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FAIR COMPETITION AND MANAGEMENT IN THE EUROPEAN UNION

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Dear Readers,

As part of the rapprochement between juridical science and management science, alongside the disciplines of *Law and Economics* and *Law and Finance* a new approach known as *Law and Management* has appeared (Masson & Bouthinon–Dumas 2011, p. 233). The latter aims at demonstrating that the law is not simply a source of constraint for economic operators; it can also be a source of opportunity and a lever for business prosperity. In this sense, this approach aims at understanding how businesses can use the law to their advantage and make it a decisive factor for their development (*Ibidem*). In the particular context of developing a competitive European strategy, the consideration of fair competition can render this new approach highly significant.

In reference to paragraph four of the preamble of the Treaty on the Functioning of the European Union, fair competition constitutes one of the competitive paradigms of the European Union (Carbonnaux, 2013). Going beyond the existing distinctions between the different norms regarding competition, it refers to a group of solutions which are coherent in their aims and content (*Ivi*). Firstly, these solutions have coherent aims because all the legal translations of a competitive nature address fair competition as a way to protect the correct functioning of the competitive market. Secondly, they have coherent content because each European regime of competition aims at ensuring fair competition by preserving the equality of opportunity between economic operators; comparable situations must not be treated differently but on the other hand different situations must not be treated equally. When applied to competition, this order aims at respecting a basic structure which presumes that, for its own development, no business benefits from advantages that other operators cannot obtain, unless such benefits are justified by considerations of general interest (Laurent, 2001, § 143). This uniform treatment of fair competition gives it axiological neutrality which allows us to believe that it constitutes a standard of the European Union. As such, and from a *Law & Management* perspective, it can help to establish recommendations for economic players in pursuit of their particular interests.

As a demonstration, fair competition is based on a liberal conception (Hernu, 2003, p. 130) of equality, a *model of material justice* (*Ivi*, p. 135) which implies that for European Union law, *according to its merits, equality presides over competition* (*Ivi*, p. 136). This implies that any advantage or ease in competition only comes from the merits of the competitor who has proved himself to be efficient. Respecting this condition offers arguments in favor of companies in order to criticize the methods used by European authorities as part of the evaluation of the merits or demerits of their competitors.

The formalism which European authorities sometimes display is particularly targeted. Equality on the merits, which is necessitated by fair competition, promotes an approach through the effects of the rules of competition[1]. The latter allows for a better definition of a company's merits so that only truly anti-competitive practices are apprehended[2] (Prieto, 2010, § 17).

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Additionally, the approach through effects helps prevent a company's commercial freedom from becoming restricted without anti-competitive proof being shown. It thereby prevents economic operators from finding themselves at an unjustified disadvantage. In this sense, said economic operators have the right to contest the upholding of certain analyses of the rules of competition. In particular, we can consider the European approach relating to the requirements of an effect of trade between member states and a distortion of competition as regards state aids rules. Moreover, from a micro-economic perspective, the aim of fair competition can also be used to condemn any advantage obtained in competition through not respecting consumer rights. These brief examples underline the strategic potential of the aim of fair competition. Its quality as a standard of European competition makes it a precious tool which allows businesses to discover opportunities and competitive threats from any juridical norm. In this regard, it can be used as a management tool in public enterprises[3]. Furthermore, it can be used to establish recommendations intended for normative authorities.

In particular, it is necessary to reinforce European legislation in social, fiscal and environmental matters. The diversity of national legislation relative to each of these sectors infringes upon the consistency of the juridical environment to which economic operators should have access based on fair competition. In the context of the current economic crisis it is becoming increasingly necessary for European institutions to duly take this legitimate interest into account.

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(Endnotes)

1 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, § 1; Judgment of the Court (Grand Chamber) of 27 March 2012, Post Danmark A/S v Konkurrencerådet, Case C-209/10.

2 Prieto C. notes that for practices of dominant businesses, the approach based on effects is *meant to better define the merits of businesses in such a way that only real abuse is apprehended.*

3 See article published in this edition (Prieto, 2010, Issue, 1423, § 17).

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