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The State of the Union

European Community Competition Law at the Crossroads.

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Competition Law has proved to be a dynamic legal institute of great economic, legal and social significance. Indeed, the over-all positive effect this institute has had in the United States of America since the Sherman Act (1890), and in Europe since the Treaty of Rome (1957), is plainly manifest. Other contending economic strategies have in the long run proved to be inconsequential. Fair Competition is paradoxically dominating the economic environment, at least, in democracies.

Like all other legal institutes, this too naturally directly effects the well being of those falling within this regimen. Strategists therefore, have to be quite alert to avoid situations that rather than leading to the intended positive effects advocated by academic analysis instead lead in the opposite direction to the detriment of those that have to bear its weight. The emphasis within the European Community for prospective Member States to adopt this legal regime in their legal order has therefore to be treated with great circumspection. The pre-accession period does not consequentially necessitate a period of mere structural readjustment. It also demands a period of deep reflection for the redefinition and proper assimilation of the delicate issues involved.

Since the positing of those early foundations referred to above at least eighty regimes of competition law have sprouted and flourished to different degrees in a variety of economic realities worldwide. Obviously, whilst each competition law regime naturally derives inspiration from a common liberal economic theory and from its appropriate translation into legal terminology, each regime has also been obviously influenced by a variety of other autochthonous sources. In this respect, geo-political and particular social realities offer the more difficult perceptions requiring proper consideration and call for a deeper understanding of the various issues raised.

This melange, although necessarily safeguarding the very same principles of Competition Law common to all other regimes, can be said to have at the same time given each regime its own particular imprint determining its specific historical evolution and direction. Naturally, this has rendered each competition law regime unique in many respects, notwithstanding the fact that each aims principally at securing a common, fair and level playing field in economic and commercial matters for the benefit both of consumers and of the other major protagonists involved.

This general flourishing, although beneficial and most welcome, has in many jurisdictions, however, been achieved within a very limited period of time. Drastic attitudinal changes have more often than not been unceremoniously imposed on economies that were previously run on diametrically opposite lines. Very often the change from a controlled- to a market-economy in these regimes has been too abrupt to fathom. There was no adequate period of adaptation, adjustment and maturation. A profound cultural change can be said to have been imposed from on high. It has not had the time to be gradually internally nurtured at grassroots level. This made it very difficult for those who were negatively affected to both fully identify themselves with and own this new institute to any particular degree. Fissures in the general edifice of these regimes can therefore not only be expected to appear but can actually already be observed.

This has obviously had its toll not only on the various legal regimes involved but also on the very European Community that is directly trying to spearhead this cultural direction even in applicant countries. A modicum of uniformity of application and of execution is imperative if the European Community is to survive as a strong economic entity of global significance. The European Commission itself has realized this. Strategists for the European Community have realized that the Commission can never hope to retain its present prerogative of acting as the sole guardian on competition issues – especially in an enlarged European Community. The direction ahead is clear.

As things now stand, the Commission itself is hopelessly inundated with such an unsustainable workload that it is exploring new avenues to avoid a total collapse in the not too distant future. As a result of the changes in the geographic and socio-political realities witnessed at the present historical juncture, a qualitative procedural quantum leap is actively being nurtured, indeed solicited and perhaps even deemed outright indispensable.

The various successes witnessed in this specific field of law are nothing but milestones of European Community

Law. Although they require no in-depth consideration here, it may be emphasized that its single most important contribution can be said to be that of establishing a proper and equitable regulation of the single market for the benefit of the community.

Past experience has led to a general re-thinking of extant strategies. A scholarly and at the same time pragmatic debate of unprecedented proportions has been unleashed involving experts from the European Community itself, from Member States and also from prospective members to the said Community. Early rumblings have now reached hurricane proportions. This has now led the European Commission to unleash a thorough re-examination of the state of the Union in this regard.

Future strategies concerning the direction which European antitrust law will eventually take are under detailed scrutiny by all concerned. The atmosphere is electric. Decisions that will be taken in the not too distant future in this regard will necessarily have a momentous effect on one and all – from the protagonist prime movers to the passive recipients involved.

It is now a moot point amongst scholars and practitioners alike that the present system of enforcement of European Community competition law has remained virtually unaltered since the early years of the Community. Notwithstanding this, the socio-economic and the geo-political contexts within which the whole competition law edifice operates have undergone radical transformation.

The present European Community notification and authorization systems operate in a rather slow, cumbersome and rather expensive manner. It is claimed by many that the fruits reaped, although quite tangible, have not proved to be as abundant as expected. At best, they are generally considered proportionately overtly expensive. Modern business cannot afford long-winded, time-consuming, hair-splitting, misdirected procedures. Bottlenecks occur at a cost.

The speed and immediacy of modern technology have also contributed to a re-drawing and re-shaping of the confines of legal wrangling. This has lead to an increasingly ever-changing dynamic reality to which the legal forum is urgently expected to respond. This legal institute does not afford to be way laid by technical progress. Even the business world, which is naturally greatly sensitive and immediately effected by any direction undertaken in this regard is justifiably demanding a proper re-focusing of future legal strategies and procedures rendering the whole regime more efficient, adequately uniform and affordable.

Waters have been rendered murkier by the fact that at the present juncture the European Community is undergoing a process of enlargement where prospective entrants have mostly only become susceptible to a market-economy in recent years. Teething troubles are obvious. The economic systems of these hopefuls can still be seen as torn between pursuing the interests of their business communities and the aims of accession. At this stage, these interests may still be seen as being at odds with each other, notwithstanding one's pious intentions. Finding the golden mean is not simple at all.

The task of efficiently and consistently applying European Community competition law strategies has thus been rendered more difficult. This added dimension has put further demands on those whose task it is to identify the proper directions to be pursued and adopted throughout the Community. Yet, although difficulties still lay ahead, progress cannot be withheld.

The proposal that presently seems to have met with the approval of a consistent majority of academics is that which requires the substitution of the present notification system required by Regulation 17/62, with the legal exception system in Community competition affairs. If this is acceded to not only the present procedure but also the present mentality will necessarily have to change. A redefinition of the limits of the competence of the European Commission will be required. National competition authorities and national courts will necessarily be catapulted to center-stage as they will assume onerous duties in this regard.

The not so subtle message that is currently being driven home is therefore that the European Commission's present monopoly with regards to competition law issues might in actual fact be obstructing the effective application of competition rules in a European and perhaps global competitive environment. The assistance of national authorities and courts is going to be indispensable. These need to be effectively roped in to jointly shoulder the heavy burdens of this legal institute with the European Commission.

As things presently stand it is deemed to be virtually impossible for the European Commission to continue to shoulder this heavy burden and play its present sole pivotal role. This will definitely be more so if the prospected enlargement of the Community goes ahead as scheduled. The Commission's own success in placing it uniquely at the center of the European Competition Law universe has proved to be a major vehicle of change in this direction. Diversification is being seen as essential. Business, especially small and medium-sized enterprises, cannot afford the excessive economic burdens involved in the present procedural set-up. Resources on both sides of the divide are over-stretched and at present both are being prevented from being utilized to their optimum.

This latest proposal, although positive in many respects especially in alleviating the heavy burdens of the European Commission, has however met with harsh criticism. This is mainly focused on the grounds that if a multiplicity of national authorities and courts are to be involved in the determi-

nation of the highly complicated competition law issues then inconsistency of decision and of execution will prevail. Forum shopping will abound. Legal certainty will be thrown to the winds.

Yet, although the effective exercise of a widely shared competence will naturally increase the probability of diversity of interpretation and of application, it is the considered opinion of many scholars and practitioners alike that this decentralized structure need not necessarily lead to such a bleak and negative outlook. It is hoped that this change will actually lead to a more systematic, timely, effective and affordable enforcement strategy. Here too, the principal of subsidiarity is being seen as vital to this drive for coherent expansion.

It is envisaged that it will indeed be beneficial to the notion of fair competition itself as different scientific approaches may be adopted towards the attainment of the same end. There is absolutely no harm in this. Indeed, the cliché unity in diversity will thus acquire a further dimension. In fact, most academics rightly hold and experience actually dictates, that deadly uniformity is obnoxious. Perfect uniform implementation is neither possible nor indispensable, especially in democracies.

The role of the European Commission will thus evolve from that of a sole, central and unique player-manager, to that of a supra-national authority working in close proximity with the national authorities and courts for the attainment of the common objectives established in the Treaty. Its guiding mission, strengthened as it is by years of experience, will definitely be of extreme benefit to the attainment of the pre-established aims of the Treaty. Hence, the fear of frustrating consistency of application can be rendered structurally impossible.

The European Commission's proposed coordinating role is intended to go a long way in achieving this common and consistent strategy. The establishment of this general network will ensure that uniform enforcement is achieved through sound information, free and open discussion, personal networking and ultimately reciprocal persuasion. Hence, national courts will be able to have direct access to the European Commission to request information and opinions as to the proper application of European Community competition rules.

It is thus deemed that as a result coherence of application will be ensured. This new approach will have the added value of having the in-built advantage of creating a one-stop shop system whereby the much-feared forum shopping will be nipped in the bud or at least minimized to a considerable extent. Furthermore, inconsistencies of application may be eradicated when one considers the possible utilization of the preliminary reference procedure to the European Court of Justice.

Yet, this is still a leap in the dark and uncertainty naturally prevails. Acute observers cannot really effect a proper assessment of the proposed direction, positive as it may seem at first hand. The precise conditions under which this network will materialize have not yet been fully finalized. As things stand problems, even of a constitutional law nature, can be foreseen.

Furthermore, some light can be thrown on this issue from the European Commission's own White Paper published in this regard. It transpires that the Commission intends to arrogate to itself the freedom of intervention in the procedures instituted in national courts and at the same time preside over the above-mentioned multi-national network where it can freely be accessed, even electronically, for advice and direction. The effect of this proposal will be to give the European Commission direct access to the national authorities and courts on the pretext of imparting expert knowledgeable advice.

Such direct access and communication might however lead to quite an untenable situation. Here, the Commission may be accused that at one and the same time it is acting both as prosecutor – through its infiltration of the national authorities who are parties in the proceedings – and as judge – through the advice it may give to the presiding tribunal. Such a scenario might prima facie legitimately be seen as infringing the principle of the independence of the judiciary and as undermining one of the major principles of natural justice – *nemo iudex in causa propria*. Many fear the consequences of allowing the European Commission to sit on both sides of the fence. This would be totally against our legal culture. A remedy is urgently sought.

Notwithstanding the dangers briefly referred to above, self-regulation, strengthened through the assistance of the Commission, seem to be gaining more ground – at least within the confines broadly outlined. Yet, inspire of the difficulties so encountered the hardest nut to crack remains that concerning the effective and uniform determination and enforcement of competition law infringements. In this respect it goes without saying that it is obvious that sometimes it may still be quite lucrative for offenders to flaunt competition law, even risking the administrative fines envisaged. Experience shows that financial sanctions do not seem to be enough of a deterrent if they are not imposed with the necessary celerity said sanctions call for in this highly sensitive field. Speed of determination and execution is crucial. Some even argue that this is more relevant than the quantum that might be imposed.

This particular aspect concerning the enforcement strategies that might be adopted in fact calls for an in-depth comparative scrutiny of the kaleidoscope of legal issues that emerge. This is all the more pertinent with respect to Malta's

own Competition Law enforcement regime, which cries out for an urgent overhaul of extant strategies. Past calls for a proper re-evaluation of this particular aspect of Malta's Competition Law regime have unceremoniously gone unheeded. The amendments to the Maltese Competition Act which have recently come into force have not even come anywhere close to resolving this delicate issue positively and intelligently. A unique opportunity to remedy this situation has been missed. Perhaps, the lobbies involved have again had their day against the national interest.

This particularly delicate aspect seems to have failed to attract the attention of those responsible for steering the ship of state in the proper direction. Synchronization with the most qualified and advanced international competition regimes is still lacking. The situation calls for an immediate remedy if Malta is to achieve and maintain any international relevance. Things cannot remain as they are. Those responsible and their advisors cannot be allowed to continue to passively thwart the true spirit of the principles of competition law by expressing mere lip service to the notions espoused by this regime, whilst at the same time putting spokes in the wheels where it matters most.

Extant enforcement strategy is farcical. The situation calls for urgent remedy to respect the intelligence of operators in this sensitive field and bring it in line with the most progressive international regimes. As things stand the local competition regime is toothless. Operators must be given a fair opportunity to be effective. Adequate procedural tools are required to enable them to act according to the spirit of competition law. Obviously, if the local situation remains as is, when the aforementioned general unitary strategy of the European Community becomes operative the whole European regime might even be jeopardized. This regime is only as strong as its weakest link.

Finally, although decentralization of competition law is attractive, one must yet be wary that this will not inadvertently lead to re-nationalization. Competition law is not just an institute that ensures fair competition. It is not only a cold economic tool for the raising of productivity and for the increasing of industrial growth. It is much more than that. It is also a tool for general social welfare. The benefit of the consumer is central to this regime as it also contributes to the lowering of prices and affords a wider choice. The competition regime does not operate in a vacuum. The precepts of the single internal market, although remaining paramount, have to come to terms with this social reality too.

It must be remembered with humility that regardless of its faults the present international regime, inclusive of fair competition law, has definitely contributed to the well being, prosperity and peace witnessed in Europe during the last fifty odd years. Any changes envisaged should bear this reality in mind. Any direction that is eventually decided upon must keep the basic issues briefly referred to above in proper perspective.

Indeed, a coherent, flexible, transparent and workable enforcement strategy will strengthen and broaden the social-welfare structure within the present social-market economy. All told, it must be remembered that this social sensitivity has been painstakingly achieved over the years and cannot be allowed to gradually disappear. When the proposed strategy involving the concerted action of the European Commission, national authorities and national courts resolves the difficulties previously addressed, the resulting mechanism will go a long way in securing the enforcement of the true spirit of Competition Law for the benefit of the whole European community.