

DEVELOPMENTS

Book Review - Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht (2004)

Ernst-Joachim Mestmäcker and Heike Schweitzer, *Europäisches Wettbewerbsrecht*, C. H. Beck, Second Completely Revised Edition, Munich 2004, ISBN 3-406-33065-7, pp. LXV, 1226, € 98,00

By *Eckart Gottschalk**

As former director of the Max-Planck-Institute for Foreign Private and Private International Law in Hamburg, Ernst Joachim Mestmäcker is not only the “Doyen”¹ of German antitrust law but also one of the most preeminent scholars in Competition Law of the European Community (EC). Thirty years after the publication of the first edition of famous “*Europäisches Wettbewerbsrecht*” (European Competition Law) in 1974, Mestmäcker and his new co-author, Heike Schweitzer, have now published a second completely revised edition.² The new edition comes in a time of phenomenal transformation. In response to globalization and to enormous changes in economic behavior, competition law has to meet new challenges. The law is expanding geographically: today at least one hundred systems of competition law exist globally, with more in its preparatory stages. Moreover, today competition law applies to economic activities that were once regarded as natural monopolies of the state: telecommunications, energy, and postal services, to name a few examples. In Europe, the adoption of Council Regulation 1/2003³, the “EC Modernization Regulation”, had radical implications for the procedure and competence of competition law enforcement.

Mestmäcker and Schweitzer comprehensively describe the rules on competition in Europe. The structure of the book is exemplary: it contains ten chapters; each

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¹ Wernhard Möschel, FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), 7 October 2004, No 234, 14.

² ERNST-JOACHIM MESTMÄCKER/HEIKE SCHWEITZER, EUROPEAN COMPETITION LAW (2nd ed. 2004).

³ EC Regulation 1/2003 of 16 December 2002, O.J. 2003 L 1/1.

chapter is referenced by paragraph, with a table of contents at the beginning of each paragraph. The authors not only provide a table of statutes and a table of cases,⁴ but also a very useful substantial index.⁵ The book covers competition law under the Constitution of the Community (Chapter 1), the scope of application of EC-competition law (Chapter 2), agreements and other concerted actions that are restrictive of competition under Article 81 EC Treaty⁶ (Chapter 3), the abuse of a dominant position under Article 82 EC Treaty (Chapter 4), the enforcement of Articles 81 and 82 EC Treaty by the European Commission and national competition authorities under the Modernization Regulation (Chapter 5) and the EC Merger Control Regulation⁷ (Chapter 6). Further, a whole chapter is dedicated to the relationship between intellectual property rights and competition law (Chapter 7). This chapter also covers the World Trade Organization (WTO) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). The final chapters deal with the obligations of the Member States under EC competition rules (Chapter 8), EC procurement law (Chapter 9) and aids granted by Member States under Article 87 EC Treaty (Chapter 10). All chapters provide for a detailed analysis of recent case law of the European Court of Justice (ECJ) as well as the essential legislation of the EC. In addition, Mestmäcker and Schweitzer place their description of EC competition law in the context of European national laws and U.S. antitrust law. The book is well suited both for readers looking for an overview and for practitioners searching for answers to specific questions. Above all the work is written in attractive language and hence is a joy to read.

Chapter 1 discusses Europe's economic constitution, whose integral parts are the rules on competition in Articles 81 and 82 EC Treaty.⁸ Mestmäcker and Schweitzer emphasize the overriding goal of achieving single market integration.⁹ The EC Treaty already expresses in Article 3 (1) lit. g the close connection of the competition system and the single market ideal.¹⁰ Article 14 EC Treaty also

⁴ MESTMÄCKER/SCHWEITZER (*supra*, note 2), LIII-LXIV and 1177-1212.

⁵ *Ibid.*, 1213-1226.

⁶ Consolidated Version of the Treaty establishing the European Community, O.J. 2002 C 325/1.

⁷ EC Regulation 139/2004 of 20 January 2004, O.J. 2004 L 24/1.

⁸ *Ibid.*, 1-124.

⁹ *Ibid.*, 45-46, 121.

¹⁰ Art. 3 (1): "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

...

(g) a system ensuring that competition in the internal market is not distorted."

documents the single market imperative. The very idea of a single market is that internal barriers to trade within the European Community should be dismantled. Goods, services, employees and capital should have complete freedom of movement. By facilitating cross-border transactions firms are able to leave behind national markets and operate on a more efficient scale throughout the Community. The accession of ten new Member States on 1 May 2004 means that single market integration will continue to be an arduous task for many years to come.

Chapter 2 explores the scope of application of EC competition law and the relationship to national competition laws;¹¹ much thought is directed to the question of how to solve conflicts between EC competition rules and national laws. The ECJ ruled in the *Walt Wilhelm* case that Community law takes precedence over national law.¹² However, the *Walt Wilhelm* decision does not resolve all conflicts situations. Under the old regime, for example, it was unclear whether the Member States could prosecute an agreement under their national laws although it was exempted by a Community block exemption.¹³ Today, the Modernization Regulation deals with the relationship between Articles 81 and 82 EC Treaty and national competition laws:¹⁴ according to Article 3 (1) of the Modernization Regulation the Commission shares the competence to apply Articles 81 and 82 EC Treaty with the national competition authorities and national courts. Recital 8 of the Modernization Regulation furthermore provides that “the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81 (1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law”. Thus, it is not possible for national competition authorities to prohibit agreements that do not infringe Article 81 (1) EC Treaty or the criteria of Article 81 (3) EC Treaty, or which are covered by a Community block exemption. However, the attitude towards Article 82 EC Treaty is different.¹⁵ Member States are not “precluded from adopting or applying in their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings”.¹⁶

¹¹ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 125-196.

¹² ECJ, Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, 1969 ECR 1.

¹³ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 150. See also ECJ, Case C-70/93, *Bayerische Motorenwerke v. ALD Auto-Leasing*, 1995 ECR I-3439, para 13, 39.

¹⁴ *Ibid.*, 140-155.

¹⁵ See Article 3 (2) of the Modernization Regulation.

¹⁶ See also Recital 8 of the Modernization Regulation (*supra*, note 3).

Chapter 3 covers Article 81 EC Treaty.¹⁷ This rule constitutes “a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”.¹⁸ Article 81 (1) EC Treaty prohibits agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition. An agreement that falls within Article 81 (1) is “automatically void”.¹⁹ However, Article 81 (3) EC Treaty provides that the provision of Article 81 may be declared inapplicable if four conditions are met: an agreement must improve the production or distribution of goods or promote technical or economic progress and consumers must receive a fair share of the resulting benefit; furthermore the agreement must not contain dispensable restrictions nor substantially eliminate competition in the relevant market. The issues to be considered in respect of this provision are intricate but Mestmäcker and Schweitzer deal with all aspects of Article 81 (1) EC Treaty in an instructive and concise manner.²⁰ The authors also discuss the effects of the decentralization of the balancing test and the required prognosis under Article 81 (3) EC Treaty. Under Regulation 17/62²¹ the Commission had the exclusive right to grant a so-called “individual exemption” to agreements notified to it. Now the Modernization Regulation declares Article 81 (3) to be directly applicable with the result that the Commission shares the power to apply Article 81 (3) with the national competition authorities and national courts. In concert with the majority of German competition law scholars Mestmäcker and Schweitzer object to a direct application of Article 81 (3).²² They argue that the direct application of Article 81 (3) creates legal uncertainty and deprives Article 81 (1) of its effectiveness.²³ Both authors reason that it might not be feasible to appraise retroactively whether an “agreement” was capable of improving either the production or distribution of

¹⁷ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 197-376.

¹⁸ ECJ, Case C-453/99, *Crehan v Courage*, 2001 ECR I-6297, para 20.

¹⁹ Article 81 (2) EC Treaty.

²⁰ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 197-326.

²¹ EC Regulation 17/1962 of 6 February 1962, O.J. 1962 13/204.

²² *Ibid.*, 334. See Arved Deringer, *Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW), 5-11 (2000); Wolfgang Fikentscher, *Das Unrecht einer Wettbewerbsbeschränkung: Kritik an Weißbuch und Verordnungsentwurf zu Art. 81, 82 EG-Vertrag*, WIRTSCHAFT UND WETTBEWERB (WUW), 446, 450-455 (2001); Wernhard Möschel, *Systemwechsel im Europäischen Wettbewerbsrecht? - Zum Weißbuch der EG-Kommission zu den Art 81 ff. EG-Vertrag -*, JURISTENZEITUNG (JZ), 61-67 (2000); but see Dirk Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 COMMON MARKET LAW REVIEW (CMLREV), 537, 559-560 (2000).

²³ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 334-337.

goods or promoting technical or economic progress by the time it was concluded. Rather, under the new regime competition authorities and courts are likely to appraise the “agreement” pursuant to the current market situation. Finally, the authors consider in this chapter in detail the Block Exemptions Regulation 2790/99 for Vertical Agreements^{24,25}

Mestmäcker and Schweitzer then turn to a profound analysis of Article 82 EC Treaty in Chapter 4.²⁶ The authors elucidate this provision as an important companion of Article 81 EC Treaty. Whereas Article 81 is concerned with agreements, decisions and concerted practices that are harmful to competition, Article 82 is directed towards the unilateral conduct of dominant undertakings that act in an abusive manner. The authors set forth the procedure to find whether an undertaking has a “dominant position”²⁷ and explain abusive practices that include predatory pricing, bundling, refusals to deal and loyalty rebates.²⁸ It may be added that a reform is underway with regard to central issues of Article 82 EC Treaty. Phillip Lowe, Director General of DG Competition, announced in March 2005 that the Commission would issue draft guidelines on Article 82 EC Treaty for public consultation at the end of this year.²⁹

Chapter 5 deals with central issues of antitrust procedure.³⁰ An infringement of Articles 81 and 82 EC Treaty has serious consequences. Article 7 of the Modernization Regulation provides that whenever the Commission establishes the existence of the infringement of Articles 81 and 82, it may by decision require the offender to bring such infringement to an end.³¹ The Commission has the power to issue cease-and-desist orders. Furthermore, the breach of EC competition rules may also be penalized by the imposition of fines and periodic penalty payments.³² Mestmäcker

²⁴ EC Regulation 2790/1999 of 22 December 1999, O.J. 1999 L 336/21.

²⁵ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 361-376.

²⁶ *Ibid.*, 377-472.

²⁷ *Ibid.*, 392-408.

²⁸ *Ibid.*, 409-472.

²⁹ Speech delivered at the International Bar Association/European Commission Conference, Brussels 11 March 2005, at 12 available at: http://europa.eu.int/comm/competition/speeches/text/sp2005_003_en.pdf. See also Competition Law Forum Article 82 Review Group, *Reform of Article 82: Recommendations on Key Policy Objectives*, 1 EUROPEAN COMPETITION JOURNAL (ECJ), 179-183 (2005).

³⁰ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 473-525.

³¹ *Ibid.*, 485-499.

³² *Ibid.*, 500-510.

and Schweitzer also cover the private enforcement of the EC competition rules and examine whether Articles 81 and 82 EC Treaty are protective laws under § 823 (2) German Civil Code.³³

In Chapter 6 Mestmäcker and Schweitzer illuminate the 2004 EC Merger Control Regulation (ECMR).³⁴ The ECMR entered into effect on 1 May 2004. Determining whether a given transaction needs to be notified under the merger regulation requires an affirmative answer to the following two questions: does the transaction amount to a “concentration” according to Article 3 ECMR? If it does, it is necessary to consider whether the transaction has a “community dimension” as defined in Art. 1 ECMR. Mestmäcker and Schweitzer provide thoroughly researched answers to these two questions.³⁵ A concentration will be approved pursuant to Article 2 (2) ECMR if it does “not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”. Mestmäcker and Schweitzer explain the new substantive test and its application in relation to horizontal concentrations, vertical concentrations, conglomerate concentrations and collective dominance. They also provide guidance on the accumulated body of case law.³⁶

Chapter 7 explores the relationship between intellectual property rights and competition law.³⁷ Under the territoriality principle intellectual property rights remain in general in the domain of the Member States.³⁸ However, the exercise of such rights may fall within the scope of the provisions of the EC Treaty. Mestmäcker and Schweitzer discuss the restrictions on the exercise of intellectual property rights imposed by the free movement of goods rules in Articles 28 and 30 EC Treaty³⁹ and Articles 81, 82 EC Treaty⁴⁰. Under the exhaustion doctrine, the owner of an intellectual property right is legally barred from invoking his right to prevent the importation of products that have been sold by him, an affiliated company or licensee in another European Economic Area (EEA) member country.

³³ *Ibid.*, 520-525.

³⁴ *Ibid.*, 527-653.

³⁵ *Ibid.*, 537-539, 552-592.

³⁶ *Ibid.*, 593-652.

³⁷ *Ibid.*, 653-782.

³⁸ *Ibid.*, 654.

³⁹ *Ibid.*, 677-688.

⁴⁰ *Ibid.*, 698-744.

Licenses of intellectual property rights may fall within the provision contained in Article 81 (1) EC Treaty if they include provisions that impermissibly restrict competition. However, many patents, know how, or designed right licenses may be exempted from Article 81 (1) by the Technology Transfer Block Exemption⁴¹ that entered into force on 1 May 2004. Mestmäcker and Schweitzer could not include the new version of the Technology Transfer Block Exemption but they already take into account the draft of this regulation⁴². Further, Mestmäcker and Schweitzer cover the Research and Development (R&D) Agreements Block Exemption⁴³ and performing rights societies.⁴⁴

Chapters 8, 9 and 10 concern state involvement in competition.⁴⁵ Chapter 8 deals with the obligations of the Member States under the EC competition rules. Under Article 10 (2) EC Treaty Member States are obliged to abstain from any measure that could jeopardize the achievement of the single market objective laid down in Article 3 (1) lit. g EC Treaty.⁴⁶ Moreover, Mestmäcker and Schweitzer discuss state measures in relation to state monopolies of a commercial character.⁴⁷ Under Article 31 EC Treaty provision Member States must adjust state monopolies of a commercial character to avoid discrimination regarding the conditions in which goods are procured and marketed and refrain from introducing new discriminatory measures of that nature. The chapter concludes with an in-depth analysis of Article 86 EC Treaty.⁴⁸ Chapter 9 covers EC procurement law.⁴⁹ Mestmäcker and Schweitzer place emphasis on the influence of the EC rules on the provisions in the *Gesetz gegen Wettbewerbsbeschränkungen* (§§ 97-129 German Law against Restraints of Competition- *GWB*).⁵⁰ Chapter 10 addresses aids granted by states.⁵¹ The EC

⁴¹ EC Regulation 772/2004 of 27 April 2004, O.J. 2004 L 123/11.

⁴² See O.J. 2003 C 235/10.

⁴³ EC Regulation 2659/2000 of 29 November 2000, O.J. 2000 L 304/7.

⁴⁴ MESTMÄCKER/SCHWEITZER (*supra*, note 2), 753-763 and 765-782.

⁴⁵ *Ibid.*, 783-1176.

⁴⁶ *Ibid.*, 805-812.

⁴⁷ *Ibid.*, 813-832.

⁴⁸ *Ibid.*, 833-902.

⁴⁹ *Ibid.*, 903-1040.

⁵⁰ *Ibid.*, 949-957. See for a detailed account of the latest Amendment of the Law against Restraints of Competition Wolfgang Wurmnest, *A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition*, 6 GERMAN LAW JOURNAL 1173 (2005) at <http://www.germanlawjournal.com/article.php?id=626>.

Treaty provides the Commission with the power in the Articles 87-89 to deal with state aids that could distort competition in the common market.

In conclusion, Mestmäcker and Schweitzer's book is one of the key texts to interpret the new EC Competition Rules. It is an academically impeccable, thoroughly researched, comprehensive work. A great achievement!

⁵¹ *Ibid.*, 1041-1176.