Law and Innovation

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Introduction

The articles which follow emerged from a full-day session organized by Section on Business Law Committees S (Products Liability, Advertising, Unfair Competition and Consumer Affairs) and C (Antitrust and Trade Law) during the IBA Conference in Amsterdam in September 2000. Inspired by Christopher Hodges, Vice-Chair of Committee S, the idea had been to look, from a number of different angles, at legal and policy (and sometimes even philosophical) issues thrown up by innovation. Fittingly for a Conference organized by these two Committees, the morning session laid more emphasis on intellectual property concerns whereas in the afternoon the focus shifted to regulatory aspects arising from antitrust and trade law.

The first article, submitted by Christopher Hodges, seeks to place innovation in its context as a goal of the economic and social policy of the European Union. It identifies the tension between the minimum regulation for consumer protection and the unwelcome side effects of regulation in terms of delaying or dissuading introduction of new products, particularly in the pharmaceuticals sector.

The emphasis on pharmaceuticals is continued in the article by Richard Manning of Pfizer Inc. He looks at the impact on US prescription drugs market of the product liability system and argues that the extension of such a system to the European Union would increase costs and deter innovation without generating any discernible benefits for consumers.

More detail on the US law on product liability for prescription drugs is provided by Professor Brian Murchison. In particular, he discusses recent legislation intended to impose a stringent burden of proof on plaintiffs and he discusses some of the research already conducted on the relationship between litigation and product innovation. At least one US court has concluded that the new law tilts the balance too far in favour of pharmaceutical manufacturers. Finally, Elizabeth Toni Guarino looks at the regulation of dietary supplements and genetically modified (GM) foods. The relatively benign approach adopted by the US food and drug food and drug administration, which currently does not even require special labeling for GM food, can be contrasted with the growing concern, even hostility, in many parts of the European Union.

Turning to the regulatory debate, Simon Topping of Bird & Bird discusses recent developments in the application of competition law to research and development agreements, in the form of a more relaxed exemption regulation. However, it remains the case that the European Commission is overly concerned about the possible restrictions on

innovation that could arise from parties cooperating on research and development and, consequently, the regime for such agreements is still too prescriptive. Continuing the theme of regulation and innovation markets, Philip Marsden of Linklaters & Alliance examines, with particular reference to telecommunications, whether there is a need for a more consistent and less interventionist application of competition laws by regulators worldwide, in order to avoid missing out on the benefits which will flow from investments in new markets and services. Finally, Rambod Behboodi, Trade Commissioner and Legal Adviser at the Mission of Canada to the European Union (expressing a personal opinion) attempts to step back from the debate and question whether technological innovation is always and automatically a 'good thing'. He reminds us that while, generally, legislators should seek not to stifle innovation, they also have to take account of other national and social interests.

As one would have expected from a panel comprised largely of practitioners advising industry, the sentiment is generally in favour of minimizing legislation which might make investment more difficult or risky. Taken together, these articles represent a welcome and thoughtful contribution to this debate. It is undoubtedly a theme to which we will return in future conferences and publications.