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Stein & Nicholson: American Enterprise in the European Common Market: A Legal Profile. Vol. II

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AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE. Volume Two. Edited by *Eric Stein* and *Thomas L. Nicholson.* Ann Arbor: The University of Michigan Law School. 1960. Pp. xxix, 732. Volumes I & II. $25.

This is a most instructive and valuable volume, with a somewhat misleading subtitle. It purports to be the second part of a "legal profile" on American enterprise in the European Common Market. "Profile" is defined by Webster as: "Contour; distinctive outline; an outline seen in or represented in sharp relief; as, the bold profile of a hill." Emphatically, this volume is not a profile. The Common Market aspires to telescope into a decade for sovereign nations having diverse histories and institutions, what it took 170 years of constitutional development, 70 years of antitrust experience, etc., to accomplish for the relatively homogeneous American states. To sketch clear outlines of the new legal institutions and procedures that will eventually emerge from this less-than-four-year-old experiment would require superhuman clairvoyance.

The current volume, however, represents an encyclopedic distillation of the current state of the law of business organization, taxation and competition in the six countries of the Common Market, consisting in effect of three full scale monographs and two sizable essays. The chapter on business organization is by Professor Conard of the University of Michigan, who has most wisely associated himself with a large panel of informed European practitioners and law professors because European

business practice bears out to a surprising extent the truism that the law in action is only partially reflected (and is occasionally misrepresented) by the law on the books. The most erudite and elaborately footnoted chapter on the protection of competition is the contribution of Professor Riesenfeld of the University of California. The comprehensive chapter on taxation is the product of Mr. van Hoorn, Jr., of the Amsterdam Bureau of Fiscal Documentation and Professor Wright of the University of Michigan. Also included in this volume are two important but less exhaustive essays. One, by Mr. Nicholson of the Chicago Bar, is on the effect of United States treaties of commerce with member countries of the Common Market, and of the Rome Treaty establishing the Common Market, on the conditions of doing business within the Common Market. This essay overlaps somewhat Professor Conard's treatment, but highlights the institution-creating potentialities inherent in the Rome Treaty. The essay by Mr. Hay of the University of Michigan is on the way in which the overseas countries and territories will be associated with the Common Market.

As a guide to helping the American businessmen and their legal advisers assimilate the massive dosage of research contained in this volume, it may be useful to point out an important distinction between the effect of the Common Market on the problems of business organization and of taxation, on the one hand, and of competition, on the other. The Rome Treaty establishing the Community creates, in the substantive provisions of articles 85 and 86, a new supra-national law of restrictive business practices. A Common Market that will be free of governmental (tariff and quota) barriers to trade within the Market must also address itself to the control and elimination of private (cartel) barriers to such trade. Of course, it is too early to say whether there will be any effort to promote greater uniformity among national antitrust laws. However, the new federal antitrust law of the Common Market seems destined to supersede in substantial part the existing antitrust legislation of its member countries—a membership now likely to be enlarged by the addition of United Kingdom, Ireland, Denmark and perhaps other countries of the European Free Trade Area. If this happens, Professor Riesenfeld's detailed historical treatment of the prior national antitrust laws, which properly encompasses such matters as article 419 of *The Penal Code of 1810* in France and the German Cartel Ordinance of 1923, will retain value as a record of earlier governmental experience with the antitrust problem. However, like the host of state antitrust laws which loomed so large in the United States in the 1880's (five of which still have a mild impact on local enterprises), national antitrust legislation may in the future have a negligible impact on the functioning of American enterprises with resources ample enough to enter the Common Market.

To illustrate the accelerated tempo of European federalization and legal thinking in the antitrust field, it is already recognized by legal commentators that a local French enterprise may have a sufficient effect on trade within the Common Market to be subject to the antitrust provisions of Articles 85 and 86 of the Rome Treaty. By way of contrast, it took more than half a century for the United States courts to lay down definitively the rule that local enterprises are capable of restraining the interstate trade of the United States in violation of the Sherman Act.

On the other hand, if one is to make responsible decisions as to proper business organization and the tax consequences of different modes of doing business, there is no imminent alternative to scrutinizing the individual laws of the member countries of the Common Market. There are no comprehensive Rome Treaty provisions establishing new and superseding supra-national norms in these areas; the clear implication is that these matters still remain within the domestic jurisdiction of the member countries. Nevertheless, the Common Market may exert an impalpable influence even in these areas, and one that will become stronger as time goes on. Thus, the establishment of freedom of movement within the Market for goods, capital, labor and service tends to reduce somewhat the importance of the geographical availability of raw materials, manpower, managerial talent and credit as determinants of where business ventures are to be located. To the extent of this lowered emphasis, there will be a corresponding increased emphasis on choosing jurisdictions and forms of business organization (which could include countries outside the Common Market, such as Switzerland) which are more flexible, lend themselves to a minimum of governmental intervention and carry with them more beneficial tax consequences. Both the business organization and tax chapters of this volume, which are arranged in excellent logical sequence, should provide handy tools for persons engaged in this search for legal alternatives.

The rate of growth of particular areas of economic law within the Common Market cannot be predicted on the basis of the substantive rules laid down by the Rome Treaty. The Common Market has general forces for legal and institutional reform that transcend the literal provisions of the Rome Treaty. Thus, as noted by Professor Ladas in the first volume of this treatise, the only specific reference to patents and trademarks in the Rome Treaty carries with it the clear inference that they will continue to be the responsibility of the individual countries; nevertheless, the adoption of a common European patent and common European trademark seem to be imminent probabilities. The constitutional basis for this development is the nebulous power conferred by the Rome Treaty to eliminate barriers to international trade and to equalize the conditions of competition within the Market. On the other hand, the

specific language of the antitrust prohibitions of the Rome Treaty is counteracted by their controversial social and economic implications; the first regulations implementing them have yet to issue.

In the corporate area, Professor Conard envisages that considerable time will elapse before provisions and concepts will operate to produce a framework for the common European company. There is no doubt that the harmonization and unification of national policies in the industrial property field currently have a higher priority than any comparable program in the company law field. However, proposals for a European Corporation had been pending in Europe long before the Rome Treaty was enacted. Also, countries anxious to attract capital and industry have a practical incentive to rid their company and tax legislation of unique features having a deterrent effect on local investment and business location. With these and other developments spurring on progress toward the harmonization of company law, who can foresee what the rate of progress toward greater uniformity will be?

It is a not unusual consequence of an intellectual task well done, such as this, that it stimulates a desire for more work in the same area. I would hope that Professor Stein and the University of Michigan Law School would not consider its work on the Common Market at an end, but will persist, despite this reviewer's initial pessimism, in the effort to predict the shape of things to come. This may involve leaving the safe bedrock of solid legal research to a greater extent than is done in the present volume, for the emergent profile of the Common Market will not be a purely legal one, but will be primarily the product of economic, social and political forces, of which treaties and legal regulations are merely the recorded traces.

Thus, the final reconciliation between the all-inclusive condemnation of restrictive business practices contained in article 85 (1) of the Rome Treaty and the indeterminate scope of the exemption set forth in Article 85 (3) will be a function of such diverse factors as (1) the attitudes of business, labor, agriculture, and differing national political parties; (2) the relations of anticartel policy to anti-inflationary and full employment policy; (3) the degree to which the member countries are willing to subordinate national economic policies to a co-ordinated supra-national policy; (4) the efficiency of the administrative and judicial enforcement mechanisms developed within the Common Market; (5) levels of prosperity and trade, and many other factors. Similarly, the effective scope of the somewhat more limited provisions of article 86, dealing with restrictive business practices engaged in by enterprises with a dominant influence on the Market, have been, and will continue to be, affected by (1) the feeling of government administrators and the business community that most existing European enterprises are too small to be efficient; (2) the ability

of economists to develop meaningful norms as to what are adverse effects on the Market and what business concentrations are capable of exercising such effects; (3) the strength of popular resentment of business monopolies; and the like.

Work along these lines will be welcomed by the intelligent businessman and his legal advisers planning long-range programs of business development within the Common Market. It should be no novelty to an academic institution nurtured in the great tradition of Thomas Cooley. The range of error will be considerable, but the enterprise will be a worthwhile extension of the two volumes already published.

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