Editorial

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*Competition Laws and the Wind of Change**

In a conference dedicated to EEC Competition Laws your organizers took the risk of inviting a speaker from outside the EEC. Consequently I feel very much at ease in endeavouring to take you for a few minutes beyond the borders of EEC competition law, even beyond competition law itself.

Simply formulated, the point I would like to make is that competition laws, both European and American, are caught in the wind of change and cannot be considered in the same ivory tower, in the same isolation, as they used to. This is for two main reasons.

There are no meaningful competition policies and law without free trade

The assumption underlying both European and American competition laws and the action of enforcement authorities was, and still is, that anticompetitive practices provoking market distortions in our western market economies can originate only in the restrictive practices of enterprises themselves.

However, what we in fact see is that today the most significant anticompetitive practices originate not so much in corporations as in government.

When Americans, Europeans, Japanese, Koreans and others agree together to voluntary export restraints or orderly marketing agreements concerning the export of steel, cars, chips, or video recorders, they distort competition and hurt the consumer in a much more damaging way than when corporations conspire. In fact, government anticompetitive practices have replaced the great old cartels of the past.

This phenomenon is not new: what is new, however, is the magnitude of government interference. Up to now, through a kind of general schizophrenia, it has been considered that competition and trade policies have been regulating two totally different fields, with little or no connection and no need for harmonization. This schizophrenia should come to an end, and it should be realized that competition policies enforced by competition laws, and trade policies enforced by trade law are the two faces of one coin and must be closely coordinated for the sake of the ultimate goal:

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keeping international markets as open and free from encumbrances as possible, in order to maintain economic prosperity.

In all fairness, it must be said that the need for coordination has been felt already. For instance, the OECD published a checklist for governments to help them assess the competitive effect of their trade policy measures. However, this has remained a largely theoretical exercise up to now. What is new is the growing awareness that it is no longer possible to allow governments to state strong competition policies and enforce them against corporations through strong competition laws with one hand, while with their other hand they set trade policies which defeat the same competition policies through protectionist measures, restrict the choice of consumers and increase the price of products. Proof of this awareness, in what could be a major move in growing awareness, was the launching last September of the Uruguay round of trade negotiations during the Punta del Este GATT ministerial conference. The Uruguay round aims at a substantial liberalization of the world trading system and talks will probably last for the next four years. Of immediate application however are two commitments by the participating countries contained in the Punta del Este ministerial declaration:

- *"Standstill" commitments*. Governments undertook not to take any new trade-restrictive or distorting measures inconsistent with their GATT obligations.
- *"Rollback" commitments*. Governments undertook to phase out currently-operated measures inconsistent with GATT within a time-frame to be agreed.

Whereas the rollback commitment depends on the agreed time-frame, the standstill commitment was immediately operative.

The business community, which was taught the hard way not to engage in restrictive practices to keep markets competitive, should remind the governments concerned that this competitiveness depends above all on the trade policies they pursue, and keep a close check on their compliance with the *standstill* and *rollback* undertakings.

The arbitrators are coming

The second major development affecting competition laws is the arrival of arbitrators to dispose of antitrust claims, following what must be considered a major breakthrough, i.e. the *Mitsubishi* decision rendered in 1985 by the U.S. Supreme Court, the effects of which have not yet been fully appreciated.

As you know, the traditional attitude of governments and courts was that cases involving competition law issues could not be dealt with by arbitrators, as competition laws pertain to public policy and are consequently the exclusive province of the courts.

In its landmark *Mitsubishi* decision the U.S. Supreme Court, in a major shift, said

that it is perfectly permissible to arbitrate foreign antitrust claims, as long as the arbitrators apply U.S. laws to them.

Although almost unnoticed, the consequences of this decision are already being felt today in international arbitration.

International arbitration is experiencing currently a flow of cases with antitrust claims which could not possibly have been thought of prior to the *Mitsubishi* decision. A typical present case involves a distribution or licence agreement between a Japanese or European principal and a U.S. distributor or licensee, where the U.S. party seeks damages from his principal on the grounds that some restrictive clauses of the agreement violated U.S. antitrust laws.

The question of whether U.S. law was violated and if so what is the appropriate amount of damages, including treble damages—all questions which until recently have been the exclusive province of American courts—will now also be decided by Swiss, Belgian, Japanese or French arbitrators sitting in Brussels, Paris, Geneva or Tokyo. In my view this will certainly affect the substance of U.S. antitrust laws, in the same manner as the work of arbitrators on international commercial law may have affected the attitude of various national courts to it.

For instance, once U.S. antitrust laws have been violated the U.S. courts tend to consider fairly easily that the private claimant has suffered damage (then trebled), even if quite often the actual proof of damage seems slim. Arbitrators applying the same statutes will certainly take a much harder look at this and require actual proof of monetary damage caused by the antitrust violations, failing which they will have little hesitation in dismissing the claim.

Another instance: some violations of antitrust laws, which U.S. courts have traditionally considered as *per se* violations, i.e. without possibility of being excused, might very well be considered by arbitrators as falling under a *rule of reason approach* where they could with good reasons, excuse certain antitrust violations where the U.S. courts would never do so.

Will this U.S. evolution be followed by a similar one in respect of private claims under EEC competition laws? My guess is that it will, as some of the very causes which prompted it—the need for international trade and court congestion—are also present in Europe.

Much more than before, competition laws will have to be viewed as a part of the whole—the whole being the laws of international economic flows—including trade law, competition law and arbitration. This will affect the shaping of competition law practitioners. Having to take into consideration the broader picture means that new challenges, but also new opportunities, lie ahead for us.