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Maxeiner, Policy and Methods in German and American Antitrust Law: A Comparative Study

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Abstract

This thoughtful contribution to American and German legal literature provides valuable insights for a reader interested in comparing the decisionmaking methodology under the West German and American systems of antitrust law. The work also provides a broader discussion of key distinctions between the jurisprudential and systematic foundations of West Germany's continental legal system and those of the Anglo-American common law system.

BOOK REVIEWS

POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY. By JAMES R. MAXEINER. New York, N.Y.: Praeger, 1986. xiii + 174 pp. $37.50. ISBN 0-275-92113-1.

*Reviewed by W. David Braun**

This thoughtful contribution to American and German legal literature provides valuable insights for a reader interested in comparing the decisionmaking methodology under the West German and American systems of antitrust law. The work also provides a broader discussion of key distinctions between the jurisprudential and systematic foundations of West Germany's continental legal system and those of the Anglo-American common law system. The book is a product of a dissertation that Dr. Maxeiner prepared while he was at the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law in Munich, West Germany.

The work is not intended to serve as a general introduction to German antitrust law, the *Gesetz gegen Wettbewerbsbeschränkungen*.[1] Instead, the author's objective is to analyze the methodology of West German antitrust law and determine whether certain of its elements may lend themselves to achieving a more just and predictable application of American antitrust law. The author's expectations about the extent of transferability of concepts from one legal system to another are justifiably cautious. "While the foreign solution may be studied to consider its transplantation home [he argues], this use of

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1. For English translations of German antitrust law and other commentaries, see generally F. BEIER, G. SCHRICKER & W. FIKENTSCHER, GERMAN INDUSTRIAL PROPERTY, COPYRIGHT AND ANTITRUST LAWS (1983); R. MUELLER, M. HEIDENHAIN & H. SCHNEIDER, GERMAN ANTITRUST LAW (3d ed. 1984); OECD, II GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES-GERMANY (Supp. 1984); M. RIESENKAMPF & J. GRES, LAW AGAINST RESTRAINTS OF COMPETITION WITH 1980 AMENDMENTS (1980); B5 WORLD LAW OF COMPETITION-FEDERAL REPUBLIC OF GERMANY Pt. 9 (von Kalinowski ed. 1985).

comparative law does not require that transplantation be the object of study. Critical examination of different legal solutions heightens awareness of the problems and of the variety of solutions, and thus widens the range of potential solutions even where transplantation is not anticipated." (p. 4). This reviewer is persuaded that while West German antitrust law does not reflect current American antitrust enforcement policy, American antitrust law could benefit from several procedural and organizational advantages of German law.

Dr. Maxeiner points out that West German antitrust law is particularly apt for comparative analysis with its American counterpart. In 1957 West Germany adopted its current antitrust law, which replaced the decartelization decrees that the Allies had imposed after World War II. The West German law largely represents the enactment of American antitrust principles within the framework of the German continental legal system. The law consists of over 100 articles, of which roughly the first quarter are substantive rules that provide detailed norms and exceptions in a format similar to our Uniform Commercial Code. The West German law provides specific guidance to a much greater degree than the few rather vague clauses that typify American antitrust law. Therefore, unlike American antitrust law, it has not been subject to the same wide range of interpretations.

Two additional factors make West German antitrust law especially appropriate for comparison with American antitrust law. First, the German law has an unequivocal free market orientation, partly based on the influence of the Freiburg School. Dr. Maxeiner explains that followers of the Freiburg School prefer the competitive economic system

> not only because they consider it more efficient, but, perhaps still more important, because they believe it more democratic. They criticize purely economic perspectives that separate economic well-being from the issue of freedom. They reject a centrally administered economy not only because they perceive it to be economically inefficient, but also because they consider the concentration of power in the hands of the state it brings to be inconsistent with democratic principles. (p. 7).

This orientation was largely consistent with the American antitrust orientation throughout the 1960's and early 1970's. Sec-

ond, German antitrust law is the most stringent and aggressively-enforced body of antitrust law in any country outside the United States. The law is enforced by approximately 100 highly qualified and dedicated professionals in the Federal Cartel Office, located in Berlin. The Federal Cartel Office's principal enforcement tasks are to impose stiff penalties against bid-rigging and market allocation schemes among competitors, and to deter anticompetitive mergers and joint ventures. Quasi-criminal administrative fines reaching into the millions of German marks are not uncommon as sanctions for bid-rigging and price-fixing. One might argue that in the last several years the Federal Cartel Office has taken a tougher stance on anticompetitive mergers than have American antitrust authorities.

It is Dr. Maxeiner's thesis that the problems afflicting antitrust law in the United States are largely problems of legal method. Antitrust laws in the United States and West Germany, he argues, are "judged differently not so much because they diverge widely in substance, but because they differ greatly in method." (p. 116). He lists several fundamental differences in methodological approach between American and West German antitrust laws. (p. 5). On the West German side, he emphasizes the normative orientation of antitrust law, the active role played by specialized decision makers, and the fact that antitrust law is often applied as a matter of administrative law. He contrasts these methodological approaches with the American reliance on judge-made law, which does not insist on the attainment of a norm, the passive role played by non-specialized decision makers in the resolution of complex technical issues, and the wholly judicial nature of American antitrust law.

Since the rise of the Chicago School in the United States, the paths of antitrust policy in Germany and in the United States have also diverged substantively. A dramatic shift in United States antitrust policy has occurred without legislative action to change a single fundamental clause of any American antitrust statute. This shift was possible because the vagueness of American antitrust rules leaves considerable latitude to the courts and to the political system to carry out such a change. The Chicago School has recently concentrated antitrust inquiry on the alleged restraint's impact on so-called "consumer

welfare," which essentially calls for an analysis of whether the restraint in question enhances or restricts "economic efficiency." Thus, antitrust rules should not interfere with a merger between direct competitors if the combined firms would operate more efficiently by merging, since this will tend to expand output, which lowers prices and thereby enhances consumer welfare. Likewise, sales below cost by a large firm with market power are not necessarily suspect. Smaller rivals may be disadvantaged, but the consumer enjoys the immediate benefit of lower prices. If the larger firm later raises prices, new entrants will enter the market and prevent the larger firm from exploiting its position so long as regulatory impediments or other barriers to entry do not discourage such entry. The Chicago School places a high level of confidence in the inherent self-correcting mechanisms of a free market to counteract the creation or exercise of market power.[2]

The inquiry that must be carried out under German law—both in terms of the policy orientation of the statute and the enforcement attitude of the Cartel Office—largely follows the antitrust policy familiar to American antitrust enforcers in the 1960's and 1970's. That policy calls for preserving deconcentrated market structures over the long term in the field of merger control even if the merger is likely to bring immediate benefits to the consumer in the form of lower prices. German antitrust law also attempts to inhibit single-firm conduct, such as selling below cost, which may benefit the consumer in the short run but which may also be capable of harming weaker competitors to the extent that they exit from the market, thereby causing deterioration of market structure. German antitrust policy places less reliance on self-correcting free market mechanisms, such as rapid entry into a market, to counteract the creation or exercise of market power.

Current American antitrust enforcement officials would probably question the relative rigidity and lack of confidence in the dynamism of a free market economy that typifies German antitrust policy. The new Chicago School approach to Ameri-

2. *See, e.g.*, Department of Justice Merger Guidelines, June 14, 1984, *reprinted in* 2 Trade Reg. Rep. (CCH) ¶ 4490, at 6879; Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Department of Justice, *Economic Policy Office Tenth Anniversary Seminar on Economics and Antitrust*, EPO Discussion Paper Nos. 83-13 and 83-14 (1983).

can antitrust policy has not escaped the attention of German antitrust commentators and enforcement officials. A leading German antitrust commentator has termed the Chicago School orientation the "strongest intellectual challenge" that German antitrust has had yet to face, and one of the German Cartel Office's best intellects has referred to the need to "comprehend" the fundamental reasons for the new American orientation.[3]

The rise of the Chicago School of antitrust law can be traced, in part, to factors largely unknown to German antitrust law. These include a growing recognition that admittedly vague American antitrust rules were being pushed in aggressive private actions and government suits to encompass an increasingly wide circle of conduct whose outer limits were ever more uncertain. Of no less significance is the enormous cost and complexity of American antitrust litigation as well as the steady growth of a body of economic literature which disputes longstanding tenants of American antitrust, particularly with respect to such issues as vertical restraints, conglomerate and vertical mergers, and the criteria for market definition.

There can be little doubt that the inherent flexibility of American antitrust rules has permitted the dynamic development of United States antitrust law to an extent that is bewildering to continental lawyers. This flexibility has a distinct positive side as well. The American court's persistent expansion of the scope of antitrust law into new sectors of the economy has been largely advantageous to consumers and to the economy as a whole. Examples are the expanded application of antitrust rules even to regulated industries—such as banking, trucking, railroads and telecommunications—under the doctrine that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions";[4] application of the rule against price-fixing to fees charged by professionals such as accountants,[5] engineers,[6] lawyers,[7] and physicians,[8] and the ap-

3. K. Markert, Die Praxis der Fusionskontrolle und der Missbrauchsaufsicht 1984/85, at 66 (FIW-Schriftenreihe No. 117 1986).

4. *See, e.g.* United States v. Philadelphia Nat'l Bank, 374 U.S. 320, 350-51 (1963).

5. United States v. Texas State Bd. of Pub. Accountancy, 464 F. Supp 400 (W.D.

plication of antitrust norms to international cartels that harm American consumers.[9] There has been very little parallel development in German antitrust law.

The American courts have also been capable of retrenching when appropriate. In the *Sylvania*[10] case the Supreme Court overruled its earlier *Schwinn*[11] doctrine, the end result being to take non-price vertical restraints out of the category of a *per se* violation and subject them instead to the Rule of Reason. Likewise, the Supreme Court declared in the *Broadcast Music*[12] decision that the Rule of Reason rather than the per se rule should be applied to test the legality of "blanket"music performance licenses offered by copyright holders who had marketed such licenses through a joint venture even though the "blanket" license involved price-fixing in the literal sense. In the field of mergers, the Supreme Court's *General Dynamics*[13] decision calls for a more thoughtful economic analysis of the likely *future* competitive impact of merging firms rather than allowing the party challenging the merger to rely largely on past and present market shares when they are no longer a fair indication of ability to compete in the future.

It is precisely the lack of flexibility to adapt to and incorporate the most recent economic learning into antitrust analysis that is perhaps the key weakness in German antitrust law. The rigid detail of the 1980 amendment to the German merger control provisions provides an extreme example. The new § 23a of the German law provides in substance that a firm with total sales of about US$1 billion will be presumed to have engaged in an anticompetitive acquisition if it acquires a firm operating in a market in which "small and medium-sized enter-

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Tex. 1978), *aff'd and modified per curiam*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).

6. National Soc'y of Professional Eng'rs. v. United States, 435 U.S. 679 (1982).

7. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

8. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982).

9. United States v. Singer Mfg. Co., 374 U.S. 174 (1963); Timken Roller Bearing v. United States, 341 U.S. 593 (1951); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), *modified*, 105 F. Supp. 215 (S.D.N.Y. 1952).

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

11. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

12. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

13. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

prises have a combined market share of at least two-thirds and the enterprises participating in the merger have a combined market share of at least five percent."[14] Thus, financial strength associated with mere size alone is *presumed* to have an anticompetitive effect on the market of the acquired firm even when there is *no* competitive relationship between the merging firms. This form of statutory presumption, which is rebuttable, provides a higher level of legal certainty than Section 7 of the Clayton Act, the American antimerger statute. Yet the economic assumption underlying the German statute would be found shocking to Chicago School economists and probably to many non-Chicagoans. Nor is this discussion theoretical. The German Supreme Court in Civil Matters recently affirmed a decision of the Cartel Office under a different antimerger provision that has understandably been the subject of debate in Germany. The decision prohibited an acquisition by Rheinmetall, a German arms manufacturer, of WMF, a dominant producer of tableware and kitchen goods. The court reasoned that availability of the acquiror's financial resources would entrench the dominant market position of WMF, which was several times larger than its next largest rival.[15] Whether such a decision can be justified as preserving "competition" as opposed to other values is open to question.

The Germans have made an economic policy decision that is clearly *not* based principally upon Chicago School analysis of economic efficiency and in many instances bears at best a loose relationship to preservation of "competition" as opposed to protection of certain classes of competitors. Germany has chosen to preserve traditional forms of market structure while recognizing that this choice is not always compatible with an optimally "efficient" market structure. German merger control enforcement now probably represents the strongest national policy in the world favoring preservation of a wide range of

14. Law Against Restraints of Competition, § 23a(1)(1)(a), BGBl. I 1761 (1980) (amending BGBl. I 1081 (1957)).

15. Edelstahlbestecke, WuW/E BGH 2150 (1985) ("Rheinmetall/WMF"). A decision based on similar grounds was issued in 1978 when GKN, a British manufacturer of automobile drive-train products, planned to acquire Sachs AG, Germany's dominant supplier of automobile clutches. Kfz-Kupplungen, WuW/E BGH 1501 (1978). For a discussion of this case and of German merger control generally, see Belke & Braun, *German Merger Control: A European Approach to Anticompetitive Takeovers*, 1 NW. J. INT'L L. & BUS. 371 (1979).

consumer choice by maintaining existing market structure even if vetoing the merger prevents the realization of efficiencies. That is a choice which any free market economy subject to democratic control must face. What is perhaps most important is that the democratic process makes a conscious decision that it wishes to preserve existing market structures at the potential expense of greater efficiency and increased output. It is not unreasonable to contend that Germany has made this decision (perhaps under the influence of outdated economic assumptions in the United States) through the detailed body of antitrust law adopted by its lawmakers. A growing debate in Germany over the value of Chicago School theory is leading to thoughtful re-evaluation of the direction of German antitrust policy.

Dr. Maxeiner's book has made a telling contribution to scholarship in this area by its emphasis on differences in methods employed in American and West German antitrust laws. One of the principal advantages of the German legal system over the American system is the procedure for taking proof. This is where the Germans properly place emphasis on the fair and efficient administration of justice, thus facilitating prompt decisions in a case without crippling expense to the litigants. Jury trials are unknown to German antitrust law, and the judge truly controls the taking of proof. There is no discovery procedure. The author comments: "In judicial proce[edings] the judge calls witnesses for the court and the parties both. The parties do not present their own witnesses and their preparation of witnesses is held to be unethical. There is no presentation of separate cases for each side. The judge is responsible for questioning witnesses. The parties ask supplemental questions to fill out the witness's testimony." (pp. 85-86). This key procedural distinction assures that the judicial inquiry is focused on essential facts. When combined with the absence of our expensive and cumbersome pre-trial discovery procedure and the continental rule that the losing party pays the winner's attorney fees, it is no wonder that the length, complexity, and cost of antitrust proceedings in Germany are kept within more reasonable bounds than in the United States. If American judges would assert greater control over civil antitrust proceedings generally (as well as over other forms of civil litigation), and particularly if the scope of pre-trial discovery were

limited to areas of inquiry determined in advance by the judge instead of by the lawyers, the time and expense of pre-trial proceedings might be significantly reduced. "Fishing expeditions" and unmeritorious antitrust suits would be curtailed if the courts generally awarded attorney's fees to defendants who prevail in the lawsuit.

American antitrust law might also benefit by careful study of the German use of specialized courts. Special cartel panels (senates) have been created at each court of appeals, which review questions of both law and fact on appeal. The existence of cartel panels helps to assure that judges who hear antitrust appeals have a specialized background and promotes greater uniformity of decisionmaking. For instance, appeals from decisions of the Federal Cartel Office are heard by a three-judge Cartel Senate of the Berlin Chamber Court (*Kammergericht*), whose Chairperson, Judge Rosemarie Werner, has a reputation for thorough factual inquiry, incisive analysis and expeditious decisionmaking. Appeals to the German Federal Supreme Court in Civil Matters are also heard by a Cartel Senate.[16] From a practical standpoint, the establishment in the United States of specialized trial court judicial panels without juries to hear complex civil antitrust suits, such as monopolization, merger and rule of reason cases, could serve to bring such monstrously long and costly cases under better judicial control and lead to more predictable results. Although the most urgent need for reform in the United States is at the trial court level, the establishment of specialized antitrust panels at the appellate level might also make a substantial contribution to consistency in decisionmaking.

There are few, if any, provisions of German law that could simply be transplanted to the United States. The procedural and organizational settings in Germany and the United States are simply too different. Yet an increased awareness of the different legal methods used in Germany may serve to provoke constructive thought about how the underlying German concepts might be employed to improve American legal methods.

16. For a general discussion of the organization of the West German appellate courts, see Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981). *See also* Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

Dr. Maxeiner's book makes a valuable contribution by stimulating the American antitrust community to a new thought: while America has given fundamental concepts of antitrust to West Germany, West Germany may be able to provide America the methodological tools to implement antitrust concepts more fairly and efficiently.

WATER LAW IN HISTORICAL PERSPECTIVE. By Ludwik A. Teclaff. Buffalo, N.Y.: William S. Hein & Co., 1985. xi + 617 pp. $67.50. ISBN 0-89941-460-5

*Reviewed by Albert E. Utton**

Water Law in Historical Perspective is a tour de force. Professor Teclaff has given us the advantage of his lifelong experience and learning in water law. Every page is enriched by his mature insight and scholarship.

This book is a virtual encyclopedia within the covers of one volume. If one wants to refer to groundwater law in Israel, or riparian surface water law in Spain, or water permits in the Soviet Union, one can easily find a discussion of each of these items, as well as other water laws of jurisdictions from Argentina to Yugoslavia. And at the same time each discussion is placed within the perspective of history. Because of this historical approach, the reader can understand and distinguish between various water doctrines—prior appropriation, for example, which aided in water development, and riparianism, which placed conservative restraints on such development in Europe and elsewhere.

The book is divided into two parts. The first consists of a far ranging discussion of national legal systems, while the second is devoted to the development of international law both as to surface waters and groundwaters. The discussion of the river Oder is particularly valuable in that comparatively little is known about either its status in international law or its history.

The international river basin section is a superb discussion of treaty practice regarding major river basins. Anyone who wants to have an understanding of international treaty practice can easily thumb through the pages of this chapter and come away with an informed understanding. The chapters on transboundary groundwater pollution and transboundary toxic pollution of drainage basins brings up to date the discussion of these issues. The various approaches and theories of different nations are compared and contrasted.

In his final chapter, Professor Teclaff warns us of the "flu-

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vial lesson." He points out that from the middle of the nineteenth century onward, under the impact of increased population and of rapid industrialization, the demand for water began to grow at such a pace that it is expected to outgrow the existing supply in many regions before the century is over. From being water surplus regions, Europe and the eastern United States are turning into water deficient areas. The situation becomes not dissimiliar to that which faced the engineers and administrators of the fluvial civilizations. And the answer, too, has been much the same—more and bigger dams, more and bigger reservoirs, more transfers of water over greater distances, and more centralization of administrative control over water disposition. He warns that if trends in water development and management reflect a general overtaxing of the limited environmental base of ever-expanding economies, then the inadequate quality of individual life of the fluvial civilization may be in store for us.

The main factors which might tend to propel us in the direction taken by the fluvial civilizations already exist, namely: 1) shrinking water resources; 2) an expanding economy highly dependent on water; 3) a developmental outlook; 4) the means to build large projects. The ancient water managers in a similar situation strove relentlessly to match the available water to the expanding needs of the economy, regardless of cost to the social and sometimes to the physical environment. As a consequence, they left us the most significant lesson of history—that without a technological breakthrough which would either provide new sources of water or permit reduced consumption in many of the tasks which water now performs, sufficient water for the needs of a growing economy can be provided only at ever-increasing cost to the physical environment or the social environment or both. There is a point in water resource development when water can no longer be matched to the economy, but the economy must be matched to the water available. This may be a bitter pill to swallow for a development-minded modern society, but history teaches us that when such time arrives water development must be controlled with the utmost thoroughness.

In the light of past experience, one thing above all should be asked of modern scientific water management—that major projects be undertaken only when all their potential effects on

the totality of the environment have been assessed by all available means. Professor Teclaff goes on to suggest that "present-day technology, wedded to the developmental outlook bequeathed by a water-rich European past, may and can at least do, what the low energy output of the fluvial civilizations could not do, namely irreversible damage to the environment, not just on a local but on a global scale." His final word is "the fluvial civilizations send a warning across the ages that there is a limit beyond which water development cannot be pushed without impairing the quality of life . . . . [A] message can be read that attitudes required in periods and areas of water plenty dare not be carried over into periods and areas of scarcity. Expansion at the expense of the environment and of the individual can be avoided if the growth of technology and the economy is geared to a pace concommitant with maintenance of the environment as a whole fit for what is considered to be the 'good life.' "

This striking book is one that anyone interested in water resources will want to have as an all purpose reference with a global perspective and a historical insight.