European Antitrust Policy

by DR. HANS B. THORELLI

In November 1958, Dr. Hans B. Thorelli, Research Consultant to the General Electric Company, gave a series of three lectures at the Law School on the subject of European Antitrust Policy. The first of these lectures, dealing with the socio-economic and political background against which recent European efforts to control monopolistic phenomena should be viewed, is presented below. The second lecture, which was concerned with a comparative survey and analysis of current national policies, is published in Volume 62, Number 2, of The University of Chicago Law Review. The final lecture, which treats of European participation in international efforts to control restrictive business practices and deals primarily with the Coal and Steel and European Economic Communities, appears also in this issue of the Record, beginning on page 19.

I. THE CARTELIZATION OF EUROPE, 1914-1945

It would seem that in recent years government and business relations in general and public monopoly control policies in particular have been moving in increasingly similar directions in the United States and Europe. Indeed, individual policies in individual European countries frequently have a striking affinity with corresponding policies here. But there are still basic differences on many points, and behind superficial similarity one will often find principal differences of economic and social philosophy, which are subject only to secular change. Thus, if we want to avoid being misled by apparent similarity in form, if we want to learn something by comparative study, if we are interested in the possibilities of international cooperation in this field, and, indeed, if we want to study law as an expression of public policy rather than as a mere body of rules and cases, we are per force obliged to start out with a review of economic organization and its social and political environment, at least during the period immediately preceding the present one. For reasons continued on page 2

Levy Mayer

by FRANK D. MAYER, JD’23

The paper which follows was delivered by Mr. Mayer at the invitation of the Law School on February 17, 1959. It is the latest in the School’s series on distinguished Chicago lawyers.

People often forget that post-Civil War midwesterners met and overcame in scarcely a lifetime three great problems, which in Europe came to the fore gradually over a number of centuries. The first was to build part of a unified nation out of an almost virgin continent, the second was to endow their towns and cities with modern machinery of production and communication and, third, midwesterners had to develop and modify their systems of law and government to meet the changing business and industrial conditions while they were tackling the first two problems.

In that tumultuous and fast-moving era, lawyers like Silas Strawn, John P. Wilson, S. S. Gregory, Horace Tenney, Levy Mayer and others helped to lift Chicago from a frontier swamp town which was merely the center of an agricultural area to today’s industrial metropolis of the midwest and one of the great cities of the world. In so doing they helped usher in what has been called the new Industrial Era.

Levy Mayer was born of revolution and fierce times. His parents, Clara and Henry Mayer, had fled their little village in Bavaria, Germany, in the aftermath of the 1848 upheavals. The Mayers settled in Richmond, Virginia, where Levy Mayer was born October 23, 1858, the sixth of 13 children. There the immigrant family was soon caught up in the ferment of the Civil War. Finding security in Richmond illusory, in 1863 Henry Mayer moved his family to Chicago, then a town of less than 300,000. (Had this somewhat dangerous migration to Chicago not occurred, you might be sleeping comfortably in your respective beds instead of drowsing here.) In Chicago he set up a small business in furnishings, tobacco and other merchandise on continued on page 3
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which I hope will become apparent I think this period extends from World War I to 1945. If we want to put a name on this period we might label it "the cartelization of Europe."

1. Origins and Growth of Cartelization

The movement towards the liberalization of trade and economic activity in Europe that we often date back to Adam Smith had its culmination around 1900. Indeed, in Britain itself the liberalization from restrictions on trade, private or public, had actually culminated two or three decades earlier. Taking Europe as a whole we may perhaps say that economic liberalism held its own between 1900 and World War I.

A. Origins: War.

War is reckless with civil and economic liberties alike. The direction of all resources towards the single, common and unambiguous goal of national survival called for by war — rather than towards a multitude of known and unknown consumer wants and needs that we associate with peacetime — makes cooperation and regulation, rather than competition and freedom of entry and access, not only natural but also imperative. From the point of view of free enterprise and competition another pertinent aspect of international conflict is that wartime regulations and restrictions — and again I am thinking of public as well as private restraints — tend to linger on. Indeed, such measures may often be introduced well in advance of war by nations bent on aggression, which in turn may call forth similar behavior in nations which feel threatened.

To a certain extent, therefore, the wanderings of European economies between 1914 and 1945 are in large part attributable to the dislocations of war or preparation for conflict. In the United States the rapid reconversion to a peacetime free economy after 1918 contrasts vividly against the lingering ideas of control and order in Europe. But even in this country the war left its mark on the economic climate, on the outlook of businessmen. This quotation is an eloquent example:

In line with the principle of united action and cooperation, hundreds of trades were organized for the first time into national associations, each responsible in a real sense for its multitude of component companies, and they were organized on the suggestion and under the supervision of the government. Practices looking to efficiency in production, price control, conservation, control in quantity of production, etc., were inaugurated everywhere. Many businessmen have experienced during the war, for the first time in their careers, the tremendous advantages, both to themselves and to the general public, of combination, of cooperation and common action, with their natural competitors.

This statement from 1921, was made not by some director of a German cartel but by Bernard M. Baruch, former chairman of the United States War Industries Board. While few would claim that Mr. Baruch's statement is representative of the general outlook of American businessmen — or perhaps even of Mr. Baruch — this type of thinking was gaining widespread acceptance in Europe.


The economic dislocations of the first World War on the European continent were severe, as manifested by general postwar depression followed by runaway inflation in Germany. Not until the mid-twenties was Europe firmly on its way back to a more liberal economy. The prime factor in this movement was neither a particularly individualistic philosophy nor, certainly, public antimonopoly policy, but rather the resurgence of free, multilateral world trade. This was an especially important factor in the restoration of competitive conditions in the smaller nations of Europe, which are drastically dependent upon international economic intercourse. But the fruits of renewed economic development were never to be fully reaped before the next great dislocation.

C. Origins: Depression.

This dislocation, of course, was the Great Depression, which you might say caused Europe's economies to rock 'n' roll. Unfortunately, depressions have turned out to constitute a threat to economic freedom analogous to that posed by war. Small wonder, then, that such ideas as the self-government of industry and the governmental planning of economic activity on a grand scale and in much greater detail than at any time since mercantilism came increasingly to the fore. Trade associations and cartels had been growing in number and power during the twenties, but they were now further strengthened and expanded under governmental auspices, and, indeed, frequently given a quasi-public status.


Several observers have pointed out the fact that the ideas of free enterprise and a competitive economy thrive best in an atmosphere of expansionism, such as has traditionally prevailed in the United States. But the climate in Europe in interwar years was different, affected by a growing realization that while it might be genuinely doubted whether Britain and France really were the two victors of World War I, it could hardly be doubted that Europe as an entity emerged as a loser. The decline of Europe in world affairs was a topic of discussion frequently associated with ideas of economic stagnationism and maturism. The epoch-making step taken by Britain in 1932, when she introduced a sizable general tariff with provisions for imperial preference, may be taken as an expression of this kind of thinking. In a nutshell the idea was to hang on to what you have got by artificial means.

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E. Origins: Autarky.

Economic nationalism has proved another breeding ground of cartelization. Reborn in the years of depression when nations surrounded themselves with tariff walls to seek protection from outside competition, the force of economic nationalism was multiplied a thousandfold with the rise to power of Nazism in Germany. Autarky, the ideal of national self-sufficiency in a planned economy, gained increased adherence. The corporate state emerged in which each sector of the economy was governed by cartels or similar organizations. In but a few years' time a pattern of regimentation and preparation for war was directly or indirectly imposed upon most continental nations by the totalitarian states.

F. The Thirties: Decade of National and International Cartels.

While the Nazis made dreadful use of the German cartels and stimulated the formation of many new ones, it must be emphasized that totalitarianism is no necessary prerequisite to the growth of cartels. This is illustrated by the case of Britain, where cartel-type trade associations had been gaining increasing sway ever since around the turn of the century. During the thirties English and German industrialists engaged in a hectic race to cartelize the markets of their countries ever more effectively. Not unnaturally, other countries tried to emulate these two bellwether nations. This process also witnessed the emergence of a super-structure of international cartels in which, incidentally, American firms were often silent but certainly not always sleeping partners. By 1939 the leaders of British and German industry were finally ready to eliminate competition between rival firms in the two countries. At a meeting in Düsseldorf of the British and German Federations of Industries a kind of super-cartel agreement was negotiated to this end. It would have extended a system of economic government and spheres of interest in the markets of the world much as national states have bargained about territories and political sovereignty. Only the outbreak of war prevented the agreement from coming to effect.

While at first the bargaining between the leaders of British and German industry on the eve of war may seem shocking, it really is not. As Walton Hamilton eloquently explains in his book on the politics of industry, large-scale economic organization knows no artificial nationalist barriers. Economic forces tend to transcend political barriers. Indeed, businessmen have often been more stalwart believers in international cooperation and the sanctity of international agreements than governments themselves.

The practices engaged in by this flora of cartels were quite varied. They ranged all the way from price fixing, via output restriction or restriction of entry by boycotts and stop-lists, and division of territories and markets, to joint selling agencies. Many agreements comprised several or all these practices, reducing individual managements to the status of mere executors of the collective will of the industry. In some industries concentration proceeded further by amalgamation and merger, such as illustrated by the ICI and the IG Farben empires, or the combines in the German iron and steel industry. General statistics of the movement are relatively meaningless, as it comprised such diverse units as rings of plumbers or barbers in many a European Podunk on the one hand and the famous so-called "as-is" agreement among the largest petroleum companies of the world on the other. That the movement at the time of the outbreak of the war was well on its way of resurrecting a new mercantilism in Europe cannot, however, be doubted.

Whether cartels are typically born during depressions or in times of prosperity is a debatable question. The experience of Europe in the 1930s does not resolve the issue, as the principal reason for the enormous expansion of cartels was the active government support they received in various forms in both Britain and Germany. It is perhaps idle to speculate on what would have happened if the movement had been allowed to run its course undisturbed by war. It is not entirely impossible that by 1950 or 60 it would have led to the complete ossification of European economic life.

G. World War II: Cartels Unlimited.

World War II at once brought the climactic realization of the cartelization idea and the seeds of reaction against it. Collective restraints of trade had greater sway in Europe than ever. Even governments that had previously been lukewarm to cartelization—like that of Sweden, for example—in the exigencies of the situation seized upon compulsory cartelization as the organizational means of enforcing rationing, licensing and national economic planning. For six years, under the auspices of public mobilization agencies, war production boards and import-export regulations, cartels completely dominated the economies of Europe.

It is no wonder, therefore, that rightly or wrongly cartels came to be associated in the public mind with the economics of scarcity and regimentation. Thus, when after the war the emphasis came to be on reconstruction and economic growth, and governments gradually eased other restrictions on economic activity, the idea began to gain momentum that many of the collective restraints imposed by private parties were really hampering the forces of progress. The ground was prepared for a revamping of public policy in re-
loration to monopolistic practices in many European nations and, at least tentatively, even in the international field. To this subject we address ourselves in two other articles.

2. The Climate of Opinion.

After this exposition of the origins in economic history of the widespread cartelization in Europe in the interwar and wartime periods, let us briefly consider the climate of public opinion in which this movement took place. And in so doing, let us remember that we will be guilty of some gross generalizations, that there were considerable nuances in outlook among different nations, and sometimes rather wide divergences of view within such groups as business, labor and the political parties, groups which will here be treated as homogeneous.

A. Business, Labor and Consumer Groups.
   a. The European Business Creed.

Long before most of the members of the rapidly proliferating tribe of American sociologists became irretrievably enchanted by the gospel of cooperation, cooperation had become an honor word among the industrialists and tradesmen of Europe. The businessmen of that corner of the world were on the defensive, their watchword being: let us hang on to what we have got, and let us divide it equitably among us. In most nations industrial markets were small enough for all competitors to know each other in person, and the getting together seemed natural. Meanwhile, back at the ranch, farmers abandoning old-fashioned individualism, embarked on the trek of collective action. Of course, old-fashioned gouging of the consumer was a motive in some instances, as was the sheer hunger for power over fellow men in others. But, by and large, the chief reasons for cartelization, as well as attempts at single-firm concentrations, ostensibly were the stabilization and rationalization of industry and trade. Unfortunately, stabilization often meant maintenance of high and level prices, which in periods of economic dislocation would tend to cause unstabilization of employment; that is, cartelized industries simply pushed their problems over on other branches of the economy. Not infrequently stabilization was also invoked to justify collective resistance to technological change. An Alec Guinness movie some years ago, "The Man in the White Suit" typifies what I mean.

Rationalization of a short-term character was certainly achieved by many cartels and monopolies. When the Swedish cement industry was consolidated into one combine it pointed with pride to the fact that no longer was a ton of that commodity cross-hauled, and German and British steelmen gained wide credence in claiming to have eliminated duplication of effort and other wastes of competition thanks to their national and international cartels. The possible, or even likely, reduction of incentives towards long-term improvements of technical and commercial efficiency was largely shrugged off. German industrialists, especially, would claim that "Rationalisierungs-kartelle" represented nothing more nor less than a natural extension of the principles of "scientific management" from the firm to the industry level.

To gain further legitimation of concerted action businessmen invoked several philosophical skyhooks. These may be represented here by such concepts as the "self-government of industry," "freedom of association," "freedom of contract" and of course the sacred right of private property.
Let the economy be run by experts, that is, by business leaders, rather than by that crude regulator of markets called competition! Let freedom of association be used until there is nothing more to associate! Freedom of contract is more important than freedom of trade! Not to recognize this would be tantamount to an intolerable infringement of the right of every man to make whatever disposition with regard to his private property he may wish.

Given this kind of outlook, and given the emergence of left-wing political movements in Europe, it is not surprising to find that the whole notion of Free Enterprise, so energetically propounded by business leaders on both sides of the Atlantic, took on a meaning over there vastly different from that originally given to it in this country. In a nutshell, in Europe Free Enterprise came to stand for freedom from government interference or regulation, while its traditional meaning here, of course, is that enterprise is free when it is competitive. In some respects this difference is on the same order as that between black and white.

We may note in passing that in instances where governments were dominated by elements sympathetic to business, their concepts of Free Enterprise did not prevent European industrialists from...
invoking government aid for the enforcement and elaboration of their own regulatory schemes. Business stood for regulation of business—by business.

b. The House of Labor

The House of Labor, on the other hand, had been conquered by a brand of socialism which as yet had not emancipated to any remarkable degree from the somewhat stuffy doctrines of Karl Marx. Thus, cartels and monopolies were viewed on the one hand as embodying all the vicious evils of capitalism, and on the other as making the economy ripe for socialists, in fact facilitating the "expropriation of the expropriators." And while the monopolist was a scoundrel in charging high prices, many a workingman believed, rightly or wrongly, that stability of employment could only be achieved under the wings of large combines. In fairness it must also be added that a number of European unions found it advantageous to enter into collusion with employers at the cost of consumers.

It is sometimes said that American labor takes an ambiguous view of the monopoly problem. This may be true of later years, but traditionally the antimonopoly current ran stronger among American workingmen than among any workers abroad. The outlook of European labor in the decades between the World Wars was also ambiguous; indeed the European ambiguity was much more pronounced than it has ever been here, due to the heavy Marxist influence.

c. Consumers

In Germany and the Southern European countries consumers as a group might well have been labeled the Hidden Non-Persuaders during the period under review. As in the United States they were largely unorganized and seemed to have no effective or independent representation. While this may not have mattered too much in this country where competition was still the rule rather than the exception in business, it was indeed a serious deficiency in nations where business was becoming hell-bent on collective action.

In Britain and Scandinavia consumers cooperatives actually did break cartel arrangements in several industries, such as oleomargarine and lamp bulbs, and they were certainly a vital element in keeping retail trade from becoming completely ossified as in France. The coops were also fairly effective as legislative lobbying groups. Nevertheless, we are probably justified in saying that by and large consumer views and consumer interests were not very well crystalized, articulated or represented in Europe before the end of World War II.

B. Political Parties.

In the political arena there was typically a fairly close relationship between business interests and conservative parties, and a very close affinity between labor unions and socialist parties. Conservatives tended to emphasize order, organic structure and stability, and so tended to look upon cartelization with favor. Holding expertise in high regard it was natural for them to conclude that businessmen know best about business, and that if cartels be the medicine they prescribed it must be a good one. Socialists, too, wanted order and stability, but under strong government direction. Distrusting the unselfishness of business they could tolerate cartels and monopolies only as instruments of government policy or as transitional forms on the road to nationalization. Liberals, representing the lost generation, suffered heavy declines in their ranks and influence in the councils of prewar Europe. No doubt many of them felt uneasy about organized restrictions on competition and artificial obstacles preventing the citizen from freely engaging in any trade or calling of his own choosing. But a majority of them would tend to shrug off the whole matter as one of rather little consequence, maintaining that in the end competitive forces could be relied on to sweep any unreasonable restraints to the side. At the other extreme, nazism and fascism found cartels and syndicates of various types convenient means of governing the economy and of mobilization planning. Also, acceptance of cartels and combines was sometimes the price totalitarian regimes had to pay to gain business support or toleration.

C. Economics Profession.

Due to its prominent role in public life in many European countries mention should finally also be made of the economics profession. Professional economists of different schools were becoming increasingly infatuated with what might be called the economics of tinkering, which held that orderly planning and regulatory measures were preferable to spontaneous development, and which incidentally also promised to make the life of economists more interesting and, sometimes, financially rewarding.

D. Public Opinion Summarized.

Summing up our observations on public opinion in Europe between 1914 and 1945 we may say that there was a strong current in the direction away from belief in the salutary effects of free and open competition and towards increased reliance on direct regulation of business. This was generally true whether in a
particular nation at any particular time conservatives, socialists or nazis were in power. They all stood for regulation—and so did business. The problem was essentially one of power: who was to regulate whom, and how much?

3. Approaches to Policy.
A. Background: Roman Law, Law of Contracts, Auxiliary Restrictions, Unfair Competition, Patents.

Before proceeding to a brief discussion of the translation of public opinion into public policy as reflected in cartel and monopoly control legislation before World War II, a few words concerning the background of such legislation in general European legal systems are in order. With the exception of the British, all European legal systems have their basis in, or have been very heavily influenced by, Roman Law. This means that we find a bias in favor of statutory rather than case law. It also means an almost fanatical respect for the sanctity of contracts, a principle from which lawmakers have been making exceptions only with great reluctance. However, with regard to auxiliary contracts in restraint of trade, and principally obligations not to compete appended to contracts of sale of a business or in connection with the termination of employment, rules as to the invalidation or modification of unduly far-reaching limitations on individual freedom quite similar to those in force in the United States have been adopted in most countries.

Of old, too, freedom of contract has been limited in all countries by legislation against unfair competition. By American standards this legislation was traditionally of a very special character, directed only against certain clearly immoral methods, such as misleading advertising, undue disclosure of trade secrets, bribery, and unfair use of brands and trademarks. The purpose of these laws was originally to guarantee the maintenance of a minimum level of business honesty and decency, and they were not as such directed against monopolistic tendencies. The Federal Trade Commission Act, and some of the other legislation administered by the FTC, on the other hand, frequently embraces the dualistic purpose of maintaining both honesty and competition. It is interesting to note that as European nations in recent years have adopted more far-reaching monopoly control legislation there has been a certain tendency to integrate and commingle unfair practices and antimonopoly laws, much as in this country. The wisdom of this I think is debatable, but that is a question which would deserve separate treatment.

All West European nations, of course, have patent legislation. Generally speaking, there has been a marked reluctance to reduce the scope of the patent privilege. Patents have been freely used as the mainspring of price, market sharing and other cartel arrangements. On the other hand, most of these countries have compulsory licensing provisions in cases of non-use of patents. In the first wave of European antimonopoly legislation after World War II the problem of drawing a borderline between the patent right itself and its use as a device to control entire branches of industry tended not to be recognized. In 1949 the writer urged on the personnel of the Swedish Cartel Registration Bureau that the 1946 cartel registration law in the absence of provisions to the contrary should be construed as including cartels based on patents, but they took the view that as restrictive patent agreements had not been explicitly included such a construction would constitute an unwarranted violation of the privileges of patentees. On the other hand, we must remember that it took the courts several decades of painful effort to clear up the border zone between the patent and antitrust laws of the United States. And in the most recent European monopoly control statutes this problem is gradually being recognized.

B. National Policies.

While there is no time to go into the details of any nation's legislation before 1945, we should at least stop to remind ourselves of England as the cradle of open markets and free trade ideas. These were concepts which reflected themselves in the ancient statutes against forstalling, regrating and engrossing, and, later, in the common law doctrines against restraints of trade and conspiracies to monopolize. On these latter doctrines, as locally interpreted during the 19th century, squarely rests the Sherman Antitrust Act of 1890.
Even by that date, however, the common law on restraints of trade and monopoly had well begun its long-term decline in Britain, in response to new social and economic values. By the time of World War I these doctrines had already lost their punch and fallen into disuse in that country. Recent legislation in Britain, therefore, has had virtually no tradition to build upon—a rather unusual situation in the Old Country!

Considering the climate of economic development and opinion prevailing in Europe during and between the World Wars, there is clearly no reason to expect to find radical antimonopoly legislation. If we divide the approaches to public policy in the field then current into a few broad categories, and then rank them according to popularity among European governments, we may come up with a list such as the following:

1. governmental indifference
2. scatter regulation
3. compulsory cartelization
4. publicity
5. prohibitory legislation

Keep in mind that these categories shade into each other, and also that a given country often subscribed to several of these approaches at different times, or even at any given point of time. Remember, too, that few European lawmakers lost any sleep over single-firm monopolies, and that hence policy in this field was concerned almost exclusively with cartels or specific trade practices, that is, indifference or scattered regulation. With these reservations you could place Britain, France, Sweden, Finland, and most East European countries in the first one or two categories. Germany, Italy and the Low Countries focused around compulsory cartelization, which to some extent was also practiced by the Norwegians. Publicity was tried by Norway and Denmark. No nation based its approach squarely on the principle of prohibition, but stray provisions against certain types of boycotts, refusal to sell and a few other practices considered undesirable could be found in several countries.

American students of public policy who have largely received their training in postwar years might well express some degree of bewilderment at the ways in which European nations handled the problems of economic organization in the period we have reviewed. Such bewilderment would be particularly natural in view of the markedly more aggressive policies of these countries during the last decade. Just to set our perspective straight, then, it may be well to remind ourselves that the 1920s and 1930s in the United States were the decades of the so-called “new competition” (hardly compatible with the spirit of the Sherman Act), of the dictum that “mere size is no offense,” and of the Appalachian Coal case in which it was held that a cartel might be all right if the industry was distressed enough, and, of course, of the NRA which involved semi-compulsory cartelization and the wholesale suspension of the antimonopoly element of the antitrust laws. Indeed, it is only in 1958 that we can celebrate the 20-year jubilee of large-scale antitrust enforcement. The fact that so much has been achieved in such a short time in this country seems to me a source of encouragement in considering the future of the new European effort in this field.

III. EUROPEAN PARTICIPATION IN INTERNATIONAL EFFORTS TO CONTROL RESTRICTIVE BUSINESS PRACTICES

1. Need and Origin of International Effort.

The most outstanding feature of international economic relations in the postwar period has been the great and on the whole remarkably successful effort to liberalize the trade between nations. As the nations of the Western world have increasingly accepted the goal of the freest possible economic intercourse between them, and diligently participated in the work to remove tariffs, quotas, currency restrictions and other government-imposed trade barriers that were once so common, these nations have also begun to realize and indeed in some cases insist that the free movement of goods between nations shall not now be impeded by trade barriers erected by private parties. In an increasingly close-knit world economy it has also become more and more evident that national efforts to control restrictive business practices on the domestic scene may be largely ineffectual if international cartels are not controlled.

In the first years after World War II the United States was the mainspring of considerable activity at the establishment of an international agreement for the control of restrictive business practices. From the U. S. point of view there were at least three factors prompting this effort: (1) There was a desire to lessen the handicaps of American firms operating abroad, constrained by an omnipresent Sherman Act but competing or making deals with foreign firms subject to no similar restraints. (2) Some responsible people in this country felt, too, that the Sherman Act almost as a matter of course is insufficient to cope with all restraints emanating from abroad but directed toward the American economy itself. (3) As usual in American foreign policy, there was also a good portion of idealism in this endeavor, and a notion that an international agreement to control restrictive business practices would strengthen domestic efforts in various countries to effectivize local monopoly controls and safeguard competition.
anti-cartel initiative within a less ambitious framework than the Havana Charter. It introduced a resolution in the Economic and Social Council of the United Nations to establish an intergovernmental committee to make recommendations to the Council for the control of restrictive business practices. In the Ad Hoc Committee on Restrictive Business Practices which was appointed, the United States delegate was Professor Corwin D. Edwards of this University. The basic report and the proposals of the Committee were submitted in 1953. Again a very considerable effort had been spent on finding a minimum platform of common principles on which nations with widely different antitrust philosophies could still agree. Two years later, however, the United States officially announced what had then been apparent for some time, namely, that she was no longer willing to put her support behind this effort. The reason given was that while it was certainly still a basic objective of this country’s foreign economic policy to contribute to the elimination of harmful restraints on international trade and the promotion of free enterprise abroad, it could be doubted whether the proposed agreement would be practicable or effective in accomplishing that objective. Whether this was so or not may perhaps be debated. Certainly the withdrawal of American leadership again had the inevitable effect that the international effort petered out. Nevertheless, it is of interest to note that several West European nations before that time had indicated their willingness to accept, or even positively support, an international agreement of the character proposed.

The proposals of the Ad Hoc Committee were again squarely on the chapter on control of restrictive business practices in the Havana Charter. There is no need to go into the details of the proposals here. It is sufficient to note that the proposals envisaged the creation of an administrative agency with primarily consultative and investigatory functions. The agency was not to be given any independent judicial, legislative or other sovereign powers. Generally speaking, the agency could only investigate restrictive business practices if the firm or firms concerned possessed “effective control of trade among a number of countries in one or more products,” and if a written complaint had been lodged by a government. The report of the agency would set out the information received and also indicate whether the complained-of practice had had or might have “harmful effects.” If harmful effects were at hand the report would also make recommendations to governments as to remedial measures. The agency had no direct sanctions at its disposal except the informal one of publicity, as it was up to the governments subscribing to the proposed agreement to take whatever steps seemed appropriate to them to enforce the recommendations of the agency. By becoming a signatory of

2. History.

The milestones on the rather tumultuous route on which European nations have gradually been drawn into concerted efforts to control restrictive business practices bear the insignia of the Havana Charter, the Council of Europe, the Ad Hoc Committee on Restrictive Business Practices of the United Nations, the European Coal and Steel Community, and the European Economic Community. It may also be that the proposed free trade area, or European Association as it is now officially called, will incorporate all or some of the provisions of the EEC in control of restrictive business practices, but this we shall only know when the negotiations concerning the free trade area have been concluded. Incidentally, the Euratom Treaty contains no rules specifically aimed at the control of restrictive business practices.

In 1945 this government, after two years of negotiations and three full-scale international conferences, persuaded the representatives of some 53 other nations—among them all European nations of any significance—to sign the Havana Charter for an all-inclusive International Trade Organization. While this charter also dealt with virtually all other forms of barriers to free international trade, it contained a chapter specifically devoted to the prevention and control of restrictive business practices affecting such trade. Due to Congressional resistance the administration later in a highly embarrassing turn-about abandoned the charter. Nevertheless the chapter on restrictive business practices in the Havana Charter has been of great significance as an inspiration to later developments.

In the years 1949 to 1951 the Council of Europe took an active interest in the possibility of a European agreement to control restrictions in international trade. I have in my possession copies of several informal drafts of such an agreement prepared by the Secretariat of the Council of Europe, some of these apparently reached as far as the Committee of Ministers of the Council. These proposals were squarely based on the Havana Charter, and in some respects went further in that they provided for the registration of cartels as well as the investigation of complaints and for a separate court to pass on whether the effects of particular agreements or practices were to be regarded as harmful or not. The effort of the Council got bogged down as jurisdictional problems developed with the Organization for European Economic Cooperation, and because of the lukewarmth—if there be such a word—of European governments to make a special European convention on restrictive business practices even before several of them had decided what their own national policy should be.

In the fall of 1951 the United States resumed its
the agreement a government would in principle obligate itself to supply information needed by the agency, to take appropriate action to implement recommendations, and to keep the agency posted on measures taken to comply with its recommendations. By these means presumably a body of opinion among the community of nations having signed the agreement could be brought to bear on a government not living up to its obligations.

Before getting into the discussion of the specifics of the coal and steel economic community arrangements, let us merely make a general observation concerning the meaning and effect of such common market schemes. In both instances a common trading area is being established comprising France, Germany, Italy and the Benelux countries, that is, Belgium, Luxembourg and the Netherlands. In effect this means that in American terms commerce between these six countries which used to be international will now become interstate in character. The elimination of governmental barriers to trade is opening the floodgates to a single market comprising 160,000,000 people. Inevitably, this will cause considerable realignment and realignment of European economies. Among other things, national cartels previously operating under the protection of tariff walls, quota restrictions and similar props, unwittingly or unwittingly supplied by governments, will find that these props have been removed from under them. Similarly, single-firm monopolies largely confined to nation markets will all of a sudden find themselves in competition with a plethora of other companies. The key factor in this entire development is the fact that only with the arrival of the common market will European industry in many of its branches be able to prevail fully on the economies of scale in production as well as in marketing. Initially, therefore, a period of concentration toward larger entities must be expected in many industries, as indeed the experience of the Coal and Steel Community already suggests. And, as a matter of fact, this is really one of the things that European politicians and economists take both for granted and desirable. Here again we encounter the philosophy that tight combinations of the larger or combine type are generally looked upon as a favorable development in Europe as long as such concerns do not engage in practices which are clearly harmful or antisocial. On the other hand, many of the enthusiasts for the common market ideas for this very reason want a rather strong policy against cartels, whose main aim often is restrictive, and primarily to insure the survival of a multitude of relatively inefficient firms, which under the umbrella provided by the cartel have no real incentive to merge into larger units where this would be more effective.—We should also note in this context that a good number of firms now active only in one of these countries after the institution of the common market schemes will branch out and become truly international in character. Thus, single nations will have to look to an international agency or to some kind of mutual cooperation if they want some form of control exercised over these concerns.

3. The European Coal and Steel Community.

The treaty establishing the European Coal and Steel Community was signed in 1951 by France, Germany, Italy and the Benelux countries and went into operation the following year. The treaty for all practical purposes establishes a common market area as among those six countries in the vital industries of coal and steel. As an indication of the size of the undertaking it may be mentioned that the aggregate output of steel of these nations is about 1/4 of that of the United States, and it is increasing at a rather fast clip. Day-to-day management of the community’s affairs is handled by the High Authority, which is located in Luxembourg. An outstanding feature of the organization is that it is actually endowed with sovereign powers, including the right of taxation. Thus, it is a supranational agency in a true sense.

While executive management is handled by the High Authority, the treaty provides that the Authority may seek the advice of, and indeed sometimes has to seek the guidance of, a Council of Ministers, composed of cabinet members from the participating countries. However, the Council of Ministers has almost nothing to do with the enforcement of the provisions of the treaty relating to restrictive business practices. The community also has its own Parliament, the Common
Assembly, composed of 18 delegates each from France, Germany and Italy, 10 each from Belgium and Netherlands and 4 from Luxemburg. Interestingly, the same common assembly will serve as the parliament of the European Economic Community. The Court of Justice set up to interpret the treaty will also serve as the judiciary branch of the European Economic Community.

After declaring that the purpose of the treaty is to establish a common market in coal and steel, the treaty in Article 2 sets forth that “the community must progressively establish conditions which will in themselves assure the most rational distribution of production at the highest possible level of productivity, while safeguarding the continuity of employment and avoiding the creation of fundamental and persistent disturbances in the economies of the member states.” This means, on the positive side, that the community has to insure that there is an adequate supply of these commodities in the common market, that all consumers have equal access to the sources of production, that research and technological improvement must be supported, that the standards of living and working conditions of the employees in these industries be promoted, and that international trade in these goods should be further promoted. But it also means that the community must “assure the establishment, the maintenance and the observance of normal conditions of competition, and take direct action with respect to production and the operation of the market only when circumstances make it absolutely necessary.”

Before all these steps can be taken the Authority must, of course, see to it that all the trade barriers that used to compartmentalize the community into six little pockets are abolished. Specifically, the treaty provides for the elimination of import and export duties, or taxes with an equivalent effect, quantitative restrictions of various types, subsidies or state assistance of all kinds, discriminatory practices, as well as privately engendered “restrictive practices tending towards the division or the exploitation of the market” (Article 4).

It is clear that an instantaneous transformation from centuries of compartmentalization to a common market of the six countries could have wrought havoc among the iron and coal industries of the region. For this reason the treaty provided for a transitional period which, however, was made remarkably short, and in fact ended in February 1958. During that period the High Authority had various extraordinary powers with regard to the temporary retention of certain tariffs and subsidies and the permission of certain restrictive business practices which might cushion the transition for the least efficient producers. In this way for instance the Belgian and Italian coal industries got a chance to modernize their machinery and operations so as to make the most efficient units competitive with the rest of the coal producers in the community by the end of the transition period. Even after the end of the transition period the Authority is in possession of certain powers of a regulatory nature. Thus it may establish quota arrangements among the producers of the community in times of extraordinary boom or of depression. Such quota arrangements were actually imposed by the Authority during the protracted period of scarcity of coal which ended last year.

Turning then to the provisions of the treaty more directly related to restrictive business practices, we may first observe that Article 48 of the treaty recognizes that “the right of enterprises to form associations is not affected by this treaty. Membership in such associations must be voluntary.” Furthermore such associations are obliged to furnish the High Authority with such information on their activity as the Authority may deem necessary—and apparently this has been interpreted as requiring a statement of registration with the Authority including the bylaws and other particulars of the trade associations and other industry groups concerned. But the freedom of association is not without its limitations. Article 65 of the treaty in language reminiscent of the Sherman Act declares that “all agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market are hereby forbidden.” The article goes on to explain that this prohibition particularly relates to arrangements to fix or determine prices, to restrict or control production or technological progress or investment, or to allocate markets, products, customers or sources of supply.

In the manner of noble Anglo-Saxon tradition all such prohibited arrangements shall be void, and therefore may not be invoked before any court of any of the member states. This all sounds fairly drastic. However, Section 2 of the same article directs the High Authority to “authorize agreements to specialize in the production of, or to engage in the joint buying or selling” of specified coal and steel products, if the Authority finds that such arrangements satisfy all three of the following conditions:

1. that the arrangement will contribute to a “substantial improvement in the production and distribution of the products in question,”
2. “that the agreement in question is essential to achieve these results, and is not more restrictive than is necessary for that purpose,” and
3. “that it is not capable of giving the interested enterprises the power to determine prices, or to control or limit the production or selling of a substantial part of the product in question within the common market.

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or of protecting them from effective competition by other enterprises" within the market. A possibly serious loophole is opened by the additional provision that if the Authority should find that certain agreements are "strictly analogous in their nature and effects" to the kind of arrangements just specified, it shall approve them, too, if it finds that they satisfy the same general conditions.

Approval by the Authority of any restrictive arrangements may be made subject to specified conditions and may be granted for only a limited period. The Authority is also directed to revoke or modify its authorization if the circumstances warranting it cease to exist. The Authority may of course obtain any information necessary for the consideration of whether an agreement should fall under the general prohibition or be granted a lease on life. The Authority itself has the power to impose fines on firms which have concluded agreements falling under the general prohibition, fines which at least in theory can be very substantial.

Whenever the High Authority does not grant the authorization of a cartel agreement the treaty provides that it "shall fix reasonable time limits" for the expiration of the voided agreements. In order to facilitate the liquidation of such cartels the Authority may name liquidators, who shall be responsible to it and shall act under its instructions. This seems to be a highly interesting innovation in the field of antitrust policy.

It may be noted that there are no explicit provisions governing export cartels in the community. While conceivably they might be included in the general prohibition—much as American export cartels might be subject to the full operation of the Sherman Act were it not for the Webb-Pomerene exception—my own impression is that the attitude of the Authority towards cooperation in the export field will be dependent largely upon considerations of what may be called "foreign policy" in the community. In other words, if such arrangements were not to be tolerated by the United States, or created considerable ill will among trading partners of less significance, the Authority might well take a rather hostile attitude toward such cartels, while otherwise it may well be prone to go slow, acting on the conventional nationalist assumption that any gain firms in the community might make at the cost of third countries are legitimate gains.

In contrast to most national antitrust legislation within the community the treaty also has provisions relating to what it calls "concentrations," which roughly means the same thing as "tight combinations" in American lingo. There are different provisions for what may be labeled emergent concentrations and already existing ones. Among the emergent concentrations more sizeable ones are given different treatment from relatively small ones. According to Article 66 any transaction which might have the direct or indirect effect of bringing about a concentration must be submitted to a prior authorization of the High Authority. This obligation is effective whether the concentration may be brought about by merger, acquisition or any other means of control. There is thus no formal loophole of the kind that we used to have in the Clayton Act. The Authority is directed to grant the authorization of the concentration if it finds that it will not give the persons or concerns involved the power to "determine prices, to control or restrict production or distribution, or to prevent the maintenance of effective competition in a substantial part of the market" for the products involved or to evade the rules of competition pertaining within the community, for instance by establishing an "artificially privileged position involving a substantial advantage in access to supplies or markets." The article goes on to say that in arriving at its decision to authorize or not the Authority shall "take account of the size of the enterprises of the same kind existing in the community," with a view that the decision shall not create "an inequality in the conditions of competition."

With regard to emergent small concentrations Article 66 exempts such arrangements from the requirement of prior authorization. The definition of such small concentrations is to be made by the Authority with the agreement of the Council of Ministers, and it may include special conditions to which such exemption is to be subject. At the moment, the limit for small concentrations affecting the crude steel production is set at 1.2 million metric tons. Similar limits are set for other products.

If concentrations occur violating the provisions governing emergent concentrations the Authority is directed to denounce them as illegal and has such powerful remedies at its disposal as to order the separation of the enterprises or assets illegally concentrated, or the cessation of common control. It may also issue such temporary restraining orders which it may consider necessary to safeguard the interests of third parties. Due to the far-reaching effect in the life of a concern that may ensue from such measures, a right of appeal against dissolution decisions of the Authority to the Court of Justice of the Community has been provided for, but restraining orders of the Authority usually can be put into effect pending the decision of the Court.

The drafters of the treaty were reluctant about making its provisions with regard to concentrations retroactive in character. Hence with regard to existing concentrations, whether they are the result of public or private enterprises, the Authority is only empowered...
to make recommendations as to business practices etc., that will protect third parties and competition. If such recommendations are not carried out the Authority may fix the prices and conditions of sale to be employed by the firms in question.

With regard to the actual enforcement of the treaty provisions on cartels I have no more up-to-date information than that available in the fifth annual report which ends April 1957. By that time a total of 92 applications for authorization of cartel agreements had been received. Of these a total of 51 had been processed. Of these 51 agreements 22 were granted, 1 was rejected, proceedings in 4 cases were discontinued as the parties disbanded voluntarily, and 24 projects proved not to call for authorization at all, as they did not constitute agreements within the meaning of Article 65. This presumably means that they were trade associations or interest groups of a more general character. The High Authority also instituted a number of inquiries on its own initiative, as a result of which two schemes were authorized, one was refused authorization, one went into liquidation, and six proved not to require authorization. Rejected schemes apparently involved primarily national scrap buying cartels. Approved arrangements usually involved either technical specialization or common sales agencies, especially for various types of fuel. The giant Ruhr Coal Sales Agency inherited from prewar days was divided into three units; the Authority is attempting to maintain competition among them.

In the area of concentrations, the High Authority by 1957 had investigated 94 cases, 51 of which on its own initiative and 43 on the basis of requests for authorization. Twenty authorizations were granted. Of the remainder 3 were permitted conditionally after the payment of fines, 8 antedated the treaty, 2 needed no authorization and 15 did not even involve Article 66. The balance of 46 concentrations were still being studied. In other words, by 1957 no authorization had as yet been withheld. While the Authority has explicitly declared that it can in no way feel bound by the old deconcentration policy imposed on Germany by the Allied Governments now that Germany has become an integrated member of the community of European nations, it is, nevertheless, interesting to note that the Authority also has stated explicitly "that a reconstitution of the Vereinigte Stahlwerke, which was deconcentrated by the Allies, could not be authorized if a demand for authorization were submitted." Unfortunately, in deconcentration cases the names of the parties involved are kept secret. Ordinarily, only the shares of the total Community quantity of production covered by proposed concentrations are published. A predominant number of the concentrations approved are vertical in character, the most typical ones involving the acquisition of collieries by iron and steel companies. It may be noted that none of the mergers or concentrations so far approved has involved more than a maximum of 5% of either the steel production or the coal production of the entire Community. Representatives of the Community like to point out that the largest single combine in Europe produces only 10% as much steel as the United States Steel Corporation, and indeed is smaller than each one of the eight largest American firms. Rightly or wrongly representatives of the Community draw the conclusion that even the largest European combines may well not have reached optimum size.

Of the provisions of the treaty for the European Coal and Steel Community those in Article 60 concerning price discrimination are also of some interest here. According to these provisions pricing practices which go against the grain of the general goals of the Community are prohibited and especially "unfair competitive practices, in particular purely temporary or purely local price reductions the purpose of which is to acquire monopoly within the common market" and "discriminatory practices involving within the common market the application by a seller of unequal conditions to comparable transactions, especially according to the nationality of the buyer." These provisions are rigidly enforced by the High Authority, which feels, probably correctly, that in the absence of aggressive enforcement many firms would continue to discriminate on a national basis for quite a while. As it is, the emergence of a truly international spirit in the iron and steel and coal industries has been greatly hastened by the Authority's determined attitude on this point.

It is interesting to note that one of the measures taken by the Authority to prevent price discrimination is very similar to the new automobile labeling act in this coun-

The Commonwealth Fellows for 1958-59: left, Donald J. MacDougall, LL.B., University of Melbourne; right, Michael C. Menton, LL.B., University of Aberdeen.
try. According to this regulation suppliers of coal, iron and steel products are obliged to print official price lists, which must contain the following information for each commodity: a) the base price; b) any extras reflecting the degree to which the commodity exceeds standard specifications; c) credit terms; d) place of delivery; e) taxes and delivery charges; f) discounts for dealers and sales organizations, quantity purchasers and standing customers. At any time when actual prices deviate on the average more than 2.5% from list prices for 60 days or more, suppliers are required to publish revised price lists.

To some American observers the enforcement effort in the field of restrictive business practices undertaken by the High Authority of the Coal and Steel Community may not seem very impressive. Perhaps in a formal sense it is not as yet too impressive. But it must be remembered that no other industries in the world have been as heavily dominated by national and international cartels as the iron and steel and coal industries of Europe in the first half of this century. Gauged against this background the mighty injection of fresh competitive forces that the emergence of a common market for these commodities among the most important nations on the continent has already provided is indeed truly remarkable. Thus, we must never lose sight of the fact that the institution of this great new plan itself means much more to the maintenance and promotion of competition in these industries in Europe than the antitrust provisions of the treaty could possibly hope to accomplish in and by themselves, even with the most vigorous administration.

4. The European Economic Community and the European Economic Association.

In March 1957 the countries participating in the European Coal and Steel Community—France, Germany, Italy and the Benelux countries—signed another and much more far-reaching agreement, the treaty establishing the European Economic Community (EEC). The area encompassed by the community has about the same population as the United States, but its GNP is as yet but one-third of ours. In principle, the treaty encompasses all areas of economic life in these nations, which are to be integrated into one giant common market. The only exception is the coal and steel and atomic industries, which by this time are already unified.

Clearly, it was again imperative to provide for a transition period to allow for the six participating nations to divorce themselves of all their trade restrictions gradually, thereby making it possible for their industries and labor forces to readjust in an orderly manner. Thus, intra-community tariffs will be abolished successively over a 12 to 15 year period, which began January 1, 1959. The establishment of a common external tariff structure will also take place gradually over this transitional period. However, instead of declining to zero, the external tariffs of the community nations will go up or down, depending on the starting point, converging, when the transition period ends, at a common tariff which generally should represent the arithmetical average of the tariffs in effect in the different community countries on January 1, 1957. In cases where the differences in duties then in effect were no more than 15% in either direction from the anticipated common tariff rate, the transition is shortened to four years.

Besides tariffs, quota restrictions may be a formidable obstacle to trade. The EEC treaty provides that all quotas between community nations must be removed according to a predetermined schedule before the end of the transition period. Again, external restrictions constitute a different problem. For the short term, at least, the signatories saw little hope of completely overcoming the dollar shortage that has long plagued most of them. Whether this shortage may be eliminated in the long run is a question which the community nations alone cannot answer. If the common market leads to expected increases in productivity and attracts considerable dollar investments, the prospects of far-reaching liberalization are bright. In the meanwhile, the treaty only requires that member states work toward making uniform their non-quota lists at "as high a level as possible" with regard to third countries. Encouraging steps towards greater liberalization were taken in connection with the "convertibility reform" in December 1958.

In the long run, it would be impossible to maintain a common market if the financial, agricultural, social and commercial policies of the participating nations were too much out of line with each other. It is for
this reason that the treaty has numerous provisions for the gradual "harmonization" of such policies. (Complete equalization is not held necessary—as indeed we find different wage, social and economic structures in various parts within the United States.) Similarly, the mobility of labor, capital and services between member countries will be increased. A joint fund for international economic development and for assistance in solving what may sometimes be quite painful adjustment problems during the transition period will be established. All these provisions have made it natural to speak of an economic community rather than merely a common market, and, for many, to see in this Rome treaty a giant step toward a United States of Europe.

The institutional structure of the economic community will be similar to that of the Coal and Steel Community. Thus, there will be a European Commission corresponding fairly well to the High Authority of the Coal and Steel Community. There will also be a Council of Ministers. As we mentioned before the Common Assembly and the Court of Justice will be identical for the two communities. While the Community will from the outset be a sovereign body with supranational powers, the individual member nations retain a considerable measure of control during the relatively long transition period. It is interesting to note that in the beginning the decisions of the European Commission in most vital matters have to be approved by the Council of Ministers. The Commission proposes and the Council disposes, in fact. However the treaty very ingeniously provides for a gradual tapering off of the powers of the Council of Ministers toward the end of the transition period, while the European Commission will increasingly come into its own as a supranational cabinet responsible directly to the Common Assembly.

The rules governing competition of the EEC treaty are in some respects similar to those of the Coal and Steel Community. Thus, Article 85 again contains a sweeping prohibition of any arrangements which are "likely to affect trade between the member states and which have as their object or result the prevention, restriction or distortion of competition within the common market." And again we find this general prohibition reemphasized in a number of particulars, including the familiar fixing of prices, restrictions on production, distribution or technological progress and market sharing. But then Article 85 adds two types of agreements not specified in the corresponding provisions of the coal and steel treaty, namely, agreements setting up "unequal terms in respect of equivalent supplies" (that is, collective price discrimination) and tying contracts. As in the Coal and Steel Community all prohibited arrangements shall be "null and void."

Again as in the case of coal and steel, the EEC treaty foresees that certain types of agreements will be exempted from the general prohibition, although no specific authorization procedure is provided for. Thus, any agreements may be exempt which "contribute to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while reserving to users an equitable share in the profit resulting therefrom" provided that such agreements do not contain any restrictions not indispensable to the attainment of reasonable objectives and that they do not eliminate competition in respect to a "substantial proportion of the goods concerned."

The provisions of the EEC treaty concerning tight combinations which have reached a dominant position within the common market are less stringent than those of the Coal and Steel Community. There is no procedure providing for the prevention of the emergence of such combinations. However, such combines are enjoined from engaging in any of those same specific practices which were explicitly enumerated as illegal in the case of cartel arrangements. (There is only the minor exception of market sharing, which of course inherently is collective phenomenon.) Article 90 extends to public enterprises the same rules with regard to competition as prevail for private concerns, with the only exception that public enterprises do not have to engage in competitive activities which would "obstruct the de jure or de facto fulfillment of the specific tasks entrusted to such enterprise."

So much for the explicit provisions, which certainly are no less vigorous than any of the national antitrust legislations now existing in the participating countries. But as yet we have said nothing about applicability and enforcement. The treaty—which clearly does not place antitrust matters at the head of the list of priorities—provides that appropriate regulations concerning the application and enforcement of the principles set out in the treaty shall be devised within a period of three years and be based on a cooperative effort of the Council of Ministers and the European Commission. In performing this task these authorities will be concerned not only with matters of procedure. They are also directed to determine the scope of applicability of the general principles in the various economic sectors of the Community, a provision that unscrupulously interpreted could clearly make the principal provisions pretty worthless. The authorities are also instructed by the treaty to determine the respective responsibilities of the Commission and of the Court of Justice in the enforcement of the law, and similarly to define the relations between state law and community law in this field.

For the period antecedent to the adoption of the rules and regulations for the enforcement and applicability of the antitrust provisions of the treaty, it is provided that the authorities of member states shall "rule
upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the common market." Furthermore, the European Commission is directed to "insure the application of the principles laid down in articles 85 and 86." At the request of a member state it shall also investigate any alleged infringement of these principles. "If it finds that such infringement has taken place, it shall propose appropriate means for bringing it to an end." If the infringement continues, the Commission may reaffirm its opinion and thereafter publish it and "authorize" member states to take necessary measures to remedy the situation. What the effectiveness of these interim rules will be remains to be seen. It seems unlikely that any member nation during that period will take any action against cartels or dominant enterprises of any more far-reaching nature than what is already suggested in existing national laws.

5. European Economic Association.

The fact that the European Economic Community nations are identical with the participants in the Coal and Steel Community of course is not accidental. These six countries have generally proceeded further in the harmonization of mutual interests than have the other 11 nations in Western Europe. Of these United Kingdom is the key element. Her agricultural policies and her commonwealth preference tariff policy are the chief obstacles to her accession to the community. However, with Sweden, Norway, Denmark, Switzerland and Austria—and possibly even the less developed Spain, Portugal, Greece, Turkey and Iceland—UK has proposed to team up with the European Economic Community in what was called the Free Trade Area, but has recently been renamed the European Economic Association, the EEA. While the obstacles in the way of the EEA plan seem formidable at the present time, the alternative prospect of an economic curtain dividing free Europe is such that there is every reason to assume that statesmen will do their utmost to overcome the difficulties.

Even if only "The Other Six" were to join it, the EEA would add another 50% to the number of consumers and another 65% to the GNP of the common market. Technically, tariffs, quotas and other trade barriers between all 12 nations would be eliminated—and presumably according to a unified schedule, as discriminations otherwise would become inescapable. With regard to external tariff and trade policies, UK, the Scandinavians, Switzerland and Austria would retain all, or at least a good measure, of their existing freedom of action. Hence there is less need for the harmonization of domestic social and financial policies of these nations. On the other hand, to avoid the mutual undermining of external tariff protection by such means as reexportation based on tariff differences, it will be necessary to introduce rather complicated rules for the definition of origin of goods in the EEA.

The preliminary negotiations for the creation of an EEA adjoined the common market failed at the close of 1958. Nothing official is known as to what was contemplated with regard to policy on restrictive business practices in the EEA during these negotiations. While we are awaiting clarification on this point, and a likely new cycle of negotiations, it so happens that by informal means of communication I have in my possession a copy of a proposed report synthesizing the views of the powerful Federations of Industries in the UK, the Scandinavian Countries, Switzerland and Austria. This preliminary and as yet unofficial report was prepared by a joint committee of the federations under the chairmanship of the President of the Swedish Federation of Industries. I shall take the liberty of quoting two pertinent passages from the draft report:

"Since one object of the EEA is to abolish tariffs and quotas it appears desirable to insure that the expected advantages are not rendered illusory by other measures of public or private character, which falsify competition or otherwise are incompatible with the aims of the EEA.

"It is therefore necessary to establish rules for competition. These rules must be applied to public undertakings and to all other enterprises, irrespective of ownership—all categories having to act in the market on the same terms."

As the representatives of industry usually tend to advance the viewpoint least in favor of vigorous antitrust measures in Europe, it would seem that this report, if ultimately adopted by the Federations of Industries in the UK, Scandinavia, Austria and Switzerland, would clear the way for the inclusion of some kind of antitrust provisions in a prospective EEA agreement. As might be expected, however, the federations will at least initially urge that such provisions leave greater room for national enforcement efforts and the application of national laws rather than supranational legislation in this field. Nevertheless, it is important to note that these federations apparently would not resist any and all kinds of international antitrust policy within the framework of the association.

6. Outstanding problems.

Our review of the antitrust provisions of the European Coal and Steel Community, European Economic Community and of the prospects of the European Economic Association indicates that there are still a host of problems which have been only partially solved, or indeed left entirely outstanding, for the time being. Let me briefly indicate a number of the major ones:
1.) The relationship of the existing national legislation inside the Economic Community and the prospective Economic Association to the emerging international laws may present administrative problems of gigantic proportions. At least during a transitional period we may well get a triple-layer cake of ERA law, EEC law and national law, all operative on various parts of interstate and intra-national commerce. If in the meanwhile a universal law on restrictive business practices is created under United Nations auspices, we could actually get four layers of antitrust law, unless heroic efforts at integration are made.

2.) A special problem is represented by the potential relationship between the Economic Association and the European Coal and Steel Community legislation. As we have displayed, and as the draft report of the Federations of Industries has carefully noted, the antitrust provisions of the Coal and Steel Community in some respects are more far-reaching than those of the EEC treaty. If the Association is created, therefore, some special arrangement to dovetail national and supranational action in the coal and steel industries will presumably be necessary.

3.) It is conceivable that in some countries outside the common market—or the Economic Association if it comes into being—cartelization may actually get a stimulus from the creation of this powerful community. It is interesting to note that in none of these supranational treaties is there any provision against export cartels, and certain tendencies toward the formation of such organizations have been observable in the Coal and Steel Community, although so far they have been fairly restrained, presumably out of respect for possible negative reaction in the United States. But if we assume, for example, that the Economic Association will not come into being it is quite possible that the Scandinavian countries might feel impelled to try to increase their bargaining power in relation to the economic giant on the continent by encouraging export cartels among their wood, pulp and paper producers, and that other nations might take similar steps in industries where they are strong.

4.) In some areas of commerce the several national and international systems of antitrust law might successfully operate on a mutually exclusive basis. But there will inevitably be many points at which some coordination will be necessary. It will be necessary to define more clearly, for instance, the role of national enforcement agencies in the application of international law, as in the furnishing of data for the execution of the decisions of such a body as the European Commission. In this context one may also pose the question of whether national registration statutes will be amended so as to cover national export agreements, in an effort to make national enforcement agencies assist the data accumulation at the community level. Incidentally, we may notice that at the time of speaking Italy only has an old Mussolini law on cartelization which she neglects, and her protracted consideration of a revamped law in this field bears no sign of yielding immediate results.

5.) A number of additional problems are likely to arise from the fact that the incidents of the treaty provisions will be very different in different nations, unless the supranational authorities are given at least as broad powers of execution as the High Authority has been given in the Coal and Steel Community. These problems root, of course, in the greatly differing national philosophies in the antitrust field. If you rely on national authorities to do the enforcement of international law, what happens if a national statute permits, or even stimulates, behavior which the international agency wants to penalize? Nations with stronger laws will tend to feel handicapped, as indeed many U.S. concerns with international interests are now complaining about the relative severity of American antitrust laws.

6.) Other sticky problems are likely to arise in considering restrictive business practices on the part of firms which are owned or directed from outside the Community or the Economic Association, for instance, subsidiaries of American concerns.

7.) The procedure for initiating action is fairly cut in the Coal and Steel Community where the High Authority as well as individual firms may start the enforcement machinery. Among the many issues left open in the common market treaty, however, is whether firms as well as governments, or firms with the sanctions of their governments, shall be able to launch complaints. The extent of the foreseen independent initiative of the European Commission also remains to be further defined.

8.) Finally, I would like to point to the problem of the relation of antitrust provisions to the regulatory and restrictive schemes that the international authorities themselves may set up under the exigencies of the transitional periods or economic depressions. It is a well-known fact, for instance, that quota schemes imposed by public authorities usually tend to be administered under some form of self-government of the firms concerned, and that when such an arrangement has been established it is often rather hard to get rid of.

It is submitted that the solution to all these and many other problems yet to be solved in the European antitrust field depends very largely on what will happen in other fields embraced by the cooperative efforts of the nations concerned. For instance, if nations turn out
to be willing to subordinate themselves fully to supranational authority with regard to social welfare policies, anti-recession policy, fiscal and financial policy, etc., it is quite likely that they will also display considerable willingness to internationalize their antitrust policies. On the other hand, if nationalism prevails in one field it is likely to prevail in the other.

The notion is often advanced that it is likely that the European Economic Community will do less with regard to restrictive business practices in intra-community trade than any one of the participating nations is doing domestically at the present time. I do not necessarily think that this hypothesis is the best one. I think an equally plausible hunch is that the Community will be able to go rather much further than the national minimum in several countries with regard to fact-finding and investigatory activities, but that, on the other hand, at least during the transitional period, the Community may be relatively weak as far as remedies are concerned.

And again, in the end we must not lose sight of the fact that the general idea embodied by the common market and the European Economic Association proposals is much more vital to the development of aggressive competition within the European economies than any antitrust provisions could ever hope to be, no matter with what zest they might be enforced.

Europe has traveled far in the direction of an American approach to the problems of economic organization and public policy in relation thereto during the twelve postwar years. First, a spiritual climate much friendlier to competition than the prewar atmosphere has emerged. Second, individual nations have forged instruments of public policy to help maintain and develop competition in business. Thirdly, a Herculean effort has been made to create common markets, which in and of themselves will represent an enormous strengthening of competition and the dynamic elements in European industry and trade. Fourthly, the nations most intimately concerned have at least drawn up the outlines of a supranational public policy capable of dealing with restrictive business practices on this new and higher level of economic organization. Indeed, in the coal and steel industries enforcement of such policy is already in full swing.

It is always difficult to prophesize—especially about the future, as someone said! But if Dean Levi invites another Guest Lecturer twelve years from now, that Lecturer might well tell you the story of how the national antitrust laws of Europe gradually fell into a state of semi-oblivion, somewhat similar to the state antitrust laws of this country. The antitrust law of Europe worthy of serious discussion at that time, of course, would then be that of the European Economic Association. Thus, in contrast to a growing complexity that seems to be characteristic of most other fields of law, students of the next generation may actually face a simpler task in learning about antitrust in Europe than that challenging the present one.

Chutkow Memorial Library

The Arnold M. Chutkow Memorial Law Library has been established in the county court house of Washington County, Colorado, in memory of Arnold Chutkow, JD'51, who had practiced in that community before his death.

Mr. Chutkow, son of Samuel Chutkow, D'20, was an outstanding student while at the Law School, and had earned an excellent reputation in practice in the Denver area. The Arnold Chutkow Memorial Fund has been established at the Law School in his honor.
to be willing to subordinate themselves fully to supranational authority with regard to social welfare policies, anti-recession policy, fiscal and financial policy, etc., it is quite likely that they will also display considerable willingness to internationalize their antitrust policies. On the other hand, if nationalism prevails in one field it is likely to prevail in the other.

The notion is often advanced that it is likely that the European Economic Community will do less with regard to restrictive business practices in intra-community trade than any one of the participating nations is doing domestically at the present time. I do not necessarily think that this hypothesis is the best one. I think an equally plausible hunch is that the Community will be able to go rather much further than the national minimum in several countries with regard to fact-finding and investigatory activities, but that, on the other hand, at least during the transitional period, the Community may be relatively weak as far as remedies are concerned.

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