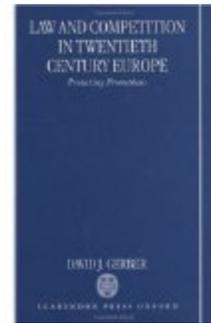


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David J. Gerber. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. New York and Oxford, England: Clarendon Press, 1998. ix + 436 pp. \$90.00 (cloth), ISBN 978-0-19-826285-5.

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Industrial Competition Law in the Emerging European Market

This book presents a very timely, interesting, and perceptive review of the dominant themes of industrial and commercial competition law in Europe during the turbulent vicissitudes of public policy in twentieth century Europe. The early part of the book emphasizes the fragmentation of policy as each country tried to serve its own parochial interests. But following the Second World War, the book traces the important shift, particularly among the six original signers of the Rome Treaty, from the establishment of the European Union (or as it was originally known, the European Economic Community) to the preeminent objective of integration of the European market into one economy. Much of the book is devoted to the importance of European Union competition law in that process. Particularly interesting is the important role, for a formative period of about twenty years, that the European Court system played in furthering the development of an integrated market. This was accomplished, in part, by the Commission (the competition enforcement agency), actively supported by the European Court, attacking vertical marketing arrangements, such as exclusive dealing, that restricted cross-border trading. The policy was applied even when the impediment was supported by the national government. In fact, in recent years reining in action by the national governments, most of which had a long history of strong governmental involvement in economic activity, has become a very important aspect of this policy, as Prof. Gerber discusses in his chapter dealing with post-1986 developments. Thus one of the central themes of the book, as it traces this history, is the tension between the forces of nationalism

and of integration.

A second important theme is the emphasis in the European approach to competition law of a basically administrative system, as opposed to one that rests largely upon court-made law. This contrast between the European approach and the dominant American approach is discussed at several points in the book. However, Prof. Gerber points out a good deal of vacillation in the European model. Absent from the book is an in-depth comparison of the American model with the vacillation in the European model. It is noted but that is about it. Two examples illustrate the point.

Much of the thrust of modern European competition law is the result of juridical interpretation in the 1960s and 1970s of the very broad language of Articles 85 and 86. This looks very much like the role of the American courts in formulating antitrust policy. There are even some similarities in substantive outcomes during that period, as both American and European policies moved rather aggressively against restrictive vertical marketing arrangements, although probably for very different purposes, as will be noted later.

The second example contrasting the European and American approaches relates to the absence under the Rome Treaty of the availability of any private action to enforce the competition laws. Under American law, of course, the private treble damage action, particularly in the latter part of the century, was a major factor in enforcement, and by definition entirely court-administered.

However, here too, the European approach has been ambivalent. While the Commission has clearly played the dominant role in enforcing the European competition law, in a very important case in 1973, the European Court recognized the authority of national courts to apply European competition law and therefore allowed private parties to seek redress for harms caused by violations of Community law by bringing suits in national courts, where in some cases national law provided appropriate remedies. Thus there is the potential for private suits very similar to those available under American law. However, it should be added that according to Professor Gerber, very few such lawsuits have been filed (pp. 368 and 393 ff.).

The book begins with a brief but perceptive review of the typical European state's control of commerce and industry before the turn of the century. There was the liberal tradition of freedom from government control growing out of the French revolution, but by the end of the century in almost every country there was strong control of the market to serve state purposes and to serve the elites that dominated the politics of almost every country in Europe. There was little if any thought of a competitive market as serving the general public interest. While Professor Gerber mentions the existence of concepts of economic justice growing out of Latin and, later, French law, these were rarely if ever translated into practical rules of legal conduct (pp. 34-36).

The book then turns to an examination of the intellectual ferment occurring in Austria at the turn of the century, including an important rethinking of the concept of competition and the state's role in protecting markets so that competition could work for the public benefit. While not directly producing legal implementation at the time, this intellectual foundation became of significant importance in the general discussion of the issues among European intellectuals. Its first major impact, of future importance, according to Professor Gerber, was in Germany just pre-First World War, but even here it was still mostly at the discussion level, although within the political mainstream. After the War the thinking finally bore important fruit in Germany and a few other countries, notably Norway, which Professor Gerber discusses in some depth at pp. 155-59. In Germany, competition law was adopted and active enforcement experimented with during the period of the Weimar Republic (Chapter 5). However, with the advent of the Nazi regime in 1933, economic regulation based upon competition completely ceased in Germany.

It was during the Nazi period, however, that a group of economic and legal scholars, primarily based at the university in Freiburg, began thinking and publishing work that would heavily influence post-World War II developments. Much of this work centered upon the failures of the Weimar Republic to control big business and cartels and the view that this may have helped lead to the downfall of the democratic republic and the rise of Hitler. One of adherents to this school of thinking was Ludwig Erhard, who after the war became Finance Minister in the West German government and, later, Chancellor. As a result he, and this school of thinking, played a dominant role in the post-War development of competition law policy in Germany and then in Europe generally. This intellectual movement and its importance is discussed at great depth in Chapter 7.

For one interested in current European competition law, the final four chapters are invaluable. Professor Gerber begins with the post-war development of antitrust law in Germany because of its importance in the soon-to-develop European legal regime. He follows this with an exploration of the movement toward European integration, starting with the creation of the European Coal and Steel Community. The treaty creating the ECSC contained competition law sections that became important in the subsequent negotiation of the Rome Treaty, setting up the European Economic Community. The interpretation and application of the competition provisions by the Commission and the European Court, established by the treaty, were a very important part of the integration movement. This is explored in Chapter 9. In Chapter 10, Professor Gerber brings the development up to date by noting the maturing of the law and legal structure resulting from the addition of new members after 1986 and the changing nature of European and World economies. Perhaps the best part of the book is the concluding chapter, in which Professor Gerber brings many of the threads, especially the post Second World War threads, together with many interesting insights and observations.

Despite its overall value as an historical survey of a specific area of commercially important law, the book does have a few faults. For one, Professor Gerber's writing and organizational style lead to a great deal of repetition. This makes the book rather turgid reading. One wonders why it is necessary to express the same thought four or five times in one chapter. In addition, at least for this lawyer-reviewer, there is too little use of concrete examples to illustrate general observations. This seems particularly true of the earlier part of the book, but even when Professor Gerber is describing concrete legal devel-

opments, there are times when examples or even factual discussion of actual cases would have been helpful for the reader to understand the observation. For example, on page 373 Professor Gerber states: "Whereas during earlier periods the Court often was willing to assess the legal characteristics of conduct by reference to the terms of the relevant agreements, Community courts have increasingly demanded that such assessment be based on the likely consequences of such conduct under the specific circumstances of the case." Contrasting examples here would have been helpful. Another example appears a few pages later (p. 387): "Given the transnational character of the system, this means, in turn, that the economic policies of states and the influence of large business units can sometimes play a significant role in decision-making." Again, an example would have helped.

It is clear that Professor Gerber was not writing a comparative history of American and European competition law. In fact, he seems at times purposely to avoid comparisons between what was happening in Europe and what was happening in America despite parallel developments. For example, at the same time that the European enforcement authorities were emphasizing the application of competition law to vertical restraints in the 1950s and 1960s, in the United States the enforcers and the Supreme Court were also applying U.S. antitrust law very strongly to vertical arrangements. While it is clear

that the two sets of law were being developed to serve very different ends (in Europe to serve the end of integration, while in the U.S. the aim was more the populist end of protecting small businesses and an economy based on small economic entities) nevertheless some comparison of developments might have been instructive. Another example is his discussion of the European movement to undo the role of national government protective laws at about the same time that deregulation sentiment became very important in the U.S. However, he does make one very important and insightful comparison, at page 420, where he discusses the shift in the U.S. after the 1970s to goals based almost entirely upon economic efficiency models, pursuant to the Chicago School of thought; as he notes, "Europeans have not generally received [these models] . . . well." Perhaps an in-depth comparative treatment is a different book, yet to come. Nevertheless, it is hard to believe that there was as little communication between antitrust thinkers in the U.S. and competition thinkers in Europe as one would be led to believe from Professor Gerber's treatment.

On the whole, this is a very important and useful addition to the legal and historical literature.

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