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Vision of Europe: Lessons For the World

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Eleanor Fox

Abstract

In this introductory essay, the author defines the economic vision of Europe for its internal market. Next, she will note how various Articles in this issue either express the vision, the tensions that lie within it, or the difficulties of the tasks involved in achieving it. She concludes by observing that Europe is grappling with a panoply of questions that will, in one decade or another, present themselves to the world, and while the world may not choose Europe's answers to the questions, it will be the wiser for confronting them.

INTRODUCTION

VISION OF EUROPE: LESSONS FOR THE WORLD

*Eleanor M. Fox**

This Ninth Annual Issue on European Community Law is a volume rich in depth and breadth. Dedicated to Jacques Delors, visionary of one Europe, it spans the array of issues inherent in the task of integrating a community of nations while sufficiently preserving national autonomy and local diversity. The effort of the European Community ("Community" or "EC") to create a market without frontiers is daunting. Yet I submit that this enterprise, with certain modifications, provides a microcosm for the challenge facing the trading nations of the world in an increasingly globalized economy. The seeds of this global enterprise are likely to be sown in the next round of the General Agreement on Tariffs and Trade, in its new incarnation as the World Trade Organization. For the global community, seeking greater openness, access, and economic opportunity and the attendant benefits of freedom, there are lessons to be learned from Europe, many of which emerge from the pages of this book.

In this introductory essay, I define the economic vision of Europe for its internal market. Next, I note how various Articles in this issue either express the vision, the tensions that lie within it, or the difficulties of the tasks involved in achieving it. I conclude by observing that Europe is grappling with a panoply of questions that will, in one decade or another, present themselves to the world, and while the world may not choose Europe's answers to the questions, it will be the wiser for confronting them.

THE ECONOMIC VISION OF EUROPE

To stabilize the conditions for peace in an erstwhile warring Europe, and to establish the conditions for a robust economy with markets sufficiently large to support efficient firms, six na-

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tions at the center of Western Europe designed and signed the Treaty of Rome in 1957.¹ The brilliant basic concept was to lift the frontiers that stood as border barriers around each of the nation-states, and to assure that neither governments nor private firms could replace them, directly or indirectly, by border restraints or discriminatory measures, or measures of equivalent effect. These first principles are enshrined in Articles 2, 3, and 5 of the Treaty of Rome, in the four freedoms, and in the articles establishing a common competition policy, which apply not only to private actors but also to state-owned enterprises, state-licensed enterprises, and state aids.

The vision of free movement across a Europe without frontiers has a seamless character. National trade laws, such as antidumping and countervailing duty laws, were abolished. Trade law was transmogrified into freedom of movement law, and the right to undistorted competition. In this sense, for the internal market, trade law became "undistorted-competition law," and the "undistorted-competition law" of the internal market caught public and private distortions alike.

The first principles of the EC internal market centrally prohibit "beggar thy neighbor" restraints — restraints by one nation or its citizens designed to profit by imposing costs on another member nation or its citizens. Thus, it was and is absolutely forbidden for Germany to order its producers to combine to exploit the French, or for French producers to cartelize to exploit the Germans. Parochial, nationalistic restraints are utterly forbidden.

It was recognized, however, that some normal and not parochial public or private action may have spillover effects on one's neighbors and it was necessary to devise principles to distinguish legitimate from illegitimate measures. Some of these measures would be legitimate simply because they served a proper national interest, but only if they were proportional and narrowly tailored to serve that interest. Other such measures would be legitimate because they also served larger objectives of the European Community, such as "lifting up" the least well off regions of

1. For the economic blueprint of the European Community and the institutional system to carry out the objectives, see generally GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* (1993).

the Community and thereby enhancing social and economic cohesion. For all permitted derogations from the one-Europe vision, transparency and proportionality were, and are, necessary conditions.

Moreover, especially after the border barriers were lifted, two phenomena appeared regarding different national regimes regulating a variety of conditions, such as product safety and the environment. First, sometimes the regimes clashed, or the need to comply with several systems imposed unnecessary costs, interfering with inter-Member State trade. Second, firms operating in regimes with a higher level of regulation thought themselves to be at an unfair competitive disadvantage because of the costs of regulation. Third, for some problems, such as environmental spillovers, common solutions would be superior to individual solutions. Accordingly, the Community developed methodologies for bringing bodies of law into harmony; and for goods in transit not subject to common policy, it developed the rule of law that member nations must give mutual recognition to the regulation (e.g., safety certifications) of one another.

The system's effectiveness depends upon acceptance of Community law in the Member States. Accordingly, the Court of Justice of the European Communities (the "Court of Justice") has ruled that Community law is supreme, and clear rules of Community law are directly applicable in the Member States; that is, they are a part of the body of the law of each nation.²

The paragraphs above concern economic foundations. Omitted, therefore, is the governance process within the Community, including the processes by which legislation is proposed and passed — a realm often described with the epithet, "democracy deficit." Along with the perceived democracy deficit is the perception of bureaucratic excess, and the claim that "bureaucrats in Brussels" extend their tentacles into the lives of the distant country men and women. Can a nation retain an accepta-

2. The principles of the EC blueprint for freedom of trade without discrimination have easy application to free trade areas beyond the Community. They have long applied in the EFTA free trade area. As Eastern Europe has spectacularly democratized and moved to freer markets, the European Community has brought the most basic of its first principles eastward.

For a suggested adaptation of the principles to North America, see AMERICAN BAR ASSOCIATION, THE REPORT OF THE ABA ANTITRUST SECTION TASK FORCE ON THE COMPETITION DIMENSION OF THE NORTH AMERICAN FREE TRADE AGREEMENT (1994).

ble share of power and responsibility while conferring power on supranational institutions whose word is supreme? The question resonates, and properly so; but yet, as we move rapidly towards the twenty-first century, a Europe with restored frontiers is all but unthinkable. The shrinking world itself is in search of principles to assure openness, non-parochialism, and methodologies for bringing disparate regulatory regimes into harmony.

THE NINTH ANNUAL ISSUE: THE TASKS OF EUROPE

Each of the Articles in this issue deals with problems or virtues of centralization. The Articles may be placed into five categories: (1) the role of the Court of Justice, (2) state aids and their compatibility with the Community, (3) telecommunications: the fit of common policy with Member State policy and of regulation with competition, (4) duties of firms that control access to essential facilities, and (5) the overarching subject of subsidiarity and sovereignty. The coverage is enriched by diversity of perspective. Among the authors are Commission officials and an Advocate General of the Court of Justice, the French Vice-Chair of competition enforcement, a practitioner from Spain, a U.S. law clerk/scholar, and a U.S. student. Not surprisingly, the officials of the Community convey the strongest sense both of the mission for an integrated Europe and of the magnitude of achievements in this direction, while others explore the complexities of the problems and the tension between federalist central control and national autonomy.

I begin with the Court of Justice, which is the focus of the opening Article and the Comment. From the outset, this distinguished judicial institution took virtually all available opportunities to make Community institutions robust and to endow them with the necessary powers to assure the emergence of a vital, integrated Europe. While the activism has been criticized on grounds of process and interpretation, it has been credited with making possible a meaningful European Community that is a player in the world today.

Fittingly, in the opening piece, Advocate General Carl Otto Lenz describes the supremacy of Community law and its reception into the Member States, and the mechanism by which Member State courts may and often must pose questions to the Court of Justice to assure that the Member State courts give the proper

interpretation to Community law and that Community law is uniformly applied. The prospect of varying interpretations is viewed by Advocate General Lenz not as an expression of possibility and diversity but as "a potential danger . . . [to] the functioning of the EC legal system as a whole" — as well it might be when states as diverse as France and Great Britain are charged with applying common (external) customs regulations and implementing the common agricultural and social security systems. It is perhaps of some interest that in one of the few cases detailed by Advocate General Lenz to explain the system of reference, the Court's answer to a British court's question directed the British court to do an act (temporarily refusing to apply an Act of Parliament) that the British constitutional system forbade.

Coincidentally, the student Comment deals also with the Court of Justice. Commenting on *Marshall II*, a case concerning equal treatment for women in the workplace, Gina L. Ziccolella observes the doctrine that Community directives must be clear and unconditional in order to have direct effect as law in the Member States; and that in *Marshall II* the Court expanded this doctrine by according uncommon elasticity to the words "clear and unconditional." While noting that the Court's judgment was "a surprisingly liberal" interpretation and an activist ruling, Ms. Ziccolella nonetheless hails the decision as a welcome development because it firmly advances the effort of the Community to eliminate gender discrimination. Thus, an example of the eternal tension; the seduction of doing "what's right" for the good of the Community at the expense of established doctrine and Member State choice.

The treatment of state aids in this issue is unusually textured, with an Article by Claus-Dieter Ehlermann, Director-General of Competition of the European Commission, juxtaposed with an Article by Frederic Yves Jenny, Vice-Chairman of the Conseil de la Concurrence in France — a country whose industrial policy tools generously include state aids. The combination of the two pieces gives a unique perspective on the fit of industrial policy tools with a regime of free movement and undistorted competition and on both the promise and the problems of a federal governmental system for administering a policy limiting state-granted subsidies.

The piece by Dr. Ehlermann provides historical background on the state action aspects of competition policy — limits on

public enterprise action as well as state aids. He shows the remarkable effort of the EC in breaking ground in this important area of competition policy (which incidentally is overlooked in most nations with respect to their own internal markets, and yet is becoming an important agenda item in international trade talks). He describes the progress of the EC in expanding to the free trade area with the Eastern European countries its policy to regulate state acts that harm trade and competition. The Jenny paper digs deeply more than broadly. He points out the panoply of often inconsistent objectives of nations in granting state aids as well as of the Community in maintaining surveillance over them (for example, the desire to help small and middle sized firms, workers, and consumers). Jenny stresses the opaqueness of Commission policy in the area, the inconsistency of its rulings, and the lack of economic market analysis underlying them, and in so doing he provides specific direction for policy reform.

A step away from government enterprise with power is the private firm with power, whose acts are regulated by Article 86 of the EC Treaty, as described by John Temple Lang, a Director in the Directorate General for Competition. The lucid Article of Mr. Temple Lang thoroughly analyzes the EC law on companies' duties to supply competitors and to grant access to essential facilities. The seamless quality of EC law reappears. Just as governments may not discriminate against non-nationals in the internal market, firms with control over essential facilities may not discriminate (against outsiders), without justification (e.g., no spare capacity). Just as governments may not block access to markets, dominant firms may not deny access. Just as governmental trade-restraining action, if allowed at all, must be proportional, dominant firm acts that block significant economic opportunities are forbidden if not justified, and they cannot be justified if they are not proportional to achieve proper objectives.

A critique may be made, and has been made, regarding substantive law under Article 86. EC law's deficit of economic analysis, and its overbreadth in finding dominance and in imposing duties to deal have been noted.³ The point I make here runs in the other direction; the point is that the EC, uniquely, has seen

3. E.g., Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981 (1986).

and acted on the links between government and private trade-restraining action, especially market-blocking action, even while the trading nations of the world appear to have just discovered the gap between trade law and competition law and are searching for ways to understand the commonalities and to bridge the gap.

Fernando Pombo, a learned practitioner in Madrid, provides the exposition on EC telecommunications law. Telecommunications, which two decades ago was highly regulated by national and local authorities of nationalistic and often discriminatory bent, is now at center stage in the global economy. Liberalization from intrusive regulation is occurring throughout the world just as world competition is intensifying and telecommunications, linked with other media, is seen as the foundation for fluid trans-world communications; a partner in the global information superhighway. The European Community has worked hard and long on liberalizing telecommunications. EC liberalization includes not only legislation — some standardization, mutual recognition and harmonization — but also competition law enforcement to assure that the firms with power do not take the seductive opportunities to enhance their profits at the expense of consumers and competitors. The telecommunications industry provides a window for observing the integrated and linking economic policies of the Commission. Thus, in the paper by Mr. Pombo we meet again the EC policies for access, nondiscrimination (in procurement and access), and transparency. As well, we encounter the multitude of ways in which potentially conflicting regulatory regimes of the Member States may be brought closer and closer into harmony.

As we approach the end of the issue, we return to the overarching tension — centralism versus autonomy. Paul D. Marquardt has contributed the stimulating Article, *Subsidiarity and Sovereignty in the European Union*. Mr. Marquardt explores the roots and modern usage of the word and the doctrine “subsidiarity.” He observes the incorporation of subsidiarity into the Treaty on European Union; a concept heralded as the means and method to save the autonomy of the member nations. In the view of Mr. Marquardt (I believe), the rhetoric of subsidiarity is a cynical ploy to keep the critics of the European Union at bay while offering nothing to the concerned Europeans who wish to preserve the souls of their nations. Indeed, he makes the argu-

ment that subsidiarity, which dictates that power be preserved at the lowest possible level for effective formation and implementation of policy, dictates that the most significant power will flow up to the European institutions in the name of technological efficiency, and that most other powers will devolve to a local level, bypassing the nation state. Thus, a cruel hoax.

I am not persuaded of the emptiness and perversity of subsidiarity. To the contrary, I view the concept as one of conceptual beauty, providing a framework for addressing the challenge of the twenty-first century.⁴ Particularly is this so for a community of nations whose future depends not only on national uniqueness and choice but also on common cause. Even for those who, like me, are attracted to the seamless economic blueprint for Europe, the observations of Mr. Marquardt are an important call to action. Unless subsidiarity itself becomes a doctrine that is transparent and meaningful in decreeing the devolution of power, it will muddy rather than clarify the waters of Europe. This instrumental role, I must add, is explicitly not a role that Mr. Marquardt wishes to play, for he sees subsidiarity as a telling by-product of a technocratic Europe, consolidating power and efficiency at the expense of identity and trust.

CONCLUSION

This Ninth Annual Issue on European Community Law is a volume on *The Work of Europe*.⁵ In their explorations of the problems confronted and the choices made in the European Community, the Articles reveal the challenges confronting a community coming together for the common good of its people.

I have suggested above that *The Work of Europe* is relevant to *The Work of the World*, but with differences. The major difference is that the trading nations of the world have no need for the depth of integration that galvanized Europe. Yet, like Europe, the world would, in my view, profit from greater openness of markets, less parochialism, higher levels of transparency and

4. The challenge is to discover what linkages should be forged at higher than national level to avoid narrow nationalism and thereby to unleash opportunities for the peoples of the world, and to determine how the linkages should be forged in view of the objective to preserve maximum national and local autonomy consistent with the linking regime.

5. See R. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM* (1991).

market access, and harmonization of regimes of regulation when disparate systems are costly and harmony will facilitate freedoms and opportunities and tend to improve standards of living without trampling upon important values.⁶ For its internal market, Europe has grappled with the many facets of these problems, as the Articles in this issue show. Many answers for the world trading system are bound to be different.⁷ But Europe has posed and is posing the right questions, and for this reason, the world can learn from Europe.

6. For a study of why and when harmonization of law might be indicated and how it might be achieved, see *Committee on the United States in a Global Economy, Harmonizing and Coordinating the Economic Law of Nations: A Comparative Study*, 49 REC. ASS'N BAR CITY N.Y. 800 (1994) (studying securities law, intellectual property law, environmental law, and antitrust law).

7. For example, Europe needed a common competition policy to effectuate deep market integration and to prevent a patchwork of disparate and warring national industrial policies from blocking its way. No similar need drives the trading nations of the world and a much more minimal system of linking principles and national enforcement is possible and I believe desirable. See Eleanor M. Fox, *Competition Law and the Next Agenda for the GATT/WTO: Forging the Links of Competition and Trade*, 4 Pac. Rim L. & Pol'y J. — (forthcoming 1995).