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Everling: The Right of Establishment in the Common Market

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the basic inadequacy of the adversary method of compensating personal injury victims. Mr. Belli points out and supports with cogent statistics the fact that personal injury judgments have not kept pace with the general increase in both incomes and the cost of living. Aside from a regrettable tendency of appellate judges to be taken aback by large figures in a judgment, the plaintiff finds himself in the unfortunate position of a pensioner. At one time the jury must set a figure to compensate him for the rest of his life—twenty, thirty, fifty years. Pensioners today are in an unpleasant situation because there has been an inflationary trend since the beginning of the century. Today's dollars are bound to be worth less tomorrow. In addition, the personal injury victim faces the possibility of an aggravation of his injury and bankrupting medical bills. (Incidentally, Mr. Belli mentions that a good lawyer should advise his client of the desirability of some sort of trust fund for his recovery.)

Mr. Belli, of course, sees one answer to the victim's problem in more "adequate" verdicts and judgments. However, he points out that a jury trial is the most expensive way of compensating a victim. There are the strict *costs* plus the costs of investigation, preparation of exhibits, witness fees and, of course, counsel's share. There are also countless factors that have nothing to do with the merits of the case. An insurance company will settle with a full grown tiger like Mr. Belli for two or three times what it would consider offering a cub fresh out of law school. Juries tend to award more to children than to adults and less to Negroes than to whites. Insurance companies are reluctant to settle with anyone in multiple-plaintiff cases (*e.g.*, train derailment), because publicity will increase subsequent claims, and in product liability cases because such claims are easily fabricated.

It is obvious that Mr. Belli's usual opponent is an insurance company. Any lawyer who becomes involved in personal injury work soon learns about the tragedy of the uninsured motorist or the one with the bare legal minimum of insurance protection or the insolvent and uninsured corporation.

No mention is made of the Saskatchewan or Columbia or Ehrenzweig Plans. Since no one else has ever "solved" the problem it is probably unfair to expect Mr. Belli to go into it, but it would be interesting for the student to have Mr. Belli's views on it.

Finally, the student must be aware that most of Mr. Belli's work is in California which is "liberal" in the admission of evidence and in discovery procedures. The problems of admissibility and procedure are quite different elsewhere. For instance, no "per diem" pain and suffering arguments are permitted in Illinois and some judges are antagonized by any but the absolute minimum use of the blackboard. Furthermore, some very successful trial lawyers strongly disagree with some of Mr. Belli's methods. On the whole, however, the book is well worth having. I wish I had made some of my students read it.

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The Right of Establishment in the Common Market. By DR. ULRICH EVERLING. Chicago: Commerce Clearing House, Inc. Pp. xi, 219. Index $15.00.

American lawyers are advising business clients daily on establishment in the Common Market. A United States manufacturer-exporter decides to establish a network of distributors or sales representatives in Europe as an aid to sales,

or elects to establish a manufacturing operation directly in a European country to avoid the discriminatory implications of the European Economic Community common external tariff. Another firm already established in the Common Market, seeks to expand its direct operations through a branch or subsidiary in another E.E.C. country. All of these increasingly common business situations, raise familiar problems of locating the business organization, deciding between a subsidiary corporation or a branch operation, dealing with exchange control requirements and obtaining local assistance. The threshhold question, however, of the "right of establishment" in the host country, cuts across all of those problems, for it involves, as Dr. Everling indicates, the basic privilege to start and conduct independent activities in the Common Market aimed at the production of income. Applied specially to the E.E.C., it means that "persons meeting the qualifications shall be granted freedom of establishment in accordance with the law that the receiving country applies to its own nationals,"[1] or in still more concrete terms: freedom from discrimination against foreigners, which is probably as much as any reasonable foreigner could ask.

The principal restrictions against foreigners are the familiar requirement of a commercial permit, such as the discretionary *Carte de Commerant* in France and the *Carte professionnelle* in Belgium, supplemented by a host of secondary restrictions like those requiring foreign companies to give special financial guarantees before commencing operations. Other provisions discriminate formally against foreigners engaging in certain kinds of activities, such as the practice of the learned professions or in conducting banking or insurance operations.[2] Since the purpose of the E.E.C. Treaty establishment provisions is to eliminate these restrictions as applied to nationals and companies of E.E.C. member states, the Treaty provisions may have critical importance, even for the American concern not formally qualified as an E.E.C. national or company.

The establishment provisions, as Dr. Everling shows, were fashioned against the background of the limited purposes of the E.E.C., which sought primarily to advance the general level of European economic activity. The most dramatic measure adopted was the progressive creation of a six-country-wide Common Market, eliminating customs and quantitative trade restrictions among member states, and erecting an external tariff common to all six member states. Perhaps less dramatically, the Customs Union would also evolve into a "Community" through the protection of inter-state trade from anti-competitive restraints, development of common agricultural and transportation policies, coordination of economic policies—and by the elimination of obstacles to the free movement of persons, services and capital within the E.E.C. The short-run objective was to move toward the enlargement of the European economic unit from the single state to the powerfully integrated group of six. A later result of the inter-play of these and other measures would almost certainly be the long-sought social, military and political unification of Europe.

As one of the "Foundations of the Community," the right of establishment

[1] EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET 47 (1964).

[2] See also CCH Common Market Reports 1311.21.

is intended to ensure that "production within the Common Market will be guided by the most favorable factors of location"[3] and that business activity will seek locations in Europe predominantly in accordance with the economic judgment of entrepreneurs, rather than the application of local discriminatory restrictions.

Various legal means of dealing with establishment restrictions were open to the framers of the Treaty. They could adopt a self-executing legislative rule directly applicable in member states, make executory rules binding merely on states, provide for a delegation of legislative authority to a community institution, or a combination of these. The American analogy might have suggested the verbal economy and clarity of Article IV Section 2 of the United States Constitution, which states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." However, the establishment provisions adopted in Articles 52 through 58 of the Treaty combine a self-executing rule with a delegation of power to the E.E.C. Council to issue non-self-executing, but nevertheless binding, directives requiring member states to phase-out their discriminatory establishment restrictions.

A first step under Article 53 was the immediate prohibition of "new restrictions on the right of establishment." In *Costa vs. E.N.E.L.*,[4] the Court of Justice of the E.E.C. held Article 53 to be self-executing and productive of rights enforceable directly by domestic courts upon the application of interested individuals. Most of the remaining establishment provisions envisage prospective application, in providing for the abolition of existing restrictions in progressive stages during the transitional period (Article 52). By a delegation of authority, the Treaty requires the Council to prepare a General Program to abolish restrictions on the right of establishment, and to issue directives in conformity with priorities and guide lines set out specifically in the Treaty (Article 54). The Council is also required to issue directives for the mutual recognition of diplomas, certificates and other evidence of qualifications, as well as the co-ordination of legislation, regulations, and administrative rules of Member States relating to establishment, (Article 57). Although establishment directives are not immediately self-executing, they are binding upon "any Memeber State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means." (Article 189). All of the establishment rules are excluded from activities involving government action, (Article 55), and from matters requiring special treatment for compelling reasons of public policy, (Article 56).

During the E.E.C.'s early years, the Council adopted the "General Program"[5] with detailed provisions for phasing the withdrawal of restrictions during the transitional period. Notwithstanding the failure of the Council to act either

[3] EVERLING, *op. cit. supra* note 1, at 29.

[4] CCH Common Market Reports 8023 (1964), wherein the court said that for Article 53 to be respected, it is sufficient that no new measure make the establishment of nationals of Other Member States subject to stricter rules than those laid down for a State's own nationals, regardless of the legal make-up of the enterprises.

[5] An English translation of the General Program and Council directives is omitted from Dr. Everling's text, but can be found in CCH Common Market Reports 1351 *et. seq.* Related directives are found with discussions of movement of persons, services and capital.

as quickly or as fully as expected in this area, Dr. Everling argues that definite progress has been made under the Treaty to date, and that the anti-discrimination rule will become fully self-executing at the close of the transitional period.

Although the European establishment rules are designed to protect only nationals and companies of member states, American and other E.E.C. non-nationals may also be able to utilize the non-discriminatory rules in certain situations. Dr. Everling has thoughtfully added to the United States edition of his book an introductory chapter describing specifically the Treaty rules' relevance for nationals and companies of non-Member States, and particularly the United States. He shows that the Treaty is silent on the rights of foreigners to the E.E.C. and that no jurisdiction is conferred on the Council to rule in respect to foreigners or even to negotiate establishment matters with them. The Treaty gives no rights based on mere sojourn or permanent domicile. Nationality being the sole criterion, the establishment of a branch of a U.S. corporation in Europe will not create establishment rights under the Treaty. If, however, the branch were transformed into a subsidiary incorporated under the law of an E.E.C. Member State, the subsidiary could qualify by assimilation for treatment as any individual national of a Member State under Article 58. Dr. Everling argues that a U.S. controlled corporation formed under the law of a Common Market country and having its principal place of business or substantial operations in the E.E.C. would enjoy establishment rights under the Treaty. Indeed Title I of the General Program adopted by the Council on December 18, 1961, recognizes the right to establish agencies, branches or subsidiaries within the E.E.C. for companies formed under the law of a Member State, provided the central administration or principal place of business is also located within the E.E.C. If only the registered office is situated in the E.E.C., the company's activities must show "an effective and continuous link with the economy of a Member State," exclusive of consideration of the managers' or owners' nationality. In Dr. Everling's view, Article 58 opens establishment rights throughout the Common Market to U.S. controlled corporations complying with those requirements in the absence of a clear abuse of the Treaty. Hence it is scarcely surprising that establishment considerations should influence decisions on the nature, form and location of U.S. enterprises in Europe.

The particular merit of Dr. Everling's text, originally published in the German language, lies in the straightforward, systematic presentation and analysis of the Treaty establishment system. He describes in detail not only the rules affecting business but also the related articles governing the performance of services across E.E.C. country boundaries, the movement of capital and employees, and the recognition of diplomas and evidence of qualifications. Especially useful is a practical analysis of the application of the rules to particular types of businesses and professions, including industry, trade, banking and insurance, transport and the liberal professions. If the writing style seems at times to retain excessively heavy traces of the original German, this is a reproach which probably should be addressed to the United States editor rather than the German author. The style is evidently superior to a translation machine text, but it evokes all the arguments for giving a translator broad latitude to produce an English text of good literary quality,

even with a legal manuscript requiring utmost precision and faithfulness to the original. The European-type structural organization and analysis of Dr. Everling's book, on the other hand, seem perfectly consistent with the fact that it was initially written as a work on European law intended for European readers. As a general survey of the establishment system, it will doubtless prove to be an invaluable aid to American students and lawyers working in the Common Market field. It's practical usefulness is further evidenced by the fact that Dr. Everling's book is the first monograph devoted to the still under-developed body of law dealing with establishment.

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Successful Techniques in the Trial of Criminal Cases. By HENRY B. ROTHBLATT. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1961. Pp. 242. $15.00.

The attorney who is charged with the defense of a man accused of crime is invested with a burden unmatched in the practice of law. No client needs his attorney's help more nor is more dependent upon his attorney, than the man accused of crime. His most important rights, *i.e.*, his right to life and liberty, are in jeopardy. It is most important that he not be wrongfully convicted or unjustly sentenced. The law recognizes this importance by granting such person certain rights, and by requiring the state to prove the charge by the highest degree of proof. However, the guarantees provided by the law are valueless to the accused, unless such rights are skillfully and diligently protected by the attorney for the defendant. Our adversary system of law places this burden almost entirely upon the defense attorney.

Criminal litigation, in addition to its great societal importance, also affords the attorney the opportunity to engage in an activity far more interesting and exciting than any other phase of law. The drama and excitement of criminal trial practice is attested to by the many books which have been written about criminal trials. It is, therefore, surprising to find how few books have been written about criminal trial technique, particularly when compared with the plethora of books and treatises written about personal injury trial practice. An attorney who turns to the library of his local bar association might find no books on criminal trial practice, or only a few ancient editions. He is indeed fortunate if he has access to the dated but classic works of Francis L. Wellman.[1]

The scarcity of such books is only matched by the scarcity of attorneys who engage in criminal trial practice. The scarcity of one appears to be both the cause and effect for the scarcity of the other. Despite the compelling reasons for practicing in the field of criminal law, attorneys shy away from criminal defense work. Small fees and low esteem within the profession are only some of the reasons. Undoubtedly another reason is the foreign nature of criminal trial work and the paucity of written material about such practice. The expert advice which can be drawn upon from books in other fields of trial practice, is largely unavailable in criminal law. As a consequence, un-

[1] THE ART OF CROSS EXAMINATION (1929); DAY IN COURT (1910).