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European Community Competition Law- A Rejoinder by Judge Pescatore

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European Community Competition Law- A Rejoinder by Judge Pescatore

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Abstract

This article contests the contention by Dr. Marengo that Judge Pescatore asserts a theory that Member States of the EEC are prevented by Community law from intervening in the marketplace by legislation. Rather, Judge Pescatore explains how his article envisaged acts of legislation by which Member States specifically intervene in the normal play of competition. He goes on to say that Dr. Marengo is battling an imaginary theory of his own making and not against what he actually wrote.

EUROPEAN COMMUNITY COMPETITION LAW—A REJOINER BY JUDGE PESCATORE

Dr. Marengo sums up what he thinks to be my opinion in the following words: "Are Member States of the EEC prevented by Community law from intervening in the marketplace by legislation? The theory set forth by Judge Pescatore . . . answers this question with a determined 'yes.'"¹ Dr. Marengo states that the purpose of his article is to "challenge[] the validity of Judge Pescatore's theory."²

I have never expressed the "theory" attributed to me by Dr. Marengo. What I *have* said is that Member States of the Community are under a bona fide obligation (pursuant to both international and Community law) not to frustrate the purpose of Articles 85 and 86 of the EEC Treaty, by facilitating, or imposing upon undertakings, behavior contrary to the Community's competition rules, or by interfering with the authority conferred upon the Commission by the same provisions. It is generally accepted that this authority includes not only the power to prosecute anticompetitive actions in the Common Market but also to grant exemptions under Article 85(3) and to determine the terms and conditions of such exemptions.

I *have* said, moreover, that the effect, if not the purpose, of legislation like the "loi Jack Lang" is clearly to exclude the application of the Community's rules and policies in the area of competition, and that the Commission has shown only an extremely weak reaction in the defense of its own prerogatives in this respect. The same observation may be made in relation to a Belgian law on profit margins of travel agencies, as is shown by a case now pending before the Court.³

Dr. Marengo has tried to justify his reading of my opinion by adding that "[e]conomic legislation inevitably distorts com-

1. Marengo, *Competition Between National Economies and Competition Between Businesses—A Response to Judge Pescatore*, 10 FORDHAM INT'L L.J. 420, 420 (1987).

2. *Id.*

3. *Vereniging Van Vlaamse Reisbureaus*, Case 311/85, 1986 E.C.R. ___. For an opinion that coincides with this author's, see the submissions delivered by Advocate General Carl Lenz on December 16, 1986. It remains to be seen whether the Court is willing to jump the shadow of the *Leclerc* precedent.

petition.”⁴ This assertion is simply wrong. There are many acts of economic legislation that affect industry or commerce without having the slightest relevance for competition. What I envisaged in my article were such acts of legislation by which Member States specifically intervene in the normal play of competition.

Thus, it would appear that Dr. Marenco is battling against an imaginary theory of his own making and not against what I have actually written.

4. Marenco, *supra* note 1, at 421.