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Antitrust Philosophy of the Common Market - Restraint or Prohibition

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COMMENTS

ANTITRUST PHILOSOPHY OF THE COMMON MARKET—RESTRAINT OR PROHIBITION

History testifies to the futility of force in achieving peace among nations; nevertheless, in each century this means has been employed in the quest for freedom, unity and peace. And although the alleged enemy is conquered and his territory incorporated, the origins of distrust and unrest continue to make political unity and harmony impossible. One step toward achieving these goals is economic unity and stability. Without these fundamental conditions peace cannot be realized. Today, there are numerous movements in existence whose aim is to unite various nations economically. These movements, however, are limited in scope and influence and often oppose each other as each zealously tries to strengthen its own position. They have, in effect, created clans of nations. Nevertheless, if they can achieve internal economic stability, they will have laid the cornerstone for an international alliance for peace.

Among these movements is the European Economic Community (EEC), usually referred to as the Common Market. Its name is, in itself, somewhat of a misnomer, for it is merely an association of six European nations: Belgium, France, West Germany, Italy, Luxemberg and the Netherlands. Established by the 1957 Treaty of Rome, the avowed purpose of the Community is:

> . . . in accordance with the time-table envisaged in this Treaty:
> (a) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the import and export of goods . . . ;
> (b) the establishment of a common custom tariff and of a common commercial policy towards third countries;
> (c) the abolition, as between Member States, of obstacles to the free movement of persons, services and capital;
> (d) the inauguration of a common policy in the field of agriculture;
> (e) the inauguration of a common policy in the field of transport; [and]
> (f) the establishment of a system ensuring that competition in the Common Market is not distorted. . . .[1]

This comment will be concerned with only one aspect of the Treaty, namely, its antitrust provisions, their basis, effect and application.[2] This may

[1] Article 3 of the Treaty of Rome (1957) translated in LANG, THE COMMON MARKET AND COMMON LAW 501 (1966).

[2] The specific prohibitions against monopolistic activities are set forth in articles 85 and 86 of the Treaty of Rome. Though there are indications of antimonopoly policies in other provisions of the Treaty, these two articles are the only ones which specify guidelines by which the European Economic Community Commission may regulate monopo-

be considered the second stage of the Common Market scheme. Primarily, the EEC was established to remove "the obstacles to the free movement of persons, services and capital,"[3] so that each member nation may thrive. However, cognizant of the results of free competition, the EEC included two articles, 85 and 86, to counter the abuses often resulting from a competitive system.[4] In order to fully understand the philosophy of the framers of these articles, it will be advantageous to compare and contrast them to antitrust legislation in the United States.

Many authors contend that the Common Market antitrust provisions are offshoots of the United States' experience in this field, which formally began with passage of the Sherman Act in 1890. Undoubtedly there is some validity to this contention, for the United States has evolved the most sophisticated antitrust legislation of all nations and it is likely that a legislative designer would look to the leader in the field in formulating an antitrust policy. However, though "the language of the Articles . . . is couched in somewhat similar broad terms to that in the Sherman Act,"[5] the similarity is superficial for the concepts of the founders of the respective provisions differ. While United States anti-monopoly philosophy is dogmatic, rigid and absolute in its prohibitions, "the Treaty provisions on restrictive practices . . . are not the result of strong views on free competition or a political objection to monopoly power,"[6] but rather the outgrowth of the prevalent view that economic stability could not be achieved without some regulation of competition. "The architects of the Common Market seized upon the logical principle that . . . an active anti-monopoly policy is indispensable in order to prevent private restrictive agreements from negating the effects of the lowering of trade barriers by the member countries."[7]

Yet, to attribute the prohibitions of articles 85 and 86 to logic alone would be erroneous, for the Common Market countries have historically regulated restrictive trade practices. As early as 1810, France had enacted a provision penalizing restrictive trade practices.[8] Penalties were imposed wherever,

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listic activities between its member states. It should be noted that these provisions, as well as all others in the Treaty, refer to activities between member states. They do not purport to regulate any activity which takes place solely within one of the states.

[3] LANG, *supra* note 1, at 501.

[4] *See* Linssen, *The Application of Articles 85 and 86 of the Treaty*, in THE ANTITRUST STRUCTURE OF THE EUROPEAN COMMON MARKET 30 (1962).

[5] Fugate, *The Activities of the Department of Justice in the Field of Foreign Commerce*, in THE ANTITRUST STRUCTURE OF THE EUROPEAN COMMON MARKET 2 (1962).

[6] LANG, *supra* note 1, at 378.

[7] Fugate, *supra* note 5, at 3.

[8] Goetz-Giery, *Monopoly and Competition in France*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 35 (1954).

the object [was] to raise or lower prices above or below the levels which would have prevailed under conditions of free and natural competition; and [when] the means to that object took the form of an amalgamation or coalition of the principal dealers of the product concerned.[9]

It was not until 1926 that this French provision was modified to penalize only those operations which were intended to secure monopolistic profits.[10]

In another Common Market country, Italy, "the history of restrictive practices . . . may be said to reach back to the fifteenth century, when an agreement was reached in the Concordat of June 11, 1470, between Pope Paul II and King Ferdinand of Naples restricting the price of alum."[11] And in Germany, "Frederick the Great promulgated, between 1766 and 1772, a series of measures bringing all branches of the mining industry under the most rigorous state control."[12] Nonetheless, in contrast to these examples of anti-monopoly regulations, European history also "abounds with examples of local, national and international cartels."[13] In fact, "the birthplace of the modern cartel was [in] Germany,"[14] where they were created by the state primarily for revenue.[15] Thus, the Common Market has a dual tradition; one which denounces monopolies which are prone to adversely affect the economy and one which encourages monopolies which can be beneficial to the economy.

This tradition clearly differs from United States tradition where monopolies and cartels have been considered inherently contrary to the spirit of free competition.[16] As stated by one authority, "the basic principal of anti-

[9] *Id.*

[10] *Id.*

[11] Torre, *Italian Antitrust Law*, 14 AM. J. COMP. L. 489, 491 (1965). *See also* Vito, *Monopoly and Competition in Italy*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 52 (1954): "Government action in relation to competition and monopoly in Italy is not necessarily directed towards protecting competition and curbing monopoly. It is rather based on the principle that in certain cases limitation of competition is necessary in the interest of all the parties concerned and of the economy as a whole. It should not be forgotten that Italy is included among those countries which, as early as the beginning of the century, resorted to compulsory cartels."

[12] STOCKING & WATKINS, CARTELS OR COMPETITION 24 (1948). *See also* Boehm, *Monopoly and Competition in West Germany*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 152 (1954): "Economic freedom means in Germany the freedom of businessmen to choose between competition and monopoly."

[13] JENSEN & WALTER, THE COMMON MARKET—ECONOMIC INTEGRATION IN EUROPE 132 (1964).

[14] STOCKING & WATKINS, *supra* note 12, at 23.

[15] STOCKING & WATKINS, *supra* note 12, at 23.

[16] STOCKING & WATKINS, *supra* note 12, at 3. A cartel is defined therein as an arrangement among, or on behalf of, producers engaged in the same line of business, with the design or effect of limiting or eliminating competition among them.

monopoly is that Congress did not condone 'good trusts' and 'condemn bad ones,' it forbade all."[17] This absolutist position, however, is erroneous in its extreme, for while United States legislation has imposed stringent restrictions on monopolistic activities which may infringe upon the hallowed ideas of free competition,[18] it is equally true that "Congress has not thought it appropriate that there should be free competition in the field of utilities."[19] By legislating monopoly in this field, there is inconsistency. Despite this, in those areas in which free competition has been deemed of the essence, Congress has enacted absolute prohibitions against courses of conduct which demonstrate an attempt to monopolize.[20]

Thus, it is evident that American and European monopoly traditions vary. Article 85 of the Treaty of Rome, enunciating the Common Market's basic antitrust policy, can only be interpreted in light of the traditions of its framers. This same provision, if interpreted in the United States' tradition would undoubtedly have a different meaning. The article provides that:

> [T]he following practices [are] incompatible with the Common Market: all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. This shall, in particular, include:
> (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
> (b) the limitation or control of production, markets, technical development or investment;
> (c) market sharing or the sharing of sources of supply;
> (d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage. . . .[21]

Because of these restrictions, it has been stated that "the Treaty of Rome establishing the EEC . . . carefully avoided to leave any opportunity [for] trusts to be formed."[22] However, it is more likely that the concern was not

[17] Heflebower, *Monopoly and Competition in the United States*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 129 (1954). This phrase, which has since become a cliche in American antitrust law, was originally pronounced by the eminent Judge Learned Hand.

[18] Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187 (1966). "Certainly, a national antitrust policy exists. In overall substance it demands the maintenance of a competitive business society, free from unreasonable restraints of trade or commerce." *Id.* at 197.

[19] NEALE, THE ANTITRUST LAWS OF THE U.S.A. 7 (1962).

[20] *Id.* at 469.

[21] LANG, *supra* note 1, at 504.

[22] Bassiouni, *The Common Market's First Major Anti-trust Decision and the Free Flow of Commerce*, July-Aug. 1965 The Bulletin 14. *See also* WASSERMAN, HUFFMAN & MOORE, THE COMMON MARKET AND AMERICAN BUSINESS (1964).

so much to prevent the formation of trusts per se, as it was to prevent restrictive market practices which might result from trusts.[23] A trust may in fact serve a useful purpose, and if so the article itself exempts such trusts from its prohibitions. Subsection three of the article provides that:

> [A]ny agreement . . . between undertakings, any decision . . . by associations of undertakings, and any concerted practice or type of concerted practice which helps to improve the production or distribution of goods or to promote technical or economic progress, [while] allowing consumers a fair share of the resulting profit and which does not:
> (a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;
> (b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.[24]

Article 85 does not create an impregnable wall of restrictions on monopolistic activities. Rather, it seeks to insulate the public from harm. Therefore, it is not necessary that there be an intent or a conscious effort to restrict competition, there need be only the objective fact of the limitation. The Treaty does not speak of "restraint of trade" as does the Sherman Act; instead, it speaks of preventing restricting or distorting competition to the detriment of the public.[25] In addition, to further protect the public from the deleterious effects of monopolies,[26] article 86 of the Treaty provides that "any improper exploitation . . . of a dominant position . . . shall be deemed to be incompatible with the Common Market . . . ."[27] It is conceded that dominant positions will exist in any competitive market.[28] The provision restricts using

[23] *But see, Political and Economic Planning*, CARTEL POLICY AND THE COMMON MARKET (Forsyth ed. 1962). "The Common Market's present provisions for restrictive trade practices are based on the following principles: restrictive agreements are forbidden a priori, with the exceptions to this rule narrowly limited; dominant positions are forbidden a priori from misusing their power; there are no provisions for action against mergers, but the Commission is given fairly wide powers to investigate sectors of the market, should it consider that this is necessary." *Id.* at 278.

[24] LANG, *supra* note 1, at 504.

[25] Minoli, *Industry's View of Trade Regulation in the European Economic Community*, in THE ANTITRUST STRUCTURE OF THE EUROPEAN COMMON MARKET 46, 49 (1962).

[26] *Supra* note 23, at 260: "[T]o fall within the scope of Article 85, an agreement must have the object or effect of preventing, restraining or distorting competition within the Common Market. This means that the intention to restrain competition is as important as any actual restraint on competition in judging an agreement."

[27] LANG, *supra* note 1, at 505.

[28] Thompson, *The European Economic Community After the 1965 Crisis*, 16 INT'L AND COMP. L.Q. 1 (1967). "Article 85 prohibits agreements, and if there is no agreement or concerted practice, there is nothing to be struck down by article 85. The matter would instead have to come within article 86, dealing with the abuse of a dominant position." *Id.* at 27.

such positions for improper exploitation. Again it is evident that a monopoly which does not abuse the public is not in violation of the Treaty.

Hence, a fundamental distinction exists between United States and Common Market antitrust philosophy. The difference lies not so much in what is being restricted, but in why there is a need to restrict. Though this distinction is theoretical in nature, it should cause court decisions in the respective systems to vary. Whereas a United States court must look solely at the facts in a given case, the EEC Commission must look solely to the effects; and while the former need only determine that a monopoly exists for public policy to be violated, the latter must determine that the public has been harmed by the existence of a monopoly.[29]

Though philosophical differences exist, it is "widely conceded that the United States is pre-eminent in the power and drive of her industry and commerce."[30] Whether or not this is because of or in spite of its antitrust policies is a question which has been pondered since the inception of American antitrust laws. Nevertheless, the Common Market approach, distinguishing that which is beneficial to a free and thriving economy and that which is detrimental, would seem to be more logical than an approach which opposes a priori any combination or agreement amounting to a monopoly regardless of its possible beneficial effects.

One need not ponder why there exists such a divergence in antitrust philosophy. The Common Market's dual tradition has restricted activities which adversely affect the market but has encouraged cartels which benefit the economy.[31] On the other hand, the United States tradition is one which has denounced bigness as detrimental to a free market economy. United States antitrust laws owe their "origin largely to political pressures of an agrarian and radical flavour; and there is little doubt that in more recent times antitrust has been an outlet for powerful currents of 'anti-big-business' radicalism growing out of the years of depression."[32] Although it is inevitable that in an expanding economy one faction will gain an economic advantage over

[29] Conrad, *Corporate Fusion in the Common Market*, 14 AM. J. COMP. L. 598 (1966), wherein the author expresses the view that "the Treaty of Rome does not make any combination of companies illegal, and that illegality can come only when a monopolistic combination abuses its powers . . . ."

[30] NEALE, *supra* note 19, at 1.

[31] Comment, *Emergence of Group Exemptions within the EEC Policy on Competition*, 6 VA. J. INT'L L. 128 (1965). "Monopolies and cartels have traditionally been a very essential instrument in economic progress, and have been looked on as having beneficial effects which in fact must be carefully balanced against possible detrimental effects. This is in sharp contrast with American antitrust law, as embodied principally in the Sherman and Clayton Antitrust Acts, which control activities restraining interstate commerce, regardless of any economic benefit resulting from such activities." *Id.* at 129.

[32] NEALE, *supra* note 19, at 419. "Agricultural marketing over a wide range of products is also substantially insulated from the antitrust law." *Id.* at 7.

another, the American public has been trained to be suspicious of the "Big" and to demand government control and restraint. This is done ostensibly to preserve the small businessman, the cornerstone on which the American system of free enterprise is supposed to rest. In reality, this pivotal group is slowly diminishing in number and is being replaced by the tremendous working force of the large corporations. The public, however, is not fully cognizant of these changes because it is still being educated in an antitrust philosophy which does not view the American scene as it is but as it was a century ago. Business may only expand within the limits of this prevalent philosophy, and whether or not such expansion is beneficial to society is not as important as the maintenance of arbitrary boundaries on business growth.[33]

To what extent the philosophical difference in the Common Market approach will affect practical application is not yet fully known. While the United States courts have ostensibly upheld its philosophy in litigation in the field for over seventy years, the Common Market's code is relatively young and has yet to be seriously challenged. Some insight, however, can be gained from the *Grundig* case,[34] which was the first major antitrust controversy decided by the EEC. This unique case afforded the Commission the opportunity to clearly enunciate its antitrust policy.

The Grundig Company of Germany had appointed the French company, Consten, to be its exclusive distributor in France. Grundig agreed not to sell to anyone else in France and to impose the same restriction on its dealers. In return, Consten agreed not to sell outside of France. Grundig also transferred to Consten its trademark, *Gint*, so that it could be registered by them in France. Subsequently, UNEF, a competitor of Consten, agreed with another German company to buy Grundig products and market them in France at a lower price than Consten. An action was originally instituted by Grundig and Consten in a French court to enjoin UNEF from selling Grundig products in France and from violating its trademark rights. While the lower French court found for Consten, the French Court of Appeals subsequently reversed the decision because the matter was being considered by the EEC Commission. At the Commission proceedings it was held that the Grundig-Consten agreement imposed an undue restriction on intra-brand competition in violation of the Treaty of Rome. The agreement was thus held null and void. Basically, the Commission used the fairness to the consumer test to

[33] While this anti-big-business philosophy is reflected in United States legislation, in fact, the line between what is technically a monopoly and what is not is very thin. For example, General Motors, which is said to have a budget larger than all but four countries in the world, is not deemed a monopoly. Surely, the pioneers of antitrust legislation in the United States never envisioned a company of such magnitude, much less that such a company would not be deemed a monopoly.

[34] 161 JOURNAL OFFICIEL DES COMMUNAUTE'S EUROPÉENNES 2545 (1964).

arrive at this decision.[35] Since the consumer was not benefited, *i.e.* the UNEF price to the consumer was, in fact, lower than the Consten price, the restrictive agreement was held to affect the market adversely and therefore was in violation of article 85. One authority has noted that the decision of the EEC in the *Grundig* case shows that,

> [I]n the field of vertical restraints one of the most important restrictions on competition, the territorial division of markets, will to the extent that it constitutes a division beween one nation market of an E.E.C. country, from the market of another E.E.C. country, be prohibited in almost every case and that dispensation under [article] 85(3) will be very difficult if not impossible to obtain.[36]

Because of this opinion it is felt that the *Grundig* decision was inconsistent with avowed EEC policies since "the Commission . . . enjoined the entire arrangement rather than prohibiting a particular practice."[37] However, once the arrangement as a whole was found to adversely affect the market, there was no reason why the Commission should not then strike it down. In accordance with their dual tradition the question which must be posed is simply whether or not the arrangement results in an adverse effect, and not, how much of the arrangement results in an adverse effect.

Despite ambiguities which may exist, the *Grundig* decision still demonstrates two major points. First, there is an "assertion by the Commission of the supremacy of the Community antitrust rules over the national laws of the Member States."[38] "This is a further step toward a European State, and . . . an increasing emphasis on 'Europe first, nation second.' "[39] This assertion by the EEC and submission by the member countries cannot be minimized. The activities complained of occurred mainly in France, albeit between a French and German company. Yet, the French courts were disposed to submit the controversy to an international body for determination, rather than adjudicate it themselves. As was conjectured by one writer before the *Grundig* decision, "entry into the Community is akin to State Succession."[40] The decision supports this premise.

There have been few, if any, instances in history when a sovereign nation has willingly allowed internal economic matters to be determined by another

[35] Bassiouni, *supra* note 22.

[36] Newes, *The European Commission's First Major Antitrust Decision*, 20 BUS. LAW. 431, 436 (1965).

[37] Weiser, *Patent and Antitrust Developments in the European Economic Community*, 10 IDEA 1 (1966).

[38] *Supra* note 36, at 439.

[39] Comment, *The External Tariff of the European Economic Community: The Commission and Supranationalism*, 5 VA. J. INT'L L. 211, 228 (1965).

[40] O'CONNELL, INTERNATIONAL LAW 294 (1965).

body politic. Yet, the Treaty of Rome has accomplished just this and so, represents a modification of its members' economic sovereignty.[41] If a country today can willingly forfeit jurisdiction in an important internal matter for the good of a larger community, then perhaps we are progressing towards a time when countries will submit grievances to an international body for the good of the world community. This submission came not from force, but from a desire to maintain economic harmony among the member states.

A second observation on the *Grundig* decision is that the EEC has, in fact, upheld its principles. The Grundig-Consten arrangement clearly created a monopoly. Yet, the Commission did not, as a matter of course, state that it must be repressed. Rather, the Commission examined the arrangement in light of the provisions of article 85 prohibiting associations "which affect adversely trade between the Member States."[42] Only after it was determined that there was an adverse effect and consequently no benefit to the consumer from the arrangement, did the Commission nullify the agreement. The Commission also indicated that the dispensation provisions of subsection three of article 85 were not moot factors, but would be considered in every case coming before it.

Those who felt that, because of *Grundig* "dispensation under [article] 85 (3) will be very difficult if not impossible to obtain,"[43] and that the Treaty of Rome carefully avoided leaving any opportunity for trusts to be formed,[44] seem to have interpreted a European antitrust decision as if pronounced by an American tribunal. Were this the case, the framers of the Treaty would have done better to have entirely left out any reference to dispensation from the antitrust provisions. More likely, such provisions were intentionally included to allow for those situations where monopolies would not adversely affect the market.

In *Grundig*, the monopoly did have an adverse affect on the market and the Commission had no alternative but to repress it. However, the concept that "bigness" is inevitably detrimental to the public is an American and not an European one. Monopolies, as some European cartels of the past, may be beneficial to the public. In such a case, the Commission will no doubt uphold their existence.

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[41] *Id.*

[42] LANG, *supra* note 1, at 504.

[43] *Supra* note 36, at 431.

[44] Bassiouni, *supra* note 22.

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