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THE E.C. – AN EXAMPLE OF BREAKING DOWN THE BARRIERS OF SOVEREIGNTY – IMPLICATIONS FOR CANADA AND THE UNITED STATES*

Guy Pevtchin **

As you know, towards the end of World War II, in 1945, guns had not yet been silenced when a handful of men of genius began to work, not to rebuild Europe, but to build a new Europe. One should never underestimate the trauma inflicted upon the European population by two major world wars in less than forty years. As many people say, if the European Union has not brought anything else but fifty years of peace, that alone makes it worth it. Someone once said that Europe is a group of countries who have decided to make the regulations for the next war so hard to follow that it will probably never happen. And this new Europe, although many Europeans seem to forget it or want to forget it, was strongly influenced by one country, the United States. It was influenced by America, a large continent with obvious local differences, but which is unified by a corpus of common laws and regulations and a uniform currency.

I cannot mention this American influence without mentioning antitrust policy. From the very beginning of the E.U., real competition was recognized as one of the indispensable elements of a unified market, and the draftsmen of the Treaty of Rome¹ went to the best source of knowledge on antitrust to write the well-known Articles 85 and 86 of that treaty, the equivalent of the Sherman Act. Articles 85 and 86 were drafted by an American lawyer named Robert Bowie from Harvard University. Article 3 of the Treaty, in fact, provides for the institution of a system, “ensuring that competition in the internal market is not distorted.”²

Let us remember that, for centuries, European commerce had been run on an “entente and cartel basis.” Even today, compliance with the antitrust rules is not as obvious in Europe as it is in the United States. I am afraid that even some Americans working in Europe have gone native in that respect. The Treaty of Rome entered into force forty years ago, on February 1, 1958, and

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¹ Treaty Establishing the European Economic Community, U.N.T.S. 140 (entered into force Jan.1, 1958) [hereinafter Treaty of Rome].

² *Id.*, art. 3(g).

was amended by the Treaty of Maastricht in 1992 and the Treaty of Amsterdam in 1997. As such, it is not even called the Treaty of Rome anymore. It is the Treaty on European Union (TEU). The changes it brought about are gigantic, and the Union may be described as a structure supported by three pillars. The first comprises the Economic Community. The second comprises a new common foreign and security policy. The third symbolizes justice.

My subject concerns the erosion of national sovereignty in the European Union (E.U.). The name has remained, but I wonder whether Hobbes or Montesquieu would recognize it. Instead of the old concept of traditional sovereignty vested in kings as a divine right constituted by an impregnable block of powers, we have now a divisible sovereignty, and the king or his equivalent has lost most of his crown.

The whole Treaty represents an encroachment of the supremacy of the national Member States. Of course, one could say that every international treaty with mutual concessions is, to some degree, an encroachment of the sovereignty of the signatory Parties. But the Treaty of Rome is very special, as it takes away the major part of the decision-making power of the contracting states. Every field covered by the Treaty, with hardly an exception, suffers a more or less significant loss of national sovereignty. I shall concentrate on Article 3(c), which provides for the freedom of movement of persons, services, goods, and capital, the so-called *four freedoms* in Community jargon.³ This constitutes the major revolution. Europe had a culture of passports, visas, and import licenses. A British doctor could not practice in Italy, a Belgium veterinary surgeon could not exercise his profession in Greece, and there was even less chance that a German lawyer could practice in the Netherlands, and cars with white and not yellow headlights could not circulate in France. Incidentally, one should not underestimate the tremendous psychological impact which these freedoms have had on new generations, though they seldom realize it. These freedoms, which are self-evident to Americans, seem heaven-sent to the older European generation because they were not born with them. It has created a new climate which, for the first time in history, has eliminated trade barriers, but has also brought a new consciousness of a European identity.

The TEU and regulations issued by the Union have what is called "direct effect," which means that they are equivalent in each Member State to national laws and must be applied as such by the local courts. This, of course, was not introduced without some resistance on constitutional grounds. The Supreme Courts of certain States have, however, endorsed it as a recognized principle. The direct effect, primacy, and preemption of Union law are the

³ "[A]n internal market characterised by abolition, as between Member States, of obstacles to the free movement of goods, persons, services, and capital." *Id.*, art. 3(c).

principles which support the functioning of the Union as a whole. As an example, the competition legislation for interstate commerce is based entirely on E.U. law and may be, in most part, enforced either by the European Commission or by the European Court or by national courts. But the transfer of national sovereignty has not always been easy, as when, for example, agents from the European Commission were prohibited from searching the premises of a German firm, or when the Commission claimed back the subsidies paid by the French government to one of their large industries.

The transfer of sovereignty has been affirmed by many judgments of the European Court of Justice in Luxembourg, and I quote just two examples, such as the famous *Costa v. ENEL*:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply

By creating a community of unlimited duration, having its own institution, its own personality, its own legal capacity, and capacity of representation on the international plan and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the Member States have limited the sovereign rights and have thus created a body of law which binds both the national and themselves.⁴

And in another case, *Van Gend v. Loos*,⁵ in even more summary form, which in fact renders my whole talk superfluous, the Court said that the Community constitutes a new legal order for whose benefit the states have limited their sovereignty rights, and the subject of which comprise not only the Member States, but also their nationals.

This is concise, clear, and final. It is the loss of national sovereignty, which permits the unification of laws and their harmonization (standardization) on a Europe-wide scale. Also, although I shall have no time to develop this point, I should mention that, after much legal debate, it is now accepted that the community treaties have a constitutional character, thus ending a long debate between legal writers.

We have said before that harmonization was the daughter of the erosion of sovereignty, and also that the Europeans were greatly influenced by the

⁴ *Costa v. ENEL*, 1964 E.C.R. 585, C.M.L.R. 425 (1964).

⁵ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) E.C.R. 1.

Americans. We must, however, observe that the Europeans in certain fields are going further than their mentors, such as the free movement of goods. As you know, of course, the Commerce Clause of the U.S. Constitution provides that, "Congress shall have the power to regulate Commerce among the general States," but we shall see that the powers of the European Union toward unification seem stronger.

Let me discuss two examples. I was impressed and amazed the first time I came to America to see all of the trucks doing interstate commerce bearing five or ten different identification plates, which, of course, is not required in Europe. By the same token, banking is now unified in Europe. A German bank might end up in Belgium and so on. But when American banks demand reciprocity, of course, the Union agreed to it, provided that the Union banks should enjoy the same rights in the United States. The United States said that it was impossible because of different legislation in the nation-states.

One could, of course, cite dozens of cases in which a European Court has decided on distortions of competition and consequentially on sovereignty. There is a very recent case which I found of particular interest because it involved public order. Very briefly, the facts were as follows: French farmers, unhappy with the importation of foreign products and the low prices their own production had enjoyed for over a decade, resorted to the destruction of foreign loads, violence against drivers, and, even threats against supermarkets, creating a climate of insecurity and a deterrent effect on trade flows, or in other words, impairment of the free flow of goods. France, according to the European Court, should have taken the appropriate measures to correct the situation. France invoked public order to justify its inaction to the situation. They claimed a stronger intervention would have provoked even more violent reactions from the farmers. This was rejected by the European Court, which also said that socio-economic grounds cannot serve as a justification for barriers.

Weakening of the sovereignty of the "Mother State" has also had a secondary effect which is seldom quoted. I refer to the growing significance of the regions; for example, Scotland in the United Kingdom, Bavaria in Germany, Brittany in France, Flanders in Belgium, and so on, want increasingly to be recognized as sub-national states. As a central state, the "mother" transfers its authority to other institutions. The regions, the "children," want to assert their independence and deal directly with that new authority, the E.U.

A vivid example is provided by France. Under the monarchies, and even more so under Napoleon, France was a totally centralized state. For instance, all of the railways used to converge in Paris and to go from Marseilles to Bordeaux, it was faster to go through Paris. Now, for the first time, the railway lines run not only north-south, but also east-west, and it is not far-

fetched to consider this as a change, as a weakening of the centralization of the country and, thus, of its sovereignty. This renaissance of the regionalism is a phenomenon that very few people had anticipated.

This regionalism should draw the attention of the business people and could also influence distribution policy and sales policy. Another amazing thing is that, by themselves, some regions have created groupings within different states. For instance, one region in southeast France has linked with Italy and even Switzerland, which is not part of the Union, to form a kind of informal economic region. This is a surprising phenomenon indeed.

However, the heaviest blow to sovereignty is the impending single currency, the Euro. As you know, the management of a national currency is one of the most potent weapons at the disposal of a state. Someone has said that the currency is a hard kernel of national sovereignty. The management of the currency regulates not only trade, but the whole life of a country, including social issues, and therefore, political ones. This is the reason why the introduction of the Euro was subject to an "opt out" policy and a few states, including the United Kingdom and Denmark, will not adhere to the joint currency, at least for the time being. It is highly likely that, if the Euro is successful, it will decrease the influence of the dollar which is now the currency of choice in a majority of world trade activities.

There are, however, certain mechanisms which protect the independence of the Member States in the Union. The first one is the subsidiarity concept, a word which some smart cleric has unearthed from canon law, defining the distribution of power between Church and State. According to Article 3-B of the Treaty,⁶ the E.U. should only take action when it can be carried out most efficiently at the European level. All other powers should be kept as close as possible to the lowest political level. This is, in fact, a bottom-up policy. I should, however, mention that this concept is not meeting universal approval, and some even suspect that it was introduced only to deflect the accusation of universal busybodies often levied at the Commission.⁷ Additionally, the community should also apply the principle of proportionality together with subsidiarity or, in other words, only act when necessary and not use the proverbial sledgehammer to crack a nut.

Secondly, national legislation is recognized as long as it does not impinge on the four freedoms and prevent the free movement of goods and services.

⁶ Treaty of Rome, *supra* note 1, art. 3-B states:

[T]he Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this treaty.

⁷ Article 3-B was inserted by the Treaty on European Union, art. G(5) (OJ 1992 C191).

In previous times, the Commission tried to harmonize everything from sausages to lawn mowers. This policy resulted in the famous Euro-sausage, an object of much ridicule. The recognition of the validity of national legislation provoked the shelving of a considerable amount of the harmonization proposals which were considered superfluous. This principle of recognition of national legislation in certain cases is, in my opinion, extremely intelligent because it is a way to safeguard national identities, thus rebutting an oft-heard criticism that, after a few years, the Union would result in a bland, uniform population.

I have mentioned that the Union issues regulations which have so-called direct effect, but it also issues directives which only provide a framework which each Member State may tailor to its own requirements, provided it respects the general guidelines and the minimum requirements laid down by the directives. Furthermore, some fields are out of bounds to the Community, such as education, public health, and broadly speaking, cultural subjects; in short, everything which pertains to the identity of the Member State.

As a conclusion to this summary survey of sovereignty in the E.U., I believe one could say that the sovereignty of the Member States has been decreased to a degree that would have been unthinkable thirty years ago, but strong safeguards have been erected to protect the identity of each Member. The feeling of the individuals, who since the Treaty of Maastricht are now European Union citizens and carry a European Union passport, is very, very slowly emerging into the consciousness of belonging to the Union.

We have seen that sovereignty of the European states is, if not dead, at least is severely diminished. With a lot of caution and some trepidation, I would like to examine briefly the situation in the United States and Canada.

The United States, Canada, and now the E.U., are great industrial powers and it is normal that disputes occur, or in other words, that sometimes sovereignties clash. Let us remember that the E.U.-U.S. relationship represents the largest trade and investment link in the world.

Of course, the E.U. is sometimes irritated by the United States extending the long arm of its law. One wonders if the United States sometimes seems like a Hindu statue with twenty different arms reaching out. The latest example is the *Nippon Paper* case,⁸ in which it was decided that U.S. antitrust laws apply in the criminal context to a price-fixing conspiracy that occurred outside of the United States and had adverse effects in the United States. You will find in your documentation, a Union regulation, protecting the Union, against the effects of extraterritorial applications of foreign laws.

⁸ *Nippon Paper Industrial Co. v. U.S.*, 118 S.Ct. 1116, 140 L.Ed.2d 466, 66 U.S.L.W. 3558 (1998).

I have recently had the opportunity to hear two speeches, one by the Ambassador to the E.U.; the other by the U.S. ambassador to Belgium. The subject was identical: U.S.-E.U., partners or rivals?

I mentioned before the American influence on the European Union. The friendship towards America remains intense and real, but it does not mean that there is never an undercurrent of tension or that this tension will die away peacefully. I alluded before to the fact that the Union is far more centralized and institutionalized than the United States and Canada. Although it seems paradoxical, the Union is, in some fields, but not all, far more integrated than the United States and Canada. It has been said that in the NAFTA and in the U.S./Canada Free Trade Agreement, the United States and Canada did not want to give up too much sovereignty because this would cause congressional problems with the ratification. Therefore, in trade matters, it is far easier for the Union than for North America to speak with a single voice. As we shall see, some of the disputes arise from the existence of state and not federal U.S. regulations and barriers, which, because of their multiplicity and diversity, are difficult to cross in an international agreement. Needless to say, I am not an expert on U.S. law, but I am impressed when I see the use of the well-known expression like, "the dormant Commerce Clause," and U.S. experts saying that the Supreme Court may sometimes give greater leeway to the States than the European Court of Justice, and paradoxically, the normative values of federalism seem far better served by the E.U.'s Member States as currently constituted.

Without going into detail, I am aware that the U.S. Supreme Court since the *Pike* case⁹ in 1970 has laid down many interesting decisions which do not make for easy interpretation as to whether a State law impedes on interstate commerce, and unfortunately, international commerce or not. The Court of Luxembourg, in the famous *Cassis de Dijon*¹⁰ and *Keck*¹¹ judgments has not always been consistent either.

From the above, it would seem, even proceeding with the utmost caution, that the United States gives a lot of leeway to its individual states, but that, many forces, including the Congress, make it assert very strongly its sovereignty in international matters. For example, is the United States exercising its sovereignty rights in a more forceful fashion than the E.U., and if it does, does it have an influence on the U.S./Canada/E.U. relationship? Is there a difference in the United States between the exercise of national versus international sovereignty?

⁹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

¹⁰ *Cassis de Dijon*, Case 120/78: [1979] E.C.R. 649; [1979] 3 C.M.L.R. 494.

¹¹ *Keck and Mithouard*, Case 269/91: [1993] E.C.R. 1-6097.

As we have seen, the Union has erected some safeguards to protect the Members from an excess of sovereignty, and efforts are made, by mutual cooperation, to decrease the counterproductive effects of excess sovereignty on an international level. And therefore, one should list with optimism the considerable efforts on both sides of the Atlantic towards self-imposed limits on the sovereignty of both parties. There are so many efforts, in every direction, so many groups, both official and private, and so many acronyms that one needs a special glossary: TABD (Transatlantic Business Dialogue), MRA (Mutual Recognition Agreement), NTA (New Transatlantic Agenda), TASBI (Transatlantic Small Business Initiative), and more.

A seminal document consists of the Union report on U.S. barriers to trade and investment from third countries. In addition to the usual complaints, barriers such as invoice requirements, customs formalities, and complex regulatory systems are singled out as especially onerous for small firms. There are more than 2,700 states and municipal authorities in the United States which issue regulations affecting trade. In contrast to this situation, according to Article 30 in the TEU, restrictions on imports between the Member States are no longer allowed, and even patents and trademarks cannot be used to restrict imports.

The TABD is composed of business leaders and E.U. delegates and is doing sterling work, making proposals, and some of them are even being followed. The MRA is a very interesting example of cooperation. It authorizes both parties to test and certify standards. However, there are serious doubts about whether independent U.S. regulatory agencies, such as the Food and Drug Administration, will respect the MRAs once they are put into effect. This is very typical of the resistance that some Europeans encounter when dealing with agencies in the United States which act with great independence. It is perhaps arrogant to say that recommendations in the United States such as adopting mutual recognition, common standards, regularity, cooperation, nondiscrimination, manufacturer's declaration of conformity, etc., are in fact an endeavor to adopt Union laws which were the result of an abandon of sovereignty on an international plan.

So, finally, the Commission is now proposing a new E.U.-U.S. initiative, the New Transatlantic Marketplace. This initiative is a huge leap towards improving Europe's relationship with the United States. The main objective was the removal of the technical barriers, and the elimination of industrial tariffs by 2010; the creation of free trade, and further liberalization of investment, procurement, and intellectual property. However, the negotiation to proceed with the proposal needs the unanimous support of the Member States, and the French are not supporting it.

Canada and the E.U. have issued a joint political declaration on their relations and on an action plan to develop, among other aims, a multilateral trading system. An inventory of tariffs and non-tariff barriers has been made. A typical example of a provincial trade barrier is the prohibition on the import of second-hand vehicles. It is also noticeable that fairly numerous barriers exist at provincial levels; for instance, local processing requirements in Ontario, the extra cost of service charges, and ownership requirements. As with the United States, a mutual recognition agreement is now being worked on and should be signed in the very near future. The situation in Canada is very much like that in the United States, with provinces guarding a fair amount of their independence, thus making the international movement of goods subject to difficulties.

I believe that state sovereignty in the E.U. has been severely decreased to the benefit of the Union predominance. It would be wrong to say that this move has pleased everybody. Subsidiarity is an example of the reaction to overreaching sovereignty. An attempt to move the main antitrust body away from Brussels is another. But, I believe the movement is irreversible because it corresponds to a weakening of the excessive nationalistic feeling which prevailed before the war and which is now foreign or even incomprehensible to the younger generation, except perhaps at football matches.

Sovereignty of the E.U. and the sovereignty of Member States are two very different animals. At times, the E.U. may be cumbersome and heavy-footed, but it is not *addictive*. It does not involve you emotionally. I am far from being a specialist in U.S. law or history, but for all kinds of reasons, including a great love of isolationism and independence at the individual and at the state level, I do not see the United States or Canada following the same path as the E.U. to growing harmonization between their own individual national states or provinces.

