From Unfair Trading to Free Competition – Towards a New Organisation of Markets in the European Union

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Outline

A shift in the attitude towards competition. In this paper, I wonder whether a shift has not taken place in the last 20 years in the European Union as regards the attitude that we, Europeans, have towards competition. Looking back at the beginning of the European communities, it appears that the European institutions attempted to promote fairness in commercial transactions between businesses as well as between businesses and the consumers. This vision has gradually been replaced by an attitude whereby consumers and businesses are considered able to defend their interest by themselves. In this new context, the emphasis is placed on efficiency in the hope that the global quantity of wealth available in society will increase. This shift corresponds to a modification in the perception that institutions have about the markets and the role of the law. In the first vision (Fair competition), the law is supposed to bring order and rationality to a world which would otherwise fall into chaos. By contrast, order and rationality are already supposed to exist in the second vision (Free competition). In that latter vision, authorities are supposed to limit their interventions to specific circumstances – circumstances where markets do not provide a satisfactory solution by themselves.

Introduction

Competition in society. – When preparing this paper, I was thinking of a recent French movie portraying Medieval knights landing in the 20th century through a machine allowing travel in time. This movie is about what people from the past would feel about our current life if they were to come back to earth. Thinking about the conference, I was wondering what these knights would think about competition in our times. Would they consider that competition is fiercer than before ? This question does not only concern people from the past. It also translates a concern of many people in our times. Many people in society are concerned by the level

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of competition which nowadays exists. It would wrong, however, to consider, on the basis of our own perception, that competition was less vivid earlier. On the basis of the enquiries I have made in History, it seems fair to say that the degree of competition existing today does not differ, probably, in substance, from what people have experienced in the past. To me, it appears, in any case, difficult to imagine any human society without one or more forms of competition. Competition within groups, and between groups, seems to have always existed, and will probably always exist.

Object of this paper. – What may have changed, by contrast, is the attitude that people have towards competition. In my opinion, it cannot be said that, across time and space, people, and authorities, always perceive, and have always perceived, competition, in the same manner. Several attitudes are indeed possible *vis-à-vis* competition. The object of this paper is to argue that a shift may have taken place, in the last 15 years, from one attitude to another, in the European Union. To formulate that shift in a short sentence, I would say that we may have gone from a vision where fair trading, and fair competition, were promoted, to an era where the emphasis is placed on efficiency, and free competition.

Fair trading and fair competition. – Before starting the discussion, let me say how difficult it appears to clearly distinguish unfair trading from unfair competition. Admittedly, competition primarily concerns relations between people or firms located, potentially at least, on the same market. For that reason, one can say that competition mainly involves horizontal relations, ie relations among entities located at the same level of the economic chain. By contrast, fair trading is a more general concept encompassing fairness in all forms of transactions : horizontal, between competitors; as well as vertical, between, for instance, suppliers and consumers.

Difficult distinction. – My understanding is that, although different definitions may be given to these concepts, they are difficult to distinguish in practice. The reason is that horizontal relations are often guided by concerns relating to vertical relations – and vice versa. For instance, suppliers compete (horizontal relations) to successfully propose their products to customers (vertical relations). In the opposite direction, the advertising techniques addressed by suppliers to customers (vertical relations) are inspired by the mutual competition which opposes these suppliers (horizontal relations). The links existing between these two sets of relations make it difficult, if not impossible, to completely dissociate fair trading and fair competition. For this reason, I propose to use in this paper the two concepts without a clear difference between them – but remain open to discussion if a clearer distinction can be proposed.

Attitudes Towards Competition

Several possible attitudes. – In the introduction to this contribution, I stated that several attitudes are possible *vis-à-vis* competition. My purpose, here, is not to dig into human psychology or anthropology, and propose a thorough classification of all possible attitudes towards competition. I will limit myself to two of these attitudes, and explore their relations with each other.

First Attitude: Fair Competition

The attitude. – A first attitude is that competition should be carried out, above all, fairly. In that attitude, the emphasis is placed on fairness. Admittedly, antagonism exists and it appears difficult to eliminate it entirely. However, the position is that antagonism may be restrained or, to use a legal word, regulated, rather than being encouraged, and supported. Society is indeed made of relations and the hope is that, with such a regulation, one will avoid violence, and, on the contrary, promote a form of solidarity. In societies where that attitude inspires authorities, unfair competition is prohibited.

Africa. – A typical place, in the world, where this attitude is dominant, is Africa. On that continent, competition does not appear as a value that should be promoted. For Africans, it rather appears as a form of danger. The reason is that competition creates divisions. Competition indeed emphasizes the personal interests of the people participating in the competitive process. As each member becomes conscious about his/her own interest, the importance of the group vanishes. This creates a risk for survival as those societies lack vital resources. In many African countries, survival is only possible through solidarity within a given group. In that context, competition appears as a force dissolving the links that bind people together, thereby implying a risk to the survival of all.

Second Attitude: Free Competition

The attitude. – In the other attitude, competition is not seen as a danger but rather as a source of opportunities. In that conception, competition provides an ideal mechanism in a struggle towards efficiency. Societies where an emphasis is placed on competition are groups where efficiency constitutes an important value. In these societies, it is important to increase the quantity, and the quality, of the output, while ensuring that prices are low. Less emphasis is placed on the possibility that competition may damage relations and possibly lead to unrest.

Motivation to do more. – To improve efficiency, people are to be motivated. In Free competition, two forms of motivation are used. A first one is based on the fear of being eliminated. A typical example is the announcement that a firm will close if workers do not improve their performance – ie work better, work more and/or earn less. The justification is generally that competitors do better and that the firm must match their performances or face bankruptcy. A second form of motivation is to stimulate people in their personal references to others. Human identity is built, to a certain extent, on comparisons with others. People often need to surpass others to have a positive image of their own value. An image of inferiority generally carries over a feeling of depression, which does not provide an ideal context for efficiency.

United States of America. – An area where a focus is placed on efficiency is the United States of America. In the American society, each individual must rely, predominantly, on his/her own strength. The survival and life of each member of society depends, to a significant extent, on him/herself. Less emphasis is placed on collective solidarity and/or social cohesion. This does not take away the importance of personal references in the construction of the personality. In the American society, it is essential, more than elsewhere, to 'make it', ie to surpass others, and become an object of admiration and envy.[2]

Illustration – Comparative Advertising

A concrete situation. – In the paragraphs above, I have presented two attitudes sometimes adopted towards competition. A concrete illustration will allow us to analyse the consequences that these attitudes have on the type of regulation which is adopted in the societies concerned. This illustration is about comparative advertising. It has been selected in view of the importance of this commercial technique in consumer law, which is in fact a major topic discussed today.

Unfair Competition

Prohibition. – Comparative advertising is often prohibited in societies emphasizing Fair competition. This prohibition is based on the fear that comparative commercial strategies may harm relations. In comparative advertising, information is rarely presented in a fair and neutral manner. The purpose being to convince customers, comparisons only contain information likely to serve that end. As a result, the products and services proposed by competitors are presented as more expensive and of a lesser quality. A consequence is that competitors are harmed in their interests. They start judicial procedures. They also react using the same commercial strategies. The result is a cycle of partial, often violent, communications, combined with judicial procedures.

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[2] To give a few examples, becoming a sport or business star is important in that country. Generally, it is important to 'make much money'. The desired quantity of money is defined by comparison to how much others earn.

Customers. – Another consequence is that, beyond competitors, consumers may also be harmed. As a result of the comparisons, they end up facing partial and contradictory information – each firm pretending that its output is cheaper and better. In that context, consumers may lose the confidence which is necessary to purchase on the markets They may restrict their consumption, as they remain uncertain as to what they should purchase. Another possible reaction is that consumers may engage in excessive purchasing as, under the pressure created by powerful commercial communication, they start buying products and services which they do not really need.

Free Competition

Permission, encouragement. – A different choice is made in societies insisting on Free competition. In those societies, comparative advertising is allowed, if not encouraged. The only risk perceived in connection with that form of advertising is that commercial information may be erroneous. Erroneous information harms customers, as the latter do not receive what they were promised. Competitors are also harmed, as the choices made by customers are not based on correct information and hence competition does not unfold on the basis of the merits.

Non misleading strategies. – These societies, thus, do not accept misleading advertising, but they refrain from going further and prohibiting other, non misleading, advertising strategies. For judges and legislators in those societies, there is no need to protect customers against non misleading comparisons. Comparisons should, on the contrary, be encouraged, as they provide information useful to find the right product at the lowest price. Beyond customers, there is no need, for judges and legislators, to protect competitors either. Admittedly, comparative advertising probably increases competition and accelerates the elimination of some as part of the competitive process. Despite this negative effect, the overall result would be positive as the best undertakings would be selected.

Underlying Assumptions: The Role of Business, Customers and Authorities

Underlying Assumptions

We have examined two attitudes that may be distinguished towards competition, both in an abstract and in a concrete context. These attitudes appear to be based on underlying assumptions, and I would now like to examine some of them.

Fair Competition: Public Intervention – or Chaos

Businesses, customers. – In Fair competition,[3] the law is presented as a tool necessary to ensure fairness on the markets. Interpreting this attitude *a contrario*, one can assume that, in Fair competition, the firms or, at least, a substantial proportion of them, are expected to engage in unfair, and possibly aggressive, practices, where left to themselves. In those societies where that attitude prevails, it is also assumed that, absent a public intervention, customers can be expected to be manipulated. Customers are not deemed able to analyse rationally the offers presented to them by the various undertakings present on the market. Nor are they considered able to give these offers an appropriate, rational answer. For instance, it is not assumed that customers are able to examine with care comparative advertisements and seek neutral information to obtain an independent confirmation. It is not expected either that customers would be able to resist eye catching information pointing to the difference in price between various products. On the contrary, it seems to be assumed, in Fair competition, that the customer is guided by a sort of natural drive pressing him/her to purchase more where discounts are proposed.

Authorities, law. – The Fair competition attitude thus appears to rest on a general assumption that undertakings and consumers would probably not behave rationally absent a public intervention. Spontaneity would not produce outcomes that could be deemed satisfactory fron an economic point of view. An external intervention by a rational body – a body of which the rationality is beyond any doubt – appears necessary to bring order, and rationality. In a short formula, one could say that, in that attitude, society is not considered to be by itself ordered and rational : that order and rationality can only be brought by authorities.[4] In this context, the law is seen as a tool whereby authorities apply their rationality to a world which would otherwise fall into chaos.

Free Competition: Markets Rational – with Exceptions

Businesses, customers. – The assumptions are different in Free competition.[5] Society there appears to spontaneously provide an ideal organisation for businesses and consumers alike. Businesses may engage in economic activities without bringing about the destruction of the social order. They can compare their products with others, for instance, without massively resorting to misleading behaviour.

[3] I use this abridged expression to refer to the attitude whereby special attention is brought to fair competition within society.

[4] Let us notice that, in this vision, authorities are supposed to be guided by rationality and indeed to act rationally.

[5] I use this abridged expression to refer to the vision where the emphasis is placed on 'Free competition'.

They accept being compared, without responding with violence. They admit being eliminated if the selection process operates against them. In a similar manner, Free competition considers consumers as being able to purchase rationally without a need for systematic public intervention. In that vision, consumers seem able to read comparative advertising without being unduly tempted or misled. They can resist tempting offers where they do not need the discounted products.

Authorities, law. – In that vision, a satisfactory degree of rationality and organisation spontaneously exists on the market without a need for a systematic public intervention. That degree of rationality has to be respected by authorities. A more limited role is thus granted to authorities. Interventions remain possible and sometimes necessary. However, they are limited to circumstances where markets do not produce satisfactory outcomes.[6] In this vision, the law is also seen as a rational tool. But its intervention is more limited and only has a complementary nature. Its object is to bring rationality in a world which functions independently in normal circumstances – but sometimes fails to do so.

Two sources of rationality. – This presentation shows that one source of rationality is envisaged in Fair competition whereas two are distinguished in Free competition. In Fair competition, rationality is brought by public interventions. In Free competition, the first source of rationality is the markets themselves through the transactions taking place between firms and/or customers. The second source is more traditional, as it is linked to public interventions where markets fail to produce desirable solutions.

Markets	Authorities
Some objectivezs may be reached by the markets acting spontaneously	→ Authorities then refrain from intervening
Other objectives may not be reached using market based mechanisms	→ These objectives are then realized through public intervention

Illustration:

Tying-up. – An interesting way to compare these two forms of rationality is through an example. To that effect, I have chosen to consider the business practice whereby a seller refuses to sell a product unless the buyer commits him/herself to purchasing another one. This practice is generally called ‘tie-up’, or ‘tying up’. Two products are tied up by the seller and, as a result of this link established between them, cannot be purchased separately. There are various reasons why sellers resort to that practice. One can be a willingness to sell more of the ‘tied up’ product. Suppose

[6] This position reflects the economic theory of ‘market failure’. Under that theory, public interventions are only legitimate where markets do not spontaneously provide a solution to an issue.

that a given firm does not sell enough products B. By contrast, it is successful in selling products A. Customers are ready to pay a significant price for these latter products. Such a firm may seek to use that dependence of customers *vis-à-vis* product A to sell more of product B.

Unfair Competition

Protection of customers and competitors. – In Unfair competition, tie-up practices are generally prohibited. The reason is the protection that judges and legislators want to provide to customers and competitors. Through tied-up practices, customers may indeed be imposed the purchase of a product which they, ultimately, do not wish. A difficulty is also that competitors are not always able to sell the two products. They may suffer from that situation.[7] Furthermore, prices become less transparent where two products are sold jointly. As a unique price is given, it is difficult to identify the price for each product. Competitors may also lose out as tying practices may give customers the impression that the products sold jointly are cheaper.

Prohibition of the practice. – As it creates these difficulties, tying up has often been prohibited in countries where Fair competition prevails. (Such rules have existed until recently in a majority of European states). As stated in the section concerning underlying assumptions, judges and legislators in Fair competition deem that customers and competitors are to be protected. The protection has to come from a public intervention, as markets do not spontaneously provide a solution. To ensure compliance, sanctions have to be imposed. Generally, they take the form of a fine, thereby decreasing benefits. The purpose of the sanction is to ensure compliance. As they are punished, infringing firms, it is hoped, change their behaviour, to avoid another sanction. A longer term objective is that, in anticipation, thus before being ever sanctioned, firms adapt their behaviour to avoid sanctions.[8]

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[7] This is the case, for instance, where a seller has a monopoly, or a quasi monopoly, on product A. Suppose that that seller ties that product A up with product B. Given the monopoly, competitors are not able to propose A, or only to propose it at a superior price. (They have to purchase A from the monopolist, and sell it at a price allowing them to recover the expenses relating to getting and selling these products A).

[8] It should be noted that, in Fair competition, judges and legislators envisage, and expect, the possibility of a modification in the behaviour adopted by the undertakings, following the imposition of a sanction and even in some circumstances out of an anticipation of the sanction that would be imposed in the case of an infringement. This expectation shows the markets, and their participants, have a sort of rationality. Changes in behaviour, and anticipations, are only possible, indeed, if firms and people are able to think about the consequences of their behaviour. The difference with Free competition probably lies in the (limited) degree of rationality of markets are supposed to have in the absence of a public intervention.

Free Competition

Market interactions. – In Free competition, markets are supposed to spontaneously create satisfactory solutions through the interactions between sellers and buyers. Thus, tie up practices are expected to disappear naturally wherever parties are not satisfied. Suppose that a seller ties product B up with product A. If they are not satisfied, buyers will turn to another supplier. The market share of the former seller will then decrease – and, with it, his/her benefit. The result is that the seller will lose out financially unless he/she adapts his/her behaviour and accepts selling the two products separately.

Similarities and differences. – An analogy may be made, in that regard, between Fair and Free competition. In both contexts, norms are imposed to avoid undesirable practices. Sanctions are imposed on non-compliance. These sanctions result in the infringing firms losing financial means. In the two cases, the purpose is produce a situation where parties are satisfied. Beyond these similarities, there are differences between the two visions. One relates to the identity of the entity elaborating the norm. In Fair competition, the law results from a complex negotiation between often elected representatives. In Free competition, they come, by contrast, from market interactions, and are generally formulated by experts in scientific or professional publications. Another difference concerns the sanctions imposed on infringing businesses. In Fair competition, these sanctions are defined by the authorities elaborating the law and they are applied by the bodies designated to that effect. In Free competition, the sanction are imposed by the markets themselves, as unsatisfied customers turn to other suppliers.

Combination of norms. – The peculiarity of Free competition is that it combines two sorts of norms – the traditional rules traditionally imposed by public authorities (‘law’) and the constraints imposed by the markets (‘market constraints’). In that vision, norms and sanctions are normally produced by market interactions and, in limited circumstances, by public authorities. It is interesting to identify the circumstances where markets fail to spontaneously produce satisfactory outcomes, thereby making a public intervention necessary. These circumstances are situations where businesses can maintain their behaviour even though customers are not satisfied. These are situations where, for some reason, customers do not have the possibility to turn to another supplier or, where they have that possibility, do not effectively use it. As they can avoid being set aside by unsatisfied customers, the infringing firms escape the sanction normally produced by the markets.

Market power. – These circumstances can be described as situations where firms have acquired, on the markets, a form of power, allowing them to engage in economically non acceptable behaviour without undergoing a sanction imposed by the markets. Market power is key concept in competition law. The existence of market power determines where authorities must intervene as market mechanisms have

FREE COMPETITION Normal circumstances – Market constraints	Market failures – Public interventions	FAIR COMPETITION
Tying in is discouraged by markets in normal circumstances.	Tying in is prohibited where the firm holds market power. In such a situation, market constraints do not work any longer as dissatisfied customers may not turn to other suppliers.	Tying in is prohibited in all situations
Firms resorting to that practice face the risk that dissatisfied customers may turn to other suppliers; such firms would then lose revenues.	A fine is imposed where the firm holds market power. This fine results in a financial sanction for the firm, as part of the revenues have to be paid to the authorities.	A fine is imposed
The hope is that tying in will be dropped by infringing firms, as these firms undergo a sanction on the markets in the form of a decrease in revenues and market share. In the longer term, it is hoped that, by anticipation, the firm will renounce ever resorting to tying up practices in order to avoid possible sanctions by the markets.	The hope is that tying in will be dropped by infringing firms, as these firms undergo a sanction. In the longer term, it is hoped that, by anticipation, the firm will renounce ever resorting to tying up practices in order to avoid possible sanctions by the authorities.	The hope is that tying in will be dropped by infringing firms, as these firms undergo a sanction. In the longer term, it is hoped that, by anticipation, the firm will renounce ever resorting to tying up practices in order to avoid possible sanctions by the authorities.

ceased to function properly. Where one or several firms acquire market power, they may behave outside the pressure of competition. They do not need to fear the reaction of customers, as the latter have no alternative where they are not satisfied. Nor do they have to fear competitors, as the latter are non existent or not strong enough to provide a credible alternative.

Articles 81 and 82 EC. – As market mechanisms cease to function properly, a public intervention is needed where firms acquire market power. This is the object of competition rules. These rules provide that authorities must intervene where market power places one or several firms in a position where they can resort to undesirable practices. Article 81 EC prohibits agreements, where these agreements have unacceptable objects or consequences. Article 82 EC prohibits abuses committed by dominant undertakings. Both provisions refer to tie up practices: they respectively prohibit agreements and unilateral practices 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'.

Where do we Stand in Europe?

Where do we Stand ?

European Union. – An interesting question is to determine where we stand as Europeans, in this debate around competition. Do we belong to Fair competition where fairness is preferred – or do we emphasize efficiency even if it leads to unfair practices? In addressing this question, it should be stressed that none of these visions exist in radical form. Society can be described as a place where different, sometimes conflicting, visions coexist, and are defended by various groups and individuals. The outcome is rarely a radical choice – there are more often hybrid forms of organisation.

France and social cohesion. – Another important point is the diversity existing among the Member States as regarding the values underlying the economic system. In France, for instance, a strong emphasis is placed on social cohesion. That theme is put forward, as in other European countries, by left wing governments. A peculiarity is it is also an important argument, in that country, for the right-wing parties. J. Chirac, for example, conquered the presidency, the first time, in 1995, after a campaign emphasizing his desire to address the 'social fracture' allegedly existing in that country. The policy carried out by his government is currently focused on the 'social cohesion' which, according to him, must exist in the country.

Consequences of that debate. – A consequence of the emphasis placed on social cohesion is a desire to limit competition in the French society. For instance, it has long been advocated, in that country, that important services should not be provided by the private sector in a competitive environment. Until recently, a significant percentage of French economic activities were carried out outside the reach of competition despite the perceived loss of efficiency resulting from such a market organisation. There is also this idea that business cooperation should be possible among French firms, despite the anticompetitive aspects of such cooperation, to build national champions able to compete with foreign firms. Another example is the existence, in that country, of numerous associations representing just about every profession, and every economic sector, of the French economy. These associations purport to defend the interest of their members. But they also have anticompetitive effects as they strictly regulate the conditions for entry and the exercise of activities to the exclusive benefit of their members.

Three illustrations. – To examine where we stand as regards competition, I propose to examine four illustrations in the next sections. The first section indicates that a choice appears to have been made, in the last 20 years, towards more Free competition and less Fair competition. The second section shows that that has not been made without hesitations, and that these hesitations still exist in some cases. The third section indicates that the shift has not occurred suddenly, but has gradually taken place.

First Illustration – A Shift has Taken Place – Yves Rocher

***Yves Rocher*. –** A key document to understand the current attitude towards competition in the European Union is, in my view, the judgment delivered by the European Court of justice ('ECJ') in the case *Yves Rocher*.[9] That case concerns a German legislation prohibiting eye-catching individual price comparisons, ie advertising containing a comparison between an old price formerly charged by the firm and the final, discounted, price, proposed by that same undertaking.[10] The case arose

[9] Case C-126/91, ECR 2361. This case was addressed by the ECJ under the rules concerning the free movement of goods. These rules also belong to the regulatory body linked to competition: as these provisions regulate the competition between national and foreign products and provides that the access of foreign products to a national territory may not be hampered.

[10] Some may consider that this case is not entirely appropriate to analyse comparative advertising. First, the case did not concern a comparison between several competitors, but a price discount. Second, the case did not address a behaviour adopted by an undertaking, but a national legislation. Third, the case was not handled under the rules of competition but under those concerning the free movement of goods. To my mind, these features do not hinder an analysis in our context. The case was analysed under the German legislation as a form of comparative advertising. See par 3: 'the German legislature … [prohibited] advertisements making use of individual price comparisons. That prohibition is intended to protect consumers and competitors against advertising by means of price comparisons.' The analysis on fair practices does not differ, as will be seen, whether the case concerned a business behaviour or a national rule. The rules on the internal market are based on the concept of competition. Their object is to ensure that competition would exist between products coming from the various Member states.

after a French firm manufacturing cosmetics, Yves Rocher, published a magazine containing advertising allegedly infringing the prohibition. As it was brought to justice, the firm argued that the national legislation was not compatible with the EC Treaty.

Germany against unfair competition. – The German government sought to defend its legislation, by explaining that the legislation purported to protect consumers and competitors. A first argument was that eye catching price comparisons often mislead customers. According to the German government, it is difficult to verify that the former price has effectively been charged and is not fictional – in which case the discount is not real. A second argument was that eye catching comparisons create the impression that the new price is really advantageous, which is not always the case. They may also suggest that all prices in the shop are advantageous whereas the prices for the other products are generally higher as sellers attempt to recuperate the value lost in the discounts. A last argument was that customers should be protected against purchasing products they do not need but only buy because of the pressure created by powerful commercial communication.

The ECJ in favour of free competition. – These arguments were set aside by the ECJ, for which consumers do not need to be protected. For the ECJ, the only difficulty is when comparative advertising is misleading. However, these practices can be addressed through a prohibition directed against misleading advertising. Similarly, no protection should be granted to competitors. Competition implies a selection process, whereby more expensive firms are eliminated to the benefit of society as a whole.

> *Protection of consumers.* – '[T]he prohibition in question goes beyond the requirements of the objective pursued, in that it affects advertising which is not at all misleading and contains comparisons of prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts' (par 17). *Protection of competitors.* – 'As for the protection of fair trading, and hence of competition, it is important to note that correct price comparisons, prohibited by a rule of law of the kind at issue, cannot in any way distort the conditions of competition. On the other hand, a rule which has the effect of prohibiting such comparisons may restrict competition' (par 22).

Second Illustration – The Persistence of Hesitations – Institute of Professional Representatives

From fair to free competition. – *Yves Rocher* indicates the desire, on the part of the ECJ, to set aside the rules established by the Member States to regulate competition and avoid excessive economic rivalry. In the judgment, the ECJ sets aside national regulation meant to promote fair competition. A choice is made in favour of free competition. This choice made by the ECJ does not mean that all hesitations have disappeared. An interesting case in that regard is *Institute of Professional Representatives*.[11] That case concerns individuals acting as representatives before the European Patent Office. These people gathered in a professional association, which adopted a code of conduct meant to regulate the relations with clients and between the members.

European Commission. – The code of conduct was found by the European Commission in global compliance with European competition rules. Several clauses were however deemed in breach of Article 81. One of them prohibited comparative advertising. For the Institute, this advertising technique was not desirable as it harms the relations within the profession.[12] That argument is in line with the attitude described in the earlier sections concerning Fair competition. It was not be accepted by the Commission, for which comparisons have to be admitted as they provide information useful for users.

> *Commission.* – 'The arguments presented by the EPI to the effect that these restrictions are necessary in order to ensure the profession's reputation do not justify obstructing access to clear and accurate information on the services in question, how much they cost and the conditions on which they are supplied so as to enable the client to choose freely which supplier of services to engage. Advertising covers not only accurate information for the user but also a promotion of the services on offer, including comparison with a competitor or with the services of competitors …Providing information on the services on offer, where it is accurate and precise, and comparative advertising, where it compares representative and verifiable aspects and is not misleading, are means of increasing user information to the benefit of users and are important elements of the competitive process. They allow users to distinguish between the alternatives which exist at the time of obtaining a service and to make a rational choice of service provider. They also make it easier for new operators to establish themselves on the market and stimulate innovation in the means of providing services.'[13]

Court of first instance. – That position adopted by the European Commission is identical to the one adopted by the ECJ in *Yves Rocher*. It was globally upheld by the Court of first instance ('CFI'). However, the judgment shows that the shift

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[11] Commission Dec 1999/267/EC (IV/36.147 EPI code of conduct) OJ 1999 L106/14. CFI Case T-144/99 [2001] ECR II-1087.

[12] 'The arguments presented by the EPI to the effect that these restrictions are necessary in order to ensure the profession's reputation do not justify obstructing access to clear and accurate information on the services in question, how much they cost and the conditions on which they are supplied so as to enable the client to choose freely which supplier of services to engage (par 40).

[13] Paras 40 and 41.

towards Free competition was not made without hesitations. In the decision adopted by the Commission, the clause prohibiting comparative advertising was analysed in conjunction with another clause preventing representatives from contacting clients of other members of the profession to propose their services. Both clauses were found incompatible with the EC Treaty as, for the Commission, they unduly limited competition. This analysis was not followed by the CFI. For the latter, Article 81 EC cannot be construed as limiting the liberty of professionals to contact clients of colleagues. According to the CFI, such clause has no anticompetitive object or effect – it only avoids discrediting practices within the profession.

> *CFI.* – '[T]he objective pursued by … [the clause] is to prevent a representative, when offering services to a client, from discrediting a fellow professional by questioning his conduct of a case which has been terminated' (par 98).

A trend – not always clear. – My purpose is not to examine whether or not the clause should have been prohibited. It is rather to show that hesitations still appear in the choice made by the European courts for Free competition. In *Institute of Professional Representatives*, the CFI takes over the 'risk-of-discredit' argument, which is typically put forward by businesses and professions in order to avoid comparisons and other forms of active advertising. This means, in my opinion, that, although it recognizes the general shift that has occurred towards Free competition, the CFI is not entirely convinced that competitors, and consumers, should not be protected. There remains this idea that protection may be appropriate in all circumstances, and should not be limited to situations where market mechanisms do not spontaneously provide an answer.

Third Illustration – A Gradual Shift – The Concept of Abuse under Article 82 EC

Article 82 EC. – Our next illustration concerns Article 82 EC, which prohibits the abuse of a dominant position. Several conditions must be fulfilled for that provision to apply.[14] The condition examined in this section relates to the existence of an abusive practice. As appears from the case law, the concept of abuse has evolved over time towards a wider interpretation. My analysis is that that evolution can be analysed as a passage from Fair to Free competition. According to that analysis, European institutions have originally applied Article 82 EC against unfair practices adopted by dominant firms. Later, they have progressively evolved towards a vision where Free competition was emphasized and abuses were deemed to exist as soon

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[14] *(a)* At the time when the alleged practice took place, the undertaking in question must have had a dominant position. *(b)* An abusive usage must have been made of that position. *(c)* The internal market must have been affected by that conduct. *(d)* To these conditions, which are explicitly formulated in the provision, another is sometimes added. This last condition is that no objective justification must be available to take away the abusive character of the practice.

as free competition was in danger even if the actions by dominant firms could not considered as unfair.

Starting Point: The Fight against Unfair Practices

Deviation from a standard. – The starting point was an interpretation of the prohibition as directed against unfair practices adopted by dominant undertakings. In that vision, undertakings were deemed to abuse their dominant position where they adopted a behaviour which could be seen as a deviation from a legal, social or moral standard. This interpretation could be labelled 'subjective', as it implied a reproach made against a person or entity for unacceptable behaviour. This subjective interpretation was applied in numerous, complex cases where facts often played a dominant role. For that reason, it is not easy to extract principles from these cases. Some examples are provided in the following paragraphs.

Elimination of a Competitor

No other justification. – A behaviour considered unfair was the willingness on the part of a dominant undertaking to engage in behaviour with no economic justification and merely oriented towards the objective of eliminating a competitor. In situations of this kind, the dominant undertaking shows a specific intent to eliminate a competitor where other, more acceptable, behaviour was possible, and even recommended, had the undertaking concentrated on business development. In that part of the case law, the authority makes the observation that the dominant undertaking did not engage in a normal, fair and standard economic course of behaviour, which is to offer goods and services to customers while competing on the merits.

Leading case. – The leading case in this category is *National Carbonising*,[15] where an undertaking dominated (97%) the market for the production of coal. That undertaking was also present on a secondary market, where the coal was refined for industrial or a domestic use. The dominant undertaking was subject to competition on that secondary market. The competitor (there was only one) on that market depended on the dominant undertaking for supply. Taking advantage of that situation, the dominant firm increased the price on the primary market (raw coal), and left the price unchanged on the secondary one (refined coal). The competitor then faced higher costs but could not increase prices out of fear that its market share would shrimp (squeeze out).[16]

[15] See the Commission Decision of 15 October 1975 (not published). See also the Order adopted by the President of the ECJ, *National Carbonising Company v Commission*, 22 October 1975, 1193 and the Commission Dec 76/185 adopting interim measures concerning the National Coal Board, the National Smokeless Fuels Ltd and the National Carbonising Company Ltd [1976] OJ L 35/6.

[16] Sale prices could not be increased by that competitor on the secondary market because customers would have turned, on that secondary market, to the main undertaking, for supply.

Commission and ECJ. – That behaviour adopted by the dominant undertaking was found unacceptable by the Commission and the ECJ. For these institutions, undertakings must behave according to economic standards in a market-based environment. One standard is that a cost increase must be reflected in the prices charged to end users. The only situation where that consequence can be avoided is where undertakings succeed in making their operations more efficient. However, a scenario of that nature did not materialize in the case under review. Thus, normal economic behaviour would have implied, in that case, an increase in the prices charged on the secondary market. The dominant firm did not do so, because it was inspired by the intention of eliminating a competitor – a behaviour which cannot be accepted under Article 82 EC.

A System of Hindering Practices

Hinder the normal course of competition. – Another example is where an undertaking uses a combination of practices to hinder the normal course of competition. Considered separately, each of these practices could be analysed, in itself, as an obstacle to competition. The peculiarity of this second situation is that the undertaking resorts to several of these practices. Together, these practices thus form a system indicating the existence of a deliberate strategy, on the part of the dominant firm, to hinder the economic process. According to the European institutions, the combination of these practices leave no doubt concerning the purpose sought by the dominant undertaking – the maintenance of a position not founded on economic merit but rather based on a capacity to constrain the economic freedom of partners and competitors.

Leading case. – The leading case is *Hilti*,[17] in which an undertaking sold related products – nail guns, cartridges and nails. Each of these products constituted a separate market. The undertaking enjoyed a dominant position on the market for nail guns, but its position was more precarious on the market for nails.[18] To consolidate that latter position, it resorted to several practices. One of them was to make the purchase of nail guns dependent on the purchase of nails. As a result of

[17] Commission Dec. 88/138 (IV/30.787 and 31.488 – *Eurofix-Bauco v Hilti*) OJ 1988 L65/19; Case T-30/89 *Hilti Akt*iengesellschaft *v Commission* [1990] ECR II-00163; Case T-30/89 *Hilti AG v Commission of the European Communit*ies [1991] ECR II-1439; Case C-53/92 P *Hilti AG v Commission* [1994] I-667; Case C-53/92 P *Hilti AG v Commission* [1994] ECR I-667.

[18] The difference in the strength acquired by the undertaking on the two markets was due to the following reasons. On the pistol market, the undertaking was protected by entry barriers such as: the amount of investment required to produce pistols, the technology needed to that effect and the intellectual rights obtained on that market. Entry was easier on the nail market, as no significant investment is necessary to start producing nails, nor any specific technology, and the production of nails is not protected by intellectual property.

that link between the two markets, any customer wishing to acquire nail guns from the dominant undertaking – there was little alternative on the market – was forced to buy nails from that same undertaking. Another practice was to refuse sharing the technology which had allowed it to design its nail guns. Considered separately, each of these practices could have been found contrary to Article 82 EC.[19] What however strikes in the decision of the Commission, and the judgment of the ECJ, is the emphasis placed on the system formed by the combination of these practices.

Disproportionate Harm to a Competitor

Assessing the situation of each competitor. – A last example is where a dominant undertaking causes disproportionate harm to a competitor. In that kind of circumstance, the European institution involved examines the situation of the various undertakings concerned. It weighs the benefits, and the costs, that result for each party from the behaviour adopted by the dominant undertaking. It also analyses the costs, and the benefits, that another behaviour would have implied for all parties. The purpose of that exercise is to assess whether the competitor was treated fairly. In that evaluation, the possibly disproportionate character of the behaviour adopted by the dominant undertaking, and that of the harm caused to the competitor, is measured in connection with, among other factors, the past relations between the parties. Have these relations been lengthy? Have they been useful for the dominant undertaking, as much as for the competitor?

Leading case. – The leading case is *Hugin*, which again involved two markets.[20] The first market was for the manufacture and sale of cash registers. On that market, one undertaking (Hugin) had a dominant position.[21] A second market encompassed derived, or secondary, activities (maintenance, repair, hiring out). On that latter market, Hugin and associated companies faced competition from an independent company (Lipton). That latter company had longed served as a distributor for Hugin but that arrangement was cancelled when Hugin decided that distribution would only take place in the future with associated companies. Hugin then sought to develop the secondary activities mentioned above but was prevented from doing so by a decision, taken by Hugin, that no spare parts could be sold to Lipton. The result of these successive decisions is that Lipton could not carry out any activities any longer on these markets.

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[19] The first behaviour amounts to a tie-up, which can be considered unfair per se. The second practice could probably not be found unfair in itself. But it could be prohibited under the step in the evolution of the concept (see description later).

[20] Commission Dec. 78/68 (IV/29.132 – Hugin/Liptons) OJ 1978 L22/23; Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869.

[21] In the case, the Commission, followed by the ECJ, defined the functional market in a rather narrow fashion. It considered that the market could be limited to the cash registers produced by a given company – the undertaking which was engaged in abusive practices.

Commission and ECJ. – The Commission and the ECJ considered that Hugin had abused its dominant position. Before they reached that decision, the Commission and the ECJ assessed the positions of the parties. In the course of that discussion, Lipton is described as an undertaking which acted faithfully when it was a distributor for Hugin. It is also presented as being bound to disappear after the decisions taken by Hugin to exclude it from the distribution network and from the circle of undertakings to which spare part could be sold. Ultimately, the damage suffered by Lipton appeared to outweigh significantly the benefits that the dominant undertaking could expect from these decisions. A significant disequilibrium appeared from this assessment and led the European institutions to consider that the refusal to sell spare parts was unacceptable.

Intermediate Step: Avoid Further Harm to Competition

An objective interpretation. – In a second step, the Commission and the European courts seemed to abandon this fault-related requirement and to accept that a subjective interpretation was no longer required. From there on, the focus was rather placed on the effect produced by the behaviour on competition in the market, independent of any judgment on the behaviour itself. An interesting example in that regard is *Continental Can*.[22] An American undertaking sought to acquire a European competitor. In the absence of specific merger regulation, the operation was addressed under Article 82 EC. In its decision, the Commission argued that, in the context where the operation was taking place, the acquisition of a competitor had to be deemed abusive as it further reduced in an unacceptable manner the degree of competition which existed on the market and which was already limited given the dominant position occupied by the firm.

Commission and ECJ. – In their rulings, the Commission and the ECJ accepted that the behaviour adopted by the American undertaking, ie the acquisition of an undertaking by another one, cannot be deemed, in itself, abusive. Nothing indeed prevented an undertaking, at that time, in law, from buying another one. Such an operation could not even be deemed contrary to normal economic behaviour, as acquisitions are often justified by prospective economies of scale. However justified the acquisition, the behaviour had to be deemed contrary to Article 82 EC because of the effect on competition. For the Commission and ECJ, the abusive character does not depend on the behaviour as such but rather on the effect produced on the market.

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[22] Dec 72/21 (IV/26 811 – Continental Can Company) [1972] OJ L 7/14 and 25; [1972] CMLR D11; Case 6-72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215. That case is generally considered important because it made the fact obvious that concentrations could not be addressed adequately under Article 81 or 82 EC and that specific regulation was needed. As far as I am concerned, I submit that the case is also important in the light of the approach adopted by Commission and ECJ to defining the concept of abuse.

Case law. – 'Article [82]... of the Treaty imposes on an undertaking in a dominant position, irrespective of the reasons for which it has such a dominant position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'.[23] *Literature.* – 'Conduct which may be permissible in a normal competitive situation may amount to abuse if carried out by dominant firms because such firms have a 'special responsibility' on account of the prejudice that their activities may cause to competition in general and to the interests of competitors, suppliers, customers and consumers'.[24]

Other case law. – Another interesting case in the same line is *Hoffmann-La Roche*.[25] In that case, a major pharmaceutical company was grating rebates to ensure that clients would not turn to other suppliers. There was no indication that providing rebates would go against normal business behaviour. The Commission and the ECJ however found that these rebates infringed Article 82 EC as they created an environment where clients had lost any incentive to consider alternatives – and competition was locked.

> *ECJ.* – '[T]hese practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted'. '[T]he interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted'. '[T]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to

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23 Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagn*ie *maritime belge transports et al. v Commission* [1976] ECR II-1201, at par 106. 'Article [82] ... covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened». See in the same direction Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* [1994] II-755, at par 106. See in the more ancient jurisprudence Case 322/81 *Michelin v Commission* [1983] 3461, at par 10. 'A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'.

24 CW Bellamy & G Child (PM Roth, ed) (2001) *Common Market Law of Competition*, (Sweet & Maxwell, London, 2001), 9–08. See also R Subiotto. 'The Special Responsibility of Dominant Undertakings Not to Impair Genuine Undistorted Competition' (1995) World Competition, 11 et seq; M Waelbroeck & A Frignani (1997), Concurrence, *in Commentaire Mégret: le droit de la CE* (Eds de l'ULB, Brussels, 1997) vol 4, 274 s; R Whish & B Sufrin, *Competition Law* (Butterworths, London, 1993) 270 et seq.

25 Case 85/76 [1979] ECR 461.

methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' (par. 89, 90 and 91).

Final Stage: Increase Competition

Marker/step 3. – In a third step, the case law went further in insisting on the effect produced by behaviour adopted by a dominant undertaking. The difference with the second step lies in the kind of obligation which may be imposed on dominant undertakings, in markets where competition is reduced by the existence of their dominance. In the second step, dominant firms were prevented from adopting behaviour likely to endanger further the already limited degree of competition. In the third one, an obligation is imposed on these firms to adopt positive actions in order to allow the emergence or the development of competition.[26]

***Stena Sealink*. –** An interesting example is *Stena Sealink,*[27] where an undertaking dominated the market for port facilities on the main maritime route between Ireland and the United Kingdom. That route could be accessed only from these facilities, which were owned by a particular undertaking. That undertaking also provided maritime liaisons between the countries involved (secondary market). In these latter activities, it faced a threat of entry from a potential competitor.[28] To impede entry, the dominant firm in substance refused access to the maritime facilities placed under its control. That behaviour was deemed abusive and an interim decision was issued to order access. The Commission considered that an undertaking must share facilities placed under its control when access is needed by competitors. Not only must access be granted, but the terms and conditions must also be similar, if not equivalent, to those granted to business partners or even, internally, to the departments or divisions in charge of the derived services.

Essential facilities. – Cases belonging to that third category are often associated with the Essential facilities doctrine. I will not devote much discussion to that theory in this paper, as the purpose is not to examine the theory as such but to examine to what extent it provides an indication about the shift which seems to

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[26] In the previous step, operations or behaviour were prohibited where they would produce unacceptable consequences for the degree of competition existing on the market. The objective was to avoid a further weakening of competition. In the third step, obligations are imposed on firms to restore more competition. Firms must adopt specific behaviour to ensure that competition will be reinforced.

[27] Commission Dec 94/19 (IV/34.689 – *Sea Containers v Stena Sealink* – Interim measures) OJ 1994 L15/8.

[28] The reasons why competition existed on the secondary market, but not on the first one, are those mentioned earlier in connection with other cases. The undertaking is protected on the primary market as a result of a barrier to entry (heavy investment to make to carry out the activity).

have occurred from Fair to Free competition. Among these cases, the most recent one is *IMS Health*. In that case, the dominant firm was engaged in tracking sales of pharmaceutical and healthcare products. It provided data on regional sales of pharmaceutical products in Germany to pharmaceutical laboratories. These data were formatted according to a particular brick structure.[29] A difficulty emerged when a competitor started to provide data using the same, or a derived, structure. That competitor was sued by IMS Health on the basis of the copyright held by that latter undertaking on the brick structure. At the same time, it refused to grant any licence allowing that competitor to use the brick structure under reasonable conditions.

The Commission and the ECJ. – A complaint was addressed to the Commission, which found that the refusal of IMS Health to grant a licence was in breach of Article 82 EC. For the Commission, three criteria were to be fulfilled to compel a dominant firm to provide a compulsory licence in such a context. These criteria were satisfied in the case. *(a)* The refusal of access to the facility is likely to eliminate all competition in the relevant market, *(b)* such refusal is not capable of being objectively justified, and *(c)* the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility. The case landed before the ECJ, after preliminary questions were addressed to the ECJ by a national court where the case had been brought. In the judgment, the ECJ upholds the analysis proposed by the Commission.

> *ECJ.* – '[I]n order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market' (par 38).

Assist in the development of competition. – The approach adopted by the Commission and the ECJ is sometimes criticized, because it comes down to imposing on dominant firms an obligation to assist competitors. This, according to those critiques, goes contrary to normal business practices which are, for an undertaking, to develop its own activities, in order to produce more revenues. That critique is not unfounded, but critiques do not realize that the case reflects a change in the vision that European institutions have towards competition. The purpose, in applying competition rules nowadays, is not any longer to avoid unfair practices, and

[29] The structure was created by taking account various criteria, such as the boundaries of municipalities, postcodes, population density, transport connections and the geographical distribution of pharmacies and doctors' surgeries.

encourage the development of fair relations on the markets. It is rather to produce an environment where, under the threat of competition, markets will produce the best possible outcomes. That objective requires authorities to intervene where the degree of competition is not sufficient.

Concluding Remarks

A Complex Movement

Rarely in a radical form. – In the paragraphs above, I have presented two attitudes towards competition and examples have been given of societies where these attitudes exist. It is important to realize that these attitudes do rarely exist in a radical form. They are generally combined to a certain degree. Thus, some competition exists in societies emphasizing fairness. For instance, Africans compete for functions within tribes or social groups just as on any other continent. Rivalry also takes place between groups in Africa – where it sometimes produces extreme forms of violence. Similarly, fairness does not cease to exist where more attention is granted to efficiency, and competition. America for instance has a legislation meant to promote fairness in transactions, in addition to the antitrust laws which seek to promote competition.[30]

Combination of legislation. – This situation where the two legislations coexist is not unique. Most countries nowadays have one body of legislation on Fair trading, or fair competition, and another one on Free, economic, competition. This can be observed in America, as well as in most European countries. Africa provides no exception as the traditional rules promoting of fairness coexist on that continent with other, more modern rules, adopted at the request of international organisms and meant to improve competition. An interesting matter, in that regard, is that the power to enforce both legislations is sometimes conferred to the same authority. In America, for instance, the Federal Trade Commission has a special responsibility to enforce compliance with fairness requirements. At the same time, it has the power to prosecute infringements to competition rules.

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[30] It should also be emphasized that the place granted to competition in the American society does not take away the existence of solidarity enhancing mechanisms. As an example, there exists, in America, a certain degree of social security, whereby a minimal solidarity is organised for all, or quasi all, American citizens. A more comprehensive form of solidarity is also available in groups, such as religious communities, where strong ties exist among members. More fundamentally, the American people are strongly united by the American flag. This has numerous consequences, which are not limited to the political and the military scenes. A typical example is the economic and monetary policy which is carried out internationally by the American government, and which allows the American industry to attract, from the entire world, a gigantic wealth, which can then be shared among the American people, through a flexible labour market and a strong stock exchange.

Nuances. – The coexistence of the two attitudes, and legislations, makes it important to nuance the opposition which has been made between the two attitudes. I am very aware of this necessity. On a theoretical point of view, it should be recognized that Free competition does not prevent, in principle, Fairness. Free competition implies the presence of a reasonable number of actors and the existence of different commercial strategies among which customers may choose. Such a market structure does not prevent actors from behaving fairly. The usual presentation is besides that a strong degree of competition must be accompanied by a stringent enforcement policy to ensure compliance with the law – including the rules on Fairness.

In the practice. – A difficulty, however, is that, in practice, competition rarely leads to fairness. The fiercer the degree of competition, the lower the degree of fairness we are bound to find on a market. Actors submitted to competition have one goal – win the battle. The pressure to win works as an incentive not to comply with the rules. The supreme rule has become victory – and the other rules are set aside in as much as they hinder the realization of that goal. Furthermore, a stringent enforcement policy can rarely be found on competitive markets. The reason is that, in a competitive system, economic activities are considered to belong to the markets. Authorities are only expected to intervene where no solution is provided by the markets. As stated earlier, the objective of an enforcement policy, in that context, is primarily to restore competition. Where competition is sufficient, unfair practices are supposed to be punished by the markets themselves. There is no need, in such a perspective, for a specific enforcement policy directed against fairness …

The Relation with Consumer Law

Protection of consumers. – Another area where more thoughts are needed is the relations between competition law and consumer law and competition law. A consequence of more emphasis being given to Free competition is that consumer law is currently losing some of its importance. Rules meant to protect consumers have been adopted at the European level in the seventies and eighties principally. Since the end of the nineties, there is a discussion about the necessity to go ahead along that line. More importance is given to the necessity not to overburden undertakings – as these produce wealth for the entire society.

New directive. – An eloquent sign of this evolution is provided by the new directive on unfair trading. In that directive, the European Commission attempts to establish a standard of fairness across the European Union. Such a standard would create a common language for all those who advocate fairness in commercial transactions within the Union. A common observation is however that the level of protection that would be granted under such a standard would be rather limited. For this reason, the directive is hardly analysed as progress by consumer organisations.

A consequence of the shift. – This evolution cannot be separated, in my view, from the shift which, I have submitted, may have gradually occurred within the European Union towards Free competition. Traditional consumer law appears to lose some of its importance because, in Free competition, consumers and businesses are considered apt to defend their interests by their own behaviour – and are increasingly expected to do so. The question is thus raised – do we still need any form of specific consumer protection at all ? In other words, does Free competition not imply the disappearance of the traditional form of consumer protection?[31]

[31] A traditional argument in favour of competition is that consumers are well served in a competitive environment as competition generally brings a wider choice and better conditions. That argument is mainly based on macroeconomic statistics measuring the global welfare available in a given society. These statistics do not consider, however, how this welfare is distributed within that society. Furthermore, the emphasis placed on competition favours those customers which all firms want to attract – the wealthier ones.