

# Michigan Law Review

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Volume 79 | Issue 4

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1981

## International Antitrust

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### Recommended Citation

James A. Rahl, *International Antitrust*, 79 MICH. L. REV. 982 (1981).

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# INTERNATIONAL ANTITRUST

*James A. Rahl\**

UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTI-TRUST: A COMPARATIVE GUIDE. By *Barry E. Hawk*. New York: Law & Business, Inc. — Harcourt Brace Jovanovich. 1979 (with 1980 Supplement). Pp. vii, 946. Hardcover loose-leaf, \$75; paper, \$25.

This is an excellent book, and it comes at a good time, given the rapid growth of antitrust law around the world. In three parts, each a book within a book, it treats: (1) United States antitrust law applied internationally; (2) European Common Market antitrust law in general; and (3) developments toward international antitrust law.

In method, the book is unusual, and although the subtitle, "a comparative guide," is an accurate description, further explanation of the approach taken may be helpful. The preface states that the book is primarily written for bench and bar, but that the author hopes that it will also be useful for the classroom. This oft-expressed, but seldom realized desire of authors and publishers might actually be borne out in this case. The book is a combination of both author's text and primary source materials drawn from Professor Hawk's experience in teaching these subjects. Far more of the book than one finds in other texts and treatises is given over to substantial excerpts from case reports and documents — I would guess about one fourth of the space.

The text also contains other signs of a good professor in action. Issues are presented as such. When so disposed, the author offers his own opinion, usually modestly and without trying to persuade. Equally often, after providing background, he leaves us with a simple "*quaere*" (or at times, "query"). Sometimes, I would have welcomed a more substantial statement of his reaction to the question at hand. But in the main he has provided a really good guide and the kind of text I prefer — one which gives context and insight but avoids the heady temptation suffered by some writers to issue rulings on everything.

Although the book will not answer all of the questions that

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practitioners and courts face, it will be a valuable, if not indispensable help. It should also prove to be a constant companion for classroom use in the small but growing number of courses and seminars in these fields. Those of us who are strongly wedded to teaching from case reports and documents, however, will have to add a selection of such materials in full text. Professor Hawk has provided excerpts from most of the significant American and European Economic Community (EEC) cases, and some of these require no greater treatment, especially given the short time usually available for teaching a course of this kind. But the field has its share of leading cases that need to be studied substantially in full. In different places the book quotes various pieces of leading American cases, such as *Timken*,<sup>1</sup> and *Timberlane*,<sup>2</sup> and EEC decisions such as *Dyestuffs*,<sup>3</sup> *Continental Can*<sup>4</sup> and *United Brands*,<sup>5</sup> making it impossible to view the opinions as a whole. Many of the excerpts are extensions of the author's text, rather than free-standing objects for study.

Some of the EEC decisions are, however, set forth in more extensive edited form. This treatment of Common Market cases may be a blessing to American students, who generally find European case reports to be more formal and thus harder to read than American reports, and often seemingly unnecessarily lengthy.

Documents such as the important Department of Justice Antitrust Guide for International Operations, Common Market annual reports on competition policy, and Organization for Economic Cooperation and Development reports and studies, are of course excerpted, and are much too long to be presented in any other way. A good selection of Common Market regulations and policy statements are reprinted in full in the appendix.

#### HAWK'S APPROACH COMPARED WITH THAT OF OTHER BOOKS

Several different approaches may be expected to appear in a field whose underpinnings, dimensions and destiny are as uncertain as international antitrust, and the approach of Hawk's book may stand out more clearly against a backdrop of other books. The two earlier

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1. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

2. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977).

3. *Imperial Chem. Indus., Ltd. v. Commission des Communautés européennes*, [1972] C.J. Comm. E. Rec. 619, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161.

4. *Europemballage & Continental Can Co. v. Commission of the European Communities*, [1973] C.J. Comm. E. Rec. 157, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

5. *United Brands Co. v. Commission of the European Communities*, [1978] C.J. Comm. E. Rec. 207, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

leading, oft-cited American works are limited to U.S. law,<sup>6</sup> and are different in method and style from each other and from Hawk. Kingman Brewster's book, now quite old but retaining some of its vitality, is strongly policy-oriented. Many of the issues are still the same, and his observations and suggestions of over twenty years ago are often still provocative. Wilbur Fugate's first edition, published at about the same time as Brewster's, was substantially revised and updated in 1973. Though certainly not insensitive to policy issues, it is a more traditional, textbook treatment of law. It is still valuable, but since the technical subject matter changes more quickly with new batches of cases and statutes than do policy matters, Fugate's work may sometimes appear more dated than Brewster's. On major problems of American law, however, the complete researcher should consult both books, and now will certainly consult Hawk as well, not to mention the growing number of excellent articles and other sources also available. (One of the many virtues of Hawk's book is the good selection of English-language readings offered as a bibliography with each chapter, in addition to the careful, though not exhaustive, footnoting of the text.)

I will have to violate a convention of some sort here and mention yet another book, one which I edited and co-authored with a group assembled by the Association of the Bar of the City of New York.<sup>7</sup> Unlike Brewster's and Fugate's books, but similarly to Hawk's, it deals with both American and Common Market law, as well as some aspects of the law of several European nations. It also deals with efforts to develop international law solutions. It contains more historical material on EEC law and on international law than the other books, a substantial treatment of the jurisdictional scope of American law, and a general description of EEC law as of 1970. Much of its focus is comparative, with a detailed effort to analyze areas of overlap and conflict.

Against this backdrop of other books, the features of Hawk's scholarship stand out more plainly. The book contains a thorough exposition of existing law, including a unique amount of primary material. The author states that he has not attempted to provide "an intellectual framework for the study of competition principles on the operation of international trade" (p. vii), and thus the book is neither historical, nor oriented around international politics or economics.

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6. See K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958); W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (2d ed. 1973).

7. See J. RAHL, *COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT* (1970).

Issues of policy of course arise frequently in the discussion of legal rules, but the author by and large does not evaluate policies critically, nor construct his own theory of how far antitrust law should extend extraterritorially.

For example, in the American law section, the book points out that the Department of Justice has adopted two "cornerstones" for applicability of U.S. law internationally — whether U.S. consumer interests are affected by the restrictive activities, and whether American export opportunities are reduced (pp. 44-52).<sup>8</sup> The book indicates that some commentators, including this reviewer, have criticized these tests as inadequate, a controversy which is carried over into a debate about the "interstate and foreign commerce" tests of the Sherman Act. Having identified this important issue of policy and law, the author — perhaps sagely — leaves the combatants on the field without attempting an answer, or a suggested analytical approach toward an answer.

#### COMPARISON OF U.S. AND EEC LAW

Hawk's book is "comparative" in more than merely presenting the antitrust law of two different systems. At various points in both the American and EEC parts of the book, and especially in the latter, the author, after developing a particular rule or question under consideration, compares it with the corresponding treatment of the matter in the other system. This is very useful in the same way that any such comparison provides perspective.

Comparative study can go more deeply, however, and become a tool for analysis and a source of new ideas. There is more to be gained in this latter respect by American study of Common Market approaches than vice versa. The Europeans have already extracted a great deal from American experience, and have sought to go on from there while at the same time watching American developments with interest. Articles 85 and 86 of the Rome Treaty, the chief substantive EEC antitrust provisions, are to a major degree modern restatements of the Sherman Act, with interesting variations and departures that represent both improvements and adaptations to a different sense of policy and purpose. The comparative approach might be most valuable in looking back now at the American law with the newer European experiments and changes in mind to see what can be learned. But by and large, this has not been the American habit in this field. Still perhaps laboring under the partially wrong notion that we in-

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8. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4-5 (1977).

vented antitrust law and that foreign antitrust is simply our "export," Americans tend to look more with the idea of seeing what and how our European friends are doing than what we can learn from them.

Hawk, who is unusually sensitive to differences in the environment and objectives of EEC law, makes none of these errors and presents a very balanced treatment. An example is his discussion of effect on interstate commerce, which is a jurisdictional requirement under both the Sherman Act and the Rome Treaty. Hawk places appropriate emphasis upon the "market integration" goal of the Common Market as leading toward a liberal interpretation. Perhaps this point is over-extended, however, when he says that "the market integration policy of the EEC has no parallel in the United States" (p. 427). The commerce clause of the Constitution, of course, reflects such a policy, and it would seem questionable to presume that this has not affected interpretation of the Sherman Act, although it might be difficult to find such an expression in modern Sherman Act cases.

Carrying this point a step further through comparative analysis could influence American thinking about an issue which the Common Market has settled, but which oddly still remains somewhat in doubt under the Sherman Act after 90 years. I refer to the question of whether the effect on commerce must be adverse to the flow of commerce.<sup>9</sup> The European Court of Justice says that an abnormal effect, even an increase in interstate commerce resulting from a restraint, may be sufficient to create jurisdiction.<sup>10</sup> If Sherman Act interpretation is approached in light of the constitutional policy, rather than under the influence of the literal language ("restraint of trade or commerce"), the question would be likely to be settled in the same way in the United States.

Professor Hawk's comparative references often present the material from which such examples may be derived, and this is a very valuable contribution. Readers and subsequent scholars can go on from there to probe more deeply through comparative study. A prime example might be the matter of the "rule of reason" under both systems. Hawk goes far enough with the comparison to bring out similarities and differences (p. 443), but the topic is not further pursued to see what can be learned. European scholars have used the American experience with the rule of reason to illuminate issues

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9. I have discussed this question in J. RAHL, *supra* note 7, at 62-63, and in an article, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 524 (1974).

10. *Etablissements Consten S.A.R.L. & Grundig-Verkaufs-GmbH v. Commission des Communautés européennes*, [1966] C.J. Comm. E. Rec. 429, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8046. *See* p. 443.

concerning interpretation of the virtual *per se* prohibitions of article 85(1) of the exemption criteria under article 85(3).<sup>11</sup> The process should work in reverse to cast light upon American interpretation.

For example, in the *Society of Professional Engineers* case,<sup>12</sup> the Court ruled out safety arguments and predictably held the rule of reason to be confined to competitive considerations. In the *GTE Sylvania* case,<sup>13</sup> the Court let in efficiency considerations as part of the competitive analysis in a rule of reason case, but did not go so far as to permit efficiency to substitute for competition. The latter approach is explicitly endorsed as part of the exemption criteria of article 85(3), although as Hawk points out, the European Commission is not disposed to grant exemptions for dealer territorial restrictions because of the market integration goal (p. 587).

There is much material here for further reflection. This comparative approach could be enhanced by consideration of the broader exemption standards provided by antitrust statutes of other nations, such as the United Kingdom Restrictive Trade Practices Act, which are not covered in Hawk's work.

#### LEGAL RULES AND PRINCIPLES

On the technical level of what the law is, the book necessarily goes well beyond offering black letter rules. On many of the issues pertaining to application of U.S. law to international transactions, there is substantial disagreement among lawyers and writers. As to EEC law, with which the author deals in its domestic as well as international application, there is more opportunity for statement of established rules. He has done this thoroughly, and has also noted areas of controversy. Frequent references to other writings are made as well as to the case law.

It is impossible here to comment on the substance of most of Hawk's exposition of rules, and I can offer only a few observations. With respect to American law, the questions of subject matter jurisdiction and scope which are the source of much heated argument concerning extraterritoriality are considerably played down. Professor Hawk is not too impressed with what he and others have called the arguments about "magic words" in the commerce tests under the Sherman Act (p. 44). Lawyers can hardly do without words, however. The choices they make reflect important considerations as to

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11. See R. JOLIET, *THE RULE OF REASON IN ANTITRUST LAWS* (1967).

12. *National Socy. of Professional Engrs. v. United States*, 435 U.S. 679 (1978).

13. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

the scope of the law, and should be taken seriously as guides to decisions. For example, the Justice Department has adopted a test of "substantial and foreseeable" effect in order to avoid the narrower "direct and substantial" test.<sup>14</sup> In a later part of the book, Professor Hawk himself seems to agree with an "in or affecting" commerce test, as did Judge Choy in *Timberlane* (p. 56).

As this book was being written, the concept of "comity" as a U.S. judicial doctrine for modifying jurisdiction in antitrust cases to conform sometimes to interests of foreign nations was in an early stage. The book does not give this idea as much critical analysis as it needs. Professor Hawk seems to feel some skepticism about it, but leaves the development and criticism to others (p. 43).

One of the most complete and substantial parts of the American part of the book is the treatment of foreign and U.S. governmental activity as it affects liability under the Sherman Act (pp. 111-86). Almost one fifth of the U.S. section is devoted to this area, including the defense of foreign government compulsion, the act of state doctrine, sovereign immunity, and related topics. These are thoroughly presented. Readers would have benefited had Professor Hawk devoted a few more pages to trying to rationalize and possibly integrate these closely related principles, which now stand theoretically separate from each other. An opportunity for others is thus presented.

Not much attention is paid to the topic which has accounted for far more American international antitrust enforcement than any other — namely, private cartels. Were the book more historically and policy oriented, this part would have been expanded, since the Sherman Act's attack on international cartels having impact on U.S. interests has been a phenomenon of major world importance.

The treatment of other topics, such as export cartels, vertical arrangements, industrial property and mergers, and joint ventures is well done, with the possible exception of the portion on distribution. The latter is extremely short, partly because there is very little case law on it. But exporters face many questions concerning distribution abroad, and further analysis would be helpful. The American section concludes with a good discussion of foreign discovery and enforcement, and a useful chapter on antidumping laws and international unfair trade practices.

The Common Market chapters, though they certainly will not command universal agreement on everything, seem to be very well done, especially considering that the author works from an Ameri-

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14. DEPT. OF JUSTICE, *supra* note 8, at 6.

can background. As indicated above, he has been sensitive to the important influence of European policies. His discussion is largely on substantive matters, and the book does not offer a great deal on the many procedural issues of this rapidly growing body of law.

The author compliments the relative speed with which the Common Market has developed rules of law for a large part of the field — rules which he considers to be clearer in many ways than those of American law (p. 427). Unfortunately, he does not offer an in-depth analysis of why this has happened. The answers could be useful in improving American and other antitrust law systems.

The discussion of concerted practices under article 85(1) and its comparison with American conspiracy doctrines is particularly interesting, as is his treatment of the complex relationship between Common Market and national antitrust laws of the member states. The experience which is developing under article 85(3) is not dealt with as thoroughly as one might like, however, given the frequency with which exemption questions must be considered by lawyers and others.

The sections on horizontal relationships and cooperation agreements, vertical arrangements, and transfers of technology are valuable, and the descriptions of evolving Common Market rules on joint ventures, which the author calls “most elusive” (p. 573), have at least contemporary utility. Good treatment of the article 86 provisions on abuse of dominant positions, together with brief reference to the as yet sparse EEC law on mergers, completes an excellent Part II.

The very short Part III on international law and related topics contains brief, useful summaries of past efforts in the United Nations and elsewhere to work out truly international approaches to antitrust and related problems. Probably the most important development has occurred since publication of the book — the U.N. member nations’ agreement in the spring of 1980 upon the UNCTAD draft of “Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.”<sup>15</sup> The 1980 Supplement contains an analysis and the full text of these principles and rules. Although they are “recommendations” to the nations,<sup>16</sup> rather than “binding rules,” they represent an important step.

The book finishes with useful appendices, good tables of cases and an index which seems a bit lacking in detail.

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15. United Nations Conf. on Restrictive Business Practices, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (TD/RBP/CONF/10) (May 2, 1980).

16. *Id.* at 2.

Overall, one can only admire the broad sweep of the author's achievement and the great help this book will give to all who work in the field. If one finds things to criticize here and there, this merely shows that the work reflects authorship which is fearless enough to go beyond the safe haven of bland thought and expression.