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Federal Republic of Germany

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Specifically, the U.K. Inland Revenue had argued that withholding should be levied on the total amount of the dividend and one-half of the ACT credit, whereas the taxpayer claimed that the withholding tax should be calculated as 5 percent of the dividend plus the amount of the tax credit actually paid (rather than payable). Mathematically, this works out to an effective withholding of 4.76 percent rather than 5 percent.²² Although the percentage difference may be small, some interesting tax savings could be reaped if large amounts of dividends are paid out through a U.K. entity.

It is not at all clear whether the case will be upheld on appeal, and the speculation is that diplomatic notes will be exchanged to clarify the intent of the treaty in question.²³ In any event, the U.K. Inland Revenue issued a Press Release on October 25, 1988, indicating that it would seek legislation as part of the 1989 Finance Bill to clarify and reconfirm by statute its prior interpretation of the refund of ACT credits.²⁴

Federal Republic of Germany*

I. Corporate Law

A. FEDERAL SUPREME COURT RULES ON CORPORATE AFFILIATION AGREEMENTS

When the German Stock Corporation Act was revised in its entirety in 1965,¹ the German Legislature for the first time codified the law of affiliated companies.² The lawmakers recognized that the close affiliation between companies through majority ownership, joint management, and other means of control changes the corporate power structure and requires specific rules on such issues as D & O liability, rights of minority shareholders, and protection of

22. See 22 Tax News Serv. (IBFD) 218 (Oct. 31, 1988).

23. See 15 Tax Plan. Int'l Rev. (BNA Int'l) 33 (Nov. 1988).

24. See 7 INT'L FIN. L. REV. 48 (1988); 22 Tax News Serv. (IBFD) 241 (Nov. 30, 1988).

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This report covers developments between September 1988 and August 1989.

1. Aktiengesetz [AktG], Sept. 6, 1965, Bundesgesetzblatt, Teil I [BGB1.I] 1089.

2. Konzernrecht—Recht der verbundenen Unternehmen.

creditors. These rules differ depending on how the companies are affiliated with one another. Where one company, through majority ownership and other means of influence, exercises control over another, the affiliation is called factual.³ The affiliation is of a contractual nature⁴ where the exercise of control is governed by an affiliation agreement.⁵

Perhaps the most common form of affiliation agreement in German corporate practice gives one company the right to control the affairs of another company.⁶ Such a right is usually coupled with a right to the profits of the controlled company and an obligation to absorb that company's losses.⁷ Aside from making the controlled company a division of the controlling entity, the main benefit of such an agreement is that it allows the controlling company to consolidate fully the controlled company's profits and losses for tax purposes.⁸

The rules on affiliated companies, including those on affiliation agreements being embodied in the Stock Corporation Act, address only situations where the controlled entity is a stock corporation (*Aktiengesellschaft*). In cases where the controlled entity is a limited liability company (*GmbH*), an entity comparable to a closely held U.S. corporation, the conditions for an enforceable profit transfer and loss absorption agreement had until recently remained unclear. The Federal Supreme Court has now clarified these conditions. In its decision of October 24, 1988,⁹ the Court held that in order for a profit transfer and loss absorption agreement to be valid, the shareholders of both companies must approve of its terms. In addition, the resolution of the controlled company's shareholders must be notarized, and the agreement and the resolutions must be notified and registered with the commercial register having jurisdiction over the controlled company.

While corporate and tax practitioners may now rely on the Federal Supreme Court's decision in dealing with new affiliation agreements, the recognition of existing agreements that do not comply with the new decision remains in doubt. It is expected that the tax authorities will promulgate regulations that will allow companies to adjust to the new situation by certain deadlines. In the meantime, however, the Federal Ministry of Finance stated in a note to the public on December 30, 1988 that the tax authorities will not object to profit transfer and loss absorption agreements not complying with the new decision.

B. LAW CONCERNING PREPARATION AND PUBLICATION OF CORPORATE FINANCIALS (*BILANZRICHTLINIENGESETZ*)

On October 24, 1988, the European Commission submitted to the Council of Ministers its proposed amendments to the 1978 and 1983 Directives on the

3. Faktischer Konzern, AktG §§ 311-318.

4. Vertragskonzern.

5. Unternehmensvertrag, AktG §§ 291-310.

6. Beherrschungsvertrag, AktG § 291(1) (1st alternative).

7. Ergebnisabführungsvertrag, AktG § 291(1) (2nd alternative).

8. Körperschaftsteuergesetz (Corporate Income Tax Code), § 14.

9. Judgment of Oct. 24, 1988, Betriebs-Berater 1989, at 95.

Preparation and Publication of Corporate Financials.¹⁰ These earlier Directives had prescribed requirements for the contents and publication of corporate financials that varied depending on whether the corporation was to be classified as small, medium, or large. Even though all Member States implemented the Directives, compliance with the new rules was slow, particularly on the part of small corporations that did not wish to have their balance sheets disclosed to the public.

The new Directive would enable the Member States to increase the criteria of size by 50 percent, allowing more companies to fall within the categories of small- and medium-size companies and thus enjoy the less stringent requirements for those groups. In addition, the Directive would alleviate the requirements for small corporations, exempting them from the application of the 1978 and 1983 Directives altogether if they are not affiliated with another company, if the shareholders and members of the management are identical, and if the shares are registered and may not be transferred without the company's approval. Other small corporations would not have to file their financial statements with the commercial register but be required either to provide access to their statutory accounts at their premises or to provide copies upon request.

The Commission's proposals were generally welcomed by both German businesses and politicians. Commentators pointed out, however, that adoption of the proposal would probably be linked to another Commission proposal extending the application of the publication Directives to businesses organized in the form of a GmbH & Co. KG, which are limited partnerships whose general partner is a corporation.

Yet it remains doubtful whether all Member States will be willing to sacrifice the more stringent publication rules currently in force for an extension of the more lenient proposed rules in favor of businesses such as the GmbH & Co. KG. It is expected that the lawmaking process will take until the early 1990s.

II. Commercial Law—Trade Agency Law to Be Amended

In October 1989 the German Legislature passed the Act implementing the 1986 EEC Directive on the Coordination of Trade Agency Law in the Member States.¹¹ The EEC Directive recognizes that trade agents, who are independent entrepreneurs acting in the name and for the account of the principal, deserve a certain minimum amount of protection against unfair termination and loss of business due to termination. As a result, the EEC Directive introduces, inter alia, minimum notice periods, mandatory termination payments, and other protective features. Contrary to other EEC Member States, German trade agency

10. *Directives on the Preparation of Corporate Financials*, 31 O.J. EUR. COMM. (No. C 287) 5 (1988).

11. BGTB1.I 1910.

law, which is codified in the German Commercial Code,¹² had always attempted to balance the principal's and the agent's interests evenly and had for a long time provided for a mandatory termination payment up to an average of one year's commission.¹³ Only a few changes in the current law were therefore necessary to bring German trade agency law in line with EEC standards.

In accordance with the EEC Directive, the notice periods for agency agreements with an indefinite duration will be modified. Long-term agreements that have lasted over five years will be terminable only upon six months' notice.¹⁴ The termination payment with up to an average of one year's commission rate remains in place.

Changes will also occur in the mandatory character of the law. Until now, the parties to an international trade agency agreement could subject their agreement to German law and exclude the application of individual provisions, including those on termination payments, if the trade agent had its place of business outside of Germany.¹⁵ As an alternative, the parties could agree that the trade agent's law was to govern the agreement and exclude termination payments if that law did not provide for mandatory termination payments.¹⁶ In the future, it will no longer be possible to contract away the mandatory features of the Commercial Code if German law is to govern the agreement and the trade agent has its place of business in an EEC Member State.¹⁷ Since the laws of all Member States will in substance be equivalent, the choice of the trade agent's law will generate the same substantive results. In relation to third countries such as the United States, however, the old rule will survive.

The new law will be effective as of January 1, 1990.

III. International Litigation—Proposed Regulation on Documentary Requests

In November of 1988, the Federal Ministry of Justice published a new draft Regulation on documentary requests under the 1965 Hague Convention on the Service of Documents and the 1970 Convention on the Taking of Evidence Abroad.¹⁸ The draft Regulation is designed to remove some of the difficulties that have arisen in international litigation involving U.S. and German parties.

These difficulties stem from the sharp differences between the legal systems in both countries, particularly the area of civil procedure. While pretrial discovery is an indispensable feature of U.S. civil practice, the German Code of Civil

12. *Handelsgesetzbuch* [HGB] § § 84-92c.

13. HGB § 89b.

14. HGB new § 89.

15. HGB § 92c.

16. Judgment of Jan. 30, 1961, Bundesgerichtshof [BGH], W. Ger., 16 Lindenmeier-Moehring Collection of Cases [LM], HGB § 89b.

17. HGB new § 92c.

18. REFERENTENTWURF DES BUNDESMINISTERS DER JUSTIZ (1988).

Procedure¹⁹ provides for no pretrial discovery at all. It requires only that the plaintiff specify the relief prayed for and the facts on which the claim is based.²⁰ The purpose of naming testimony and documents in the complaint and subsequent briefs is to prove the facts alleged but not to generate new facts and testimony.²¹ Consequently, the Code of Civil Procedure contains no rules dealing with requests for the production of documents. When West Germany ratified the Hague Convention on the Taking of Evidence Abroad, it reserved the right to deny foreign documentary requests until such time as the relevant procedures and the circumstances under which requests were justified were laid down in a regulation on the subject.²²

Pending the promulgation of such a regulation, German authorities have consistently rejected requests by U.S. authorities for the production of documents. This policy, in turn, has prompted U.S. courts to request the production of documents in the United States in accordance with U.S. law, provided that the U.S. court had jurisdiction over the German defendant. When the United States Supreme Court, in *Aérospatiale*,²³ held that the provisions of the Hague Convention were not exclusive and foreign parties could in the appropriate circumstances be required to produce documents in the United States in accordance with U.S. law, German industry and business circles asked the Federal Government to develop a regulation designed to relieve some of the tension from what has been referred to as the U.S.-German judicial conflict.

The new draft Regulation would provide a mechanism for dealing with documentary requests as long as the fundamental principles of German procedural law were observed and the request did not violate the vital interests of the parties concerned. These principles are set forth in sections 1 and 2 of the draft. According to the draft Regulation, any documentary request must clearly identify the relevant documents and must specify the facts upon which a substantive claim is based, including in product liability cases the allegedly defective goods and the defect. Requests may be denied if the documents are apparently unrelated to the substantive claim or if the production of the documents would cause the parties concerned substantial harm. In disposing of the request, the German court may impose restrictions to protect the party's justified interests, particularly where the documents contain privileged information or business secrets.

On the procedural side, the decision on the request is entrusted to the lower courts, which must hear the parties involved before rendering their decision. All decisions are subject to review by a Court of Appeals (*Oberlandesgericht*).

19. Zivilprozessordnung [ZPO].

20. ZPO § 253.

21. Judgment of May 4, 1964, BGH, [1964] Neue Juristische Wochenschrift [NJW] 1414.

22. Official Announcement of June 21, 1979, BGBl.II 780; Ausführungsgesetz (Implementation Act) (Dec. 22, 1979), BGBl.I 3105.

23. *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522 (1987).

The draft Regulation has been criticized by some and hailed by others. While the government is in favor of it, business circles remain skeptical. If the administration goes ahead with the draft Regulation, it may enter into effect on relatively short notice.

IV. Tax Law

A. TAX REFORM ACT PARTLY WITHDRAWN

As already reported in this article,²⁴ the Tax Reform Act of 1990 increased the taxes on capital gains from the sale of businesses and substantial shareholdings and introduced a 10 percent withholding tax on interest income. Faced with lasting criticism from the public, the Federal Government has now stated that it will withdraw, or at least mitigate, some of the new features before they have entered into effect.

While the exact contents of the new scheme are still under consideration, it is expected that capital gains from the sale of businesses or substantial shareholdings of up to DM 30,000,000 will continue to enjoy the current 50 percent tax reduction, and that the full rate will only apply to gains over and above that amount. The Government's position on a withholding tax, however, is already clear: this tax will not be implemented.

Even though the Government lost some of its credibility as a result of this zigzag course, it managed to gain the favor of entrepreneurs who had already set out to sell their companies while the old capital gains rule lasted. The move also might dissuade investors from diverting their investments into countries with a more favorable tax system.

B. FEDERAL TAX COURT RULES ON U.S.-GERMAN ESTATES

A new decision of the Federal Tax Court (*Bundesfinanzhof*) may create difficulties for the administration of a U.S. estate whose beneficiaries, for tax purposes, are German residents. In a judgment handed down on June 8, 1988,²⁵ the Federal Tax Court held that for German tax purposes the estate of a New York decedent passes to the German beneficiaries at the time of the decedent's death and not at the time of interim distribution or the rendering of a final decree of distribution by the U.S. probate court.

Under German inheritance law, all assets and liabilities of the decedent pass to the heir or heirs at the time of death, and the heirs are considered to be the decedent's successors-in-law in all respects.²⁶ The same is true if the testator has appointed an executor (*Testamentsvollstrecker*). In that case, too, legal title vests

24. Bastuck & Weitbrecht, *Regional Developments, Federal Republic of Germany*, 23 INT'L LAW. 287-90 (1989).

25. Judgment of June 8, 1988, Bundesfinanzhof [BFH] (Federal Tax Court), II BStBl 808.

26. Bürgerliches Gesetzbuch (German Civil Code) [BGB] § 1922.

in the heirs at the time of death, and the executor only has power to take possession of the estate and administer it in accordance with the testator's orders and directions.

German tax law follows this general scheme. The inheritance tax under the Inheritance and Gift Tax Act²⁷ is levied on the inheritance of a share in the estate, and since the inheritance occurs at the time of the decedent's death, the tax obligation also arises at the time of death. For purposes of income tax law, all income derived from assets held in the estate is considered as income of the heirs, and there is no intermediary income tax payer such as the estate.

These German tax rules are ill-fitted to address different rules of succession under foreign law. If, under applicable rules of choice of law, the succession is governed by the laws of a foreign jurisdiction (this is usually the case when the decedent is a foreign national who last resided in the foreign jurisdiction) the foreign succession rules must be interpreted to fit the German categories of inheritance and income tax law. Until recently, the Federal Tax Court has consistently held that succession under U.S. law was so drastically different as to require a different characterization under German inheritance tax law. Since legal title to individual assets only passed to the beneficiaries of the residual estate at the time of interim distribution or the rendering of a final decree of distribution, at least when the executor had free discretion as to the time when distributions were made, the succession only occurred at those moments, and consequently the inheritance tax only arose at those points in time.²⁸ Even though the cases were not very clear on the point, this allocation of assets would also have seemed governing for income tax purposes. Thus, income derived by the estate prior to the relevant time of succession under German inheritance tax law would not be attributed to the heirs and therefore would not be taxable to them.

In a recent case, the Federal Tax Court overruled its earlier decision of 1964, holding that for the purpose of capital tax (*Vermögensteuer*) the estate of a New York decedent must be deemed to have passed to the main beneficiaries under the will at the time of the decedent's death even if the executors had been granted the widest discretion to administer and dispose of the assets. The Court compared the German tax treatment if an executor had been appointed and concluded that the situation was not so drastically different as to warrant a different tax treatment. In addition, the Court found that under New York law beneficial title to real estate passed to the heirs at the time of death, which would in any event require a different characterization of succession to real estate and to other property.

From the Court's opinion it is clear that this characterization will apply for the purposes of all taxes, including income tax. The main discussion revolves around

27. Erbschaftsteuer- und Schenkungsteuergesetz.

28. Judgment of May 15, 1964, III BStBl 408; Judgment of May 31, 1961, III BStBl 312; see also Judgment of May 12, 1970, II BStBl 462; Judgment of Feb. 2, 1977, II BStBl 425.

section 39 of the Federal Tax Code (*Abgabenordnung*), which deals with title to assets for purposes of tax law in general.²⁹

The new decision would seem to create more problems than it attempts to solve. Where the administration and liquidation of the estate takes a few years, all income derived by the estate must be allocated to the German beneficiaries and become subject to German income taxation, provided that the U.S.–German Double Taxation Treaty assigns the taxation right to Germany. This raises the problem of determining which costs of the estate may be deductible for German income tax purposes. When the estate has paid income taxes in the United States, it appears that double taxation may be avoided only if a reconciliation proceeding under article XVII of the Double Taxation Treaty is initiated. To mitigate these problems, American executors may be best advised to distribute assets from the estate as early as possible.

V. Product Liability—Enactment of New Law Delayed

In June of 1988, the Federal Government submitted the draft of a German Product Liability Law (*Produkthaftungsgesetz*), implementing the EEC Product Liability Directive. Even though the EEC implementation period ended on August 1, 1988, Germans are still waiting for the new law, which would introduce the concept of strict liability for all industrial products.

When the draft was discussed in the Bundestag in November of 1988, Social Democrats and Greens said that the draft did not sufficiently protect consumer interests. They contended that agricultural products would be excluded from the application of the new law, that it would contain the so-called development risk defense, that it would provide for a cap on liability for defective product series, and that it would not grant damages for pain and suffering on a no-fault theory.

The draft was referred to various legislative committees for further review. It may be passed into law relatively soon but will most likely enter into effect at a later date because industry has asked for a transition period within which it can adjust to the new regime.

VI. International Trade—Germany to Ratify U.N. Sales Convention

On April 20, 1989, the Federal Parliament adopted the Act Concerning the United Nations Convention on Contracts for the International Sale of Goods.³⁰ At the same time the 1964 Hague Uniform Laws on the International Sale of Goods were repealed. The Act thus having completed the domestic law-making process, the Government will now proceed with the ratification of the Conven-

29. The Berlin Ministry of Finance has already stated that it will apply the new rule to inheritance tax, Decree of Mar. 28, 1989, DSr 323.

30. BGBl.II 586.

tion and the denunciation of the Hague Conventions in accordance with article 99 of the U.N. Convention.

VII. Antitrust Law

A. GERMAN ANTITRUST LAW

1. *Merger Control*

Merger control continues to be the most important area of the Federal Cartel Office's enforcement activities. Even though very few merger proceedings result in a formal prohibition order,³¹ many merger projects are abandoned after objections from the Federal Cartel Office. Such objections may be raised either during informal pre-merger discussions between advisers and the Federal Cartel Office or during the course of merger proceedings.³²

a. Extraterritorial Reach of German Merger Control Law

In the prohibition order of March 3, 1989,³³ concerning the merger between Linde and the Kaye Organization, the Federal Cartel Office had to face the issue of the extraterritorial reach of German merger control. The Decision Making Board came to the conclusion that Linde held a dominant position in the German market for certain kinds of forklifts. Once a company is considered to enjoy a dominant position, an acquisition of another company that is active in the same product market and resulting in additional market share will normally be considered as strengthening this dominant position. The Federal Cartel Office will prohibit such a merger unless the merger has procompetitive effects that outweigh the anticompetitive effects.

Because the Kaye Organization produced and distributed forklifts in many European countries, especially the United Kingdom, France, and the Federal Republic of Germany, the acquisition of both the English parent company and the German subsidiary was considered to strengthen the dominant position of Linde in the domestic market. The Decision Making Board, however, limited its prohibition order to the German subsidiary. Linde was allowed to acquire the

31. During the reporting period, the Federal Cartel Office has, *inter alia*, prohibited the merger between two specialized producers of nonferrous wrought products, Decree of Aug. 18, 1988, 39 *Wirtschaft und Wettbewerb* 82 [= *WuW/E BKartA* 2304] (Wieland/Langenberg), a merger in the fields of industrial gases and carbonic acid, Decree of Aug. 2, 1988, 39 *Wirtschaft und Wettbewerb* 165 [= *WuW/E BKartA* 2319] (Messer Griesheim/Buse), and the acquisition by Melitta Werke of Kraft's German wrapping paper business including the trademark "Frappan," Decree of Apr. 19, 1989, 39 *Wirtschaft und Wettbewerb* 843 [= *WuW/E BKartA* 2377].

32. The Federal Cartel Office continues to point to this so-called "Vorfeldwirkung" in order to support its contention that the German merger control laws are quite effective despite relatively few and often unspectacular prohibition orders. For the latest statement of this thesis, for which there is supporting evidence, see the biannual report of the Bundeskartellamt [*BKartA*] for the years 1987 & 1988, *BUNDESDRUCKSACHE* 11/4611, at 14.

33. See 39 *Wirtschaft und Wettbewerb* 765 [= *WuW/E BKartA* 2363] (Linde/Lansing).

entire non-German business of Kaye, even though such acquisition was considered to strengthen Linde's dominant position on the German market. The Decision Making Board was of the opinion that under public international law a German governmental agency has no jurisdiction to prohibit and enjoin the acquisition of a foreign corporation.

Until *Linde* it has been generally accepted in the Federal Republic and most other Western countries (with the exception of the United Kingdom) that under the effects principle a state has jurisdiction over the acquisition of a foreign company if such acquisition would have anticompetitive effects on the domestic market.³⁴ Such jurisdiction, however, is to be exercised with restraint and under observance of an international rule of reason.³⁵ *Linde* would appear to abandon this concept for a per se prohibition emanating from public international law.³⁶ Officers of the Federal Cartel Office have suggested that *Linde* is to be limited to its facts and that no further conclusions should be drawn as to the future practice of the Federal Cartel Office regarding the extraterritorial application of German merger control laws.

b. The Daimler-Benz/MBB Merger

The Federal Cartel Office also prohibited the proposed acquisition by Daimler-Benz of a substantial interest in Messerschmitt-Bölkow-Blohm (MBB).³⁷ Daimler-Benz is not only a leading manufacturer of passenger cars and trucks but also holds controlling interests in the electrical equipment manufacturer AEG and in the technology/aerospace firm of Dornier. The Federal Cartel Office was of the opinion that the merger would lead to or strengthen dominant market positions of Daimler-Benz in the fields of defense technology, aircraft and aerospace technology, as well as trucks.

Daimler-Benz and MBB subsequently applied to the Federal Minister of Economics for an exemption under section 24 subparagraph 3 of the Act against Restraints of Competition, which allows the Federal Minister of Economics to override the Federal Cartel Office, provided that the merger has other advantages that outweigh the competitive concerns raised by the Federal Cartel Office. On September 6, 1989, the Federal Minister of Economics allowed the application

34. See *Consol Gold Fields, PLC v. Anglo Am. Corp. of S. Afr.*, 713 F. Supp. 1479 (S.D.N.Y. 1989).

35. Such restraint is required by the public international law principle of noninterference. For a comprehensive discussion of antitrust jurisdiction under customary international law, see Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 AM. J. INT'L L. 783 (1984). A more restrained application of domestic antitrust law to international fact situations may also be suggested by conflict of laws principles found in domestic law (see, e.g., *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979)).

36. The Decision is under appeal, *supra* note 33. The appeal is, of course, limited to that part of the decision that prohibits the acquisition of the German subsidiary and thus is not likely to shed new light on the issue of extraterritorial application.

37. Decree of Apr. 17, 1989, 39 *Wirtschaft und Wettbewerb* 633 [= WuW/E BKartA 2335].

subject to certain conditions.³⁸ The decision holds that the advantages the merger entails (reduction of subsidies for Airbus Industrie, improvements of international competitiveness in the defense and aerospace industry) outweigh the merger's negative effects on the market structure found by the Federal Cartel Office.³⁹ The conditions imposed upon the merging enterprises require, inter alia, divestiture in the field of marine technology and divestiture of Daimler-Benz's stake in Krauss-Maffei, the leading German producer of tanks.

2. Legislation

The Federal Cabinet has introduced in the legislature a proposal for a new Antitrust Improvement Act known as the Fifth Revision of the Law Against Restraints of Competition (*5. Novelle zum Gesetz gegen Wettbewerbsbeschränkungen*). This little-known but potentially very significant provision would broaden the statutory definition of what constitutes a merger. At present, the acquisition of shares in another company is subject to merger control only if at least 25 percent of the shares are acquired.⁴⁰ This threshold would be lowered by the new legislation (without giving a specific percentage) when the acquisition allows the acquiring company to exert, directly or indirectly, an influence over the target company that is of competitive relevance. Mergers of this kind would, however, be exempt from pre-merger notification.

B. EEC ANTITRUST LAW

In all but the most local transactions, a lawyer advising on German antitrust law will have to take into account Community antitrust law as well. The emphasis continues to shift from national to Community antitrust law.

1. *New Block Exemption Regulations*

As expected, the Commission has enacted the Block Exemption Regulations for Franchising Agreements⁴¹ and Know-How Licensing Agreements.⁴²

2. *Proposed Merger Control Regulation*

Without any doubt, the proposed merger control regulation of the EEC is the most important topic on today's EEC antitrust agenda.⁴³ Substantial progress

38. Decree of Sept. 6, 1989, 39 *Wirtschaft und Wettbewerb* 947 [= WuW/E BMW 191] (Daimler-Benz/MBB).

39. These findings by the Federal Cartel Office must be accepted by the Minister of Economics and can only be reversed upon appeal. See Federal Minister of Economics, *supra* note 38, 39 *Wirtschaft und Wettbewerb* 947, at 956 [= WuW/E BMW 200].

40. Under the present law the acquisition of less than 25 percent of the shares constitutes a merger only if additional factors are present (e.g., where the acquiring company receives additional voting rights). See *Law Against Restraints of Competition* § 23.

41. 31 O.J. EUR. COMM. (No. L 359) 46 (1988).

42. 32 O.J. EUR. COMM. (No. L 61) 1 (1989).

43. For the latest published proposal, see 32 O.J. EUR. COMM. (No. C 22) 14 (1989).

was achieved during the first ten months of 1989, but some details still remain to be agreed upon before the Council, which in this case must act unanimously, will be in a position to adopt the regulation. Issues that remained open include: which threshold will trigger the application of EEC merger control; the relationship between EEC merger control and national merger control; and the availability of exemptions for anticompetitive mergers on grounds of public policy. It is quite conceivable that the regulation will have been enacted into law by the time this article appears in print.

3. *Application of Articles 85 and 86 to Mergers*

Following the Cigarettes Judgment of the Court of Justice,⁴⁴ the Commission has stepped up its merger control activities. For example, it has investigated two large mergers in the packaging industry (Carnaud/Metal Box; Pechiney/Triangle). None of the proceedings, however, has resulted in a formal prohibition order; the standards that the Commission is using, therefore, remain far from clear.

The antitrust defense to hostile takeovers has been successfully used in the case of Irish Distillers.⁴⁵ In this proceeding, the Commission for the first time examined proposed mergers not merely under aspects of merger control but also under the aspect of collusive bidding.⁴⁶ This novel theory would apply article 85 of the Treaty not merely to competition for goods and services but to competition for target companies as well.⁴⁷

4. *Application of Community Antitrust*

Law to Conduct Abroad—Effects Doctrine

In its long-expected ruling in the *Wood Pulp* cases,⁴⁸ the Court of Justice considered the application of EEC antitrust law to conduct that takes place abroad but may have anticompetitive effects in the Community. In the past, the Court of Justice has never squarely endorsed the effects doctrine, preferring to use other jurisdictional bases for its decisions. While the Advocate General suggested an adoption of the effects doctrine, the Court again hesitated to endorse any particular jurisdictional principle. Rather, the Court developed the extraterritorial reach of EEC antitrust law from the purpose of the substantive provisions of EEC

44. *British Am. Tobacco Co. v. EEC Commission*, 1987 E. Comm. Ct. J. Rep. 142 & 154, Common Mkt. Rep. (CCH) ¶ 14 (1987).

45. 21 BULL. EUR. COMM. 34, No. 7/8 (1988).

46. The joint bid by General Electric Company (GEC) of Great Britain and Siemens for Plessey has also been reviewed under this aspect.

47. For an application of this theory in German antitrust law, see Judgment of Apr. 22, 1988, Landgericht (District Court), Bremen, W. Ger., 9 Zeitschrift für Wirtschaftsrecht [ZIP] 987, *aff'd*, Oberlandsgericht (Appeals Court), Bremen, Judgment of Apr. 20, 1989, 10 ZIP 1085.

48. Judgment of Sept. 27, 1988, Joined Cases 89/85, 114/85, 116/85, 117/85, 125-129/85. This (interlocutory) judgment is limited to the issue of a jurisdiction. Substantive issues will be decided in a second phase.