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BOOK REVIEW

EEC Competition Law: Business Issues and Legal Principles in Common Market Antitrust Cases. By U. P. Toepke. New York, New York: John Wiley & Sons, Inc., 1982. Pp. 925.

EEC competition law can be a strange and baffling creature for an observer familiar only with United States antitrust law. There is a tendency to make very straight-forward comparisons between these two systems. Each system is part of a federal structure of legal regulation which applies to practices capable of affecting trade between member states. In addition, both the Sherman Act¹ and the Treaty of Rome² establish a two-part scheme for regulating competition with different standards in judging agreements between firms on the one hand, and the actions of monopolists or dominant firms on the other hand. Like sections 1 and 2 of the Sherman Act,³ articles 85 and 86 of the Rome Treaty⁴ are phrased in broad sweeping language with the burden on the judiciary to fill in the details in creating a comprehensive legal regime.⁵

A casual observer would have a great deal of difficulty cataloging the differences and similarities between the two systems. For example, while article 85 of the Rome Treaty has certain parallels with section 1 of the Sherman Act, its very language prohibits concerted practices beyond the reach of even the most expansive interpretation of section 1 of the

¹ 15 U.S.C. §§ 1-7 (1982).

² Treaty Establishing the European Economic Community, done Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter cited as Treaty of Rome].

³ Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (1982). Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize. 15 U.S.C. § 2 (1982).

⁴ Article 85 of the Treaty of Rome prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Treaty of Rome, *supra* note 2, art. 85, at 47. Article 86 of the Treaty of Rome prohibits an abuse of a "dominant position." *Id.*, art. 86, at 48.

⁵ The origin of the Sherman Act in the United States common law doctrine of restraint of trade explains the willingness in the U.S. to delegate broad authority to the judiciary to guide the developments of the antitrust laws. See Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982).

In the European Economic Community, the European Court of Justice has played an equally critical role by extending the scope of the Treaty of Rome provisions to cover vertical restraints, mergers, and a variety of predatory and exclusionary practices.

Sherman Act.⁶

Another difficulty comes in analyzing article 86 of the Rome Treaty which prohibits the "abuse" of a dominant position and is widely perceived as different, and perhaps weaker, than section 2 of the Sherman Act. These differences have been greatly exaggerated. Because recent cases under section 2 have begun to emphasize the bad acts of the monopolist,⁷ United States monopolization law has moved toward the European concept of "abuse" as the key to a finding of illegality. Since article 86 applies to firms with a dominant position, rather than merely with a monopoly position, it can be argued that the European system may well be farther reaching than its United States counterpart.

The most fundamental difference exists in the very purpose of the competition laws of each system. The antitrust laws of the United States are based on a notion that competition is valuable for its own sake.⁸ The Treaty of Rome also recognizes this aim, but only as a subsidiary goal to the achievement of an integrated European common market. The Rome Treaty itself explains the significance of competition law in achieving this broader goal:

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.⁹

To this end, the Treaty mandates "the establishment of a system ensuring that competition shall not be distorted in the Common Market."¹⁰

Articles 85 and 86 of the Rome Treaty are functional instruments of economic integration. Practices illegal under these provisions are pro-

⁶ Compare *ACF Chemifarma v. Commission*, 1970 E. Comm. Ct. J. Rep. 661 with *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

⁷ See, e.g., *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 234 (1983); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287-88 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). See generally Waller, *The "New" Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.* 32 DEPAUL L. REV. 595 (1983).

⁸ The debate in the U.S. is whether to define that competition in economic, social or political terms. See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977).

⁹ Treaty of Rome, *supra* note 2, art. 2, at 15.

¹⁰ Treaty of Rome, *supra* note 2, art. 3(f), at 16.

hibited as "incompatible with the Common Market."¹¹ This is a role that the Sherman Act need not play. Even at the time of the enactment of the first national antitrust laws in 1890, the creation of a national economy was largely complete. Articles 85 and 86, along with other provisions of the Treaty,¹² must therefore play the same role as did the commerce clause of the United States Constitution¹³ during the nineteenth century. Appreciating this function of EEC competition laws clarifies the two crucial distinctions between the European and the United States systems: the inexorable hostility of the EEC to any form of territorial protection or export prohibitions and the existence of article 85(3) exemptions for restrictive agreements which serve other interests of the Community.

Even stripped of the comparisons with United States law, EEC competition law is fascinating for its institutional aspects. It is the most fully developed and most effective of any of the Community's policies. In comparison, the common transportation policy languishes in administrative turmoil and national obstinance,¹⁴ while the common energy policy is virtually non-existent.¹⁵

The competition regime owes its success to the dual system of public and private enforcements of rights derived from articles 85 and 86. On the public side, the competition laws are enforced by the European Commission, a powerful and professional administrative body not directly embroiled in the politics of national interest as practiced by the Council of Ministers.¹⁶ The power of the Commission to investigate, initiate proceedings, and grant negative clearances as well as exemptions under article 85(3) give it an enormous ability to influence the development of EEC competition law.

The role of the Commission is complemented by the ability of private parties to invoke rights derived from articles 85 and 86. The European Court of Justice has held that articles 85 and 86 have direct effect

¹¹ Treaty of Rome, *supra* note 2, arts. 85 & 86, at 47-49.

¹² Of particular significance in this regard are the provisions concerning the free movement of goods. Treaty of Rome, *supra* note 2, arts. 30-34, at 26-28.

¹³ U.S. CONST. art. I, § 8, cl. 3.

¹⁴ See A. PARRY & J. DINNAGE, PARRY & HARDY: EEC LAW 295-311 (2d ed. 1981).

¹⁵ *Id.* at 412-18.

¹⁶ The European Commission was created pursuant to Article 4 of the Treaty of Rome. Treaty of Rome, *supra* note 2, art. 4, at 16. Its general powers are derived from articles 155 through 163, and numerous other specific Treaty provisions. Treaty of Rome, *supra* note 2, arts. 155-163, at 71-73. Unlike the Council of Ministers, the Commission is a *Community* institution without specific national identification.

and could be enforced by private parties in *national* courts.¹⁷ Until recently, this has meant that litigants used articles 85 and 86 as a defense to a breach of an agreement with restrictive conditions or occasionally to seek injunctive relief against predatory practices such as refusals to supply.

Within the past year, there has also been the promise of articles 85 and 86 as a plaintiff's weapon in a suit for damages. The highest court in England, the British House of Lords, held in an interlocutory appeal that damages were available under article 85 in a suit alleging a refusal to supply.¹⁸ Although the product of a national court, this ruling is likely to have wide-reaching implications for the Community since it is based on the doctrine of direct effect which has authorized suits for damages for breaches of other Community obligations.¹⁹

The comparative and institutional aspects of European competition policy have been the source of rich scholarship on both sides of the Atlantic. In addition to theoretical study, the existence of a sophisticated competition system is of great practical interest to United States firms who manufacture, sell, or license in the Common Market, and the lawyers who advise them. Both of these groups are the intended audience for Utz Toepke's handbook, *EEC Competition Law*.²⁰

EEC Competition Law is intended as a comprehensive treatise of both depth and breadth. It is organized into eight parts. The substantive content of the introductory chapters is limited to a very short description of the evolution of the Community and the doctrine of direct effect as set forth by the European Court of Justice. Part 2 is devoted to an analysis of articles 85 and 86 of the Rome Treaty and a short discussion of the extraterritorial application of EEC competition law. This section is a largely straight-forward parsing of the language of the Treaty, emphasizing the elasticity inherent in such concepts as "concerted practices,"²¹ "effect on trade between the Member States,"²² and "abuse" of a "dominant position."²³

The principal shortcoming of part 2 comes in Toepke's analysis of

¹⁷ See *Belgische Radio en Televisie v. SV SABAM*, 1974 E. Comm. Ct. J. Rep. 51 (preliminary ruling).

¹⁸ *Garden Cottage Foods Ltd. v. Milk Mktg. Bd.*, [1983] 2 All E.R. 770.

¹⁹ *Id.* at 775 (opinion of Lord Diplock).

²⁰ U. TOEPKE, *EEC COMPETITION LAW: BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES* (1982) [hereinafter cited as *EEC COMPETITION LAW*].

²¹ *Id.* at 31-35.

²² *Id.* at 39-43, 92-95.

²³ *Id.* at 79-92.

article 85(3), a provision permitting the European Commission to exempt otherwise illegal anticompetitive practices

which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

(a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.²⁴

Article 85(3) is the explicit recognition that competition policy represents an instrument of continued European integration and that on occasion it must play a subservient role when it fails to promote further integration. Article 85(3) permits the European Commission to consider societal and Community values unrelated to competition in passing on the legality of agreements and practices between undertakings. This is a concept entirely foreign to United States observers, but absolutely crucial to understanding EEC competition law and policy.

Unfortunately, Toepke muddles the working of article 85(3) in two ways, the first an error of description, and the second a more serious error of analysis. First, the language of article 85(3) mandates two positive conditions and two negative conditions which must be satisfied before an exemption can be granted. The agreement or concerted practice *must* promote some form of enhanced efficiency or technical advance *and* pass along to consumers a "fair share" of the benefits. At the same time, the agreement or concerted practice *must not* contain unnecessary restrictions on the firms involved *nor* result in the substantial elimination of competition.²⁵ For some reason, Toepke insists on referring to these requirements as "the double twosome of prerequisites."²⁶ This is an unfortunate and awkward phrase that obscures more than it explains.

The second and more serious error is Toepke's insistence that article 85(3) contains a European "rule of reason."²⁷ This statement is simply wrong and misapprehends the rule of reason in United States antitrust law. The "rule of reason" is a rule of construction necessitated by the broad sweep of section 1 of the Sherman Act, which declares that all contracts, combinations, and conspiracies in restraint of trade are illegal.²⁸ To avoid the absurdity of making most commercial contracts illegal, the Supreme Court has held that under the rule of reason only

²⁴ Treaty of Rome, *supra* note 2, art. 85(3), at 48.

²⁵ *Id.*

²⁶ EEC COMPETITION LAW, *supra* note 20, at 57.

²⁷ *Id.* at 56.

²⁸ 15 U.S.C. § 1 (1982).

agreements which *unreasonably* restrict competition violate section 1 of the Sherman Act.²⁹ More recently, Justice Stevens held in *National Society of Professional Engineers v. United States*³⁰ that the inquiry under the rule of reason is confined to a consideration of the impact of the challenged conduct on competition and does not inquire whether a policy favoring competition is in the public interest.³¹

Article 85(3) is based on an entirely different rationale. Article 85(3) is not designed to determine whether a practice is sufficiently anticompetitive to declare it illegal. Instead, it examines restraints already illegal under article 85(1) and asks whether other societal goals dictate that the particular restraint should be authorized nonetheless.³² Limited exemptions of this sort certainly exist in United States law,³³ but should not be confused with a rule of reason designed to separate the innocuous agreement from the pernicious agreement on the basis of competitive effect.

The heart of the book is an analysis of the legality of specific business practices under articles 85 and 86, plus an overview of the procedural aspects and enforcement of Community competition law. Part 3 discusses diverse forms of business conduct which are largely the province of dominant firms regulated by article 86.³⁴ The sections that follow discuss a large number of topics grouped loosely under the heading of joint ventures,³⁵ distribution,³⁶ pricing,³⁷ and intellectual property rights.³⁸ The analysis in these sections is generally sound, but the topics covered are organized in somewhat arbitrary fashion.³⁹

Because each chapter covers a very discrete and narrow topic, *EEC Competition Law* has a certain utility as a reference source for the answer to specific questions. It is, however, tiresome reading. Toepke's style is

²⁹ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

³⁰ 435 U.S. 679 (1978).

³¹ *Id.* at 690, 692.

³² See generally B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTI-TRUST: A COMPARATIVE GUIDE 483-99 (1983).

³³ The most prominent example is the labor exemption to the antitrust laws. See 15 U.S.C. § 17 (1982).

³⁴ EEC COMPETITION LAW, *supra* note 20, at 103-61.

³⁵ *Id.* at 163-287.

³⁶ *Id.* at 289-473.

³⁷ *Id.* at 479-577.

³⁸ *Id.* at 579-675.

³⁹ For example, there is a chapter on patent licensing separate from the larger section on intellectual property rights. EEC COMPETITION LAW, *supra* note 20, at 349-81. In addition, most of the topics discussed under reprehensible business conduct easily could have been dispersed in the later sections to achieve a better focus. See *Id.* at 109-61.

to rely on large amounts of introductory material.⁴⁰ Each chapter begins with a "perspective," followed by a discussion of the cases, ending with some "observations" which largely duplicate the material in the earlier perspective.

The discussion of the cases is particularly repetitious. Toepke begins with a perfectly valid and concise statement of the law and then uses excerpts of up to five cases quoting virtually the identical language used in text. The practice of excerpting rather than editing becomes tiresome when lengthy excerpts of several cases are used to illustrate a point already handled adequately in a paragraph or two of text. This is simply an instance of insufficient and inadequate case selection and editing.

The problems of *EEC Competition Law* are compounded by the fact that it is a prideful and boastful book, often condescending to the reader. Toepke claims that his book fills a vacuum caused by the lack of a comprehensive review of European competition case law.⁴¹ He also claims that his book is a unique blending of cases and commentary.⁴² Neither of these claims is precisely accurate. There are any number of good treatises in this area which must by virtue of their subject matter discuss principles derived from cases, if not the cases themselves. These treatises include Bellamy and Child's *Common Market Law of Competition*,⁴³ and the more recent *Competition Law of Britain and the Common Market* by Valentine Korah.⁴⁴ The best blending of commentary and cases in this area remains the EEC section of Barry Hawk's *United States, Common Market & International Antitrust: A Comparative Guide*.⁴⁵ Toepke begins his book with the, presumably rhetorical, question: "Why on earth another book on the Common Market and its antitrust law?"⁴⁶ Nine hundred pages later the reader is still inclined to ask, "Why indeed?"

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⁴⁰ Toepke spends a great deal of time introducing himself and his topic. There are two separate sections describing the purpose of the book, in glowing terms, plus introduction at the beginning of the book and at each chapter. Other minor but noticeable annoyances include the pointless emphasis of words and phrases throughout the text. Also, Toepke adds abstracts of the cases in the margin much like case briefs done by first year law students.

⁴¹ *EEC COMPETITION LAW*, *supra* note 20, at vii, 13.

⁴² *Id.* Even if this were accurate, it is unclear why an extended discussion of cases would be of interest or value to the businessman, half of Toepke's intended audience.

⁴³ C. BELLAMY & G. CHILD, *COMMON MARKET LAW OF COMPETITION* (2d ed. 1978).

⁴⁴ V. KORAH, *COMPETITION LAW OF BRITAIN AND THE COMMON MARKET* (3d rev. ed. 1982). For a slightly dated treatise of value, see D. BAROUNOS, D. HALL & J. JAMES, *EEC ANTI-TRUST LAW: PRINCIPLES AND PRACTICE* (1975).

⁴⁵ HAWK, *supra* note 32.

⁴⁶ *EEC COMPETITION LAW*, *supra* note 20, at vii.

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