MONOPOLY

LAW and MARKET

Studies of EC Competition Law with US American Antitrust Law as a frame of reference and supported by basic market economics

Jens Fejø

Kluwer

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by

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Preface

In the European Communities a strong competition policy will play a fundamental role in maintaining and strengthening the internal market. This is spelled out in the Commission's White Paper from 1985. That year, which saw the publication of the Danish edition of this book, an impressive volume of precedent established by the EC Commission and the European Court of Justice had already developed EC competition law. Apparently, however, the EC authorities only attached relatively subordinate importance to the economic factors in the assessment of certain restrictive contract practices. Information from parallel US fields of law, on the other hand, revealed that judicial evaluations and decisions involved the inclusion of economic aspects to a steadily increasing extent. This discrepancy prepared the ground for this dissertation.

Several chapters have been rewritten since the year of the Danish edition. Others have been revised to a minor extent only.

It is my hope that this book may contribute to the theoretical discussions within the field of competition law and may be applied for a practical purpose by the many interested circles engaged in competition law in Europe as well in the United States or elsewhere.

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Copenhagen, autumn 1989

Jens Fejø
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Chapter I

Introduction to the Book

A. The Purpose and Structure of this Book

Three large American enterprises agree to sell a specific type of product at the same price. Section 1 of the Sherman Act lays down that 'Every contract ... in restraint of trade' is illegal. If the agreement made by the three enterprises is brought before the American Federal Supreme Court, the ruling of this court will be that, on the basis of the price fixing agreement alone, the Sherman Act has been violated. The decisive factor in this example is the *conduct* of the enterprises, *i.e.* the conclusion of a price fixing agreement. In American antitrust law price fixing is illegal *per se*. On the face of it this attitude seems strange. Why does the Court not consider the *structure of the market*, which is influenced by the agreement? It could for instance take into consideration the number of other enterprises operating in the market and selling similar products, or look at the competing products of the three enterprises. And why does the Supreme Court not consider whether the agreement is actually detrimental to competition in the market in question? It may also seem odd that the Supreme Court apparently ignores the fact that this agreement may be to the benefit of the participating enterprises and the consumers by improving the distribution of goods and the enterprises' *market performance*[1] as a whole. For a price agreement does not necessarily have 'adverse', 'undesirable' or 'detrimental' effects on the market performance. It is not unlikely that a price agreement is concluded to counteract detrimental or destructive competition among the parties to this agreement. It may create favourable market conditions in respect of the distribution of goods and be to the benefit of the consumers without causing any significant damage to other enterprises. The price agreement may have prevented the enterprises from ousting each other from the market. Thus an undesirable monopolistic market structure has been avoided. It is even conceivable that the agreement has fixed the price at a level which has ensured continued existence of other enterprises in the

1. In German, French and other non-English books and articles the American terminology is often taken over. *See e.g.* R. Linda in van Damme Réglementation 88. But *see e.g.* Harding 48 f.

market; it may thereby have contributed to the supply of more goods to the benefit of the consumers.

When in spite of this the American court refrains from discussing these and other favourable results of the price agreement, it must be presumed that it has fundamental reasons for doing so. Which are the reasons for the Court taking only the conduct as such, the price agreement, into account disregarding the market structure and performance?

To cite *another example:* An American manufacturer concludes an agreement with an enterprise authorizing it to sell his goods. He specifies the market area, prescribes the nature of sales promotion and binds the distributor to boost sales primarily within the specified area. In this case the *per se* rule will probably *not* be invoked. For if such an agreement is brought before an American court, it will not, without more, declare the agreement to violate the antitrust laws. Instead the court will focus on the effects of the agreement on the market, the number of distributors and competing manufacturers, the characteristics of the goods, the possibility for other enterprises of gaining a foothold in the market, etc. Another consideration of the court may also be whether the agreement is beneficial to consumers with regard to supply and prices. In this example the decision of the court will thus be influenced by market structure and performance as to whether the agreement is legal or not.

This book will analyze the problem outlined above: How are price agreements, distributor agreements and other selected restrictive practices dealt with by the judicial authorities, and to what extent are their decisions influenced by the market structure and market performance?

Such an analysis is of general interest. It can contribute to clarify the relation between the actual/economic market conditions and the judicial regulation thereof, thus forming an important basis for recommendations as to how the practices of the enterprises should be regulated by the judiciary.

The central issue of this book is the *rules governing restrictive business practices*. The illustration of the two above types of agreement - price agreements and distributor agreements - is based on the American antitrust law.

However, the primary concern of this book will be how *the authorities of the Common Market* - mainly the European Court of Justice and the Commission[2] - have dealt with or are likely to deal with the restrictive business practices that have been selected here for study. Furthermore, on the basis of the analyses the book will try to indicate guidelines that should be followed by the authorities in pursuance of the antitrust policy of the Common Market.

2. Other authorities which may be taken into consideration in this connection are the national antitrust authorities and the national courts of justice. The national antitrust authorities have been reluctant to execute and enforce the rules of the Common Market governing competition, cf. J. Temple Lang 17 C.M.L.Rev. 457, 458 (1980).
Owing to the doctrine of the European Court of Justice of 'Preliminary validity', cf. Konkurrenceret og EF 396 ff. the national courts of justice can only decide whether agreements are null and void because they violate Article 85. As a consequence of the ruling in case 48/72, Brasserie de Haecht no. 2, judgment of 6.2.1973 ECR 1973, 77, the national courts will to a large extent postpone their decisions as to whether agreements violate Art. 85 until the Commission has made its final decision cf. for instance H.J. Hackenberger & A. Schmidt AWD 1973, 188, 191 and P.Blok TfR 1974, 498, 537; and also A.Dashwood 33 C.L.J. 116 (1974).