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Audretsch, Supervision in European Community Law: Observance by the Member States of Their Treaty Obligations (2d Rev. Ed.)

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BOOK REVIEWS

SUPERVISION IN EUROPEAN COMMUNITY LAW: OBSERVANCE BY THE MEMBER STATES OF THEIR TREATY OBLIGATIONS—A TREATISE ON INTERNATIONAL AND SUPRA-NATIONAL SUPERVISION. By H.A.H. Audretsch. Amsterdam: North-Holland, 1986 (second revised edition). US$144.75.

*Reviewed by Blaise G.A. Pasztory**

This is an intriguing work, starting from its lengthy title and subtitle, and a very worthwhile one. It is basically a scholarly account of the law and procedure that have developed in the more than three decades since the adoption of the EEC Treaty with regard to the ways in which compliance by the Member States of the European Communities[1] with their obligations under Treaty and under growing Community law has been and is being assured.

The book should be evaluated in several respects: first, as a treatise for the practitioner in European Community law; second, as a scholarly history of the development of the law and procedure of the European Communities with possible lessons to be learned for the future; and finally, as a case study of jurisprudential development in a fast-moving area of administrative and constitutional law. It provides a valuable contribution to the literature in each of those areas.

While Professor Audretsch's work should be in the library of every lawyer engaging in legal work in the Member States of the European Communities, it poses certain problems in being used solely as a treatise by the private practitioner. The first of these problems is definitional. The very term "supervision" used in the title raises an uncertainty in the mind of an American reader, and perhaps a reader from a country other than the Community countries. Professor Audretsch's work is clearly and logically organized, and it is necessary for the reader to

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1. Throughout his book Professor Audretsch focuses on the treaty provisions applicable to the European Coal and Steel Community and Euratom as well as those applying to the European Economic Community.

understand his definitional premise before beginning to understand the book:

> The word "supervision," and especially the word "control," is generally used in two senses: (a) check, test, review, verification; (b) enforcement, maintenance, restraint, correction. (P. 7.)

From this definitional base the reader gathers that the author will be dealing generally with the areas of administrative law and enforcement. Nevertheless, it must be noted that the word "enforcement" hardly ever appears in the more than 400 pages of text, because the possibility of legal compulsion is so distant from concepts of the legal regime on which the European Communties are based.

Another reason why this is not a treatise primarily for a practitioner representing private parties is that "supervision" procedures in the Communities do not involve private parties but only Member States, and are intended to ensure their compliance with their obligations under treaty and under law. Private parties may be only indirectly involved in these procedures.

Very briefly summarized, "supervision" procedures in the Communities, as described by Professor Audretsch (such as in the summary beginning on page 415), involve an administrative phase before the Commission and, in due course, a judicial phase before the Court of Justice. As Professor Audretsch points out, the Commission (on the basis of a complaint or on its own initiative) conducts a preliminary investigation, issues a formal notice to the Member State that gives it an opportunity to respond, and in case of a violation, to reach a negotiated settlement. If such a settlement cannot be reached, the Commission delivers a reasoned opinion settling a time limit for compliance by the Member State. The case is then brought before the Court of Justice, which eventually issues a declaratory judgment clarifying the law in question and specifying the obligations of the Member State involved. The Court's judgment is binding on the Member State, although the EEC Treaty contains no provisions for enforcement of the judgment. Notwithstanding this absence of enforcement power, the author demonstrates, as may be expected from the nature of the EEC Treaty and its goals, that compliance with the

Court's judgments is more the rule than the exception. The relevant case law indicates that the most frequent compliance procedures undertaken by the Commission and the Court of Justice have involved the removal of obstacles to the free movement of goods, customs duties, and quantitative import restrictions.

None of the foregoing should lead the prospective reader to believe that Professor Audretsch's approach is in any way abstract or academic. He deals in detail with the panoply of ways by which individuals or corporations, members of the European Parliament (which has no specific authority of "supervision"), and others can help secure compliance by Member States with their obligations. Thus, for example, as Professor Audretsch indicates (pp. 240 *et seq.*), individuals and corporations can (i) lodge complaints with the Commission; (ii) institute proceedings against the Commission in certain limited instances under the Treaty of the European Steel and Coal Community; and (iii) institute actions in their national courts seeking to establish the precedence of Community law over national law. In the last instance, the individual or corporation can endeavor to convince the national court to seek guidance or clarification from the Court of Justice (p. 242).

Professor Audretsch devotes a portion of his work to the contribution that has been made by members of the European Parliament to bring about more extensive compliance by Member States by their obligations. While the EEC Treaty did not give Parliament any particular authority of "supervision" over Member State compliance, a number of members of Parliament (led by H. Vredeling, Arved Deringer, and others) began in the mid-1960s to issue a number of parliamentary questions to the Commission inquiring about the status of ongoing compliance procedures that did not seem to be going anywhere. The resulting publicity, the author believes, had some effect in bringing about compliance.

The European Parliament also brought about greater compliance by the Member States with their treaty obligations by means of a series of reports, culminating in the Sieglerschmidt Report issued in early 1983. This report can best be described by its rather lengthy title: "Report on the Responsibility of Member States for the Application of Community Law and the Resolution of 9 February 1983 of the Eu-

ropean Parliament on the Responsibility of Member States for the Application of and Compliance with Community Law." As indicated in the title, the report contained both an analysis of the existing situation and a resolution containing suggestions for improving compliance procedures (pp. 250 *et seq.*). According to the author, the Sieglerschmidt Report led the Commission to start issuing annual "supervision" reports to the European Parliament in 1983. While the author feels that these reports could be more informative, they seem to him to be a great improvement over the previously existing situation, in which there were no reports at all (pp. 263 *et seq.*).

The author also sees a usefulness for ad hoc inquiries conducted by the European Parliament, such as those conducted in the case of the catastrophic chemical accident at Seveso in 1983 (pp. 266 *et seq.*). He notes that the parliamentary inquiry has shown to be an efficient instrument in the United States as well as other jurisdictions (p. 272). When one thinks of the most recent, well-publicized Congressional inquiry—the Iran-contra hearings conducted by a joint Congressional committee—it seems likely that the use of this instrument in the United States goes far beyond what would be even remotely conceivable in Europe.

The foregoing, somewhat detailed description of some parts of the book should indicate that the author's treatment is definitely not abstract or superficial but that he is deeply concerned with the practical aspects of "supervision" and compliance. To ensure more effective and uniform compliance throughout the Community, he is not averse even to "mobilizing shame" by publicizing entrenched infringements (p. 289).

The author is well versed in his subject matter. As one of the questions submitted by a member of the European Parliament to the Commission indicates, Professor Audretsch had devoted himself to the subject of Community "supervision" since he wrote his thesis on the subject more than a decade ago.[2]

In light of the author's genuine expertise and enthusiasm

2. *See* Written Question No. 519/75, J.O. C 49/9 (Nov. 12, 1975) (submitted by Mr. Laban to the Commission), *cited in* H.A.H. AUDRETSCH, SUPERVISION IN EUROPEAN COMMUNITY LAW: OBSERVANCE BY THE MEMBER STATES OF THEIR TREATY OBLIGATIONS app., at 470 (2d rev. ed. 1986).

about his subject, it is regrettable that the publisher did not have the text edited by someone whose primary language is English. While Professor Audretsch's English is quite serviceable and his meaning is generally quite plainly set forth, the reader is frequently caught short, particularly in the more conceptual portions of the work, trying to figure out what the author is trying to say. The literal translations of several of the names of reported cases, such as the "French Advertising of Alcoholics Case" (p. 125) and the "Pig-Meat Aids Cases" (p. 129), could definitely have been avoided through more careful editing. (I believe a proper translation of the names would be the "advertising of alcoholic beverages" and the "pork subsidies.")

Despite this criticism of a shortcoming that could have been so easily avoided, one must give credit to a very well-organized book, with highly useful summaries throughout as well as at the end of the text and appendices containing voluminous background materials that are very useful to a fuller understanding of the text. A full description of the relevant case law (*see, e.g.*, pp. 167-92) helps not only to break up the monotony of descriptions of procedural nuances, but also to elucidate these procedural details within the context of actual, often highly dramatic national disputes. A notable example of this description is the French-Italian Wine Case of 1982, which, in addition to involving issues of national sensitivity and susceptibility, stands as a landmark from the viewpoint of the fashioning of very imaginative interim relief by the Court of Justice without the basis of any application precedent (pp. 185 *et seq.*).

Supervision in European Community Law is also an important work for readers interested in understanding the history of modern Europe and of European post-war integration. One is struck, after reading Professor Audretsch's work, by how far the Community has progressed, especially after reading one commentator's somewhat dim prognosis on the subject expressed twenty years ago, when the membership consisted only of the initial six Member States:

> Since a directive does not override the inconsistent national law, national courts probably will apply national law, even when to do so is a breach of the obligations of the state under a directive. Even if the national courts take notice of the directive and try to interpret the national law to comply

> with it, the interpretation of the directive normally would not be "essential" for the national court "to render judgment."
>
> Nor is it easy to see how the enterprise could challenge the validity of a directive in a national tribunal. If member state acts against an enterprise, pursuant to a directive, and the act is legal under national law, the enterprise has no redress, even if the directive is contrary to the Treaty and need not have been acted upon. The act is illegal under national law only if the state has omitted to amend the law before taking action against the enterprise or if the amendment to the national law is unconstitutional. In either case it seems unlikely that the validity of the directive is relevant, even if the directive is relied upon by the state as a defense. Even if there is no constitutional provision, such as that in the Netherlands, which permits an act of a Community institution to prevail over the constitution, a directive cannot be challenged as unconstitutional because directives are not directly applicable.[3]

None of this sense of futility or hopelessness as to the chances of securing compliance by the Member States with the provisions of the Treaty is apparent in Professor Audretsch's work twenty years later. Despite perceived shortcomings and possibilities for improvement, he appears to feel that compliance with treaty obligations and with the decisions of the Commission and of the Court of Justice has been quite widespread.

Professor Audretsch's evaluation of the existing legal situation and his suggestions for improvements should be of great interest to officials of the Commission, of the European Parliament, and of the Member States. His basic criticism is that current procedures are too slow, but he does not believe that they are basically deficient. His remedies involve an enhanced collection and circulation of information (utilizing recently developed software systems that are already in place), depoliticization of the process of "supervision," the bunching of cases that are factually related to each other, and a closer adherence to procedural requirements, such as time limits for compliance with directives and for submission of pleadings and specific information required by the Commission.

Professor Audretsch sees no basic defects in the process of

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3. J. TEMPLE LANG, THE COMMON MARKET AND COMMON LAW 19 (1966).

compliance by the Member States. Thus, he expresses the view that

> Indeed, as a rule the Member States do not intentionally violate their obligations, not even when the cost appears to be lower than the profit. Usually it is a matter of carelessness or negligence. (P. 410.)

Accordingly, he does not favor any drastic changes, not even an amendment to the EEC Treaty, although he recognizes that different solutions may be needed "if a European Union should be carried through" (pp. 443-45). He believes in preserving the low-key, diplomatic approach that has been successful so far. In the words of one commentator, the Community "supervision" system is a "procedure that is anxious to spare national susceptibilities."[4]

A large part of what makes Professor Audretsch's work so interesting comes from the realization of the dramatic developments that have taken place with regard to treaty compliance by the Member States. The book highlights the reluctance of the Commission, particularly in the late 1960s, before the initial six members of the Communities were joined by Ireland, the United Kingdom, and the others, to antagonize any Member State for fear of undermining the functioning of the Communities. During this period, the idea of taking the issue of an infringement to the Court of Justice was considered to be a matter of last resort. For the same reason, waivers of the Commission's procedural requirements were frequent, and repeated lengthy delays were routinely granted. This conduct reflected, of course, the Commission's awareness of its role in the political as well as the legal area. As Professor Audretsch notes, the repeated failures to seek compliance with legal obligations tend to undermine any system of law. In his own words,

> Of course, deliberate infringements are usually connected with a politically explosive climate. However, if these are not dealt with for purely political reasons, the Community will surely be undermined. In my opinion, therefore, even in politically thorny cases one should not hesitate too readily to refer the matter to the Court of Jus-

4. J.P. DELORME, L'ARTICLE 169 DU TRAITÉ DE ROME 173 (1971), *cited in* H.A.H. AUDRETSCH, *supra* note 2, at 415.

> tice. Indeed, it may be advisable to depoliticize the matter. (P. 313.)

As has already been indicated, Professor Audretsch's book is a highly readable one. After getting over the definitional difficulties, the reader encounters a dramatic story about the development of a particular phase of international, constitutional, and administrative law. The story involves a treaty that established certain institutions and certain rights and obligations among the contracting parties but did not provide any specific means or procedures for insuring that those rights and obligations were respected. Professor Audretsch's book confirms that both the institutions created and the contracting parties successfully developed the means for substantially insuring such compliance.

In some respects, the experience of the Member States of the European Communities recounted by Professor Audretsch parallels that of the thirteen original American colonies during the six years that the Articles of Confederation were in effect prior to the adoption of the U.S. Constitution in 1787. The principal similarity relates to the way in which a common constitutional and legal structure had to deal with the concept of the sovereignty of the member states. The analogy cannot, of course, be carried too far. The EEC Treaty was never intended to create a union of nations, although it was intended by its framers to set the stage for such a union in the indeterminate future. A major cultural difference, of course, is that while the American colonies had never been independent, they all essentially had the same cultural background and had been subject to the rule of a single colonial power. By contrast, the nations of the European Communities have been independent (to a greater or lesser extent) for a millenium and are the possessors of distinctly different cultures and languages. Perhaps it is for this reason that their accomplishments in the legal field have been so impressive. Professor Audretsch's book renders homage to some of these accomplishments.

LAW OF THE EUROPEAN COMMUNITIES. Edited by David Vaughan. London: Butterworth Legal Publishers, 1986. US$264.00.

*Reviewed by Joseph Weiler**

What book would (or should) *any* European Community law lawyer—regardless of specialization—have on his or her desk or shelves?

The answer to that question, at least for the English-language Community lawyer, is *Law of the European Communities*, edited by David Vaughan. The book is also Volumes 51 and 52 of the fourth edition of *Halsbury's Laws of England.*

Let me first state, to adopt an Americanism, my "bottom line." Publication of this book is an important event in the English-language Community-law literature. It is an outstanding achievement: the veritable first fully-fledged treatise on the subject. It is exquisitely organized and edited and has the technical perfection of *Halsbury's*. Its tables of materials (cases, treaty articles, legislation, etc.) are the best I have seen. The quality of the contributions is usually high, a point to which I will return later. Again, this is the book that every English-speaking Community law lawyer should have always close by.

Vaughan has divided his two volumes into a total of twenty-one chapters. Volume One starts with *The Communities* and covers a brief legal history of the EEC, the EEC Treaty's first few Articles on objectives, and then the institutions and financial provisions; *The Court of Justice* covers all heads of jurisdiction; *Application of Community Law in National Courts* (perhaps better described as application of Community law in the national legal orders) has, as expected, a special section dealing with the United Kingdom. There is then a chapter dealing with *External Relations*, which covers both constitutional issues and commercial policy and development. There are chapters on *Monetary* and *Economic Policy*, as well as a useful chapter on *Industrial Policy*, rarely dealt with in such a tight legal way. *State Aids and Regional Policy* are dealt with in one chapter—frankly a

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creative editorial choice. *Environment and Consumers* receive their own chapter. This chapter is convincing because it includes both a general discussion and a separate treatment of the legal regime governing specific products and types of environmental hazards. One chapter deals with *Coal and Steel* and another with *Energy Other than from Coal.* Volume One ends with a chapter entitled *Undertakings*, which deals essentially with the company law directives, and with public contracts, including public supply contracts.

Volume Two includes chapters on *Movement of Goods*, on the EEC's *Agriculture* and *Fisheries* policies, on *Movement of Workers*, *Establishment*, *Services*, and *Capital* — one chapter for each— and concludes with chapters on *Transport*, *Competition*, *Taxation*, and *Social Policy*.

One sees then a traditional organization that will make finding one's way easy, with the occasional innovative flash, such as the chapter on *State Aids and Regional Policy*.

It would be inevitable in a treatise of this size not to have some unevenness of quality. Certain sections of the first chapter that deal with general constitutional principles of the Community, such as direct effect, overlap with the chapter on Community law in national courts. I must confess that I found the latter chapter more tightly and originally argued. All in all, Chapter One was the weakest. Another overlap concerns the field of external relations. The constitutional provisions concerning these relations are dealt with both in Chapter One and in Chapter Four. These overlaps lead to *lacunae*. Mixed agreement—the most important instrument of Community external legal relations—receives inadequate treatment, and in general the whole area of international competences is not covered deeply enough in terms of identifying very real problems that exist in the day-to-day operation of the Community in the international field.

Chapter Four, on external relations, is strongest in its treatment of commercial policy. The section on antidumping cannot compete with the specialized treatises on this subject but it is the best of its kind in such a short space.

The chapters on the Court of Justice and on free movement of goods are very good indeed.

This new publication should be viewed against the back-

ground of already existing work in the field. A lawyer whose principal working language is German, French, or Italian could instantly come up with his or her preferred text on the EEC. For the German it would be a tight choice between Grabitz[1] and Groeben, Ehlermann, and Thiesing.[2] The French speaker would no doubt mention the formidable Mégret series,[3] lamenting, perhaps, that some of the volumes are dated. The Italian would boast the recent Pennacchini, Monaco, and Ferrari-Bravo commentary.[4]

What about the English speaker? Here there would be a lot of Hms and Ahs. The competition lawyer would have a wide choice, probably opting ultimately for the magisterial Hawk series.[5] The antidumping specialist may choose Van Bael and Bellis,[6] while the "goods specialist" will have a hard time in electing Gormley[7] or Oliver,[8] probably ending up with both. And, of course, books on the Court exist in abundance and with a remarkably high level of excellence: Hartley,[9] Lasok,[10] and Schermers,[11] to mention but a few. But a general Community text covering the entire field?

To be sure, there are some fine books around—but none that would really take one sufficiently deeply into the subject matter. Why is this so fifteen years after British and Irish accession? One reason turns on a matter of form. Most of the

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1. KOMMENTAR ZUM EWG-VERTRAG (E. Grabitz ed. 1986).

2. H. VON DER GROEBEN, C. EHLERMANN & J. THIESING, HANDBUCH DES EUROPÄISCHEN RECHTS (1957-).

3. J. MÉGRET, LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE (1970-).

4. E. PENNACCHINI, R. MONACO & C. FERRARI-BRAVO, MANUALE DI DIRITTO COMUNITARIO (1983).

5. FORDHAM CORPORATE LAW INSTITUTE, ANTITRUST AND TRADE POLICIES IN THE EUROPEAN ECONOMIC COMMUNITY AND UNITED STATES (B. Hawk ed. 1974, 1978, 1982-).

6. I. VAN BAEL & J. BELLIS, INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY: EEC ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS (1985).

7. L. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC: THE THEORY AND APPLICATION OF ARTICLES 30-36 OF THE EEC TREATY (1985).

8. P. OLIVER, FREE MOVEMENT OF GOODS IN THE EEC UNDER ARTICLES 30 TO 36 OF THE ROME TREATY (1982).

9. T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EEC (1981).

10. K.P.E. LASOK, THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE (1984).

11. H. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (3d ed. 1983).

Continental texts adopt the established "commentary" format—they cover European Community law through an Article-by-Article analysis. Continental lawyers are accustomed to this format and feel comfortable with it. The Anglo-American tradition, however, has shied away from this type of scholarship—and arguably for good reason.

One such reason is theoretical. The treaties are only partly systematically arranged. A few examples will illustrate this point. The common commercial policy is centered on Article 113 and its immediate "neighbors." But to get a complete picture of this subject, one would also have to consult Articles 228, 238, the Annex dealing with the Associated Territories, and others. As the Court reminded us in the *Rubber Case*,[12] the ambit of the common commercial policy cannot be read in the 1980s in the narrow confines of 1958.[13] Similarly, judicial remedies will be found in the Articles following 164, but to get the full picture one cannot forget, say, Article 93. And finally, intellectual property issues fall, uneasily if excitingly, between Articles 36 and 85.

Practical experience with commentary-type publications of Community law in English seems to support this theoretical unease. Two publications fall into this category. Smit and Herzog[14] is the first that comes to mind. This publication was an early and audacious commentary that appeared very soon after British accession to the Community and followed the Continental style of Article-by-Article treatment. The swiftness of publication, which did not result in a compromise of a high scholarly and technical standard, is an illustration of the spirit of enterprise that the New World continues to demonstrate in comparison to the more sedate pace of British and Irish scholarship. But Smit and Herzog has not been a success. It is not, in my experience, widely used and in any event not nearly as widely used as its Continental brethren. Many would say that its relatively low use is due precisely to the format adopted.

The second work of this style, albeit with different objec-

12. Opinion 1/78, 1979 E.C.R. 2871 (1979).

13. *Id.* at 2873, ¶4.

14. H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY (1976-).

tives, is Simmonds's formidable multi-volume *Encyclopedia of European Community Law*.[15] Although geared in some of its volumes to the United Kingdom user, it is in all other respects a wonderful research aid. It is one of the best sources to follow the evolution of the mass of secondary Community law. Its notes to the Treaty Articles are a model of conciseness and a useful source of recent jurisprudence. The updating is regular and frequent. (The latest update already incorporates in the annotation all the changes effected by the Single European Act[16] — where else will one find such annotation so soon after the Act's adoption?) However, Simmonds deals with *notes* to the Articles and the secondary legislation—not with fully-fledged treatment. This observation is not a criticism, since the *Encyclopedia* serves a different function from that of a treatise; it is not intended as a treatise and in fact it is not one.

In the final analysis, I believe that an Article-by-Article commentary can be very useful—witness the regularity with which one turns to the foreign-language commentaries in one's research. The English speaker has simply not yet had the advantage of a truly accomplished work of this genre. One awaits with high hopes the latest venture—a Continental-style commentary under the general editorship of Dr. A. Barav, to be published in the near future in England.

Returning to the Vaughan work, the overall impression left by this treatise is very satisfying. The texts are concise and usually precise. It is annoying to find only a few references to other secondary literature, but such is the format of *Halsbury's*. The book attains an overall high standard despite occasional weaknesses. But even at its weakest, the standard is high. One would be hard-pressed to find a misleading statement anywhere in the book; if there is criticism, it is where the text does not go far enough.

The *Law of the European Communities* will rarely suffice as a sole source in one's professional or academic research. But it will always be a convenient first place from which to start.

One historical contingency mars the overall picture and merits a word of caution. Work on the volumes was completed before the conclusion and entry into force of the Single Euro-

15. K. SIMMONDS, ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW (1973-).
16. Single European Act, O.J. L 169/1 (1987).

pean Act. The Act has important effects in a variety of areas, not the least in institutional matters, and more importantly, in the area of free movement of goods. There will accordingly have to be some serious revision in the first supplement to this book.

However, in terms of an overall treatise that approaches Community law by subject area, occassionally with real innovation, Vaughan's work is singularly important. No European Community library can afford to be without it.