

BOOK REVIEWS

Common Market Cartel Law. By Conrad W. Oberdorfer, Alfred Gleiss and Martin Hirsch: Commerce Clearing House, 1963, \$15.00, pp. 240.

In the last three years American lawyers and their clients have witnessed the emergence of a viable antitrust program in the European Common Market. English language materials on the subject are copious¹ and the American lawyer may have a sense of *déjà vu* in reading learned interpretations of what constitutes an "adverse effect on trade," a "relevant market," or a "dominant position"; or in following a discussion of whether a "concerted practice" is more like a conspiracy or more like conscious parallelism, and whether the concerted practice is illegal under one or both views. But while the American lawyer viewing the emergence of an antitrust system in the European Common Market sees problems similar to those in his domestic law and hears similar terms employed (at least in translation) in the analysis of many of the problems, it is apparent that the answers to many of these seemingly similar problems will require more than translating American answers into Common Market law. For the Common Market antitrust policy, as set out in Articles 85 and 86 of the Rome Treaty and the regulations promulgated thereunder, arises in a different context and with a frequently different emphasis. In view of this fact, it is useful to have a book such as *Common Market Cartel Law*, in which the authors have made a detailed study of the antitrust provisions of the Rome Treaty and the first regulations issued by the EEC antitrust authorities.

Unfortunately, the work lacks an introduction that would give the reader a perspective on the relative place of the EEC antitrust laws within the broader purposes of the Rome Treaty, on the manner in which these antitrust laws are intended to function and on the way their administration is organized. The non-specialist should therefore first look elsewhere for such a perspective; this work is a technical study of greatest use to lawyers whose work brings them regularly into this area. And, indeed, all who turn to this work may regret that, with all the care devoted to the specific provisions of the law, the authors did not more frequently attempt to state some of the broader policies that can be inferred from the specific details.

At least two important tendencies that are implicit in the law as it is described seem to go unarticulated. First, the Community at this stage of its development must see that measures and practices adopted by private parties do not undo the advantages that have been obtained through the dismantling of barriers to trade among the Member States. To this end, the policy favoring competition in the Community has been aimed initially at breaking up private marketing arrangements that divide territories along Member-State-lines. This policy is reflected in the current emphasis of the EEC Commission's initial regulations and decisions which concentrate upon the application of the antitrust laws to exclusive dealing

¹ The current bibliography in the CCH Common Market Rep. lists more than forty articles and books in English discussing the antitrust laws of the European Common Market.

contracts,² a subject that is only now being considered in depth by the United States courts.³

Second, the EEC policy on competition is being shaped by the notion that the Community must promote the process of economic union, and that, if the markets are to merge and if economies of scale are to be achieved, enterprises in the Community must be free to affiliate. Thus, as noted by the authors, neither article 85, which forbids agreements in restraint of trade, nor article 86, which deals with the abuse of a dominant position, expressly prohibits mergers or acquisitions or clearly makes them subject to the prior or subsequent approval of the Commission; there is continuing debate on the extent to which these articles are adequate to regulate combinations. European authorities charged with administration of the antitrust laws have recognized in their statements that the emergence of a vast market will necessitate some concentration of economic power.⁴ (This indication that concentration is desired stands in sharp contrast to the present American predilection for attacking the affiliation of substantial entities even where only problematical competition may potentially be lessened.)⁵ On the other hand, the direction of Community merger policy may be affected by such political considerations as the attitude of the Community toward acquisitions by non-EEC companies. For example, the French Government has, in the past, proposed EEC action to study and presumably regulate such acquisitions.

Common Market Cartel Law was originally published in Germany in 1962 and contains comparisons by German lawyers of the emerging EEC legislation with the existing German antitrust legislation. The German law background is useful since the West German government had the most fully developed anti-cartel law among the Common Market members at the time the Rome Treaty provisions were adopted; German law was a significant influence in the drafting of the Treaty and has continued to be so in connection with the first regulations issued by the Community authorities.⁶ In the American edition of the book, published in 1963, the authors have

² To date the principal activity of the EEC Commission under article 85 has been the regulation of vertical distribution arrangements. The Commission's only formal refusal of exemption from article 85(1) was on September 23, 1964, in its decision in the Grundig-Consten case, CCH Common Market Rep., ¶ 7026, in which the Commission refused an exemption for an exclusive distributorship agreement under which a German manufacturer agreed to prevent any firm other than its French distributor from importing the manufacturer's products into France. In other instances, the Commission has indicated that it will grant antitrust exemption respecting two-party distributorships which involve neither restrictions on imports across Member State frontiers nor resale price maintenance. See e.g., Commission Regulation No. 153 of December 24, 1962.

³ See, e.g., *United States v. White Motor Co.*, 372 U.S. 253 (1963), reversing and remanding for trial, 194 F. Supp. 562 (N.D. Ohio 1961), settled by consent decree, 1964 CCH Trade Cases ¶ 71,195; *United States v. General Motors*, 1964 CCH Trade Cases ¶ 71,250.

⁴ See, e.g., *Proceedings of the Conference on Antitrust and the European Communities*, American Bar Association's Section of Antitrust Law, Brussels, September 23-25, 1963, pp. 20, 42.

⁵ See, e.g., *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

⁶ See Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects*, 62 Colum. L. Rev. 1 (1962); Kelleher, *How Competition is Regulated in the Community*, 19 Bus. Law. 148 (1963).

followed the comparison with German law by comparisons with United States antitrust practice.

The American edition also includes developments which occurred after the publication of the German commentary and prior to its publication in the United States.⁷ Specifically, the book consists of a detailed analysis of the language of Articles 85 and 86 of the Rome Treaty, Regulation 17, adopted on March 13, 1962 (the first antitrust regulation issued by the EEC Council), Regulation 26, adopted on April 4, 1962 (issued by the Council, and relating to the rules of competition governing agricultural products), Regulation 27, adopted on May 10, 1962 (issued by the Commission to implement Regulation 17); it further includes discussion of the *Bosch* case of April 6, 1962 before the European Court of Justice, and the issuance in 1962 by the Community Press and Information Service of the Guide Lines concerning Articles 85 and 86 of the Treaty.

In an area in which very little law has been decided and in which the legislative history remains an esoteric subject, the authors exhibit an impressive willingness not merely to outline the areas of debate but also to express interpretations of the many complex provisions of the law and regulations. In accepted civil law fashion, they refer throughout the book to other German writers to note authority supporting each statement made or disagreement with their own interpretations. While one would wish for citations to other European commentators, this work should serve as a useful reference to the published views of German interpreters at the initial stage of the implementation of the antitrust provisions of the Rome Treaty. In addition to providing comparisons with the German law and the statements of German commentators, the authors have based certain interpretations on the decisions of the European Court of Justice in connection with European Coal and Steel Community antitrust cases.

Of considerable interest to the American lawyer is the authors' finding of the absence of provisions for Community antitrust regulation of exports and extraterritorial activities by Community industries.⁸ The prerequisite for application of Article 85(1) of the Rome Treaty to trade arrangements is that the agreement must be "apt to affect adversely"⁹ trade among Member States of the EEC. Where what is involved is not trade among Member States of the EEC, but rather trade between outside countries and the EEC area considered

⁷ See Honig, Brown, Gleiss & Hirsch, *Cartel Law of the European Economic Community* (1963) for a somewhat similar version with a different format which was published in the United Kingdom.

⁸ Pp. 22-24.

⁹ The requisite effect on Community trade required of a particular practice before it is subject to prohibition under article 85(1) is the subject of controversy regarding the meaning of the four equally authentic official texts (Dutch, French, German and Italian), compounded by translation into English. The authors conclude that the proscribed conduct is that which is "apt to affect adversely" trade among Member States. Other possibilities include "likely to," "may," or "capable of" having such effect. There is also debate over whether the effect upon trade must be "adverse," a term that appears in the German, Dutch, and Italian texts but not in the French text. See Nebolsine, *The Rome Treaty—The Case of Exclusive Dealing*, 1962 *Proceedings of the American Society of International Law* 18, 21-23. The authors have furnished their own English translation of articles 85 and 86. They have utilized existing translations in the case of the Regulations.

as an economic bloc, the authors conclude that the Treaty prohibitions do not apply. Therefore, they suggest that a manufacturer within the Common Market may bind his foreign customer not to export the goods supplied to the customer (or other goods) into the Common Market. Similarly, the EEC manufacturer may give an exclusive distribution franchise to his foreign customer for a specific territory outside of the EEC and may bind the manufacturer's EEC customers not to export the manufacturer's products into the foreign distributors' exclusive territory. Of particular significance is the fact that export cartels organized by Member State enterprises for export from the Common Market are permitted provided that competition among the participants within the Common Market remains unrestricted. Such export cartels may in practice be subject to considerably fewer restraints than the American export cartels operating under the limited United States antitrust exemptions of the Webb-Pomerene law.¹⁰ The initial decisions of the EEC Commission have thus far tended to bear out the authors' assertion of the legality, under article 85, of extraterritorial restrictions outside the EEC.¹¹

The development of the role of Community law vis-à-vis the national laws of the Member States will continue to be of particular significance in the antitrust area. Community antitrust law is directly applicable in the territories of the Member States and has the force of municipal law. The authors include comparatively little discussion of the relationship between the Community law and the national antitrust laws and no discussion of the individual Member State antitrust laws other than German Law. They have devoted their attention to those areas in which the municipal authorities and courts are competent to administer the Community law and in which the Community law is supplemented by local law. For example, they point out that the right to damages of a private party injured by an antitrust violation under article 85(1) depends upon the applicable national law. In the authors' view, as set forth in the American edition, the question of whether the illegality of an agreement may give rise to claims for damages under German law depends upon whether article 85(1) is a protective law within the meaning of Section 823, Paragraph 2, of the German Civil Code.¹² They conclude that article 85(1) is not such a protective law, since in their opinion, it is not aimed at the protection of individuals or limited groups.¹³

¹⁰ Webb-Pomerene Export Trade Act of 1918, 15 U.S.C. §§ 61-65. Examples of United States antitrust problems encountered by United States exporters are set forth in the Report to the President of the White House Conference on Export Expansion, September 17 and 18, 1963, pp. 35, 36.

¹¹ Recent decisions of the EEC Commission indicating a disinclination to apply article 85 (1) to restrictions on trade outside the EEC include the negative clearance granted the Commission to Grosfillex Co., on March 11, 1964 (Official Journal No. 58, April 9, 1964), CCH Common Market Rep. ¶ 7020; the negative clearance granted S.A. Nicholas Freres on July 30, 1964 (Official Journal No. 136, August 26, 1964), CCH Common Market Rep. ¶ 7025; and the negative clearance granted the Dutch Engineers and Contractors Association on October 22, 1964 (Official Journal No. 173, October 31, 1964), CCH Common Market Rep. ¶ 7030.

¹² Pp. 122-23.

¹³ One of the German authors has more recently indicated his skepticism as to whether the differentiation between a law protecting the public as such and one protecting

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A reading of *Common Market Cartel Law* creates an awareness of the broad discretion accorded to the EEC Council and Commission for planning and directing the competitive economy of the Community. The Sherman Act in the United States and the antitrust laws that have followed it have been supplemented by a few guide lines issued from time to time by the Federal Trade Commission in certain areas, but in general the legislative and administrative agency approach in the United States with respect to the antitrust laws has been more like the approach of some religious sects to Bible study whereby every man is entitled to interpret the laws in his own fashion—but at his peril. In contrast, the approach of the Common Market to antitrust regulation is manifested in the injunction to the Council and the Commission that they issue comprehensive regulations implementing and interpreting in detail the more general statements of policy laid down in the Rome Treaty.¹⁴ This process is understandably proceeding in a deliberate manner. *Common Market Cartel Law* conveys a vivid notion of how many problems remain unresolved and how many problems this process can create.

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A Lawyer's Guide to International Business Transactions. Edited by Walter Sterling Surrey: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1963, \$35.00, pp. 1071.

Starting from practically nothing ten years ago, the list of guides, how-to-do-it books, symposia, and similar materials on international legal practice has grown today to awesome proportions. A recent addition, and a very welcome one, is this impressive compilation sponsored by the ALI-ABA Joint Committee on Continuing Legal Education.

The *Lawyer's Guide* includes contributions from over twenty-five writers, including many familiar names. The various authors are obviously well-informed and at home in their fields.

There are sections on trade control regulations, foreign licensing, foreign laws relating to direct investment, insurance, financing, antitrust, United States taxation, the various regional trade blocs such as the EEC and EFTA and a final section on international litigation and arbitration.

The volume, in many ways, is just what its title suggests; it is a *guide* to international business transactions, and, as such, it is surely a useful starting point for the lawyer faced with the problems of dealing across national boundaries. You will not, for example, find in the *Guide* a country-by-country list of income taxes throughout the world, but the *Guide* does tell you

its individual members or classes of them is not too theoretical and has indicated less certainty concerning the course of German judicial decisions on this point. See Proceedings, Conference on Antitrust in the European Communities, American Bar Association, Section of Antitrust Law, Brussels, September 23-25, 1963, p. 154.

¹⁴ Article 87 of the Rome Treaty directs the Council of the Community to issue the necessary regulations or directives to put into effect the general principles of articles 85 and 86. See CCH Common Market Rep. ¶ 2201.