, peace or conciliation depending on the context) and not to go against other persons. This historical message is naturally no longer of any legal effect. But it has continued to be one of the most important social norms, which have strongly ruled the

behaviour of the Japanese people. The fact that the prohibition of cartels by the Japanese Antimonopoly Act has not been more effective can be traced at least partially to the culture of *wa* in Japan. Namely, in Japanese society there have been grounds for firms not to compete, but to cooperate – and sometimes conspire – without being blamed.

Do we accordingly have to assume that there is fundamental inconsistency between Japanese culture and competition law? No, not at all. Rather, the spirit of *wa* is a good friend of competition law and policy because cartels and other anticompetitive practices are to be regarded as something against *wa*. If it is correctly understood, the spirit of *wa* must be based on the common welfare. In this sense cartels seem to be related only to the degenerate meaning of *wa*. So today we Japanese can have both our old culture and competition law without any anxiety. But, to be honest, it was just a few years ago that the anxiety at last disappeared: Yes, that was about at the beginning of the 1990s. It was very hard for us to become an approved owner of an antimonopoly law, much harder than becoming an owner of a Mercedes, Cadillac or Jaguar, anyway.

III. The Third Implication

Fourteen months ago I stayed for a week in Mombasa, Kenya, where the "Regional Training Seminar on Competition Law and Policy for East and Southern Africa" was held, organised by UNCTAD and the government of Kenya. The third implication is related to my experience in Africa at that time. It was symbolic and meaningful that the air in Mombasa smelled quite different and also looked very different from any air I had ever known. It was hot, but fantastic.

As to my work in the seminar, I was and I am satisfied. This is so partially because there in Kenya I could indeed practice English for the first time in my life. But on the other hand there has been always a kind of reservation both in my brain and in my heart.

Together with British, Italian and German colleagues I took part in the seminar as one of the so-called international experts from outside the region. African participants spoke mainly about the experiences they have had with their competition laws, if they have one. We international experts practically functioned as teachers by talking about all the main topics of antitrust. I, for example, talked about vertical restraints and so on. Well, now we are going to jump to the reservation mentioned above, so to the third implication in my speech.

First of all I would like to cite some passages from a persuasive speech that *Donald I. Baker*, an attorney and counsellor from Washington, D.C., made in 1999 in Zambia.[1] He said to the Africans, "Your problems are not the same as our problems – or Europe's either – and therefore you must be careful about just following North American or European solutions in competition law or elsewhere. … In creating your own solutions to your own circumstances, you still can and should learn from the mistakes that others made on North America, Europe, and elsewhere." And then he pointed out six legislative errors and four agency errors that, according to him, have occurred in OECD countries. In this way he showed a lot of concrete failures such as "creating a paper tiger," "making the competition law too vague," "being random and undisciplined in selecting targets" and so on. I completely agree with *Mr Baker*. But as a reporter for the cultural implications in the framework of basic issues of competition policy, I dare to go further.

So I would say that (at least) some of the developing countries including African countries can and should have more future than to learn from our particular mistakes concerning competition law. Namely, the concept of existing competition laws in our countries is itself only an answer to the monopoly problems that our developed countries have confronted since the last decades of the nineteenth century. Therefore Kenya and its neighbours should be able to find new answers when they encounter their own problems, by applying their own creation and imagination. We expect that new concepts, so new cultures of competition law, may possibly even give up the old conception of "competition." And we would like to learn from mistakes that Africans might make sometime in the future, wouldn't we?

IV. The Fourth Implication

Would you allow me to be overcome with homesickness and to return to Asia? What I mention now will surely break the theme.

About a hundred and fifty years ago Japan decided to introduce modern social institutions that were already established in some parts of Europe and North America. According to some statistics, the Japanese decision seems to have been sufficiently rewarded, and that is true. But on the other hand it is quite questionable whether Japanese culture has been connected happily with originally European and North American institutions, though officially the Japa-

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[1] *United Nations Conference on Trade and Development (UNCTAD)*, Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA), 2000, UNCTAD Doc. UNCTAD/ITCD/CLP/Misc.18, p. 77-81.

nese political leaders and diplomats would not be ready to recognise such doubts. This problem also seems to be closely related to the great recession that we are now suffering at home in the Far East.

It is fairly hard for Japanese lawyers to think Western and to feel Japanese at the same time, to live with this ambivalence. However, it has been fun and it has been even a privilege for Japanese to enjoy both East and West. Moreover, it would be highly interesting to compare how differently the Chinese, Koreans and Japanese have reacted to Western influences, particularly since the nineteenth century. But it is already time to come to the next paragraph.

We Japanese ought to confirm fundamental conceptions based on human dignity, which are necessary for political, social and economic institutions, if we would like to become a country that is worthy of being called one of the leading countries in the world. The task confronting us, which includes the matter of competition law, has not been accomplished yet because Japan always hurried excessively on its way to catch up with European and North American countries and to be dominant in Asia. It would take much time to get our homework finished, and we need your help, friends! In this concern we expect that many young people will come to us from your countries in order to become good critics to us. As to the most important qualification for that, they should have sufficient ability in the Japanese language in order to get to know Japanese culture, how my country is and how it should be. Regarding this matter there is, very fortunately, an obviously positive tendency: some faculties of law in Germany are planning to offer courses on Japanese law on a regular basis.

V. Ending Remarks with Respect to DIAC

Now I want to summarise what the above-mentioned implications tell us concerning the theme of the meeting, "the future of transnational antitrust – from comparative to common competition law":

The first implication is the general and global necessity of competition law. This tends to speak for accelerating in the direction of common competition law. The second implication seems to be neutral. And the last two (third and fourth) will rather show yellow cards to a hurried rush toward common competition law: they seem to make us take into account "trans-cultural" cases.

With the Draft International Antitrust Code (DIAC) of 1993 you did sufficiently take into account the standpoints presented above, because it is based on plurilaterality. If we go ahead with it rationally enough and patiently enough, we can surely be successful in realising the main conception of

DIAC. There seem to be, however, at least two conditions for that: (1) Naturally we must be ready to accept new ideas in the future, maybe from African, Asian and deep Slavic areas and so on, if these ideas are persuasive. (2) Maybe we have to take into account that Asian understanding of time and Asian feeling of time are different from those of European and North American people. It might take a long time before the DIAC is realised.

Cultural Implications in the Framework of Basic Issues of Competition Law: Comments on *Kiminori Eguchi*

Wolfgang Fikentscher*

Contents

Competition is about risk and risk is a culture-specific notion. Thus, there are two complementary positions involved: In order to be able to talk about "competition," a meta-cultural, universal vantage point need be assumed.[1] However, its meaning will necessarily differ from culture to culture.

Therefore, I fully agree with *Kiminori Eguchi's* message that there is a necessity for global rules of economic justice, freedom and fairness of competition. But Western and Eastern nations have different ideas about doing business. Like *Mr. Eguchi* today, *Mr. Pons* has already drawn our attention to the differences in the importance and understanding of antitrust in developed, de-

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1 Cf., as to the distinction between universal and culture-specific concepts and evaluations, *Fikentscher*, Modes of Thought: A Study in the Anthropology of Law and Religion, 1995, p. 140 et seq.

veloping and transient countries. The Restrictive Business Practices (RBP) Code of 1980 contains illustrations of this.[2] An example is the still unsettled dispute between proponents of the competition test and the development test as guidelines to the interpretation of transnational competition law.[3]

Let me try to assess the differences in the cultural meanings of antitrust by giving more examples (I) and mentioning some remedies (II). This leads to a cultural understanding of antitrust as such (III), and in the framework of globalization (IV). From this, the issues of a global competitive culture together with its necessary conceptual and evaluative requirements follow (V), as well as an agenda (VI). Needless to say, within this comment on *Kiminori Eguchi's* challenging statement my remarks will be brief and sketchy.

I. Examples of Differing Competitive Cultures

Chicago classics deem vertical restraints generally harmless because of outside competition.[4] But vertical restraints (such as exclusionary distribution systems, "bundling," or boycotts) are more harmful to buyers the smaller a national (or other) economy is. National (or other) borders may prevent market entry by outsiders. Therefore, the laws of medium or small countries often treat vertical restrictions as strictly as or more strictly than horizontal agreements in restraint of competition.[5] By the way, in a global market, there are by definition no outsiders anymore, and the Chicago School's arguments in favor of vertical restraints must stop here. For a global market there can be no differentiation anymore between the negative influence of horizontal and

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2 *Atkeson & Gill*, The UNCTAD Restrictive Business Practices Code: A Step in the North-South Dialogue, 15 The International Lawyer 1, 8 (1981).

3 *Fikentscher & Straub*, Der RBP-Kodex der Vereinten Nationen: Weltkartellrichtlinien, 1982 Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR Int.) 637-646, 727 at 736.

4 *Mueller*, Das Antitrustrecht der USA am Scheidewege, 1986 Wirtschaft und Wettbewerb (WuW) 533, 534 and 539, with a list of Chicago School publications; see also *Geberth & Janitzki*, Kartellrecht zwischen Kontinuität und Anpassung, 1987 Wirtschaft und Wettbewerb (WuW) 447, 453; *Schmidt & Rittaler*, Das wettbewerbstheoretische und -politische Credo der sog. Chicago School, 1985.

5 Austria, Canada, in former years France. After the German unification in 1990, new vertical restraints by Western firms in the former GDR had disastrous results. *Fikentscher*, Wirkungsforschung zum Recht: Folgen von Gerichtsentscheidungen – am Beispiel von extraterritorialem Wettbewerbsrecht, in: *Hof & Schulte* (eds.), Wirkungsforschung zum Recht III: Folgen von Gerichtsentscheidungen, 2001, p. 53-60.