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Stein and Nicholson: American Enterprises in the European Common Market: A Legal Profile, Volume 1

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RECENT BOOKS

AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE, Volume One. Edited by *Eric Stein* and *Thomas L. Nicholson*. Ann Arbor: The University of Michigan Law School. 1960. Pp. xxiv, 510. Volumes I & II \$25.

This is a valuable and stimulating volume. As the first half of a broad study, it brings together material on the countless legal problems presented by the new European Economic Community. The central theme of the volume is the effect of the Common Market on the plans and organization of American business. The over-all plan is found in an Analytical Table of Contents which is itself a useful preliminary checklist. The plan for the book, as well as the Introduction and one of the chapters are the work of Professor Eric Stein of The University of Michigan Law School, Co-Director of International and Comparative Legal Studies, who directed this project.

The knowledge and insights of a group of American and European scholars and practitioners are drawn together in this volume. As the formal acknowledgements show, they also have had the benefit of the views and comments of other experienced and knowledgeable lawyers, many directly concerned with operations of the European Economic Community.

This book, together with the second part of the study published in December 1960, is intended for the American practicing lawyer. It aims to assist him in preparing to counsel business clients on their contacts with the Community and the Common Market which forms its economic basis. Dr. Kahn-Freund, referring to his own chapter on Labor Law and social security, observes that its purpose is to help the reader ask the right questions, rather than give those answers which only the expert on the spot can provide. (p. 298) This comment could be applied to the work as a whole. There are questions raised throughout which would not have occurred to this reviewer.

The plan of the study covers the range of topics which counsel for an American enterprise would want to consider. Professor Stein observes (p. 27) that the law discussed is predominantly the national law of the countries concerned, company law, tax law, competition, foreign exchange and credit regulation as well as labor legislation.¹ However, he also observes that superimposed upon these bodies of law are the questions raised by the existence of the Treaty of Rome of March 25, 1957, which created the European Economic Community. The individual chapters reflect varying

¹ Chapters in the second volume include "Organizing for Business," by A. F. Conard, Professor of Law and Director of Graduate Studies, University of Michigan; "The Significance of Treaties to the Establishment of Companies," by Thomas L. Nicholson of the Chicago Bar; "Protection of Competition," by Professor S. A. Riesenfeld, Vice-Chairman, Institute of International Studies, University of California, Berkeley; "Taxation," by J. van Hoorn, Jr., Tax Consultant and Managing Director, International Bureau of Fiscal Documentation, Amsterdam, and Professor L. Hart Wright, University of Michigan Law School; and "The Association with Overseas Countries and Territories," by Peter Hay, Instructor of Law, University of Michigan.

points of view of the authors. These differences in themselves are illustrative of the usefulness of a comparative law approach. Although Professor Stein has identified the prospective readers as practicing lawyers, the book is likely to be of interest also to law teachers concerned with international transactions. By its approach — employing a variety of techniques which involved fact gathering, analysis, and the collaboration of a group of recognized experts— the Michigan Law Faculty has made a significant contribution.

The volume contains a good deal of descriptive material which, together with the text of the Treaty itself, is essential to a consideration of the technical questions. Thus, Professor Stein has written one chapter on the new institutions with a full description of the inter-relationships of the Council, Commission and Court. His description covers more than the Constitution of the Community as contained in the Rome Treaty, because it shows the institutions as they have operated thus far. For example, after pointing out that the Council possesses the power of final decision concerning Community legislation and policy, he observes that in practice, surrounded by an extensive Secretariat and permanent representatives of governments, the Council has considered questions only after agreement has been reached among national administrations or after a deadlock has developed in negotiations which could be resolved by political decision. Here, then, is evidence of a tendency toward the familiar pattern in international organizations when representatives of governments meet and seek agreement — and away from the concept of supranationality under which decisions are made by organs independent of national governments. (pp. 89-92)

Mr. Marc Ouin, Deputy Director, Directorate of Trade and Payments, Organization for European Economic Cooperation, in his chapter on "The Establishment of the Customs Union," proceeds on the premise that the Community is above all else a customs union. He then analyzes in detail the treaty formula for computing the external tariff. He raises various points on the inter-relationship, if not conflict, between obligations arising under the Treaty and those under the GATT; but he does not deal at any length with the interpretation of those provisions of the GATT authorizing the formation of customs unions. His section on the meaning of *libre pratique* under the Treaty opens up interesting technical questions on how products entering the Community from third countries will be treated as they move from one member country to another. He indicates that the free circulation of goods within the Community will remain a serious problem so long as the common external tariff is not in force and also so long as the countries of the Community have not adopted a common quota policy toward third countries. Although he expresses a degree of personal optimism that the Community may stimulate a movement along the road toward freedom of world trade (p. 188), he raises, but makes no attempt to answer, the most debated question: whether the Community will turn inward upon itself, developing a protectionist approach, or whether it will develop an outward orientation having a liberal commercial character (p. 132).

Maître F. C. Jeantet, an Advocate of the Court of Appeal, Paris, and Chargé de Cours, Institut des Sciences Juridiques et Financières Appliquées aux Affaires, University of Paris, has contributed a chapter on "Exchange Control Regulations in France." In the plan of the volume this is intended as a description of exchange controls in one of the Six. Both the editors and Maître Jeantet feel that controls have been relaxed in France beyond the obligations contained in Article 67 of the Treaty. However, apart from this conclusion, the chapter stands as a compact and informative study of the recent past and the possible future. In and of itself, this is a valuable source for an American lawyer. Maître Jeantet's discussion shows that the device of exchange control regulation is far from dead. He points out that in spite of the language of Article 67 of the Treaty providing that restrictions on monetary transfers must progressively disappear, the approach to this position has been very cautious. In spite of the Rome Treaty, and the current trend toward liberalization, he observes that the system of exchange controls gives the government a ". . . means of effective and immediate action in case of emergency. The system of exchange control laws and regulations in France makes it easy to make the necessary changes." (p. 207) This is fair warning.

S. P. Ladas of the New York Bar and Chairman, Industrial Property Commission, International Chamber of Commerce, writes his chapter on "Industrial Property" drawing on long familiarity with patents, trademarks and licensing agreements. He points out that in this large area the direct impact of the Treaty is less than in the fields covered by the other chapters. This is because the Treaty does not contain specific affirmative provisions concerning industrial and commercial property. It is the more general Treaty articles on harmonization of law which may by interpretation affect the law of industrial property. Thus, these questions remain primarily matters of national law and international treaty. Mr. Ladas considers the effect of the harmonization sections of the Rome Treaty and envisions the possibility of a community trademark. He points out that from the point of view of American owners of industrial property rights, progress toward harmonization of industrial property laws should be welcome. As to the possibility of such progress, this depends, in his view, on the same basic political-economic factor mentioned by Mr. Ouin, *i.e.*, whether the effect of the Treaty will be to free trade or whether nationalistic attitudes of member States will retard that process. (p. 291)

Professor Otto Kahn-Freund, Professor of Law, London School of Economics and Political Science, and Co-Editor, *Modern Law Review*, provides a chapter on "Labor Law and Social Security," including an appendix which is a skeleton survey of the social security benefits of the Six. In length, 161 pages, this chapter comprises virtually one-third of the volume. Professor Kahn-Freund attempts to provide materials which will enable the reader to see the issues in this complicated field. He begins, however, by pointing to Treaty Article 117, which assumes that equalization or har-

monization of labor conditions throughout the Community will come about as a result of the operation of the Common Market and the working of the Community institutions. He then discusses in detail three special problems of harmonization, equal pay for both sexes, holidays with pay and working hours including overtime pay. In connection with equal pay for both sexes, he points out that Article 119 of the Treaty² is very cautiously formulated and that this principle of equal pay for equal work does not, under his interpretation of the Article, become part of the legal system of member States. This language is treated as creating an obligation between the member States themselves. The Article, therefore, is not to be considered as self-executing in the national legal systems of member States. He concludes that it does no more than create an obligation binding upon them in international law. (p. 329)

In his discussion of working hours, he mentions the Protocol relating to certain provisions of concern to France which is treated as an integral part of the Treaty. In discussing the escape possibilities which this provides for France, he points out that France might, under its operation, be permitted to establish or re-establish tariffs or subsidies or, indeed, quantitative import restrictions. He feels that no prophecy can be made as to whether this or other developments will occur. He does warn, however, that while there is the possibility that at the end of the first stage provided in the Treaty, working hours and rates may have reached a point at which the Protocol is of little significance, on the other hand, under other conditions the Protocol might produce the crises he describes. (p. 335)

Finally, he concludes that the Treaty's provisions on labor and social policy stand for promises rather than legal principles, and he advises the practitioner and those interested in labor relations that they must still consult national legal sources in addition to looking for the trends, which he describes (p. 361), toward or away from harmonization.

Professor Stein and Mr. Peter Hay, an Instructor of Law at The University of Michigan, have done the final chapter on "New Legal Remedies," under the Treaty. They have surveyed the remedies available to private companies as well as the sanctions which a private company may invoke or which may be invoked against it. In considering the administrative law of the Community as applied by its Court, the discussion of *détournement de pouvoir* or misapplication of power (p. 505) is of particular interest. From this description of remedy and sanctions emerges the authors' view that this field of Community law will draw mainly on the general principles of the national laws of the Member States as the jurisprudence of the Community develops and that the contacts with public international law are distinctly limited. (p. 506)

² The first clause of Article 119 reads: "Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers."

Professor Stein and his co-authors have compressed within the covers of one volume materials, analysis, as well as an approach, suggestive of paths for future study. At the same time, they provide a considerable body of material now ready and waiting for the lawyer who is immediately involved in planning an inter-State transaction involving the Community.

What this volume may lack in unity of style it gains from its presentation of the differing points of view of the individual authors, each an expert in his respective field. Although study of the Analytical Table of Contents may lead a reader to a particular point of interest, it cannot entirely take the place of a subject-matter index which is absent.

This work represents a fresh approach to the commercial law of the Six which must now be considered a subject for comparative law study as the Community evolves perhaps to a position above the national law of the member States. It suggests further lines of research apart from those reserved for the second volume, and at the same time it provides bases which will facilitate such research.

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