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# Sleeping With the Enemy: Tales of Yankee Power, Globalization, and the Transformation of Economy by Cartel in the European Union

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## BOOK REVIEW

### SLEEPING WITH THE ENEMY: TALES OF YANKEE POWER, GLOBALIZATION, AND THE TRANSFORMATION OF ECONOMY BY CARTEL IN THE EUROPEAN UNION

CLIFFORD A. JONES\*

*Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency.* Christopher Harding and Julian Joshua. Oxford: Oxford University Press, 2003. Pp. 230, \$74.00 (Hardcover).

Christopher Harding and Julian Joshua's *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency (Regulating Cartels)* is a significant and well-written book that deserves to be widely read by scholars, practitioners, and students in the United States as well as in Europe and other jurisdictions with antitrust laws. For those readers to whom European Community (E.C.) competition law remains largely a mystery,<sup>1</sup> this book also serves as a good introduction to the European system because of its detailed description in the cartel context of the development of the European Community's substantive and procedural rules for handling enforcement of several varieties of competition law offenses, including judicial review and what Europeans call "rights of the defence."<sup>2</sup>

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1. A shrinking number, one hopes, in view of European Community (E.C.) competition law decisions in the Boeing/McDonnell-Douglas and GE/Honeywell mergers, not to mention the March 24, 2004 decision fining Microsoft €497 million (approximately U.S. \$612 million) for tying and abuse of dominant position in the personal computer operating system market. See EU Rapid Press Release No. IP/04/382 (March 24, 2004), available at <http://www.cec.eu.int>. The Commission's full opinion is available on the Commission's website, COMMISSION DECISION of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), Commission Document C(2004) 900 final.

2. The European concept of "rights of the defence" broadly correlates to U.S. concepts of procedural due process. For example, it includes the right (even of corporations) against self-incrimination, the right of access by target companies to the European Commission's file of evidence on which proposed enforcement action is based, and the right to

One attribute of the book that is particularly valuable to an American or other non-European audience is its comparative treatment<sup>3</sup> of the historical, cultural, and philosophic underpinnings of the “cartel offence” in Europe and the United States. The “cartel offence” is a general reference to antitrust offenses generally regarded as the most serious of those engaged in by cartels. They include violations such as price-fixing, market-sharing, limiting supply or production, or bid-rigging. In the United States, at least, these activities would all be considered per se violations of the Sherman Antitrust Act, and defenses based on any alleged reasonableness of the conduct would not be heard. These offenses are consistently and widely condemned on an international basis.<sup>4</sup>

Harding and Joshua present an interesting etymology<sup>5</sup> of the term “cartel,” which is known to traditional international lawyers (and a few others)<sup>6</sup> as the negotiated truce in wartime conventionally used for the exchange during hostilities of prisoners of war. Historically, the cartel was an agreement to suspend hostilities, and this definition echoes in the “modern pejorative meaning of ‘cartel’ as an arrangement of truce, whereby natural rivals come together in uneasy alliance.”<sup>7</sup> This connotation follows from an earlier meaning on the European continent of the “cartel of chivalry,” originally referring to “the terms of a combat” and later “simply the challenge” to engage in combat<sup>8</sup> Harding and Joshua refer to cartel participants as “sleeping with the enemy”<sup>9</sup> to capture the ambiguous relationship of intimacy and hostility reflected when

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an oral hearing. See generally Julian M. Joshua, *The Right to be Heard in EEC Competition Procedures*, 15 FORDHAM INT'L L.J. 16 (1992); CHRISTOPHER KERSE, E.C. ANTITRUST PROCEDURE (4th ed. 1998); Commission, Notice on Internal Rules of Procedure for Processing Requests for Access to the File, O.J. 1997, C 23/3.

3. CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY 39–60 (2003).

4. See, e.g., Organization for Economic Cooperation and Development, *Council Recommendation Concerning Effective Action Against Hard Core Cartels*, C(98)35/FINAL (April, 1998); Enterprise Act, 2002, c. 40 (Eng.); see also HARDING & JOSHUA, *supra* note 3, at 30–31.

5. HARDING & JOSHUA, *supra* note 3, at 11–16.

6. See, e.g., PATRICK O'BRIEN, MASTER AND COMMANDER (1970) (one of O'Brien's twenty wonderful tales of the British Navy during the period of the Napoleonic wars, in which the “cartel” is a naval shuttle maintaining communication in a discreet truce between Britain and France, even though Napoleon flouted tradition by refusing to exchange prisoners during the wars).

7. HARDING & JOSHUA, *supra* note 3, at xxiii; see also *id.* at 12–13.

8. *Id.* at 12.

9. *Id.* at 9. A note regarding popular culture: *Sleeping with the Enemy* was a film starring Julia Roberts and Patrick Bergin, in which Bergin played a husband plotting to kill his wife.

competitors become bedfellows for economic gain at the expense of the public.

On both sides of the Atlantic, “cartel” now refers to business competitors engaged in the most egregious forms of antitrust violations, such as price-fixing, market allocation, and bid-rigging. Under U.S. antitrust law, these are per se offenses, in that business or economic justifications for the conduct are so unlikely to suffice that they seldom will be considered by courts.<sup>10</sup> The U.S. Supreme Court long ago announced that the federal courts will not determine whether prices fixed by conspiracy or agreement in lieu of market forces were reasonable prices; such prices were per se unreasonable not because of their level but because they were fixed.<sup>11</sup>

Harding and Joshua trace the development of cartel regulation in Europe, drawing on a comparative analysis of their treatment of cartels in the United States. The contrast helps to highlight the economic, cultural, philosophical, and legal differences in the perception of the desirability of condemning cartels. In the United States public outrage over the rapacious Standard Oil Trust and others in the late 1880s led to the passage of the Sherman Antitrust Act of 1890.<sup>12</sup> In Europe cartels were viewed favorably as engines of industrial development driving the economic growth of Europe, especially in Germany.<sup>13</sup> Indeed, cartels were respected economic institutions, and economy by cartel was the rule in Europe prior to 1945.<sup>14</sup> Harding and Joshua review some relatively unknown literature on the behavior of European cartels and paint a broad, detailed picture of cartel history from private systems of transnational trade regulation to government-encouraged market stabilization, to the compulsory cartelization in Nazi Germany, to international commodity agreements. This history helps to explain

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10. *But see* *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23–24 (1979) (holding that the issuance of blanket licenses to perform copyrighted music did not amount to a per se price fixing violation under the Sherman Act). The Court appeared to retreat from this view one year later, however, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (holding that an agreement among competitors that is “plainly anticompetitive” is price-fixing and is thus presumptively illegal).

11. *See, e.g.*, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 401 (1927).

12. CLIFFORD A. JONES, *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE EU, UK, AND USA* 7–8 nn.20 & 27 (1999).

13. *See generally* CLIVE TREBILCOCK, *THE INDUSTRIALIZATION OF THE CONTINENTAL POWERS 1780–1914* (1981).

14. Harm G. Schröter, *Cartelization and Decartelization in Europe, 1870–1995: Rise and Decline of an Economic Institution*, 25 J. EUROPEAN ECON. HIST. 129, 137 (1996); *see also* JONES, *supra* note 12, at 23–28.

why the culture of competition represented by U.S. antitrust law has never been as completely accepted in Europe, which has always had more socialist and even Communist governments and industry. Europe is known for its pervasive cartel tradition and an historical lack of enthusiasm for vigorous competition on the part of business, government, and even consumers.<sup>15</sup> Harding and Joshua chronicle this attitudinal change, which has occurred over the past fifty years and changed the regulatory view of cartels in Europe from a positive one to the negative view long held in the United States. From the standpoint of European business that might engage in cartels, the victory remains somewhat incomplete, as noted by the authors' suggestion that a cartel culture remains in European business.<sup>16</sup>

Supporters of cartels—whether private, government-encouraged, or government-mandated—have traditionally justified them in part based on alleged need to stabilize employment and markets, especially in situations of excess capacity and overproduction. The underlying notion was that vigorous competition among firms faced with a “crisis” of low demand and excess capacity and production would force one or more firms out of business and result in unemployment and economic and social hardship for workers.<sup>17</sup> Under this view, it would be preferable for firms to share markets and hold prices up in order to prevent increased unemployment and other adverse economic consequences.<sup>18</sup> Such social policies have been used in both Europe and Japan to justify exemptions from antitrust rules, but this has never really been the case in the United States.<sup>19</sup> The closest the U.S. Supreme Court has come to recognizing permissible “crisis cartels” was its decision to legitimize a joint coal-selling arrangement during the Depression in *Appalach-*

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15. See Clifford A. Jones, *A New Dawn for Private Competition Law Remedies in Europe? Reflections from the USA*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 95, 96 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003); see also JONES, *supra* note 12, at 23–28.

16. HARDING & JOSHUA, *supra* note 3, 45, 275–77.

17. For discussion of the concept of crisis cartels, see D.G. GOYDER, EC COMPETITION LAW 151–53 (4th ed. 2003); RICHARD WHISH, COMPETITION LAW 132 (4th ed. 2001); HARDING & JOSHUA, *supra* note 3, at 146–47.

18. HARDING & JOSHUA, *supra* note 3, at 42.

19. *Cf. id.* at 75–77, 274–76.

*ian Coals*.<sup>20</sup> The *Appalachian Coals* case is considered an aberration, however, and was effectively overruled in *Socony*.<sup>21</sup>

The Allied occupation of Germany following World War II included a decartelization plan.<sup>22</sup> When the “Schuman Plan” for the creation of the European Coal and Steel Community (ECSC), precursor to the current European Community and European Union, was presented to U.S. Secretary of State Dean Acheson on May 7, 1950, Acheson’s first reaction was fear that the plan was a clever cover for a “gigantic European cartel.”<sup>23</sup> As Harding and Joshua note:

[T]he ECSC then substituted a supranational system of extensive public management. Part of the latter entailed the ability of the new supranational body, the High Authority [later the Commission], to require conformity with arrangements reminiscent of a conventional business cartel. Article 58 of the ECSC Treaty enabled the High Authority to impose production quotas in response to crisis conditions or decline in demand. Article 61 allowed the High Authority to fix maximum and minimum prices. Article 63 enabled the High Authority to specify condi-

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20. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). A joint coal-selling arrangement could be viewed as a “rationalization” measure to ensure that each member shares in the sales being made, thus sharing the business among competitors to prevent failure of one or more due to “ruinous” competition.

21. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In *Socony-Vacuum*, the Court held that any tampering with pricing structures interfered with the “free play of market forces” and that the Sherman Act “places all such schemes beyond the pale . . . . Congress has not left us with the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.” *Id.* at 221. Hence, rationalization or crises cartels are not justified under the Sherman Act.

22. “On March 14, 1951, the Allied decartelization plan finally secured Adenauer’s agreement, and Hallstein at once accepted the two Treaty Articles that were still in dispute. They had been drafted by Robert Bowie, with meticulous care. For Europe, they were a fundamental innovation: the extensive anti-trust legislation now applied by the European Community essentially derives from those few lines in the Schuman Treaty.” JEAN MONNET, *MEMOIRS* 352–53 (Richard Mayne trans., 1978). See HARDING & JOSHUA, *supra* note 3, at 86–87.

23. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 383 (1969); DESMOND DINAN, *EVER CLOSER UNION?: AN INTRODUCTION TO THE EUROPEAN COMMUNITY* 23 (1994). Acheson feared objections by the Antitrust Division, which took a dim view of cartels controlling essential war material in light of then recent experience with the powerful cartelized German economy. ACHESON, *supra*, at 383. The now-defunct European Coal and Steel Community (ECSC) placed coal and steel in the then six Member States (France, Germany, Italy, Belgium, The Netherlands, and Luxembourg) under the supranational control of the High Authority in order to make war impossible. The coal and steel industries of the members were essentially administered by the High Authority as to production, allocation, employment, pricing, and quotas. JOHN PINDER, *THE BUILDING OF THE EUROPEAN UNION* 3–8 (3d ed. 1998). Coal and steel now generally fall under the general EC Treaty. See JO SHAW, *EUROPEAN UNION LAW* § 1.2 (3d ed. 2000).

tions of sale. To that extent the ECSC organized coal and steel producers into a kind of public cartel.<sup>24</sup>

Although Acheson's concerns were satisfied by the inclusion of antitrust rules in the Treaty and the plan went forward, the history of cartels in Europe to that point would have supported Acheson's initial reluctance. The history of German and other European cartels is recounted in some detail by Harding and Joshua.<sup>25</sup> Indeed, the first vigorous antitrust enforcement in Europe, and particularly in Germany, was carried out under the Allied decartelization plan beginning in 1947 and expanding in scope in 1950 shortly before the ECSC Treaty was agreed.<sup>26</sup>

At least among European businesses, this radical change in legal treatment of cartels did not receive full acceptance then or even now. As late as 1980, one Dutch commentator expressed a nostalgic longing for the good old days of respectable cartels:

And now I expect, but I sincerely do not hope, that this second time that Western civilization is seriously endangered since the eighth century when Rome crumbled under the victorious Islam, that the second time will bring to light that the Sherman Act and Article 85 [Now Article 81 of the EC Treaty] are luxuries, the fundamental errors of which are not felt in a fast-growing economy but that they are an obstacle to a society which should be based on solidarity and regard for others. In my country, before the [former Article] 85 [now 81] men on horseback came galloping in, we did not speak about competitors; we spoke about "colleagues". I feel that we shall have to face the oncoming economic war not with *competitor competitori lupus*,<sup>27</sup> but with the concepts I just evoked—solidarity and regard for others.<sup>28</sup>

Much of *Regulating Cartels* traces the substantive legal and procedural developments case-by-case as the European Commission gradually enforced the E.C. antitrust rules (primarily Articles 81 and 82 of the E.C. Treaty) with increasing vigor and success beginning around 1970, and the resulting changes in the legal climate for cartels in Europe. In the current climate, when European Commissioner for Competition Mario Monti speaks of cartels as "cancers on the open market economy"<sup>29</sup> and Director-General for

24. HARDING & JOSHUA, *supra* note 3, at 94.

25. *Id.* at 63–82. For developments in other European countries, see *id.* at 84–113. See also TREBILCOCK, *supra* note 13; Schröter, *supra* note 14.

26. HARDING & JOSHUA, *supra* note 3, at 86–87.

27. As translated by the author, roughly, competitors competing as wolves, for example, "dog-eat-dog."

28. JONES, *supra* note 12, at 28.

29. HARDING & JOSHUA, *supra* note 3, at 277.

Competition Philip Lowe comments that “we have only touched the tip of the iceberg in terms of our attack on cartels,”<sup>30</sup> it is clear that a major shift in social and economic culture has occurred in the direction of the longstanding U.S. antipathy toward cartels.

Concerning this paradigm shift toward the U.S. view of cartels, Harding and Joshua ask: “Is this a tale of conversion to, or at least a successful exportation of, the American model—*tales of Yankee power*? Or is it a tale of late-twentieth-century globalization, involving an internationalization and harmonization of legal policy and regulatory method?”<sup>31</sup> The answer seems more toward the notion of successful export of the American model, but not exactly “Yankee power.” The authors conclude that U.S. international cartel prosecution has energized other antitrust agencies—including those agencies located in the European Union—but that enforcement for the foreseeable future is likely to remain national in nature rather than becoming internationalized and harmonized.<sup>32</sup> The authors reach this conclusion because the increase in enforcement by the United States in particular has resulted in large part from the increase in effectiveness of the national enforcement mechanisms<sup>33</sup> and their application to international cartels. For example, the Clinton Administration announced a focus on cases having large volumes of commerce, for example, international cartel cases, and in one period, 1996–1999, this resulted in seventy-six percent of fines imposed by the U.S. Justice Department coming from firms based outside the United States.<sup>34</sup>

The authors are skeptical that international cooperation agreements can be fully effective because of practical limitations, such as the inability of national enforcement agencies—due to national privacy rules—to share confidential information with officials of antitrust enforcement agencies in foreign countries.<sup>35</sup> Increased international cooperation of the “pick up the phone” variety is on the rise, but Harding and Joshua do not perceive bilateral cooperation in enforcement as yet able to replace national efforts. This is correct, since bilateral cooperation agreements are merely procedural in nature and require national enforcement authorities to do

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30. Interview with Philip Lowe, European Commission, Director General, DG Competition (Sept. 25, 2003), at <http://www.eupolitix.com/EN/Interviews/200309/26545d22-8f11-46b2-abb2-cfd2029e0f4b.htm> (last visited Nov. 1, 2004).

31. HARDING & JOSHUA, *supra* note 3, at 270.

32. *Id.* at 289–90.

33. *Id.* at 287.

34. *Id.* at 285.

35. *Id.* at 288.



the heavy lifting.<sup>36</sup> Harding and Joshua cite the innovation by the United States of criminal leniency programs (getting cartel members to turn state's evidence in exchange for lenient treatment), the remarkable success of such programs, and the adoption of similar programs in the European Union and other jurisdictions as all indicative of increased effectiveness of national exercise of jurisdiction but not necessarily of internationalization of anti-cartel law.<sup>37</sup> The authors see no harmonization of international rules of substantive anti-cartel law, procedural law, or international enforcement agencies or tribunals on the horizon.<sup>38</sup>

It seems likely that Harding and Joshua are correct in the sense that internationalization of cartel enforcement means harmonized law and international agencies or tribunals. Outside the European Union, and NAFTA to a lesser extent, national sovereignty interests would appear to preclude truly international agencies or tribunals for a considerable period of time.<sup>39</sup> A hybrid form of multinational enforcement, however, remains a possible outcome of international negotiations now underway. Since the Singapore Ministerial Conference of the World Trade Organization (WTO) in 1996, various countries—at the prompting of the European Union—have worked toward inclusion of antitrust rules in some form under the WTO agreement.<sup>40</sup> Agreement was reached to place the issue on the agenda for the Doha Round of WTO negotiations,<sup>41</sup> and the Doha Declaration stated that negotiations on that topic would begin at a time to be specified during the Round.<sup>42</sup> The Cancun Ministerial Meeting in September 2003 broke up without agreement, however, and the status of the negotiations is unclear at the time of this Review. Whatever happens on the international front in the near future will most likely take place in other fora, such as the International Competition Network (ICN).

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36. See Clifford A. Jones, *Global Antitrust in the Millenium Round: The Ways Forward*, in *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM* 402 (Clifford A. Jones & M. Matsushita eds., 2002).

37. HARDING & JOSHUA, *supra* note 3, at 289.

38. *Id.* at 289–90.

39. See Jones, *supra* note 36, at 403 (indicating that national sovereignty concerns have made adoption of the Draft International Antitrust Code impractical). In the European Union, the Commission enforces the competition rules in all Member States in addition to national enforcement with judicial review to the Court of First Instance and the European Court of Justice. In the North American Free Trade Agreement (NAFTA), the NAFTA competition rules may be enforced in some cases by the multinational tribunal.

40. See generally *COMPETITION POLICY IN THE GLOBAL TRADING SYSTEM* (Clifford A. Jones & M. Matsushita eds., 2002).

41. Jones, *supra* note 36, at 397–406.

42. WTO, Draft Ministerial Declaration, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001).

The ICN is an organization of national antitrust enforcement agencies founded in 2001 that works to develop international standards and best practices guidelines for antitrust enforcement agencies throughout the world. It also works to provide technical assistance and other resources to the many new and inexperienced antitrust agencies in the world. Its first project has resulted in a set of international merger guidelines and best practices in the merger field.<sup>43</sup> The ICN had its genesis in the report of the U.S. Attorney General's International Competition Policy Advisory Committee (ICPAC),<sup>44</sup> and this recommendation was subsequently adopted by then-Assistant U.S. Attorney Joel Klein and agreed to by E.U. Competition Commissioner Monti.<sup>45</sup> The ICN is not an international enforcement agency or tribunal; it attempts to obtain convergence through "soft" measures such as best practices guidelines.

The present combination of extraterritorial application of the antitrust laws and international cooperation—most visible in the cases of the United States, the European Union, and Japan<sup>46</sup>—will continue to be the major tool of international antitrust enforcement for perhaps the next decade. Beyond that, negotiations at the WTO and perhaps in the ICN may produce at least the beginnings of true international antitrust enforcement. The European Union has demonstrated the value of supranational antitrust enforcement and may yet be a model for organizing international antitrust on a global basis.

Harding's and Joshua's book is a valuable introduction to European competition law in general and cartel enforcement in particular. Given that as of May 1, 2004, E.U. competition rules were harmonized law in over thirty countries<sup>47</sup>—representing about one-third of all the countries in the world with antitrust laws—the subject is ripe for attention.

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43. See International Competition Network, Guiding Principles and Recommended Practices for Merger Notification and Review, at <http://www.internationalcompetitionnetwork.org/guidingprinciples.html> (last visited Nov. 1, 2004).

44. Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited Nov. 1, 2004).

45. Jones, *supra* note 36, at 400–01.

46. The United States has formal antitrust cooperation agreements with the European Union and Japan, among others. The European Union has also entered into an antitrust enforcement cooperation agreement with Japan. With regard to cross-border mergers and cartels, these are the three most active antitrust jurisdictions in the world.

47. Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409, 417 (2004).

