Recent Developments in German Antitrust Law

Dr. Kurt E. Markert
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DR. KURT E. MARKERT**

The paper, which I have prepared for this conference deals with a broader range of topics than I will address here. I will not discuss the role of competition in German economic and political life, nor the development of antitrust in Germany and the various practices that are covered now as a result of the 1957 law and two amendments since the law was passed. In order to make a useful contribution I think I should perhaps underline a few aspects that are covered in my paper against the background of United States antitrust law.

First of all, a few remarks with regard to horizontal restraints of competition which we generally call cartels. German antitrust law is very similar to United States antitrust law in that illegal cartels can be criminally prosecuted. There are no jail sentences under German law, but as may be seen in the examples I have given in the Appendix, the fines are considerably higher than those imposed under United States antitrust law. In the biggest case so far, the fine imposed against several firms and several managers totaled 50 million DM. There will be an out-of-court settlement in a very short time, so the fine will be somewhat reduced, but it will still be over ten million DM. I am not sure if a fine of that size can be imposed under American antitrust law.

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** Chairman of the 7th Decision Tribunal of the German Federal Cartel Office. M.C.J., New York University, 1959; Dr. jur., University of Wurzburg, 1961.

1. See Appendix.
2. See Appendix, Part I. This subject is included in order to provide a general background of the climate in which antitrust in Germany has to be viewed today.
3. See Appendix, Part II.
5. See Appendix, Part IIIA.
6. Approximately four million dollars.
Turning to the differences between the two laws, in Germany there are no strict per se rules as there are in the United States. This can be seen in a number of German exemption clauses, whereunder particular cartels can be exempted from the general ban. The granting of an exemption depends, first of all, on the degree of restraint of competition effected by the cartel. Here two aspects have to be distinguished. The first aspect is whether the agreement excludes competition between the parties entirely, or only with respect to particular items such as terms of sales, discounts, et cetera. The second aspect is whether and to what extent there are outsiders competing with the cartel, which would guarantee the functioning of competition in the market. In this respect, the market share of the cartel members plays a decisive role—the higher the market share of the cartel the less likelihood there is that an exemption will be granted.

In addition to the competition question—the question as to what degree competition is restrained by the cartel—the other important factor is whether the anti-competitive effects can be or are in fact outweighed by positive effects of some other kind, such as cost reductions that are passed on to the consumer.

Without going into detail, I think one can say after more than fifteen years of practical application of the system that it is not easy to get an exemption. The more power the cartel members have in the market and the less it can be demonstrated that the cartel has some beneficial effects (the members of the cartel have the burden of proof on this issue) the more difficult it becomes to secure an exemption. The main idea behind this system today is to help smaller firms combine among themselves in order to compete more effectively with the larger firms.

We have seen in a number of cases that this is a better choice to make than just letting the small firms be swallowed by the big firms. Of course, there are a number of controversial questions involved in this concept, but I think basically there is something positive to it from a competitive point of view.

Finally, as to horizontal restraints, I should mention that private enforcement, contrary to American practice, does not play a very important role in Germany. There are a number of explanations for this. I will just mention two. First of all, there is no treble damage clause in our law. This is not a familiar concept in German law in general, so it has not been put into the antitrust law. Secondly, and this is of course of more interest to the legal community, lawyers are prohibited under German law from working on a contingent fee basis.

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These factors explain, I think, why many private antitrust suits that could be brought in Germany (in the Appendix, I have indicated that we have a number of conspiracy cases) are never even instituted.

With regard to vertical restraints of trade, with the exception of resale price maintenance, German law is somewhat less strict than United States law. Resale price maintenance was prohibited last year except for books, periodicals, newspapers, magazines, and the like. In addition, and I think this is something unknown in United States antitrust law, we have relatively strict controls on the practice of suggesting retail prices. We have in recent months prohibited quite a number of retail price systems because we thought that they either enhanced prices or were deceptive to the consumer.

As to exclusive dealing agreements, territorial and customer restrictions and tie-ins, the law enforcement in recent years has not been very active. But in evaluating the record, I think one has to bear in mind that EEC antitrust law resolves these problems if interstate trade within the Common Market is involved; and the result has been that if you cannot consummate a particular kind of restrictive agreement on a Common Market basis, neither can you effect it on a national level. In other words, if the Commission eliminates territorial restrictions in trade between the various member countries of the Common Market (which it has done quite frequently) then this is also the end of territorial restrictions in Germany. Therefore, we have not felt it necessary to give too much care to that particular field of restrictive practices.

In the area of patent and know-how licensing, the same situation appears. Again, there is a relatively liberal practice under the German antitrust law. But as with exclusive dealing arrangements, EEC law comes into play and the trend, though presently not quite as developed as the territorial restrictions and similar restrictions, appears to be moving toward the same result. Within the past year the Commission

8. See Appendix, Part IIIA.
10. See Appendix, Part IVB.
11. See Heil & Vorbrugg 351-54.
has increased its efforts to deal with restrictions and know-how licensing and results can be expected within the near future.

The conduct control of dominant firms\textsuperscript{14} is a subject discussed at length in the Appendix\textsuperscript{15} since it is entirely unknown in American antitrust law. The general approach which we have taken in Germany is not a structural approach toward monopoly power, but rather a conduct approach. In other words, German law, apart from merger control, accepts monopolistic positions but submits them to a system of conduct control. The term that is relevant in this context—that is, the criterion on which the control is based—is the concept of abusive exploitation of a market dominating position.

Of course, when one uses the terms “market,” and “market dominating position,” difficult problems come up—for example, what is the relevant market? And, as a matter of fact, as can be seen from the pharmaceuticals cases that are mentioned in the Appendix, this is one of the central issues of the cases.

How dominance is defined in our law is discussed in the details in the Appendix. We have, and this is perhaps worth mentioning here, in addition to substantive criteria, market share presumptions. If a firm reaches a certain market share, it is presumed to have a market dominating position. And what is more important, the law on dominant positions also covers shared monopoly power. So if several firms together as a group, even though there is no agreement between them, have a dominant position on the market, each of the firms is subject to the abuse control under section 22 of our law.\textsuperscript{16} Thus, for example, if two or three firms together have a market share of 50 percent or more, or four or five firms have a two-thirds share of the market, they are presumed to be market dominating. In the Appendix,\textsuperscript{17} I have indicated how the system is applied in practice in the light of recent cases. We have had some business with the oil industry. The Federal Cartel Office as a matter of fact lost the only court cases that came up in this field. But this was only on the preliminary question of whether the order that was made should be given immediate effect. The court in this case did not really go into the entire problem of abusive exploitation of a market dominating position. But, since the oil case, we have issued two orders against two different drug manufacturers, and they have also brought appeals. It can be expected that the courts in these two cases will be forced to really test the concept that was

\textsuperscript{14} See Heil & Vorbrugg 362-73.
\textsuperscript{15} See Appendix, Part IV.
\textsuperscript{16} See Act Against Restraints of Competition § 22. An English translation of the German antitrust law from 1957 to 1972 may be found in 2 OECD, Guide to Legislation on Restrictive Business Practices (1973). For a translation of § 22, see id. at 15.
\textsuperscript{17} See Appendix, Part IVB.
developed by the Federal Cartel Office on the basis of some Supreme Court judgments that were not exactly to the point, but in our view developed the same general principles. The more important of these two direct cases is the Hoffman-LaRoche case. It is expected that the court hearing on the appeal will take place in the near future.

Now, very briefly within my time limit, a few words on merger control. We did not have any merger control until an amendment last year. The new control system which was introduced by the amendment of 1973 has essentially the following features. There is a compulsory notification system, under which purchase mergers of a certain dimension have to be notified. As a rule, notification is required only after the consummation of a merger. But large mergers, defined as mergers in which at least two firms with one billion DM (approximately $400 million) in annual sales are involved, have to be notified in advance and can only be put into effect after clearance has been given or certain time limits have elapsed without a reaction by the Federal Cartel Office.

The duty to notify and the control powers of the Federal Cartel Office to intervene also depend on whether the merger reaches certain size and market dimensions. Incidentally, in the 1974 spring issue of the Antitrust Bulletin there is an article of mine which describes the whole system in detail. I am just mentioning here that not every anti-competitive merger is covered by the law; rather there must be a certain minimum dimension in terms of aggregate annual sales. The annual sales of the firms involved must together be at least 500 million DM (approximately $200 million), and also the merger must not be of a purely local character.

The other feature is that the merger control is divided into two stages, and this leads back to what I said at the beginning with regard to horizontal restraints. The first stage deals with the anti-competitive effects of the merger and this stage is handled by the Federal Cartel Office. In other words, the Federal Cartel Office has to investigate the competitive situation in connection with the merger, and if it finds that the merger is anti-competitive according to the definitions of the law (i.e., if the merger creates or strengthens a market dominating position), it is required to prohibit the merger. And only then, if such a prohibition case has been made, can the parties apply to the Economics Minister for an exemption.

As can be seen from one of the cases, a case involving a merger of two German oil companies, such an exemption has been given. For

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reasons that I have stated in the Appendix, I have not identified myself with this position.

I have also set forth in the Appendix\(^2\) a few figures concerning the number of cases that arose during the period of more than a year that the system has been in operation. We have had about 120 cases so far. Of these 120 cases that have been examined, three prohibitions were made. But these three prohibitions do not tell the whole story. There are a number of other cases where in preliminary talks with the parties, we persuaded them that it was not worthwhile to continue with the merger because they would have to face a prohibition order. I am also told that there are a number of other cases, where perhaps without even approaching the Federal Cartel Office, merger plans were changed because of antitrust considerations. So as a whole, I would say the system has been working quite effectively during the first year of its application.

In the Appendix I also deal with export cartels.\(^2\) I cannot go into detail, but in concluding I would just like to answer one of the questions that was raised by Mr. Timberg. He asked whether a Webb-Pomerene export cartel that covers exports to Germany can be prosecuted under German law. The answer is clearly yes. I remember working on a case against the American Films export cartel. We did not bring the case ultimately, but only because we thought that at that time the cartel did not act in violation of German law; thus this was not a matter of principle, but rather a matter of the facts of the particular case.

But we have had a number of other cases where we acted against foreign export cartels. There are several cases involving Japanese self-restraint arrangements; these cases are at present still pending. We have also brought a case against the Scandinavian Paper export cartels. So the principle that you can act against foreign export cartels to the extent that imports to the country are involved is well established.

I am afraid that is all I can say within the limits that I had for this talk. Thank you very much.

**APPENDIX**

**I. THE ROLE OF COMPETITION**

Competition is given a stronger emphasis in Germany than in most other member countries of the European Economic Community.\(^1\)

\(^{21}\) See Appendix, Part VI.

\(^{22}\) See Appendix, Part III.

\(^1\) Earlier antitrust developments in Germany are described in 3 Business Regulation in the
Thus, Germany today is the only member country without some sort of general price and wage controls and without much sympathy for the various self-restraint schemes for the importation of "low price" foreign products. Competition is playing a primary role in public and political life. This is indicated not only by the scope of the antitrust law and the vigor of its enforcement, but also by the interest of the public in questions of competition policy. Certainly the situation in Germany in this respect is not quite comparable with that in the United States where, as Galbraith once said, antitrust is part of the domestic folklore. But apart from the United States, Germany is probably the only country where competition questions are discussed on a broad basis and where there is an echo in the media to developments in the field of antitrust law.

It must be said, however, that the role of competition in the German economic system has changed somewhat during the last ten years. Only part of this change is due to the political change five years ago when a coalition of the Social Democratic Party and the Liberal Party came into power. Before the mid-sixties competition was regarded almost as a religious phenomenon, and any idea of planning, even in the form of general projections, was considered a sacrilege. Some legal scholars at that time had even argued that the "social market economy" was protected by the federal constitution so that changes would require a two-thirds majority of both houses of Parliament. Reflections of this "purist" form of thinking can also be found in the explanatory memorandum to the government's antitrust bill of 1952-55 where "complete" competition—i.e., the absence of market power of individual firms—is described as the primary aim of competition policy and where the socio-political functions of competition as a charter of economic freedom are strongly emphasized.

This picture has since changed in two respects. First, the idealistic concept of "complete" competition as the guiding principle of competition policy has given way to more realistic concepts which are usually described as workable or effective competition. Secondly, the role of competition in the entire economic system today is seen more in the context of general economic development. While competition is still regarded as the primary steering instrument on the micro-economic level—i.e., the economic activities of individual producers and consumers of goods and services—governmental measures are regarded as necessary to ensure general economic stability and growth. This new approach has been characterized as a combination of neo-liberalism and Keynesianism. Legally, it has found expression in the Act for the Common Market Nations (H. Blake ed. 1969); Markert, The New German Antitrust Reform Law, 19 Antitrust Bull. 135 (1974); Schapiro, The German Law Against Restraints of Competition—Comparative and International Aspects, 62 Colum. L. Rev. 201 (1962).
Promotion of Economic Stability and Growth of June 8, 1967, which provides for a variety of measures of economic and fiscal policy to enable a global steering of the general economic development. One of these measures is the publication of an annual economic report at the beginning of each year which must contain the so-called “yearly projection,” i.e., an exposition of the government's economic and fiscal policy aims for the coming year. The law, however, expressly states that these aims must be realized only “within the framework of the market economy order.”

In addition to global steering, one can observe in Germany today the same tendency as in most modern industrialized countries, namely, that the government actively influences the development of certain economic sectors—a phenomenon which is usually called industrial policy. While there is at present no general system of sectorial planning (not even a weak form of indicative planning), the activities of the government in the field of industrial policy are growing, particularly in the energy and technology sector. It is quite natural that in this context conflicting points of view concerning competition policy can arise. In such cases competition policy considerations are not easily brushed aside but rather are usually weighed on an equal basis with the other policy considerations involved.

II. COVERAGE OF ANTITRUST LAW

The 1957 Act Against Restraints of Competition,² replacing the post-war antitrust laws enacted by the occupation powers, was a compromise between different interest groups within the then governing Christian Democratic Party. This can best be seen when one compares the government's bill with the text finally passed. Parliament, for example, did not accept the government's proposal to control mergers. Further, it enlarged the list of exemption clauses. What finally came out as law was essentially:

- a general ban on cartels (horizontal restrictive agreements);
- a list of exemptions from that ban;
- a general ban on vertical restrictive agreements relating to resale prices and resale terms of sale;
- an exemption for resale price maintenance;
- an abuse supervision over certain other vertical restrictive agreements, such as exclusive dealings, other marketing restrictions and tie-in clauses;
- a prohibition of certain restrictive clauses in contracts on the transfer or licensing of patents, registered designs and protected seed varieties, with the possibility to grant exemptions from that prohibition;

an abuse supervision over prices and tie-in clauses of market dominating firms;
a duty to register mergers with a market share of 20 percent or more;
a prohibition of certain coercive measures and of unfair hindrance and discrimination against other firms;
a prohibition of recommendations insofar as they result in a type of conduct that would be unlawful if brought about by an unlawful restrictive agreement; and,
a list of exemptions of certain economic sectors from either the whole or part of the provisions of the law, including transportation, agriculture, banking, insurance and public utilities.

The 1957 law being a political compromise, discussion about its reform is as old as the law itself. Mainly, two points have remained consistently controversial: the exemption of resale price maintenance and the absence of merger control. On the other hand, the business community has criticized the narrow scope of the exemptions from the cartel ban as an undue burden on cooperation between independent firms, particularly the smaller ones. All this led to a new legislative measure in 1965 when the first amendment to the law was passed. Because the general political situation had not changed since 1958, however, only minor changes were brought about, namely:

- a simpler exemption procedure for standardization and specialization of cartels;
- the introduction of a public register for resale price maintenance and the introduction of presumptions to facilitate the abuse supervision over exempted resale price maintenance systems;
- an extension of the abuse supervision over market dominating firms to include the entire conduct of such firms; and,
- an extension of the registration requirements for mergers.

The new law satisfied neither side. Resale price maintenance remained and merger control was still missing. Business claimed that the scope of cooperation permitted by the law was still too narrow. In addition, discussion of amending the law was more and more influenced by the experiences encountered in the application of the existing law. There were three issues in particular which increasingly gained momentum. First, the fact that the prohibition of cartels covered only "contracts" turned out to be a serious gap, particularly after the Supreme Court decided in 1970 that this term required a contract under the rules of the Civil Code. After this decision there was an increasing demand that the law be changed so as to include concerted actions as in Article 85 of the EEC Treaty. Second, the concept of market domination, defined as absence of effective competition, proved to be rather impractical. Therefore the introduction of more practicable criteria, such as a standard based on market share,

was proposed. Finally, the sector exemptions were more and more regarded as an unjustified privilege.

The second amendment in 1973 not only dealt with most of these points but also brought about substantial changes. The exempted sectors question was the only issue not dealt with, but Parliament, recognizing that changes were necessary, asked the government to present within a year a report on the situation in these sectors together with proposals on changes in the existing law. The main changes made by the 1973 law were:

- the abolition of resale price maintenance (except for books) and a stricter supervision over resale price recommendations;
- the introduction of a system to control mergers;
- the introduction of more specific criteria for market domination; and,
- a wider scope of inter-enterprise cooperation with a view to strengthening the competitive position of smaller enterprises.

III. Application of the Law to Cartels

Cartel agreements are unenforceable and the implementation of such agreements can be prohibited by administrative orders and prosecuted by fines. There are, however, exemption clauses for certain types of cartels. The procedural requirements for an exemption depend upon the estimated extent of the cartel's effect on competition.

The first category of cartels may gain exemption by mere notification; this applies to standardization cartels and export cartels. A second category of cartels becomes effective (i.e., gains exemptions) only if the enforcement authority does not object within a period of three months after notification. During that period they are usually closely scrutinized. This second category includes cartels on terms of sale, rebate cartels, specialization cartels, and rationalization cartels not substantially affecting competition in the market. Finally, a third group of cartels requires a special authorization decision in each case to become effective. These are structural crises cartels, rationalization cartels (to the extent not included in the second group), importation cartels and cartels which serve the public interest.

A. Prosecution of Illegal Cartels

As of the end of 1974, 2,610 proceedings against illegal cartels had been initiated. Most of these cases were terminated at a very preliminary stage either because no violation could be found or because the incriminating practice had been abandoned. Administrative fines were
imposed in thirty-one cases, most of which are fairly recent. Only one fine was imposed during the first ten years of the act. But in the following years (1967-1974) more than thirty administrative fines were imposed (one in 1968, four in 1969, one in 1970, three in 1971, nine in 1972, three in 1973, and seventeen in 1974). In 1971 the Federal Cartel Office for the first time made use of its power to impose fines up to three times the amount of profits made as a result of the illegal practices. The fine in this case (the Linoleum case) totalled 5,62 million DM but was later reduced by the appellate court to 1,01 million DM. The following is a more detailed description of some important cases.

In the Man-made Fibers case, the Federal Cartel Office found that all suppliers of man-made fibers in the Federal Republic—except subsidiaries of American firms and, in some cases, British groups—had participated in domestic, European and world-wide cartel agreements with a view to restrict competition in markets for staple fiber, polyamide (perlon and nylon), rayon viscose and acetate. The illegal practices included: allocation of areas of interest to individual groups with the result that, for the most part, Japanese fibers did not enter European markets; agreements between European suppliers on divisions of European markets and on prices; and, aggregate rebates and methods of distribution in their home markets so as to secure national spheres of interest. In addition, agreements, primarily price agreements, existed between the manufacturers regarding the domestic markets. In March 1972 nine German firms were fined a total of about 48 million DM and eighteen directors, sales managers, heads of legal departments and executives of the firms involved (as well as one employee of an auditing firm) were fined a total of 410,450 DM. All orders are still under review before the Berlin Court of Appeals.6

During its investigation, the Federal Cartel Office had conducted searches of the premises of most defendants. It had also successfully applied to the local criminal court for a search warrant and a seizure order, demanding permission to search the offices of Treuarbeit, an auditing and trust company, and to seize documents if necessary. On appeal by that firm, the court of second instance confirmed the order. On further appeal the Federal Constitutional Court stated that the right and duty of an auditing company to keep secret all facts concerning its customers does not preclude a search of its premises when such a company is itself suspected of participation in an illegal cartel.7 This decision is mentioned to emphasize the importance of the

6. The case was terminated after the indicated firms agreed to pay a 12 million DM fine.
far-reaching investigatory powers of the Federal Cartel Office. Under the Administrative Offences Act, the Office has the authority of a public prosecutor and may apply to the competent court for search and seizure warrants concerning both offices and private homes of suspected persons. Such warrants are issued without prior notice to the defendants and, if necessary, can be executed with the assistance of the police.

In the Linoleum case two manufacturers of linoleum and felt-base participated in cartel agreements restricting competition between two German suppliers of floor coverings for domestic and foreign markets. Their agreements concerned prices, quotas, rebates and exports. The Federal Cartel Office for the first time made use of its power to issue fines up to three times the additional profits obtained as a result of the violation and imposed fines totalling 5,62 million DM (the amounts corresponding to one and a half times the additional profits). In a later decision the Berlin Court of Appeals upheld the conviction with regard to all alleged offences. The court, however, was not convinced that the price agreements resulted in additional profits, and it therefore reduced the fines to 1,01 million DM, based solely on the additional profits derived from the rebate and quota agreements. While one of the defendant firms and two of its managers have appealed to the Federal Supreme Court, the conviction is final with respect to the other defendants.

In a recent decision, the Federal Cartel Office imposed fines against the Federal Chamber of Physicians, its former president and another officer, and against the Association of Laboratory Doctors, its vice-president and another of its officers. The fines totalled 122,500 DM. The defendants had threatened two firms which had established blood test laboratories accessible to independent doctors. Both firms—drug manufacturers—were threatened, inter alia, with boycotts of their drugs. The case is now pending before the appellate court.

B. Exempted Cartels

From the enactment of the Act Against Restraints of Competition in 1957 through the end of 1974, 448 cartel agreements were notified or otherwise submitted to the Federal Cartel Office with a view to obtaining an exemption. Of these agreements, 340 came into effect, and 227 were still in force as of December 31, 1974. The number of

11. The appeal has meanwhile been rejected by the Supreme Court with the exception of one minor technical point. See Judgment of Sept. 19, 1974, KRB 2774.
exempted cartels increased until 1970, but since 1971 their number has been decreasing. It should be mentioned, however, that these numbers do not indicate the total number of legal cartels in the Federal Republic since they do not include cartels in the exempted sectors (transportation, agriculture, banks and insurance companies, and public utilities). Statistics on cartels in these sectors are not available. The largest groups of exempted cartels are export cartels (sixty-eight), specialization cartels (fifty-four), terms-of-sale agreements (forty-three) and rebate cartels (thirty-one).

The new exemption clause of section 5(b), permitting cartels which do not substantially restrict competition in the market and which promote the efficiency of small and medium-sized firms, has not yet had much practical relevance. As of the end of 1974, fewer than ten such cartels had been allowed.

C. Export Cartels

The export cartel exemption (section 6) distinguishes between: (i) export cartels relating exclusively to exports ("pure" export cartels); and, (ii) export cartels which entail ancillary restraints on domestic competition—for example, where domestic export merchants are restrained by export cartels of domestic manufacturers in their dealings with foreign customers ("mixed" export cartels). In both cases the granting of an exemption requires that the cartel serve "the protection and promotion of exports," but whereas "pure" export cartels merely have to be notified, "mixed" export cartels require an express authorization. Section 6 is applied both to national export cartels and to the participation of national firms in international export cartels. Exempted export cartels are to be supervised to prevent "abuses."

A detailed analysis of exempted "pure" export cartels as of December 31, 1970 is contained in the UNCTAD interim report "Restrictive Business Practices" of 1971. Since then, no major new export cartels have been added. At the end of 1973 the number of exempted "pure" export cartels had dropped from seventy-three to sixty-six and the number of exempted "mixed" export cartels remained at five.

Until a recent judgment of the Federal Supreme Court, the

14. 2 OECD 6.
Federal Cartel Office took the position that "pure" export cartels involving German exports were covered by German antitrust laws regardless of whether such cartels had domestic effects in Germany. The Supreme Court held, however, that the general rule of section 98(2)—that German antitrust law "shall apply to all restraints of competition which have the effect within the territory in which it applies, even if such restraints result from acts done outside"—is applicable also to "pure" export cartels. At the same time the Supreme Court held that a domestic effect, in the sense of this provision, requires adverse effects on domestic competition.

The precise consequences of this judgment are at present not yet fully ascertainable. It is hardly possible to demonstrate that the registered "pure" export cartels have adverse effects on domestic competition. This would mean that these cartels are no longer within the reach of German antitrust law. As a result, they would no longer be notifiable, nor could action against "abuses" be taken. This was clearly not the legislative intent.

In this context, mention should be made of the critical German attitude vis-à-vis private self-restraint ("orderly marketing") agreements of Japanese exporters limiting exports to German markets. Generally, this position was expressed in a letter by the Minister for Economic Affairs to the President of the Federal Cartel Office, stating that for economic policy reasons private self-restriction arrangements limiting imports into the Federal Republic are generally considered undesirable, and that such arrangements might be acceptable, in exceptional cases, for a limited period of time. With regard to the application of the Act Against Restraints of Competition, the letter stated that the prohibition of cartels relates to all private self-restrictions which affect the German market. If in exceptional cases self-restriction arrangements are considered necessary for overall economic reasons, the Minister, after a hearing, will inform the Federal Cartel Office which will then tolerate the arrangement. In several cases the Federal Cartel Office opened proceedings against Japanese self-restraint agreements and contacted Japanese authorities within the framework of the 1967 OECD Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade. To date no official declarations of tolerance, as provided for in the letter of the Minister for Economic Affairs, have been issued.


18. The text of this letter is published in Der Betriebsberater 1111 (1973).
IV. CONDUCT CONTROL OF DOMINANT FIRMS

A. General Approach

Section 22 empowers the Federal Cartel Office and the state authorities to prohibit the “abusive exploitation” of a market dominating position. Section 22 defines such a position as one where a firm has no competitors, is not exposed to substantial competition, or has an “overriding” market position in relation to its competitors. These definitions also apply to “shared” dominant market power of several firms if factually no substantial competition exists between them. Concert between the members of the group is not required. In addition, dominant market power is rebuttably presumed if a single firm has a market share of one-third, or two or three firms together have a market share of one-half, or four or five firms together have a market share of two-thirds. These presumptions, however, do not apply to smaller firms. The law does not define the term “abusive exploitation.” As interpreted by court and administrative practice, a dominant firm’s market conduct constitutes such an abuse if its conduct could not be practiced under conditions of effective competition.

The range of possible abusive practices is usually divided into exclusionary and hindering practices adversely affecting the competitive freedom of other enterprises (e.g., exclusive dealing, refusal to sell, discrimination, tie-in clauses) and exploiting practices (e.g., excessive prices). The latter practices comprise the majority of cases brought during the last year. Of 685 cases instituted since the enactment of the 1973 law through August 31, 1974, 293 involved abusive prices and ninety-three involved abusive terms of sale. Cases against hindering practices primarily involved refusals to sell (171).

In price abuse cases the yardstick of excessiveness is the price that would prevail on the same market under conditions of effective competition (the “as if competition” concept). Several methods are available for this determination. If there is a comparable competitive market (e.g., where separate geographic markets for the same product exist), there is a presumption that the fictitious competition price in the dominated market would not be higher than in the comparable competitive market. If the price on the comparable market is lower, this may also indicate excessiveness, unless the higher-priced market has structural particularities that would also force competitive firms to charge a higher price. Other indicators of excessiveness may also be: (1) a price increase substantially exceeding cost increases, and (2) profits of the dominant firm in the dominated market being higher in

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19. 2 OECD 10.
20. For further details, see Barnikel, Abuse of Power by Dominant Firms: Application of the German Law, 14 Antitrust Bull. 221, 231-40 (1969).
relation to its profits in more competitive markets and the profits of comparable firms in such markets.

B. Major Recent Cases of Price Control

The first major case in which the "fictitious competitive price" concept was applied by the Federal Cartel Office arose in 1967 and involved the large oil companies doing business in Germany. After the closing of the Suez Canal in June 1967, these companies had raised their gasoline retail prices in several steps by 0,05 DM per liter. The higher prices were maintained until the Fall of 1967, although the supply situation had, in the interim, improved considerably and transportation costs, claimed as justification for the high prices, had dropped considerably. The Federal Cartel Office thereupon started proceedings against the larger companies on the assumption that: (a) due to the fact that they had for a long time followed a policy of parallel conduct on the market, they were a dominant group within the meaning of section 22(2); and, (b) the practice of a dominant firm or group maintenance of prices although costs have gone down considerably was an abusive practice within the meaning of section 22.

Public hearings were held in which Esso, Shell, BP and DEA (a subsidiary of Texaco) appeared, and the Federal Cartel Office thereafter clearly indicated that an order would be issued. Esso then started to lower its price by an average of about 0,02 DM per liter and the others followed suit. The proceedings were thereupon terminated.

During the recent oil crisis the Federal Cartel Office again examined the oil prices of the major sellers. In May 1974 preliminary orders were issued against the German subsidiaries of BP and Texaco, prohibiting an intended rise of gasoline prices by 0,01 to 0,02 DM per liter. Since BP, unlike Texaco, did not drop its plan, a final order against it was made two weeks later. However, a motion by BP to suspend the immediate effect of the order was sustained by the Berlin Court of Appeals. The court expressed "serious" doubts as to whether the Federal Cartel Office had presented sufficient evidence to establish a dominant market position and an abuse. On the question of abuse, the court said that the "very considerable" profit increases shown by the parent company during 1973 gave rise to a "certain suspicion" that the transfer prices paid by BP/Germany to the parent company were excessive, but absent further inquiry this did not prove the abuse. In this connection the court noted that the Federal Cartel Office had the power to issue formal requests for information and documents directly.

21. For further details of this case, see id. at 223-28.
against the foreign parent company. The case was dropped in August 1974 after gasoline prices in Germany again began to decline.

Another important area where the Federal Cartel Office applied section 22 to excessive prices is drugs. In a formal decision, Ernst Merck, the leading seller of vitamin B12, was ordered to lower its price by between 60 and 70 percent. It was found that prices of other sellers in Germany and in Switzerland were substantially lower and that Merck could maintain its prices only as a result of the irregular conditions on the drug market. On appeal the Berlin Court of Appeals, by a decision of March 19, 1975, affirmed in substance the order of the Federal Cartel Office, but lowered the price reduction percentages from 60-70 percent to about 50 percent.

A second case concerns the prices for “Valium” and “Librium” which are distributed in Germany by the German subsidiary of the Swiss firm Hoffman-LaRoche AG. The German subsidiary buys the ingredient from the parent company at a transfer price which in the case of Valium is ninety times higher than the market price in Italy where no patent protection exists. Moreover, Hoffman-LaRoche/Germany is a licensee of the Swiss parent and is paying substantial license fees. As a result, the total transfer price paid for the ingredient in the case of Valium is 130 times higher than the manufacturing costs. Profits in this case are about 60 percent on turnover, compared, for example, with two percent in the electrical industry. After a public hearing the Federal Cartel Office ordered price reductions of 40 percent for Valium and of 35 percent for Librium.

Abuse control activity is also found in the automobile industry. In the Fall of 1973 the Federal Cartel Office proceeded against VW to prevent the intended introduction of a consignment system for the distribution of VW and Audi-NSU cars. This step was regarded by the Federal Cartel Office as a means of evading the statutory abolition of resale price maintenance. VW, Ford/Germany and Opel (a subsidiary of GM) together have a market share between 60 and 70 percent which brings them under the market share presumptions. In May, 1974 the Federal Cartel Office started proceedings against VW’s automobile prices, after they had been raised twice within two months amounting to a total increase of more than ten percent. After an inspection of VW’s accounts and a public hearing, the Federal Cartel Office came to the conclusion that the cost increases for labor, parts, energy and transportation were even higher than the price increases so that it could not be said with sufficient certainty that comparable firms in a

24. Decision of Oct. 16, 1974 (not yet published). In a preliminary ruling the Berlin Court of Appeals has stayed the execution of the order until its final decision.
competitive market would not have effected the same price increase. For this reason the case was dropped.25

V. MERGER CONTROL

A. General Approach

The main features of the control system introduced by the 1973 law26 are:

1. There is a compulsory notification system. As a rule, notification is required after consummation, but large mergers involving at least two firms with annual sales of one billion DM ($400 million) or more must be notified in advance and cannot be effected before clearance has been given or a certain time has elapsed without intervention by the Federal Cartel Office.

2. The duty to notify and the Federal Cartel Office's power to contest apply only if the mergers reach certain size and market dimensions. Mergers which do not reach these dimensions are exempt, regardless of their effects on competition.

3. The control procedure is divided into two stages. The first stage is the examination by the Federal Cartel Office of the competitive effects of the merger measured in terms of market domination. The second stage is the exemption procedure before the Economics Minister for reasons of public interest.

4. Decisions to prohibit mergers and to refuse an exemption are subject to full judicial review.27

The following points are of particular importance. Since the new law uses market share and size criteria as requirements for notification and control, it is important how affiliates are defined and whose market shares and sales are included in the calculations of these criteria in a particular case. In this respect the law contains special rules which go beyond the traditional corporation law concepts of affiliation. There is a special clause to the effect that a merger of firms

25. In February 1975 the Monopolies Commission, an independent advisory body to the Federal Government, presented a general opinion on the "Application and Scope of the Abuse Supervision over Market Dominating Enterprises since the Coming into Force of the Amendment to the Cartel Act." While agreeing with the general position of the Federal Cartel Office that prices may be controlled under section 22 and that costs may be examined in this context, the Commission expressed the view that in applying section 22 priority should be given to actions against exclusionary practices and "structural price abuses" (e.g., price discrimination) rather than to control prices as such. Specifically, the Commission criticized the Federal Cartel Office practice to control price increases on the basis of cost increases. To strengthen the "structural" side of section 22 the Commission proposed that the law should be amended so as to empower the Federal Cartel Office to prohibit any restrictive practice, whether or not otherwise legal, if in a particular market the market share presumption of section 22(3) applies. In addition, the Commission proposed amendments to widen the scope of private antitrust action based on section 22.


having subsidiaries is regarded at the same time as a merger between the subsidiaries themselves. As a result of this clause, mergers of foreign companies having subsidiaries in Germany are at least partly covered by German law. On this basis, the merger of the United States firms Colgate and Helena Rubinstein, both of which have subsidiaries in Germany, came within the scope of German merger law.\textsuperscript{28}

The rule that mergers can be prohibited only if the annual sales of the participating firms together are at least 500 million DM, and the exclusion from control of the takeover of small firms with less than 50 million DM annual sales and of purely local mergers, represents a policy decision by the legislature in favor of small business. The underlying idea was that smaller firms should be free to perform the necessary restructuring of their businesses. Further and perhaps more convincing reasons were: (1) the intention to concentrate control regulation on a reasonable number of major cases, rather than to deal with great masses of petty cases, and (2) the experience that normally if the size of firms is small, there is less likelihood that mergers of such firms lead to monopoly power.

B. Enforcement Practices

As of December 31, 1974, 205 mergers had come within the scope of the new control system and were investigated. Of the 205 cases, the great majority involved acquisitions of equity and joint ventures, while only ten percent involved other forms of merger. In eighty-four of these cases, advance notifications were made (fifty-five mandatory and twenty-nine voluntary). The remaining cases involved notifications of consummated mergers. Of the 205 cases, 115 were terminated by giving clearance, four by withdrawal of the advance notification, and five by prohibition orders. Eighty-one cases were still pending. Of the five cases resulting in a prohibition order, one was exempted by the Ministry for Economic Affairs, three are pending on appeal, and in the fifth case the merger plan was dropped.

The first of the five cases in which the Federal Cartel Office prohibited the merger involved Veba AG and Gelsenberg AG, both companies having substantial activities in various sectors of the oil and petrochemical industry. The merger was brought about by the Federal Government, which already had a controlling influence in Veba AG before the merger, when it acquired a majority of the equity of Gelsenberg AG. The Federal Cartel Office, in prohibiting the merger, pointed mainly to the substantial market shares of both firms for light

\textsuperscript{28} No order in this case was made since the firms did not reach or strengthen a market dominating position in Germany
and heavy fuel oil, for certain petrochemical products, for inland navigation of oil and coal and for electricity. The oligopolistic structure of most of these markets was also an important factor. The exemption decision is mainly based on considerations of energy policy. It was said that a strong national oil company was “indispensable for secured supplies of mineral oil products” and that such a company would “improve the prospects of negotiations with oil producing countries to be purchased and direct participation in joint projects.” Another consideration was that both companies together would only be medium-sized on a world-wide scale.

The second prohibition order concerned the proposed merger between two medium-sized paper manufacturing companies. Both companies together would have reached 90 percent of domestic newsprint production. Together with two importing firms, their domestic market share would have been two-thirds. Allegations by the firms that the strong position of the Scandinavian producers would endanger the maintenance of a major paper producing company in Germany were not accepted by the Federal Cartel Office.

The third case involved a joint venture of Veba/Gelsenberg, Deutsche Fina and Occidental Oil GmbH for the joint selling of liquid-asphalt products. The four companies together had a 22 percent market share. The other major sellers are Shell (30 percent), Esso (25 percent), BP (eight percent) and Texaco (eight percent). The Federal Cartel Office reasoned that the merger would bring about a tight oligopoly with the three largest sellers having a 77 percent market share. Further, in view of the parallel price behavior of the sellers, the merger would strengthen the already existing market dominating position of the large sellers.

In the fourth case, the United States company Johnson & Johnson had acquired a majority interest in Dr. Carl Hahn GmbH, the leading German manufacturer of tampons with a domestic market share of about 80 percent. In prohibiting this acquisition the Federal Cartel Office reasoned that Dr. Carl Hahn GmbH already had a dominant position in tampons before the merger and that, although Johnson & Johnson did not sell tampons in Germany, this position was strengthened by the merger. In this connection the considerable financial and technological resources of Johnson & Johnson, its advertising

30. Decision of Feb. 4, 1974, (1974) Wirtschaft und Wettbewerb 553. The order in this case was not challenged by the parties; nor did they ask for an exemption.
potential and the fact that it offered a large range of hygienic and cosmetic products were taken into account. These factors, in the opinion of the Federal Cartel Office, amounted to substantial market entry barriers deteriorating the competitive position of actual or potential competitors. Both firms have brought an appeal against the order of the Federal Cartel Office.

The fifth case also involved a United States firm, the Kaiser Aluminum and Chemical Corporation. Kaiser and the German Preussag AG are joint owners of the Kapal group which consists of several joint ventures for the production and distribution of aluminum ingots and other aluminum products. Under the merger plan notified to the Federal Cartel Office, Preussag would sell its 50 percent interest in the raw aluminum joint venture to Kaiser and the German firm Vereinigte Aluminiumwerke AG (VAW). Kaiser's and Preussag's interests in the other joint ventures would be transferred to VAW Leichtmetall GmbH, a subsidiary of VAW, and Kaiser would acquire a 25 percent interest in VAW Leichtmetall. VAW, a subsidiary of the state-owned Vereinigte Industrie-Unternehmungen AG (Viag), is the largest domestic producer and processor of aluminum. Taking into account the close oligopolistic structure of the domestic market and Kaiser's position as one of the largest producers in the world, the Federal Cartel Office concluded that the merger would strengthen already existing market dominating positions for aluminum ingots and several types of semi-manufactured and aluminum finishes. The parties have asked the Ministry for Economic Affairs for an exemption from the prohibition order of the Federal Cartel Office.

The five prohibition orders do not show the total impact of the new law. In one case a merger project was dropped entirely after the Federal Cartel Office had informed the parties that it would veto it. In several other cases of an announced veto, the mergers were ultimately carried out in a different form (by acquisition of a 20 percent instead of 25 percent interest, by a merger with a smaller competitor, or by reducing the number of participants in a joint venture). Undoubtedly there are other cases where merger projects were dropped for antitrust reasons even without any contacts with the Federal Cartel Office. As a whole, the impact of the new system on the merger activity of firms must be considered rather substantial.

VI. COMPARATIVE EVALUATION

As a result of the 1973 reform law, the antitrust system in Germany has come considerably closer to American antitrust law. German antitrust law now covers almost all practices covered by United States
antitrust law. Certainly, the exemption clauses for horizontal agreements, licensing agreements and mergers, and the absence of deconcentration powers similar to section 2 of the Sherman Act, make German antitrust law still considerably less strict than its American counterpart. On the other hand, German law is stricter in regard to the market behavior of powerful firms including shared monopoly, resale price maintenance and restrictive recommendations. It should also be noted that as a result of EEC antitrust law, vertical territorial restrictions within the Common Market are virtually per se illegal. Similarly, public enforcement, both from a legal and practical point of view, is comparable to United States practice as can be seen, for example, from the conspiracy cases described above. Only private enforcement is still rather undeveloped. Germany has no treble damage action and "normal" antitrust damage suits are rare.

A further similarity is the wide coverage of international practices. Section 98(2) of the German antitrust law
\[3\]
\[3\] covers all restraints of trade which have effects on domestic territory. It is true that this wide concept has not been applied as extensively as in some American cases. But German practice in this respect goes further than in most other countries with active antitrust systems.

Antitrust in Germany also has more than a mere economic dimension. Its function—to protect freedom of economic activity and to combat excessive business power—is seen as equally important. It is true that competition is not given absolute priority over other policy considerations. This is reflected by the various antitrust exemption clauses and the absence of strict per se rules. But it is generally accepted that competition should be traded off for other policy considerations only as an exception. The general political trend is for stronger antitrust policy, rather than diminishing its role. As a result, antitrust considerations will become still more important in business and political life.

33. 2 OECD 42.