CURRENT LEGAL DEVELOPMENTS

The 1980 Amendment and Other Recent Developments in German Antitrust Law

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Almost seven years had passed since the enactment of a major revision of the German Antitrust Laws in 1973, which among other things introduced merger control into the German business scene, when another major revision—the 1980 amendment—came into effect on May 1, 1980.[1] This latest amendment brought about a significant tightening of the law, and what was started on January 1, 1958, the date when the Gesetz gegen Wettbewerbsbeschränkungen (Law Against Restraints of Competition—GWB) first came into effect,[2] as something considered not to dramatically change life, has over the years become more and more important as the rules were strengthened and the Bundeskartellamt's (Federal Cartel Office—BKA) attitude became stiffer. It now affects business decisions on a daily basis. A body of law that for historical reasons was as strange to the German legal system as to other civil law countries[3] now plays a central role within the German legal system comparable to the role of the antitrust laws in the United States. Although other continental European countries have also passed antitrust statutes, e.g., France, Italy and Switzerland[4] it is probably fair to say that no other country in Europe including even Great Britain has reached the degree of "sophistication" in this area as that of Germany as a result of stringent laws and a rigid application of the law by the enforcement agencies.

Interestingly enough, even though Germany has assumed this special role

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[1]Gesetz gegen Wettbewerbsbeschränkungen of Sept. 24, 1980 (GWB), (1980) Bundesgesetzblatt (BG Bl) I 1761 *et seq.* (W. Ger.); for overview, *see* Riesenkampff, *Major Amendments to German Antitrust Law*, 1981 COMM. GER. 44.

[2]GWB of July 27, 1957, (1957) BG Bl I 1081 *et seq.*, (W. Ger.).

[3]Riesenkampff, *Recent Developments in German Antitrust Law*, 30 BUS. LAW. 1273 (1975).

[4]*See* D. Gijlstra, *Competition in Western Europe and the USA*, FR/L/1, SW/L/7, SW/C/1 (1980).

only after having adopted U.S. antitrust philosophies after World War II[5] and has long relied upon and benefited from U.S. experience, it is now reciprocating the assistance received and influencing antitrust legislation in the U.S. The premerger notification requirement under the Hart-Scott-Rodino Act[6] enacted in 1976[7] was patterned in part along the lines of the corresponding German regulations first introduced into the GWB in 1973 as part of the new merger control.[8] Although the Sherman Act has always provided the basis for prohibiting external growth[9] of companies, it is only now that U.S. legislators are considering amendments of the U.S. antitrust laws to include a formal system of merger control.[10]

The heart of the Fourth Amendment of April 26, 1980 which was published on April 30, 1980[11] and came into effect on May 1, 1980, consists of measures to further tighten merger control. The provisions relating to merger control have been given retroactive effect to February 28, 1980 in order to counteract the so called "announcement effect", i.e., the repercussions the announcement of the proposed tightening of merger control may have had on potential mergers in Germany.[12]

This article will first discuss the major changes brought about by the Fourth Amendment in 1980 and will then briefly touch upon some of the more important developments that have recently occurred in the field of antitrust enforcement.

1. Tightening of Merger Control

a) The most visible changes, which significantly affect merger plans of national and multinational companies, concern the so called "minor effects" clause of section 24 (8) GWB and the extension of the pre-merger notification requirement under section 24 a (1) GWB.

aa) Under previous law enterprises with sales of up to 50 million Deutsch Marks could merge, free of merger control,with other enterprises

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[5]Law No. 56 of American Military Government of Jan. 28, 1947, Official Gazette of Military Government in Germany, American Control Area, ed. C, 2.

[6]Hart-Scott-Rodino Antitrust Improvement Act of 1976, PUB. L. No. 94-1373, 90 Stat. 1383 (1976) added § 7 A to Clayton Act.

[7]The statute applies to any mergers consummated after Sept. 4, 1978 and implementing rules are at 16 C.F.R. §§ 801-03 (1979).

[8]Riesenkampff & Patterson, *Die kartellrechtliche Anmeldepflicht nach dem Hart-Scott-Rodino Act—ein neues Hindernis fuer ausländische Investition in den USA*, 1979 WETTBEWERB IN RECHT UND PRAXIS (WRP) 188.

[9]Kintner, Griffin & Goldston, *The Hart-Scott-Rodino-Antitrust Improvements Act: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977).

[10]Patterson, *Notification Under the Hart-Scott-Rodino-Act: An Introduction*, 16 PHILA. LAW. 1 (no. 2, 1979).

[11]*Supra*, note 1.

[12]GWB Art. 4 (1980); *Begründung zum Regierungsentwurf of May 26, 1978 eines Vierten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, BT Drucksache 8/2136, 34 (1978) (W. Ger.) reprinted in 1980 WIRTSCHAFT UND WETTBEWERB (WuW) 366; [hereinafter cited as SUBSTANTIATION OF GOVERNMENT DRAFT].

regardless of their size,[13] whereas in the future a merger will be subject to control if the merging enterprise has sales of at least 4 million Deutsch Marks during the preceding fiscal year and the acquiring enterprise had sales of at least one billion Deutsch Marks during the same period.[14] This fundamental change of the so-called "small-company-merger" clause means that henceforth the only mergers which will not be controlled are those in which either the sales of the merging enterprise are less than 4 million Deutsch Marks, or the sales of the acquiring enterprise are less than one billion Deutsch Marks and the sales of the merging enterprise do not exceed 50 million Deutsch Marks.[15] Since sales are always computed on a consolidated basis and include domestic sales as well as foreign sales,[16] any acquisition of importance, i.e., of companies with sales of four million Deutsch Marks or more by even a small subsidiary of a multinational company with consolidated sales of at least one billion Deutsch Marks will henceforth be subject to merger control.

bb) Before the Fourth Amendment was put into effect, a prior notification to the BKA of a proposed merger was required only if at least two of the enterprises participating in the merger each had sales of one billion Deutsch Marks or more during the preceding fiscal year.[17] The new law provides for pre-merger notification also in those cases where only one of the enterprises participating in the merger had sales of at least two billion Deutsch Marks.[18] Basically this holds true irrespective of the size of the other enterprise participating.[19] Only those mergers that would fall within the "minor-effects" clause of section 24 (8) GWB[20] are not subject to prior notification. Thus no proposed merger by a national or multinational company with consolidated sales of at least two billion Deutsch Marks can be consummated prior to clearance by the BKA provided the target company had sales of at least four million Deutsch Marks.

b) The new law further has noticeably improved the BKA's ability to control mergers that concern several different markets such as vertical or conglomerate mergers or concern narrow oligopolies.[21,22] Three new sets

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[13]GWB § 24 (8) no. 2 (1974); A. RIESENKAMPFF & J. GRES, LAW AGAINST RESTRAINTS OF COMPETITION, 97, 105 (1977).

[14]GWB § 24 (8) no. 2 (1980); A. RIESENKAMPFF & J. GRES, LAW AGAINST RESTRAINTS OF COMPETITION WITH 1980 AMENDMENTS, 53, 55 (1980).

[15]*Id.*; SUBSTANTIATION OF GOVERNMENT DRAFT, *supra* note 12, at 22-23.

[16]GWB § 23 (1); Judgment of Nov. 20, 1975, 65 BGHZ, W.Ger., 269 (1975), 1976 Neue Juristische Wochenschrift (NJW) 243; Ebel, *Vierte Kartellnovelle in Kraft getreten*, 1980 DER BETRIEB (DB) 1105.

[17]GWB § 24 a (1) (1974), A. RIESENKAMPFF & J. GRES, *supra* note 13, at 104-09.

[18]GWB § 24 a (1) (1980), A. RIESENKAMPFF & J. GRES, *supra* note 14, at 55-59.

[19]Ebel, *supra* note 16, at 1108.

[20]*See supra* note 14 at 52-55; *Bericht des Ausschusses fuer Wirtschaft vom 21. February 1980 zu dem Entwurf eines Vierten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Drucksache no. 8/3690, 27-28 (1980), reprinted in 1980 WuW 366 [hereinafter cited as *Report of Economic Committee*].

[21]*See Report of Economic Committee, supra* note 20, at 26; SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 12-14; Ebel, *supra* note 16, at 1105-07.

[22]GWB § 23 a (1).

of facts have been introduced into the law, the existence of which gives rise to a presumption that a merger results in or strengthens a market-dominating position. In this case the BKA shall prohibit the merger in question.[23]

aa) Under the so-called "medium-sized market presumption" it is presumed that a market-dominating position is created or strengthened if a major enterprise having sales of at least two billion Deutsch Marks enters, by merging with another enterprise, a market in which small and medium-sized enterprises have a combined market share of two-thirds provided that the enterprises participating in the merger have a combined share of 5 percent in any particular market concerned.[24] The provision designed to protect small and medium-sized companies against possibly deadly competition[25] means, in practice, that major companies may find it hard or impossible to enter such markets[26] and small and medium-sized companies, in turn, may become unsaleable to the dislike and dissatisfaction of their respective owners.

bb) The creation or strengthening of a market-dominating position is equally presumed if a major enterprise with sales of at least two billion Deutsch Marks merges with a market-dominating enterprise, provided that sales in the dominated market amounted to at least 150 million Deutsch Marks in the preceding calendar year.[27] In those cases where the target company would be dominating in several different markets, total sales in all dominated markets would have to be considered when calculating the figure of 150 million Deutsch Marks.[28]

cc) The so-called "elephant marriage" presumption is fulfilled if the enterprises participating in the merger had combined sales of at least 12 billion Deutsch Marks and at least two of the enterprises participating in the merger had sales of at least one billion Deutsch Marks each.[29] This presumption does not apply to the establishment of a joint enterprise, e.g., a company held on a 50:50 basis by its shareholders unless at least 750 million Deutsch Marks sales are attained in the market in which the joint enterprise is active.[30] This exemption serves the purpose of avoiding undue restrictions on the formation of joint ventures with economically desirable synergetic effects in growing markets.[31]

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[23]GWB § 24 (2) sentence 1.

[24]GWB § 23 a (1) (no. 1a).

[25]SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 20-21; *Report of Economic Committee, supra* note 20 at 26.

[26]For an explanation of how the presumption does not consider the effect on the market, *see* Ebel, *supra* note 16, at 1106; *see also* GWB § 24 (8) no. 3 (1974) the "regional market" exception now repealed, noted in, SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 21.

[27]GWB § 23 a (1) (no. 1 b).

[28]A. RIESENKAMPFF & J. GRES, *supra* note 13, at 47. SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 21.

[29]GWB § 23 a (1) no. 2.

[30]*Id.*

[31]*See* SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 21; Ebel, *supra* note 16, at 1108.

c) The strengthening of the BKA's authority over merger control and prior notification requirements will equally affect foreign based companies. The GWB applies to all restraints of competition which have domestic effects even if such effects are caused by actions taken abroad.[32] For example, if two foreign based companies that have German subsidiaries consummate a merger, merger control and prior notification provisions will be applicable.[33]

Domestic effects are also deemed to exist

- if only one of the companies participating in the merger has a German subsidiary and the other is selling into Germany[34] or
- if both companies are selling into Germany[35] or
- if one company is engaged in business in Germany through a subsidiary or importing goods and the other company can be expected to start selling into Germany after the completion of the merger.[36]

German merger control, therefore, may even be applicable if one U.S.-based company tenders for the shares of another U.S. company.[37]

2. Increased Authority vis-à-vis Market-Dominating Enterprises

a) Section 22 GWB provides that the cartel authority may prohibit abusive practices by market-dominating enterprises.[38] An enterprise in a monopoly situation and several enterprises in an oligopoly situation are considered market-dominating if the enterprise or enterprises are not subject to substantial competition.[39] The Fourth Amendment has added to section 22 GWB definitions as to certain forms of abusive practices:

- market-dominating enterprises abuse their dominating position if they significantly impair the competitive conditions of other enterprises in the absence of facts justifying such an impairment.[40] Any conduct that is based on sound

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[32]GWB § 98 (2); A. RIESENKAMPFF & J. GRES *supra* note 13, at 239; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 135.

[33]*See* Judgment of May 29, 1979, BGH, W. Ger., Wirtschaft und Wettbewerb Entscheidungssammlung zum Kartellrecht (WuW/E) 1613 (1979); Judgment of July 12 1973, 61 BGHZ 202, W. Ger., 1973 NJW 1609; Judgment of April 5, 1978, Kammergericht (KG) Berlin, WuW/E 1993 (1978).

[34]*Angaben bei Anzeigen und Anmeldung nach §§ 23 und 24a GWB*, Bundeskartellamt (BKA), 1974 WuW 46; translated into English and published, D. Gijlstra, *supra* note 4, at GER/L/III/1.

[35]*Id.*

[36]*Id.*

[37]In the case of an American subsidiary merging with another American parent, the BKA has applied GWB notice requirements to the German subsidiaries, reported in, Axster, *The German Merger Notification Requirements and their Application to Foreign Mergers*, 1980 INT'L CONT. 303; *see* GWB § 23 (3) sentences 3 and 4, which also deem mergers of foreign subsidiaries or parents to include any German subsidiaries; RIESENKAMPFF, *supra* note 3, at 1281.

Note, however, that enforceability of the law against a foreign corporation is another question; *see* E. REHBINDER, EXTRATERRITORIALE WIRKUNGEN DES DEUTSCHEN KARTELLRECHTS (1965); I. Schwartz, *Deutsches Internationales Kartellrecht* (1968).

[38]GWB § 22 (5); A. RIESENKAMPFF & J. GRES *supra* note 14, at 31-33.

[39]GWB § 22 (1) no. 1.

[40]GWB § 22 (4) no. 1.

and reasonable commercial considerations will be considered factually justified.[41] The principle that market-dominating enterprises may not unfairly hinder competitors has long been established by the courts.[42] The new provision thus only reiterates what has been applicable before;

— Further, market-dominating enterprises may not demand prices or other business conditions which deviate from those likely to result under effective competition[43] or which are more disadvantageous than those demanded by the dominating enterprise itself from similar buyers in comparable markets, unless such differentiation is factually justified.[44]

The principle that an abusive practice exists if a dominating enterprise behaves in a way it would not have behaved under effective competition has also long been established.[45] In order to determine how it would have behaved under effective competition, the courts have looked at comparable markets with effective competition.[46] This so-called "comparative market concept" has now been incorporated into the GWB.[47]

b) In connection with the control of abusive practices employed by market-dominating enterprises, the Fourth Amendment has closed a gap which so far has enabled dominating enterprises to continue alleged abusive practices until a prohibition order by the cartel authority had become unappealable and to retain until such time the additional revenues received as a result of employing abusive practices.[48]

Under prior law, the addressee of a prohibition order that was not declared immediately enforceable could—without risking damage payments—continue to charge prices alleged to be abusive until the prohibition order had become final.[49] The Fourth Amendment now provides that the dominating enterprise, once the order is no longer subject to appeal, will be liable to third parties for all damages which have occurred ever since the order has been served.[50]

Similarly, the additional revenues acquired by the enterprise after service of the prohibition order can be collected by the cartel authority.[51] The enterprise, however, will not be burdened by both damage payments and the requirement to pay over to the cartel authority the additional revenues received.[52] To the extent the enterprise concerned has been or will be required to pay damages the obligation to pay to the cartel authority addi-

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[41] W. BERNISCH, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN UND EUROPÄISCHES KARTELLRECHT, § 26 (2) anno. 41, at 49 (1973).

[42] *Id.*; Judgment of January 26, 1977, KG Berlin, OLG WuW/E 1767 (1977); Judgment of May 4, 1978, KG Berlin, OLG WuW/E 1983 (1978); *see* A. RIESENKAMPFF & J. GRES, *supra* note 14, at 35.

[43] GWB § 22 (4) no. 2.

[44] GWB § 22 (4) no. 3.

[45] *See Report of Economic Committee, supra* note 20, at 25.

[46] Judgment of Feb. 12, 1980, 76 BGHZ 142, W. Ger., 1980 NJW 1164.

[47] Ebel, *supra* note 16, at 1109.

[48] *Report of Economic Committee, supra* note 20, at 28.

[49] *Id.*; Ebel, *supra* note 16, at 1109-10.

[50] GWB § 35 (2); A. RIESENKAMPFF & J. GRES *supra* note 14, at 73.

[51] GWB § 37b (1) sentence 1; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 77-79.

[52] GWB § 37b (2) sentence 2; also applies to administrative fines.

tional revenues received will be reduced.[53]

3. More Stringent Controls of Strong Demand Positions[54]

a) Market-dominating enterprises or enterprises having a strong market position may not unfairly hinder another enterprise in its business activities which are usually open to similar enterprises or, in the absence of facts justifying such differentiation, discriminate against such enterprises.[55] Whereas the definition of a market-dominating enterprise or enterprises is contained in section 22 GWB,[56] section 26 (2) GWB defines a strong market position.[57] The latter is held by those enterprises upon whom offerers or purchasers of specific goods or services depend to such an extent that adequate and reasonable alternatives to switch to other enterprises do not exist.[58] This definition has proved adequate to determine the existence of dependency by a purchaser upon an offerer of goods and services.[59] The BKA, however, has found it considerably difficult to cope with strong demand positions, i.e., those situations in which an offerer would depend upon a purchaser within the meaning outlined above, such as the dependency of a small manufacturer of goods on a large department store.[60]

In order to facilitate the determination of a strong demand position by the cartel authority, a presumption for this purpose has been introduced by the Fourth Amendment.[61] The dependency of an offerer upon a purchaser or, correspondingly, the "relative market power" of a purchaser over an offerer[62] is presumed

> if in addition to the customary price discounts or other remunerations for performance, this purchaser regularly obtains from him special benefits which are not granted to similar purchasers.[63]

Special benefits are a preferential treatment of the purchaser which he does not receive in return for specific services performed by him, such as

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[53]GWB § 37b (4).

[54]*See* Ulmer, *Die neuen Vorschriften gegen Diskriminierung und unbillige Behinderung (§ 26 Abs. 2 S. 3 und Abs. 3, § 37a Abs. 3 GWB)*, 1980 WuW 474.

[55]GWB § 26 (2), sentence 1 & 2; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 65.

[56]GWB §§ 22 (3) and 23a (2) contain presumptions as to a market-dominating position.

[57]GWB § 26 (2) sentence 2.

[58]*Id.*; Judgment of July 4, 1974, KG Berlin, OLG WuW/E 1499; Judgment of Nov. 20, 1975, 65 BGHZ 269 (1975); W. Ger., 1976 NJW 243; Judgment of Nov. 14, 1974, OLG Munich, WuW/E 1540 (1974); Judgment of Dec. 3, 1974, KG Berlin, OLG WuW/E 1548 (1974); Judgment of Feb. 24, 1976, BGH, W. Ger., WuW/E 1429 (1976); Riesenkampff & Sauer, *Zum Diskriminierungsverbot des § 26 Abs. 2 S. 2 GWB*, 1975 BB 72; Riesenkampff, *Umfang des Diskriminierungsverbot nach § 26 Abs. 2 Satz 2 GWB*, 1974 BB 206; A. RIESENKAMPFF & J. GRES, *supra* note 13, at 125-26.

[59]*See* Riesenkampff, *supra* note 3, at 1285-88; Ulmer, *supra* note 54, at 480-82.

[60]SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 24; *Tätigkeitsbericht des Bundeskartellamts 1978*, Presse-Information no. 26/79 of July 13, 1979, 34, reprinted in 1979 WuW 539, 542.

[61]SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 24.

[62]*Id.*; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 65.

[63]GWB § 26 (2) sentence 3.

"entrance fees" paid by the offerer to buy his way to the purchaser.[64]

b) To further improve the ability of the cartel authority to efficiently deal with the undesirable exploitation of purchasing power, the Fourth Amendment contains an express prohibition of discriminatory practices carried out by an offerer at the request of a market-dominating enterprise or an enterprise having a strong market position.[65]

The law prohibits preferential conditions, not justified by the facts, which are requested from an offerer by purchasers enjoying a market-dominating or strong market position and which are discriminatory because they are not accorded to comparable purchasers who have a weaker market position.[66]

4. Improved Protection of Small and Medium-Sized Companies

According to section 37(a) GWB the cartel authority may prohibit the implementation of agreements which are invalid under the law, such as cartel agreements, resale price maintenance agreements, etc.[67] and may prohibit any conduct violating the law, such as concerted practices, discrimination by market-dominating enterprises or enterprises having a strong market position.[68]

The Fourth Amendment has added a third sub-paragraph to paragraph 37 (a) GWB according to which the cartel authority may prohibit hindrance of smaller and medium-sized enterprises by competitors with superior market power.[69] The new provision shall supplement the provision of sections 26 (2) and (3) which deal exclusively with unjust hindrance and discrimination, as practiced in the vertical relationship between suppliers and customers,[70] by providing that the cartel authority may in the future also prohibit unjust hindrance, by enterprises having a strong market position,[71] in the horizontal relationship, i.e., in their relationship to competitors.[72] So far, this provision does not seem to have gained any practical importance.

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[64]SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 24; Ulmer, *supra* note 54, at 478.

[65]GWB § 26 (3); definition of "market-dominating," *see* note 56, "strong market" *see* notes 57-58, Ulmer, *supra* note 54, at 485-92.

[66]SUBSTANTIATION OF GOVERNMENT'S DRAFT, *supra* note 12, at 25; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 67-69; Ulmer, *supra* note 54, at 489-91.

[67]GWB § 37a (1); A. RIESENKAMPFF & J. GRES, *supra* note 13, at 143; GWB § 37a (1) makes specific reference to agreements or resolutions under §§ 1, 15, 20 (1), 21, 100 (1) sentence 3 and 103 (2).

[68]GWB § 37a (2); A. RIESENKAMPFF & J. GRES, *supra* note 13, at 143; GWB § 37a (2) refers to conduct under §§ 25, 26 and 38 (1) no. 11 or 12; *see* text at notes 55-67.

[69]GWB § 37a (3); A. RIESENKAMPFF & J. GRES, *supra* note 14, at 75-77.

[70]*Report of Economic Committee, supra* note 20, at 28.

[71]GWB § 37a (3).

[72]*Report of Economic Committee, supra* note 20, at 29; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 76-77; Ebel, *supra* note 16, at 1111.

5. Other Amendments

In addition to the major changes and amendments as outlined above, the Fourth Amendment has brought about numerous modifications which, though extremely important to particular business sectors or markets, are of lesser general interest. These amendments can be summarized as follows:

a. The GWB tolerates non-binding price recommendations with respect to the resale of branded goods which are in price competition with similar goods, if certain requirements are met.[73] The new law has improved the cartel authority's powers to control abuses and to eventually prohibit the use of non-binding price recommendations.[74]

b. If notification has been given to the Banking Supervisory Authority, banks and insurance companies are exempt from the general prohibition to conclude cartel agreements according to section 1 GWB and allowed to enter into tying arrangements according to section 15 GWB.[75] The new law renders the exemption of such contracts more difficult by providing for additional requirements such as a waiting period,[76] the requirement to supply supporting reasons in the notification,[77] a publication requirement[78] as well as a hearing of the industries affected.[79]

c. Public utility companies benefit from exemptions similar to those accorded to banks and insurance companies.[80] The powers of the cartel authority to control abuses of such exemptions have been improved by inclusion of a list of abusive practices which particularly needed coverage by the law.[81]

d. Before the Fourth Amendment was put into effect, "pure" export cartels without any domestic effects were not subject to the law at all.[82] Section 98 (2) GWB merely provided that the law shall only apply to those restraints of trade which have effects within the territory in which the law applies.[83] Now a new sentence has been added to section 98 (2) GWB according to which the law shall also apply to export cartels that do not have domestic effects, insofar as enterprises domiciled in Germany participate in the respective export cartel.[84] This means that even genuine export cartels henceforth will require notification with and for abusive practices, will be subject to supervision by the BKA.[85]

e. Finally, the government's determination to apply and enforce the antitrust laws more stringently is also reflected in the increase of the possible maximum

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[73]GWB §§ 38 (1) no. 11 and 38a (1) and (2) (1974); A. RIESENKAMPFF & J. GRES, *supra* note 13, at 156-57.

[74]GWB § 38a; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 84-89.

[75]GWB § 102 (1974); A. RIESENKAMPFF & J. GRES, *supra* note 13, at 246-49.

[76]GWB § 102 (1) no. 2; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 140-45.

[77]GWB § 102 (2).

[78]GWB § 102 (3) sentence 1.

[79]GWB § 102 (3) sentence 2.

[80]GWB § 103; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 144-49.

[81]GWB § 103 (5); SUBSTANTIATION OF GOVERNMENT DRAFT, *supra* note 13, at 33.

[82]GWB § 98 (2) (1974); A. RIESENKAMPFF & J. GRES, *supra* note 13 at 238-39; Judgment of July 12, 1973, 61 BGHZ 202 1973 NJW 1609.

[83]*Id.*

[84]GWB § 98 (2) sentence 2; A. RIESENKAMPFF & J. GRES, *supra* note 14, at 134-35.

[85]*Verwaltungsgrundsätze des BKA über das Verfahren bei der Anmeldung von Ausfuhrkartellen*, Bekanntmachung des BKA no. 5 80 of July 8, 1980, BAnZ no. 133 (July 23, 1980), reprinted in 1980 WuW 649 (BKA Adm. Guidelines for Export Cartel Notification) applies to cartels under GWB § 9 (2) and abusive practices under GWB § 12 (2).

fine, from 100,000 Deutsch Marks[86] to 1 million Deutsch Marks.[87] As before, the fine may exceed this sum and amount to a maximum of three times the additional revenues realized as a result of the violation.[88]

6. Practice of Antitrust Enforcement

Since the Fourth Amendment came into effect on May 1, 1980, numerous cases have demonstrated an increasingly stringent application of the GWB by the BKA. It appears that during this period the cartel authority, rather than the courts, has taken a lead in adopting a hard line in many areas of the law. Thus, the rulings that seem to be of particular interest and significance with regard to antitrust enforcement and will be briefly commented upon here have all been issued by the cartel authority. The courts, with appeals still pending, have not yet had a chance to articulate their views. The BKA is now admittedly pursuing the policy of exhausting the means available in the law to the greatest extent considered possible.

a) This holds true in particular for the BKA's ruling of October 28, 1980 in the so-called "Texaco-Zerssen" case.[89]

The German subsidiary of Texaco Inc., the Deutsche Texaco AG, gave notification to the BKA, in accordance with section 24 a GWB, of the proposed formation of a joint company with Zerssen & Co., a firm of local importance in northern Germany selling some 200 million Deutsch Marks worth of petroleum products, and nautical equipment. The business purpose of the joint subsidiary, in which Zerssen was to hold a 55 percent interest and Texaco a 45 percent interest[90] would have been trading in gasoline, light heating oil ("LHO"), fuel oil and lubricants.[91] Zerssen had in the past purchased most of its supplies from Texaco.[92]

This proposed merger which, in contrast to previous law, had to be notified in advance to the BKA under the newly worded section 24 a(1) no.1 GWB because one of the participating enterprises, Texaco, had sales of more than 2 billion Deutsch Marks, was prohibited by the BKA on October 28, 1980[93] on the grounds that it would strengthen a market-dominating position.[94]

The BKA considers the sixteen crude refiners in Germany dominating in the LHO market within the meaning of section 22 (2) GWB because there is allegedly no substantial competition among these sixteen companies and the group as a whole is not subject to any substantial competition by third

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[86]GWB § 83 (4) (1974).
[87]GWB § 84 (4) (1980).
[88]*Id.*; Riesenkampff, *supra* note 1, at 46.
[89]Texaco-Zerssen case of Oct. 28, 1980, BKA, WuW/E 1840 (1980).
[90]*Id.* at 1841.
[91]*Id.* at 1840.
[92]*Id.*
[93]GWB § 24 a (1) no. 1; *see* A. RIESENKAMPFF & J. GRES, *supra* note 14, at 54-59.
[94]Texaco-Zerssen case, *supra* note 89, at 1849.

parties.[95] The relevant market in the BKA's view is the entire LHO market regardless of distribution channels used, rather than a more broadly defined heating market.[96] In this market the sixteen refiners in 1979 held a share of 82.7 percent[97] and competition among the sixteen refiners was alleged to be absent for the following reasons:

- expected long-term shortages of crude tend to exclude offensive price competition for higher market shares;[98]
- the network of so-called product exchange agreements concluded between refiners to save transportation costs also contributes toward generating a conformity of market behavior with neutralizing effects on competition;[99]
- in addition, certain structural elements of the market in question, which are identical for all sixteen members of the alleged market dominating oligopoly, reveal that these companies are not subject to substantial competition. The BKA lists among others: the fact that most companies concerned are subsidiaries of international oil companies, have close mutual links through joint refineries, pipelines and other joint subsidiaries, basically identical manufacturing facilities, excellent access to supply markets, storage, processing and distribution facilities all over Western Europe and the logistical resources of their respective parent companies, a close, flexible and diversified network of domestic distribution, and the structure of the market on the other side consists of thousands of predominantly small dealers;[100]
- quality, competition does not exist in markets for homogeneous mass products;[101]
- the market behavior of the enterprises concerned does not indicate the existence of substantial competition: among other things, the companies are alleged to have disproportionately increasing LHO prices and to not engage in competition for terms and conditions of sale.[102] Shifts in market shares are said to result from reasons other than competition.[103]

The BKA further argues that the group of sixteen refiners is not subject to substantial competition by outsiders because they depend mostly on the sixteen refiners for their supplies.[104]

In the BKA's view, the proposed joint venture is likely to strengthen Texaco's position in the LHO market and thereby strengthen the market dominating oligopoly as such.[105] Texaco's position in the market is strengthened not only by benefiting from Zerssen's market share, but mainly and above all by securing its sales on a long-term basis at the expense of independent importers and traders.

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[95] *Id.* at 1842.
[96] *Id.* at 1841.
[97] *Id.* at 1848, according to figures provided by the Bundesamt für gewerbliche Wirtschaft.
[98] *Id.* at 1842.
[99] *Id.* at 1843-44.
[100] *Id.* at 1844.
[101] *Id.* at 1845.
[102] *Id.* at 1845-47.
[103] *Id.* at 1847.
[104] *Id.* at 1847-48.
[105] *Id.* at 1849.

This ruling has been appealed and the Kammergericht in Berlin will have to decide the case. The court's decision is of utmost importance to the industry because the BKA's ruling, if upheld, means in practice that external company growth, i.e., by acquisition or mergers with other companies will no longer be possible unless the "minor effects" clause of section 24 (8) GWB applies.[106] This holds true in particular since the Bundesgerichtshof (Federal Supreme Court—BGH) has clearly stated that the strengthening of a market-dominating position need not be "noticeable" as defined in court rulings regarding section 1 GWB.[107]

The BGH's opinion that the strengthening of a market-dominating position need not be "noticeable" is entirely questionable. In order to avoid a prohibition order, how can the enterprises prove as provided by section 24 (1) GWB that the merger will also result in improvements in competitive conditions and that such improvements outweigh the detrimental effects of the market domination, if the strengthening need not be noticeable "in the first place?" The BKA, in its attempt to fully exhaust the application of the law, will definitely rely on this opinion whenever possible. Thus, in principle, it has decided to prohibit the purchase of an independent trader by a domestic refiner, and even the purchase of a single service station by one of the major oil companies such as Esso, Shell, BP or Texaco.

If the BKA's opinion that the sixteen domestic refiners constitute a market-dominating oligopoly not subject to substantial competition is confirmed by the courts, virtually any acquisition by any one of these companies would constitute a strengthening of a market-dominating position which must be prohibited by the cartel authority. This would not only affect the oil industry, as outlined above, but may well mean the strict prohibition of external growth for other industries also where a relatively small number of suppliers manufacture and sell homogeneous mass products.

In addition the BKA has prohibited the acquisition of an interest in a medium-sized dealer in southern Germany by Mobil Oil for basically the same reasons.[108]

b) Very recently, the BKA has added a most interesting aspect to its practice of occasionally accepting company assurances when deciding whether a proposed merger should be prohibited under section 24 GWB.[109] These assurances by the companies involved in such merger cases must either outweigh or eliminate the anti-competitive defects of the proposed

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[106] *See supra* note 20.

[107] *See* Judgment of Dec. 18, 1979, BGH W. Ger., 1980 NJW 1381, WuW/E 1685 (1979). It is recognized that under § 1 the mere theoretical possibility of a market being influenced will be insufficient; A. RIESENKAMPFF & J. GRES, *supra* note 13, at 15-21. But it is required that the agreement be capable of "noticeably" affecting market conditions. Judgment of Oct. 14, 1976 BGH, W. Ger., 1977 NJW 804, WuW/E 1458 (1976).

[108] *Kurzinformation*, 1981 WuW 4.

[109] *See* Riesenkampff & Gerber, *German Merger Controls: The Role of Company Assurances*, 12 ANTITRUST BULL. 889 (1975).

transaction.[110]

In two cases, the BKA has not prohibited the planned formation of a joint company by the two major German paper manufacturers, Feldmühle and Papierwerke Waldhof Aschaffenburg, with two major Swedish paper and cellulose concerns, Keparfors and Svenska Cellulose, respectively, after the enterprises participating in the merger gave the assurance that the joint subsidiary would form another company with the business purpose of supplying cellulose to small and medium-sized paper manufacturers in Germany.[111] The small and medium-sized manufacturers who want to be supplied by this company will be required to purchase a share in the supplying company and to furnish security for the purchase price. With this decision the BKA has attempted to secure cellulose supplies for small and medium-sized companies, i.e., to accord to them just those benefits which the major paper manufacturers such as Feldmühle and PWA had in mind when establishing the joint ventures with the Swedish suppliers in the first place.[112]

c) For the first time the BKA has prohibited a proposed merger abroad.[113] Bayer AG, via a French subsidiary, was to have acquired the Synthetic Rubber and Latex Division of Firestone in France.[114] The BKA prohibited this acquisition on the grounds that Bayer has a market-dominating position in the field of synthetic rubber and that the small quantities of synthetic rubber sold by Firestone France into Germany were sufficient to support the expectation that the merger would strengthen a market-dominating position.[115] This decision was reversed by the Kammergericht for procedural reasons.[116]

d) Also for the first time the BKA has prohibited an association of purchasers, alleging that it is an illegal cartel agreement.[117] The association consisted of four major trading companies active in the food business at the wholesale and retail level and pursued the purpose of agreeing to a uniform product line, concentrating purchases on a selected group of suppliers and purchasing on uniform conditions. The association was considered an illegal cartel agreement of purchasers with anti-competitive effects on small and medium-sized food dealers and the other market side represented by food manufacturers.

e) In a recent conference, the BKA and the cartel authorities of the various German states have arrived at the conclusion that joint bidding by con-

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[110] *Id.* at 891-97.

[111] BAnz of February 27, 1981, at 1; Frankfurter Allgemeine Zeitung, February 23, 27 & 28, 1981.

[112] *See* Klaus Peter Kraus, Frankfurter Allgemeine Zeitung, March 13, 1981.

[113] Bayer France-Firestone France, Case of Sept. 23, 1980, BKA, Bekanntmachung no. 81/80 of Sept. 26, 1980, BKA WuW/E 1837 (1981).

[114] *Id.* at 1837.

[115] *Id.* at 1838.

[116] Judgment of Nov. 26, 1980, KG Berlin, Kart 17/80 (unpublished); *see id.* at 1837, note 1.

[117] *See* Frankfurter Allgemeine Zeitung, December 11, 1980.

struction companies violates the cartel prohibition insofar as the individual construction company has sufficient construction capacity to do the job itself.[118] It remains to be seen how this will affect the construction industry in Germany where joint bidding is standard practice.

In summary, it can be said that both the new legislative tools provided by the Fourth Amendment as well as the BKA's stiffened attitude when applying the law will make the GWB, as amended in 1980, an even closer companion of German and foreign businessmen in the foreseeable future.[119]

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[118] *Zulässigkeitvoraussetzungen fuer Bietergemeinschaften*, Presseinformation des Niedersacchsischen Ministers für Wirtschaft und Verkehr of Oct. 27, 1980, 1980 WuW 805.

[119] *See* A. RIESENKAMPFF & J. GRES, *supra* note 14, at 7.