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Limits and Control of Competition with a View to International Harmonization

Edited by
Jürgen Basedow

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Limits and Control of Competition with a View to International Harmonization

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PREFACE

The XVIth International Congress of Comparative Law was held at the University of Queensland at Brisbane, Australia from 14th to 20th July 2002. One of its commercial law sections dealt with 'Limits and control of competition with a view to international harmonization'. The papers written for that conference – 13 national reports, two regional reports and a general report – are published in this book. They are based upon a questionnaire which the general reporter had drafted about two years ago and which is equally published as an annex.

The background of our topic is twofold. While legal provisions for the protection of competition against private restrictions could only be found in a limited number of market economies until 1990, legislation of this type has proliferated all over the world since the breakdown of so many socialist systems. Today, more than 80 countries are said to have some kind of competition law, and more than two thirds of these statutes took effect during the past ten years. While this surprising development would be sufficient to stimulate the interest of a comparatist another movement which appears to gain momentum makes the comparison of competition law a necessity: the ongoing discussion about the harmonization of competition laws at the international level. The foundation of a working group on competition in the framework of the World Trade Organization some years ago has in fact initiated a worldwide discussion on the pros and cons of such harmonization. The arguments exchanged in that debate draw upon the particularities of national laws which renders a thorough comparative study indispensable. At the same time this context explains why global competition policy cannot be left to economics and political science but has to be supported by legal research.

The focus of this book which clearly emerges from the questionnaire, is on anti-competitive behaviour of private market actors. It goes without saying that competition policy has a much wider scope. It would include measures taken by sovereign states such as trade barriers, antidumping duties, subsidies and other state aids. These issues are only slightly touched upon in the papers collected in this book. An extensive discussion would

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require an in-depth analysis of the framework provided by national administrative law and by public international law. It would have gone beyond the possibilities available at an international congress of comparative law.

The reader of this book will perhaps regard the selection of the reports as eurocentric and may ask for the reasons. The International Academy of Comparative Law which prepares the international congresses is supported in its work by a great number of national committees of comparative law. In his work the general reporter has to rely on the appointments of national reporters made by the national committees. It appears that not all national committees are equally active or successful in the recruitment of national reporters. With a particular view to competition law it should also be pointed out that the system of national reports is no longer fully adequate given the emergence of more or less extensive legislation on competition in the framework of regional economic organizations such as the European Community and – to a lesser extent – the MERCOSUR. Both areas are covered in this book by regional reports.

The editor has been supported by advice and help from several persons. In particular, I am indebted to Dr. Christian Jung and Professor Dr. Dr. h.c. Ernst-Joachim Mestmäcker for their comments on earlier drafts of the questionnaire, to Mr. Humphrey Hill who, as a native speaker, carried out the linguistic revision of several reports, to Dr. Stefan Pankoke for the editorial work, and to Ingeborg Stahl for the preparation of the manuscript.

Hamburg, 5 August 2002 *Jürgen Basedow*

CONTRIBUTORS

Prof. Dr. Dr. h.c. Jürgen Basedow, LL.M. (Harvard), Director, Max-Planck Institute for foreign private and private international law; Professor of Law, University of Hamburg; Member of the German Monopolies Commission

Prof. Dr. Fernando Esteban de la Rosa, Área de Derecho internacional privado, University of Granada

Prof. Raúl Aníbal Etcheverry, University of Buenos Aires

Prof. Dr. Jens Fejø, Copenhagen Business School

Prof. Dr. Andreas Furrer, University of Luzern, associate with Pestalozzi Lachenal Patry, Zurich

Prof. David J. Gerber, Chicago-Kent College of Law, Chicago, Illinois

Dr. Massimiliano Granieri, Libera Università Internazionale degli Studi Sociali 'Guido Carli', Department of Legal Studies, Rome

Prof. Laurence Idot, University of Paris I (Panthéon-Sorbonne), Paris

Georgios Kiriazis, European Commission, Brussels

Dr. Christoph G. Lang, Pestalozzi Lachenal Patry, Zurich

Prof. Paul Latimer, Monash University, Melbourne

Andrew Matthews, Minter Ellison Rudd Watts, Auckland

Dr. Stefan L. Pankoke, Maître en droit (Aix-en-Provence), Max-Planck Institute for foreign private and private international law, Hamburg

Prof. Roberto Pardolesi, Libera Università Internazionale degli Studi Sociali 'Guido Carli', Department of Legal Studies, Rome

Prof. Urszula Promińska, University of Lodz

Dr. Eve Rimoldi de Ladmann, University of Buenos Aires

Prof. Dr. Hans-Peter Schwintowski, Humboldt-University of Berlin

Prof. Tadashi Shiraishi, University of Tokyo

Prof. Piet Jan Slot, University of Leiden

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I. Preliminary Remarks

This paper is mainly based on the national and regional reports published in this book. Our goal has been to present the basic ideas that stand behind the regulatory models. We hope that such basic ideas will not only further the understanding of the dynamics of and the interrelations between the competition laws. This general report is equally motivated by the wish that it might provide a basis for international harmonization in antitrust, and diminish the widespread pessimism about that goal.

That pessimistic view has at least four weaknesses: First, it is an inadequate response to what markets need. Globalization has dramatically increased the transaction costs that are caused by divergent national antitrust regulations concerning trans-border transactions such as distribution schemes or mergers and acquisitions. Second, antitrust still lacks effective instruments to prevent economic actors from substituting regulatory barriers to competition (gradually being abolished in the framework of the WTO), by agreeing on private restrictions. Third, international competition still suffers from the failure of national antitrust laws to combat export cartels. Finally, the pessimists seem to ignore the remarkable evolution towards a liberal competition model and its protection through enforceable antitrust rules which many countries have seen during the last decade. Contenting oneself

with existing national laws would amount to a conscious acceptance of major systemic deficiencies to the ultimate detriment of consumers.

Thus, we consider it to be the main purpose of this paper to provide a systematic overview of the regulatory models of 13 countries and two regional organizations as they are today. The structure of the following chapters is orientated around the questionnaire on which the national reports are based.

II. General Aspects

A. General Orientation of the Economic System

A secular project such as the harmonization of national antitrust laws at the global level must take into account the long-term orientation of the countries' economic systems. National governments are unlikely to agree to a liberal domestic competition law or liberal supra-national competition rules if their national policies are not based upon a common belief in the superiority of the market economy; nor would such harmonised statute, even if it were literally transformed into national law, have a good chance of being applied with a sufficient degree of coherence. Therefore, our comparative analysis of existing national antitrust systems must start with a glance at the general economic orientation of the countries, with an emphasis on the long-term perspective. It is particularly with regard to this long-term view that one might expect the decision in favour of a particular economic order to be especially enduring if it has its legal basis in the form of constitutional provisions. Paradoxically, the national reports cover countries that, despite the absence of any basic economic orientation at the constitutional level, belong to the most stable and liberal economies in the world, while other countries are described as rather interventionist and unstable as to their economic system, although their constitutions explicitly provide for economic freedom. Thus, solemn proclamations in a country's constitution prove much less significant for the economic reality than do political, social and cultural traditions.[1] This is even more so if appropriate proceedings for the judicial implementation of the constitution are lacking.

The focus of this paper on antitrust law is restricted to some rough observations and avoids detailed analyses of market intervention by the states.

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[1] Cf. only Swiss Report, p. 394.

1. European Community

One straightforward economic orientation is to be found in the Treaty Establishing the European Community (ECT)[2] which provides that the EC shall be 'conducted in accordance with the principle of an open market economy with free competition'.[3] Moreover, in order to achieve a single integrated market, the activities of the EC shall include 'a system ensuring that competition in the internal market is not distorted'.[4] The quasi-constitutional nature of such principles derives from the primacy of the ECT over both secondary legal measures of the EC itself and any national legal rule of EC Member States, including national constitutional law.[5] Although the scope of EC competition law is confined to economic activities that may affect trade between Member States (Article 81(1) ECT), the guiding principles of the Community's economic order mentioned above have trickled down to the purely national level.[6] Notwithstanding some persisting regional and sectoral limitations one can conclude that the EC institutions, above all the European Court of Justice (ECJ), have, during more than four decades, successfully introduced a remarkable political and economic evolution throughout the Member States which has gradually guided Europe into becoming a free market economy combined with a substantial body of state intervention mainly for the sake of social protection. The high degree of economic, legal and political integration as well as the social welfare which the EC countries have enjoyed during the past decades make a future fallback to interventionist or even centralised economic systems of single Member States very unlikely.

2. European States

Despite the above, the national reports of the EC Member States reveal some notable discrepancies as to the countries' general economic orientations resulting from different political, social and cultural realities.

a) Whereas the French Constitution of 1958 does not provide any general economic orientation, the famous *Décret d'Allarde* of 14-17 March 1791

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2 For the sake of simplicity, we will only refer to the Treaty Establishing the European Community as amended by the Treaty of Amsterdam which entered into force on 1.5.1999.

3 Article 4(1) ECT; cf. EC Report, p. 120.

4 Articles 2 and 3(1) lit. g ECT.

5 Case 6/64 Costa v. E.N.E.L., [1964] E.C.R. 585.

6 French Report p. 189; Spanish Report, p. 358.

regarding freedom of trade and industry is still in force and applied by the courts. It is referred to as a general principle of law.[7] Traditionally very strong, the French public sector was even enlarged by the nationalizations of 1982. It was only in 1986 that the system of price controls was repealed. Thus, the culture of competition in France is characterized as being weak.[8] The same applies to Italy whose Constitution provides in its Article 41(2) that private economic activity shall not contravene, inter alia, the public interest. However, since the notion of public interest has always been construed in the light of the relevant political climate,[9] the aforementioned provision does not provide any specific economic orientation.[10] Italy's decision in favour of a market economy is now to be found in its Antitrust Act of 1990.

Similarly, the Swiss reporter points to the country's long tradition of cartels, although Article 27 of the Federal Constitution declares economic freedom to be a central principle of Swiss constitutional law.[11] The first modern competition legislation was passed as recently as in 1995.

b) Whereas the EC founding members France and Italy, reflecting their rather interventionist past, refrained from bold liberalization of their economic systems for a long time, there is another group of Member States that adapted their national laws promptly to the Community's competition principles, once they decided to join the EC. Probably the most obvious example of this latter group is Spain. In 1978 it adopted a modern, democratic Constitution containing in its Article 38 an individual right to economic freedom. Having adhered to the EC in 1986, it took only three years until the enactment of the 'Law of Defence of Competition'[12] that was modelled to a great extent upon the EC competition rules.

The Polish Constitution of 1997 provides in its Article 20 for a social market economy based on economic freedom, private property and the solidarity, dialogue and collaboration of 'social partners'.[13] The Polish Competition Act was passed in 2000.

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7 See French Report, p. 188.
8 See French Report, p. 188.
9 Prior to its accession to the EU, Italy was known as the most centralized economy in Western Europe.
10 Italian Report, p. 237.
11 Swiss Report, p. 394.
12 Spanish Report, p. 358.
13 Polish Report, p. 337.

c) Although it is in vain that we look for a normative foundation of the economic system in the German and Dutch constitutions, it was at an early stage that both states developed a stable, liberal market economy with significant social components.[14] In the case of Germany, the legal principle of economic freedom can be traced back to 1869.[15] The Dutch reporter considers the principle of economic freedom to be 'totally self-evident' in his country.[16] The German economic order, often described as a 'social market economy', was conceived and established during the 1950's. Since then, it has never been questioned. The German Competition Act[17] was first enacted in 1957, the Dutch one in 1998. Similarly, Denmark's Constitution of 1849 did not explicitly provide for economic freedom, which was granted later by an 1857 statute. Nonetheless, Denmark is noted for a high degree of state intervention.

3. American Style Market Economies

Australia, New Zealand and the US are depicted as liberal market economies. In the case of the US, though lacking an explicit constitutional guarantee of economic freedom, this statement seems self-evident and has never been questioned in the country's history. As a reaction towards monopolistic tendencies after the Civil War, the US antitrust laws of 1890, 1913 and 1950 have become the most influential regulatory model in the world.[18]

This influence proved particularly powerful in New Zealand, where an ambitious liberalization programme was commenced by a new government from 1984 onwards in order to transform the country's highly regulated economy into an open market economy.[19]

The Australian Federal Constitution does not provide for a general orientation of the economy, nor does it confer upon the federation the power to regulate all aspects of an integrated Australian market.[20] However, national

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[14] German Report, p. 219 with an emphasis on the fundamental rights prohibiting inter alia the uncompensated nationalization of private property; Dutch Report, p. 295.

[15] Cf. § 1 of the Gewerbeordnung.

[16] Dutch Report, p. 295.

[17] Gesetz gegen Wettbewerbsbeschränkungen (GWB). The text is available online under <www.bundeskartellamtd.de/rechtsgrundlagen.html> (in German) and <www.bundeskartellamt.de/english.html> (in English).

[18] US Report, p. 416.

[19] New Zealand Report, p. 308.

[20] Australian Report, p. 73.

regulation of the common market was achieved in 1995 by means of an agreement among the federal states.

4. Argentina

The case of Argentina poses major difficulties due to the current financial, monetary and political crises which have resulted in a multitude of cases of state intervention. Nonetheless, the country is described as liberal[21] and has implemented a profound reform programme towards an open market economy. This is reflected in an amendment to the constitution which came into force in 1994 aiming at the attainment of undistorted competition. For the time being though, reliable predictions for the long-term future would seem to be rather audacious.

5. Summary

In summary, it can be said that in all countries considered, economic freedom is a guiding principle of the economic order, although it is only enshrined in the constitutions of some of them. The success of the United States' model as well as the enlargement and intensification of the integration process in Europe have proved to be powerful promoters of economic freedom. In the long-term perspective, however, it must be noted that some countries such as Argentina, are undergoing a process of economic reorientation the consequences of which can not yet be foreseen.

B. Prevailing Competition Model

As is impressively shown by the evolution of US antitrust law over the last 25 years, competition theory can have far-reaching effects on substantive competition rules. However, the national reports show substantial differences between the countries. It is not an oversimplification to subdivide the countries into two theoretical camps, the first being committed to the theory of workable competition, the second being primarily influenced by the Chicago school. However, none of the countries referred to in this report advocates one of these concepts exclusively. Instead it appears that the competent authorities apply these models, depending on the circumstances of the particular case. In contrast, other theories such as the contestable markets

[21] Argentine Report, p. 63.

approach and the effective competition model have minor practical significance.

1. The Workable Competition Model

Both EC competition rules and the national antitrust systems of the EC Member States are clearly dominated by the *workable competition model*, although the courts and competition authorities pragmatically draw on various approaches if this seems appropriate in view of the particular market structure or other economic factors.[22] Further, the EC reporter points to a recent tendency in the Commission's decision-making practice to take into account efficiency arguments as put forward by the Chicago school. A similar change is observed in the Netherlands.[23]

This 'model-picking' is also practised by EC Member States and by Switzerland. The German reporter even comes to the conclusion that one cannot determine any predominant competition model.[24]

Moreover, the workable competition model has had some influence on New Zealand's antitrust law,[25] despite its Competition Act of 1986 being inspired by the Australian competition rules and the Chicago school.[26] All these legal systems have in common the fact that the legislator did not predetermine the application of one particular competition model, even if the notion of workable competition occurs in a legal precept.

2. Chicago School

The second group of countries including the US and Australia is committed to the *Chicago school of antitrust* with its emphasis on efficiency arguments. The clearest example for this recent development is the fundamental change in the approach to mergers. Yet, the set of arguments used by US courts is by no means confined to economic ones. On the contrary, they have sometimes

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22 EC Report, p. 121.
23 Dutch Report, p. 296.
24 German Report, p. 220 et seq.
25 New Zealand Report, p. 309.
26 New Zealand Report, p. 309.