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Derrick Wyatt & Alan Dashwood, *European Community Law*

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Abstract

Despite the fact that the book's coverage of institutional and administrative EC law is not detailed enough to qualify it as the sole textbook for a general course, Wyatt & Dashwood must continue to form a standard part of any comprehensive reading list in undergraduate and post-graduate courses. However, recourse to Hartley, at least on the recommended list, will still be necessary. Despite this, Wyatt & Dashwood remains an excellent and practical selection for a substantive law course. Yet, Weatherill & Beaumont is more modern in its approach. Their wine has a different bouquet and taste, regarding both its discussion of the literature on EC law and its feel and perception. In the end, given that modernization is the direction in which the wind is blowing for the teaching of EC law in the United Kingdom, Weatherill & Beaumont may be the better choice.

BOOK REVIEW

EUROPEAN COMMUNITY LAW. By Derrick Wyatt & Alan Dashwood; assisted by Anthony Arnall, Aidan Robertson, Malcolm Ross, and Philippa Watson. London: Sweet & Maxwell, 1993, 3d ed. 690 pp. ISBN 0-421-46890-4 cloth. US\$58.00.

*Reviewed by Laurence W. Gormley**

European Community Law ("Wyatt & Dashwood"), the Third Edition of this well-established textbook on European Community ("EC" or "Community") law, has undergone a change in title that reflects the broadening of its scope to embrace institutional law as well as substantive law.¹ As a result, the original two chapters on legal order and the Court of Justice have been expanded into a far more detailed discussion split over five chapters and 159 pages. There has also been an expansion in the substantive law covered, reflecting the development of merger control and the increased importance of EC policy on vocational training. This expansion has been accompanied by some significant rearrangement of chapters and the demise of the chapter on agriculture.²

Wyatt & Dashwood concludes with twenty pages on the Treaty on European Union ("TEU"),³ which had not yet come into force at the time the text was written. As is often the case with EC textbooks, external relations are not covered. This, like the exclusion of agriculture, may perhaps be justified on the

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1. DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* (1st ed. 1980; 2d ed. 1987).

2. Those interested in this important but, as the authors rightly observe, changing area of EC law, will have to look to RENE BARENTS, *THE AGRICULTURAL LAW OF THE EC* (1994) for the most thorough and up-to-date treatment of that subject.

3. Treaty on European Union, Feb. 7, 1992, O.J. C 224/01 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (1992) [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987)).

ground that the typical undergraduate syllabus in EC law does not cover this topic despite the fact that both of these areas deal with central and characteristic questions of fundamental importance outside of their specific contexts. In fact, these areas ought to be covered by the authors in the next edition, provided that the publishers are willing to agree to the necessary expansion of the book.

Chapter 1 provides an historical overview of developments from the background of the foundation of the European Coal and Steel Community to the TEU. Compared to the Second Edition, this chapter has been pruned and perhaps modernized in its approach, providing a clearer discussion of the expansion of the European Community separate from the amendments affecting its internal development.

Chapter 2 turns to the institutions of the European Communities and of the European Union. This elegantly written overview explains in clear terms the workings of the now five EC institutions: the European Court of Justice, the Council, the Commission, the European Parliament, and the Court of Auditors.⁴ It provides a helpful explanation of the role of the European Council and its development, characterizing that body as the highest political authority of the Communities and of the future Union.

In the section dealing with the European Council, the authors point out that there is a clear legal distinction between the European Council, as defined by Article D of the TEU,⁵ and the Council "meeting in the composition of the Heads of State or of Government," as provided in Article 109j(2)⁶ and 109j(4)⁷ of the EC Treaty. As the authors rightly observe, the distinction is not merely a matter of legal form. Rather, it is also a matter of composition, with the President of the Commission being a member of the European Council, but not, of course, a member of the

4. In the overview, the authors should have noted that the designation of the Court of Auditors as an institution means that body now has general *locus standi* under Article 175 of the EC Treaty to bring actions against the European Parliament, the Council, or the Commission for failure to act. Treaty Establishing the European Community, Feb. 7, 1992, art. 175, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* TEU, *supra* note 3.

5. TEU, *supra* note 3, art. D.

6. EC Treaty, *supra* note 4, art. 109j(2).

7. *Id.* art. 109j(4).

Council, even though he or she and/or one of the members of the Commission is present at all Council meetings.

Wyatt & Dashwood's implicit view that the existence of the European Council does not distort the institutional structure of the Communities is certainly far from universally shared.⁸ This is because the Commission, despite its independence, cannot operate effectively in political isolation from the broad support of the Member States. Thus, the authors' observation that recent experience shows that a strongly led Commission will be better able to achieve its medium term objectives through working in close partnership with the European Council has considerable force. In fact, the contrast between the Commissions led by Thorn and Delors could not be greater, the latter being in grand Presidential style.⁹

Chapter 2 is a trifle dismissive of the Commission's right of initiative. Perhaps this is the result of the fact that Dashwood was a Director in the Legal Service of the Council at the time he wrote the book. In the Chapter 3 discussion of the Commission's right to alter or withdraw its proposal, Dashwood's Council background is further evidenced by the relatively narrow view he provides of the Commission's right to withdraw a proposal, and the relatively low-key treatment given to the Parliament's role in the legislative process.¹⁰ Dashwood also emphatically takes the view that the Commission has no right to withdraw a proposal after the Council has adopted a common position under the cooperation procedure, although acceptance of that view depends on the adoption of the common position being taken as an action by the Council for the purposes of what is now Article 189a(2).¹¹ Dashwood's view is perhaps not wholly beyond question, as is apparent from the wording of Article

8. See P.J.G. KAPTEYN & PIETER VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 107-08 (2d ed. 1989).

9. If the Commission operates more as a team structure under Jacques Santer, the newly-elected President of the Commission, it will be interesting to see whether the achievement of medium-term objectives can be as effectively assured as under strong Commission leadership.

10. In fairness, the Reviewer would like to point out that he worked for the Commission prior to taking up his present appointments.

11. EC Treaty, *supra* note 4, art. 189a(2). "As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act." *Id.*

189a(2) itself, which leaves room for the view that action by the Council means the adoption of a Community act.

Next, the difficulties posed by the new co-decision procedure, in relation to the role of the Commission, are highlighted. If the conciliation phase is reached, Dashwood views the Commission's proposal as becoming irrelevant. That is, the Council will act unilaterally on the basis of the common position subject to a veto by the European Parliament, or the Parliament and the Council will act together on the basis of the text agreed upon by the conciliation committee. Dashwood's institutional chapters demonstrate the hand of one who has been deeply involved in the practicalities of decision-making and his account is both elegant and informative. He is not afraid to take positions on controversies and his lively account whets the appetite for more.

In Chapter 4, *Wyatt & Dashwood* examines the EC legal order. The book provides a relatively extensive discussion of the direct effect of directives and the liability of the Member States for damages for breach of EC law. In both cases, the discussion is elegant, effective, and well-reasoned. The chapter concludes with a helpful discussion of general principles of EC law.

Chapters 5 and 6, written by Anthony Arnall, deal with the Court of Justice and the Court of First Instance, respectively. Arnall condones the practice of the delivery of a single judgment, although he notes that the single judgment "may perhaps have the look of a 'committee' document, lacking in elegance and occasionally even in coherence."¹² This is an observation that recalls the definition of a camel as a horse designed by a committee. Given the paucity of the reasoning in some recent judgments, it will be interesting to see how long the facade of a single judgment can or even should be maintained.

The largest part of this book is, as might be expected, devoted to substantive law. A casualty of the expansion of the scope has been the Second Edition chapter on the aims of the common market.¹³ This is unfortunate because that chapter did provide a valuable view of the common market by placing this important aspect of EC activity in an international setting. To some extent, this casualty is repaired by Chapter 12, an ex-

12. DERRICK WYATT & ALAN DASHWOOD, *EUROPEAN COMMUNITY LAW* 109 (3d ed. 1993) [hereinafter *EUROPEAN COMMUNITY LAW*].

13. This was Chapter 2 in the second edition.

tremely helpful chapter on the completion of the internal market. In this chapter, Dashwood takes a balanced view, particularly on the delicate question of the legal effects of what is now Article 7a of the EC Treaty.¹⁴ However, he sideswipes at the Commission surface, particularly in relation to the legal basis for company law proposals.

Chapter 7 discusses customs duties and discriminatory internal taxation. It introduces its subject by emphasizing the distinction between a customs union and a common market and explaining the concept of goods originating in the Member States. The treatment of EC transit is perhaps less satisfactory. Furthermore, the authors make no reference to the Community Customs Code and the changes resulting from the abolition of systematic frontier controls on goods crossing the Community's internal frontiers. On the other hand, the authors' treatment of discriminatory taxation on imports and exports, a subject that is not always conceptually certain, is helpful and thought-provoking.

In Chapter 8, the treatment of quantitative restrictions on imports and exports and measures having equivalent effect has been strengthened and substantially rewritten in light of the case law of the Court of Justice (the "Court"). To the authors' credit, this improvement has been effected despite the fact that this case law is often incoherent. However, it is somewhat surprising that the starting point is still Directive 70/50,¹⁵ a measure that does not bind the Court¹⁶ and is referred to by the Commission merely to demonstrate a long-standing view. Despite this, the resulting discussion is clear and helpful. It must be noted that the author's proposition that prior to the judgment in *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*¹⁷ ("Cassis de Dijon") it was generally assumed that discrimination was a necessary element in establishing a measure having equivalent effect is insupportable. That proposition, never generally accepted, was advanced by the German school of writers and demonstrated to

14. EC Treaty, *supra* note 4, art. 7a.

15. Commission Directive No. 70/50, 13 J.O. 29 (1970), O.J. Eng. Spec. Ed. 1970, at 17.

16. See LAURENCE W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 12, 279 n.58 (North Holland, Amsterdam 1985) (providing convenient summary of how Directive 70/50 does not bind Court).

17. Case 120/78, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

be misconceived by the Dutch and Belgian school.¹⁸

Wyatt's discussion of the only instance of discrimination being a necessary criterion as opposed to a sufficient criterion glosses over the fact that Article 30 of the EC Treaty, as interpreted by the Court, is centered on an effects doctrine. Alternatively, it can be analyzed in terms of competence. In fact, a parallel with the approach to the public policy regarding the free movement of persons may be found. In that area, the Court still considers the ambit of public policy to be a national matter while simultaneously restricting the use of public policy as a ground for expulsion. So too, the Court accepts the competence of the Member States to regulate prices, but restricts the manner in which this regulation may be exercised in so far as foreign products are affected.¹⁹ Ultimately, Wyatt's lively treatment of the incoherent approach of the Court will certainly stimulate discussion. With respect to this subject, it would have been helpful to students if the authors had provided more references to the specialist literature.

The treatment in Chapter 9 of the free movement of workers is well-organized and clear. However, more attention could have been given to the 1990 package of directives that bestow rights of residence upon individuals, and the Court's action in maintaining the effects of the directive on the right of residence of students,²⁰ which was annulled until the adoption of a new directive on the correct legal basis. It was also surprising not to find any criticism of the Court's indefensible approach in *Groener v. Minister for Education*.²¹ Moreover, the explanation of permissible differentiation relating to penalties for failure to possess a valid passport or identity card issued by the Member State of origin, when the document under which the person originally entered the host Member State expires, is distinctly less nuanced than the judgment of the Court in *Sagulo*.²² In that case, the message to the national court to use its discretion impliedly in the direction of the lower end of the scale was clear.

In Chapter 10, the subject turns to the right of establishment and the freedom to provide services, with emphasis on the

18. See GORMLEY, *supra* note 16, at 8-19 (providing summarized discussion).

19. *Id.* at 26-33, 73-85.

20. Council Directive No. 90/366/EEC, O.J. L 180/30 (1990).

21. Case 379/87, [1989] 5 E.C.R. 3967, [1990] 1 C.M.L.R. 401.

22. Case 8/77, [1977] E.C.R. 1495, [1977] 2 C.M.L.R. 585.

former. Once again, the discussion is lively and practical. Furthermore, considerable attention is given to the more complex aspects of these two subjects. The discussion of the freedom to provide services, however, should have explained the Court's approach to home state control and host state control and the balancing that has characterized much of the case law in this field. In addition, the question of the relationship between goods and services could have been explored in some depth.

Chapter 11, written by Philippa Watson, provides an eminently clear and helpful analysis of social security for migrant workers. This is an area in which EC legislation coordinates, as opposed to harmonizes, national legislation. The chapter's approach is extremely practical and it combines lucid explanations with considerable discussion of the difficulties resulting from the Court's case law in this area.

Chapters 13 through 19 deal with various aspects of EC competition law and practice. Chapter 13 introduces the rules on competition, chapter 14 discusses the rules on restrictive practices, and Chapter 16 addresses the rules on the application of Articles 85 and 86. These chapters are written by Aidan Robertson. Chapter 15, dealing with abuse of a dominant position, and Chapters 17, 18, and 19, dealing with merger control, state aids, and public undertakings, are written by Malcolm Ross.

After the general introduction in Chapter 13, in which the sources and scope of EC competition law are discussed, including the still sensitive problem of extraterritoriality, Robertson sets out the scheme of Article 85 in a helpful manner. Robertson leads readers into the controversial areas of the subject and gives them an idea of its practical application, though in a style somewhat more formal than the style adopted in the rest of the book. His treatment makes copious references to academic discussions and to decided cases and Commission decisions, demonstrating that this book will be of value to practitioners and teachers, as well as students. Furthermore, his discussion of the inconsistencies within the approaches of the Court and the Commission is a valuable pointer through the maze. Finally, his examination of the block exemption regulations is somewhat black-letter and therefore stands out from the conceptual nature of the rest of Chapter 14. Such a black-letter approach is perhaps inevitable given the limited amount of space available.

Chapter 16, which addresses the application of Articles 85 and 86, examines the procedure before the Commission, gives a brief examination of review by the Court of First Instance, against whose judgment appeal lies on points of law only to the Court of Justice, and discusses the relationship between EC and national competition law. It also discusses the application of EC competition law by national courts. Malcolm Ross's revision of the chapter on Article 86 maintains the elegance of the treatment in the Second Edition, taking account of the often controversial approaches of the Commission and the Court.

Chapter 17, which is new and also written by Ross, provides a critical account of merger control practice, although it is surprising not to find a reference to Jones & González-Díaz's book.²³ Ross does not leave readers in doubt about the political and economic dimension of merger control with his prophecy that merger control regulation may "prove the catalyst for important developments in refining the proper scope of the Commission's powers as a legal and political animal and the extent of individual protection."²⁴

The political dimension, in particular the political relevance of economic and social cohesion considerations, jumps from the pages of Ross's revision of Chapter 19 on state aids. This chapter is extremely clear and provides a refreshing treatment of what is not always a clearly understood or even demarcated area of EC law. Furthermore, Ross's revision of Chapter 19 on public undertakings notes the grey areas unanswered in the Court's case law, an area of the law that is presently developing in a dynamic way. Meanwhile, readers may be mystified by note 34 on page 554 to a contribution by Mathijsen, as the reference was inadvertently omitted. As consultation of the Second Edition demonstrates, the reference is to Mathijsen's contribution to Volume 2 of the F.I.D.E. 1978 Conference Reports, at the pages cited.

Wyatt and Robertson's treatment of intellectual property in Chapter 20 examines yet another area of steady development and controversy in a manner that pays the necessary attention to detail and yet retains Wyatt's great lucidity of style. Chapter 21, written by Phillipa Watson, competently discusses sex discrimina-

23. CHRISTOPHER JONES & ENRIQUE GONZALES-DIAZ, *THE EEC MERGER REGULATION* (Sweet & Maxwell, London 1992).

24. *EUROPEAN COMMUNITY LAW*, *supra* note 12, at 518.

tion while delivering a noticeable political message. Chapter 22, also written by Watson, addresses vocational training, a new area of EC law. For the most part, Chapters 21 and 22 are dominated by a black-letter approach. In the next edition, a more conceptual look at EC social policy might be useful. A closer examination of social policy would be particularly pertinent in light of the fact that this is an area in which the United Kingdom has been notoriously stand-offish in the Thatcher and Major years. It is important that the U.K. readers, at whom this book is clearly aimed, become more aware of this dimension of EC law. Finally, the book concludes in Chapter 23 with a very brief introduction to the Treaty on European Union, which was not yet certain to enter into force at the time the book was published.

A major strength of *Wyatt & Dashwood* has always been its lucidity. This merit is continued and even improved in the Third Edition, despite the fact that such improvement is always a difficult task when a team of writers is involved. Thus, reviewing *Wyatt & Dashwood* is like revisiting a wine first tasted early to check its progress (and already much loved) and returning to decide whether the wine should be served at dinner. Similarly, it is like tasting a new vintage while having fond memories of an older one. The "wine-makers" certainly have not lost their touch. The "wine" is sure, velvety, and deep, although the wine-making method may now appear a shade traditional. In fact, at times, the approach seems a shade too conservative, though it does not shrink from controversy; perhaps at times the authors nod in the direction of the Member States' desires as opposed to the more *communautaire* interpretation. Overall, if this Reviewer dares say so, the book's approach is very English. Perhaps this is because the authors were mindful of English perspectives. This Reviewer, however, may now be showing signs of a continental perspective!

It is worth noting that due to the recent emergence of many other texts on the Community, the stakes for the student reader market have never been higher.²⁵ *Wyatt & Dashwood* and *Weatherill & Beaumont*²⁶ are firmly at the head of the list of au-

25. The Reviewer believes that many of these new texts are less ambitious and certainly not better than *Wyatt & Dashwood*. However, because several of them were published after the TEU entered into force, they take fuller account of the revisions implemented by the TEU.

26. STEPHEN WEATHERILL & PAUL BEAUMONT, *EC LAW* (1993).

thoritative general EC law textbooks, written solely by lawyers from common law countries. However, if *Wyatt & Dashwood* is in fact to be used widely, a Fourth Edition, which takes full account of the TEU and looks more conceptually at the activities of the Community, is essential.

Given the pace of expected change, including the enlargement of the Community in 1995 and the Intergovernmental Conference scheduled for 1996, writing textbooks on EC law increasingly resembles taking pot luck. A reader finds good insights, very good insights, and sharp theoretical and practical perceptions in *Wyatt & Dashwood*. Furthermore, the quality of the writing is on the whole outstanding.

Despite the fact that the book's coverage of institutional and administrative EC law is not detailed enough to qualify it as the sole textbook for a general course, *Wyatt & Dashwood* must continue to form a standard part of any comprehensive reading list in undergraduate and postgraduate courses. However, recourse to Hartley,²⁷ at least on the recommended list, will still be necessary. Despite this, *Wyatt & Dashwood* remains an excellent and practical selection for a substantive law course.

Yet, *Weatherill & Beaumont* is more modern in its approach. Their wine has a different bouquet and taste, regarding both its discussion of the literature on EC law and its feel and perception. In the end, given that modernization is the direction in which the wind is blowing for the teaching of EC law in the United Kingdom, *Weatherill & Beaumont* may be the better choice.

27. TREVOR HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (3d ed. 1994).