

1974

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Recommended Citation

Paul W. Heil & Gerog Vorbrugg, *Anti-Trust Law in West Germany: Recent Developments in German and Common Market Regulation*, 8 INT'L L. 349 (1974)

<https://scholar.smu.edu/til/vol8/iss2/11>

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Anti-Trust Law in West Germany: Recent Developments in German and Common Market Regulation

I. Introduction

The Federal Republic of Germany possesses the most thorough legal structure for the assurance of a competitive economic system on the European continent.¹ Many of the statutory components of this intricate and (by American standards) carefully organized structure date back, in form if not in substance, to the turn of the century or even to the last century. The Trade Regulation Act, which sets forth the basic principle that all are free to participate in the enterprise system, traces its origins back to 1869.² The Unfair Trade Practices Act, which attempts to insure that such participation will take place in accordance with "good morals," was first introduced in 1909.³

The more purely "anti-trust" aspects (designated as "cartel law" by Germans and other Europeans) of the structure are of a relatively recent origin, however, and clearly exhibit the fact that they are drawn from the American model.⁴ The German Act Against Restraints of Competition,⁵ originally adopted in 1957,

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¹See generally Strobl, Killius & Vorbrugg, *German and EEC Competition Law*, in CCH BUSINESS GUIDE TO GERMANY, 117 *et seq.* (CCH 1971), and 2 COHN, *MANUAL OF GERMAN LAW*, 2nd ed. (Oceana Pub. 1971), 46 *et seq.* for briefer summaries of German law concerning economic competition, up to to the time of developments discussed in this article. A more thorough study in English is 3 BLAKE, ed., *BUSINESS REGULATION IN THE COMMON MARKET NATIONS: WEST GERMANY* (1969). A convenient one volume, paperback edition of the major West German statutes dealing with anti-trust and unfair trade practices, in German, is *WETTBEWERBSRECHT UND KARTELLRECHT* (Beck-Texte, Deutscher Taschenbuch Verlag, 1973).

²Trade Regulation Act (Gewerbeordnung), as published (1960) RGB1. 871, as most recently amended Sept. 7, 1968, (1968) I BGB1. 1065.

³Unfair Trade Practices Act (Gesetz gegen den unlauteren Wettbewerb) of June 7, 1909 (1909) RGB1. I 499, as most recently amended June 26, 1969 (1969) BGB1. I 633.

⁴See generally 3 BLAKE, *supra* note 1, at 87-97, and Schwartz, *Anti-trust Legislation and Policy in Germany—A Comparative Study*, 105 U. Pa. L. REV. 617 (1957).

⁵Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) of July 27, 1957 (1957) BGB1. I 1081, as republished (1966) BGB1. I 37, as most recently amended August 3, 1973 (1973) BGB1. I 917 (hereinafter cited as *GWB* and sometimes referred to as the *Kartellgesetz*). English translations of the Act and its amendments up to the date of their publication appear in 2 OECD, *GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES*, pt. "D" (loose leaf ed.

has as its objective the preservation of price competition between business enterprises.⁶ The *Kartellgesetz*, as it is popularly known, more specifically concerns itself with various restraints affecting price determination (e.g., cartel agreements, resale price maintenance agreements, licensing agreements, and the regulation of practices of trade associations) and with the control of problems created by market size (e.g., abuse of market power, and market concentration including, recently, merger control). Its philosophy is thus complementary to the earlier statutes. In addition to this municipal legislation, the competitive economic system in Germany is also subject to the competition policies laid down by the emerging legal system of the European Communities, especially by Articles 85 through 90 of the Treaty of Rome.⁷ If the German anti-trust statute shows signs of its American sources, the EEC rules even more clearly reflect their debt to the German legislation.

As can easily be understood, this structure is not a static one. The rules of the EEC, being in their formative years, have been especially dynamic, as anyone who follows the frequent reports of EEC developments in the American business press knows. The judgment of the European Court of Justice in the *Continental Can-Europemballage* case last February⁸ and the proposed draft of a Council Regulation concerning merger control, announced by the Commission in July,⁹ were particularly significant events. Less U.S. press coverage has accompanied the recent adoption in Germany of the 1973 Act amending the Act Against

1966), and 3 BLAKE, *supra* note 1, at 379-412. A complete English translation of the Act Against Restraints of Competition, as amended in 1973, printed side by side with the original German text, became available late in 1973: MUELLER & SCHNEIDER, *GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (KARTELLGESETZ) - THE GERMAN LAW AGAINST RESTRAINTS OF COMPETITION: Bilingual Edition with Introduction* (Fritz Knapp Verlag, Frankfurt/Main, 1973).

* The term "enterprise" (*Unternehmen*) is used frequently in this article and in all discussions regarding both German and EEC anti-trust law. It is a key continental commercial law concept, but one which continues to be the subject of scholarly dispute concerning its precise content. For purposes of this article, the following definition should be sufficient:

[T]he expression "undertaking" . . . or "enterprise" . . . includes any form of business, whether carried on individually, or by a partnership, or by a commercial or civil company with or without legal personality . . . The characteristic of an enterprise is the existence of some business organization, simple as this may be, which is implicit in the carrying on of business as distinguished from the performance of an isolated transaction. Basically it is an economic and commercial concept but it has acquired in Continental European commercial and fiscal laws a legal meaning. . . . A further characteristic of an enterprise is the element of gain. [ZAPHIRIOU, *EUROPEAN BUSINESS LAW*, 18 (Sweet & Maxwell, 1970).]

⁷Treaty Establishing the European Economic Community, signed at Rome March 25, 1957 (hereinafter cited as EEC Treaty). The quotations used herein are taken from the unofficial English translation published by the Publishing Services of the European Communities in 1965. Other English versions of the Treaty are found in 1 CCH COMM. MKT. REP. ¶151 *et. seq.* and 298 U.N.T.S. 3 (1958).

⁸*Europemballage Corporation and Continental Can Company Inc. v. E.C. Commission* (Case No. 6/72; European Ct. of Justice Judgment of Feb. 21, 1973), (1973) COMM. MKT. L. R. (Part 68) 199, at 219 (April 1973); 2 CCH COMM. MKT. REP. ¶8171.

⁹Draft Regulation of the E.C. Council Concerning Control of Concentrations Between Undertakings, EEC Comm'n. Doc. Com. (73) 1210 final (18 July 1973), (1973) COMM. MKT. L. R. D205 (Sept. 1973); 2 CCH COMM. MKT. REP. ¶9586.

Restraints of Competition.¹⁰ The effective date of that Act was described by one leading German newspaper, however, as "the beginning of a new epoch in the competition policy of the Federal Republic."¹¹

It is the purpose of this article to describe briefly, for the benefit of the American business lawyer, who is not a specialist in the European anti-trust field, these developments which have taken place in the area of German and EEC anti-trust law primarily during the first half of 1973 (with an emphasis on the new German legislation) and which can be expected to have long-term effects on American enterprises doing business in Germany.

II. The New Concerted Practices Prohibition

One of the changes introduced into the Kartellgesetz by the 1973 Amending Act was a specific prohibition of certain "concerted practices," *i.e.*, of parallel market behavior.¹² The practical significance of such a prohibition, as the American anti-trust experience has shown, is open to some question, largely, of course, because of the great difficulties involved in proving a violation. The following discussion of the background behind this new prohibition and its role within the structure of the German Act should, therefore, not be taken as a sign of the practical importance which the writers attach to the new provision itself: although it is important, it is substantially less important than certain other changes introduced by the 1973 amendments. The significance that the following discussion has in this report lies in its ability to illustrate the general nature of the Kartellgesetz and German patterns of legal thought in this area of the law.

The Kartellgesetz, in its structure, constitutes a compromise between three regulatory concepts:¹³

¹⁰Second Act Amending the Act against Restraints of Competition (Zweites Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen) of August 3, 1973 (1973) BGBI. I 917 (hereinafter cited as 1973 Amend. Act or referred to as the 1973 Amending Act). The complete text of the Gesetz gegen Wettbewerbsbeschränkungen with the 1973 Amending Act integrated therein was published in the August, 1973, issue of WIRTSCHAFT UND WETTBEWERB, (1973) WuW 537. A readable and brief summary, in German, of the 1973 amendments and their more significant consequences is Ebel, *Novellierung des Gesetzes gegen Wettbewerbsbeschränkungen* (pts. 1-2), (1973) NEUE JURISTISCHE WOCHENSCHRIFT 1577 (Sept. 4, 1973), 1666 (Sept. 18, 1973).

¹¹Die Welt, Aug. 9, 1973, at 7. Or in the words of a German commentator on the 1973 amending act: "One can describe the 1973 revisions without exaggeration as a new Cartel Law." Rauschenbach, *Die Hauptprobleme der Kartellnovelle für die Unternehmen und ihre Berater*, (1973) NEUE JURISTISCHE WOCHENSCHRIFT 1257 (Oct. 16, 1973) at 1257.

¹²1973 Amend. Act, Art. 1 (11); now GWB § 25 (1). The German phrase which is herein translated as "concerted practice" is "aufeinander abgestimmte Verhaltung," more literally translatable as "mutually adjusted conduct." For a recent scholarly discussion of the concerted action problem, with comparisons between U.S., EEC and German law (including the 1973 German amendment), see Axster, *Das Verbot des "aufeinander abgestimmten Verhaltens" in § 25 Abs. 1 der Zweiten Novelle des GWB*, (1973) WIRTSCHAFT UND WETTBEWERB 605 (Sept. 1973).

¹³See generally 3 BLAKE, *supra* note 1, at 83-99, and 1 MÜLLER-HENNENBERG AND SCHWARTZ, eds., *GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN UND EUROPÄISCHES KARTELLRECHT: GEMEINSCHAFTSKOMMENTAR* (3rd ed., 1972), for discussions of the historical and political background of the GWB.

1. The prohibition principle, where certain activities (such as the making of certain types of cartel agreements), with minor exceptions, are out-and-out forbidden;
2. The licensing principle, *e.g.*, where certain cartels are permitted to function, some only with prior governmental permission and others without specific prior permission but always subject to the government's right to enjoin frowned-upon activities; and
3. The supervisory principle, where the anti-trust agency has general authority to prohibit "abuses" by the regulation of certain business practices (such as price maintenance and recommendation practices and the practices of so-called "market-dominating" enterprises).

Section 1 of the Act, which itself was left unchanged by the 1973 amendments, illustrates the nature of this compromise, which, as will be noticed in the balance of this article, can be observed throughout the Act. That Section first states a sweeping prohibition against horizontal agreements in restraint of trade—and then goes on to limit the scope of that prohibition:

(1) Agreements made for a common purpose by enterprises or associations of enterprises and decisions of associations of enterprises are of no effect insofar as they are likely to influence, by restraining competition, production or marketing conditions with respect to trade in goods or commercial services. This shall apply only insofar as this Act does not provide otherwise.

(2) The term "decisions of associations of enterprises" shall include decisions of meetings of the members of a legal person, insofar as such members are enterprises.

Section 1 illustrates another legislative technique important to an understanding of the Kartellgesetz: it declares certain agreements to be "of no effect," *i.e.*, to be void. The offenses relating thereto, enumerated later in the Act,¹⁴ consist in ignoring the lack of effect, the voidness, of such agreements. It is therefore, at least technically, not the making of certain types of agreements that the law prohibits, but rather the attempt to treat such agreements as if they had legal effect.¹⁵

Finally, in reading Section 1 it should be observed that it specifically refers to "agreements." Herein to date lay the problem in attempting to get at "concerted practices." Under well-settled concepts of German law,¹⁶ the term "agreement" (*Vertrag*) is limited to what American lawyers would describe as contractual obligations, *i.e.*, understandings which the parties intend to be

¹⁴GWB § 38-43.

¹⁵GWB § 38 (1) 1: "An offense is committed by any person who . . . willfully disregards the ineffectiveness of an agreement or decision arising under Section 1. . . ."

¹⁶See discussion in Palandt, *BÜRGERLICHES GESETZBUCH*, 32nd ed. (Beck'sche Kurz-Kommentare, C.H. Beck'sche Verlagsbuchhandlung, Munich, 1973), at 121-131 (introduction to Civil Code's provisions dealing with contractual obligations) and at 194-195 (comment 2 to § 241 of Civil Code, concerning the obligation to perform contractual duties). See also Willoweit, *Rechtsgeschäft und einverständliches Verhalten: Rechtsdogmatische Randbemerkungen zum "Teerfarben"-Beschluss des BGH vom 17.12. 1970*, (1971) *NEUE JURISTISCHE WOCHENSCHRIFT* 2045, at 2049.

enforceable through judicial proceedings. Conscious parallel market behavior does not involve such an expectation and, therefore, would not be expected to qualify as an agreement under Section 1 of the Kartellgesetz.

In 1967 the German Federal Cartel Office (the Bundeskartellamt), the principal authority administering the Kartellgesetz,¹⁷ imposed fines against four leading German chemical manufacturers and three individual officers of those concerns for the alleged concerted raising of prices for aniline dyes, which, according to the Cartel Office's theory, constituted a violation of Section 1.¹⁸ The proceedings which followed in that action, the so-called *Teerfarben* case, were among the most carefully followed in the history of the enforcement of the German anti-trust legislation. The case also had European-wide significance, since shortly before commencement of the Cartel Office's action the Commission of the European Communities had also brought an action against these (and other, non-German) aniline manufacturers for essentially the same set of facts.¹⁹

Eventually, late in 1970, a decision on the Cartel Office's action was made by the German Federal Supreme Court.²⁰ That decision, as had been expected in legal circles, fully confirmed the orthodox view that concerted practices were not encompassed by the term agreements and, therefore, were not prohibited by Section 1. Although legally correct, the decision met with wide public disapproval in Germany, partially because the decision was contrary to the EEC result (albeit under different statutory language)²¹ and partially because

¹⁷The regulation activities covered by the Kartellgesetz is usually exercised by the Federal Cartel Office, located in Berlin, although in some circumstances *Land* (state) authorities, usually state ministries of economics, may also exercise jurisdiction.

¹⁸Judgment of November 28, 1967, WuW ENTSCHEIDUNGS-SAMMLUNG ZUM KARTELLRECHT [WuW/E BKartA] 1179 (Bundeskartellamt). German cases referred to in this article are cited to this collection of decisions (hereinafter cited as "WuW/E," followed by the name of the court or other deciding authority), published by the journal WIRTSCHAFT UND WETTBEWERB (WuW), which, although "unofficial," serves as the leading topical reporter of cases in the competition and trade regulation law field.

¹⁹EEC Comm'n Decision of June 24, 1969 (Dyestuff Manufacturers Case), 2 CCH COMM. MKT. REP. ¶ 9314 (1969); the Commission's proceedings that resulted in this action for the imposition of fines was commenced on May 31, 1967. When the German Cartel Office action was taken to its initial appeal against the administrative decision, the manufacturers raised the defense that the Cartel Office's jurisdiction was preempted by the Commission's action. That issue was then sent by the German Court to the European Court of Justice for a preliminary ruling. In a ruling of major importance to the "constitutional structure" of the EEC legal order—and to the risk of incurring substantial fines because of anti-trust law violations committed in Germany—the European court held that cumulative penalties may be imposed by a domestic court for the violation of the national statute and by the Commission for violation of the Community anti-trust law because of the same restrictive agreement or practice. *Walt Wilhelm et al. v. Bundeskartellamt*, case No. 14/68, 2 CCH COMM. MKT. REP. ¶ 8056 (1969). An anti-trust violation in Germany (if it may affect trade between EEC states) is thus subject to a form of double jeopardy. See generally Markert, *The Dyestuff Case: A Contribution to the Relationship Between the Antitrust Laws of the European Economic Community and Its Member States*, 14 ANTITRUST BULL. 869 (1969).

²⁰Judgment of December 17, 1970 (*Teerfarben* Decision) WuW/E BGH 1147. (Also found at 24 BGHSt 54.)

²¹EEC Comm'n Decision of June 24, 1969, *supra* note 19. The Commission action was based on

legislative consideration of reform of the Kartellgesetz was already well underway.²² To the general public, the area of concerted practices thus appeared to be an obvious area for reform and both legislators and legal scholars²³ turned their attention to the issue.

The manner in which the Act was amended to prohibit concerted practices furnishes yet another example of the statutory structure of the Kartellgesetz.

The normal rule under the Act has been that the competitive behavior of individual enterprises (except when resulting from the forbidden types of agreements or when that behavior constitutes an abuse of a market-dominating position) is not subject to governmental supervision. The unilateral pursuit of business objectives, even when that pursuit involves discrimination between customers or suppliers, has generally not been limited by the statute. The exceptions to this general principle are collected in Chapter 4 of the Act,²⁴ which is where the new concerted practices prohibition is also now found.²⁵

Section 25 (1) of the Act now provides as follows: "A concerted practice by enterprises or associations of enterprises, which under this Act may not be made the subject of a contractual obligation, is forbidden." Thus the solution to the issue of conscious parallel market behavior has been to declare as illegal such parallel behavior as could not be made the subject of a legally binding agreement and therefore transfer such behavior into the same realm as

the theory that the repeated and general price increases of the aniline dye manufacturers consisted a concerted practice within the meaning of paragraph 1 of Article 85 of the Treaty, which reads: "The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: . . . any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. . . ." *EEC TREATY*, art. 85.

²²Prior to 1973, the last major amendment of the Kartellgesetz occurred in 1965 and became effective on January 1, 1966. Act to Amend the Act Against Restraints of Competition (*Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*), (1965) BGBI. I 1363. Minor amendments to the Act were made in 1968 and 1969. Almost immediately after the 1965 Amending Act became effective, the consideration of further changes in the Act, usually on the ground of the necessity of adjusting the German economy to the increasing requirements of the Common Market, commenced. Serious work on substantial revision of the Act began in 1967 and the government's bill for the Second Amending Act was sent to the Bundestag in the Spring of 1971. Draft and Comments of the Federal Government for a Second Act for the Amendment of the Act Against Restraints of Competition (*Entwurf der Bundesregierung eines Zweiten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*), *BUNDESRATSDRUCKSACHE* 265/71, reprinted in (1971) *WuW* 531 ff.

Consideration of this Draft was suspended during the German Federal elections in 1972 and was then resumed in January, 1973. The Draft itself was in the process of being completed when the Teerfarben decision was handed down in 1970. In January 1973, when consideration of the Bill was again commenced, the government indicated its willingness to consider additional changes, particularly in the areas of concerted practices, resale price maintenance, and price recommendations. *See Commerce in Germany*, March 1973, at 28. It is in these last-mentioned areas that the effects of legislative compromise in the 1973 amending act are most obvious.

²³*See, e.g.,* ULMER, *ABGESTIMMTE VERHALTENSWEISEN IM KARTELLRECHT* (Verlag C. F. Müller 1972), for one of the better, relatively brief (49 pp.) discussions of the concerted practices issue resulting from the Teerfarben case.

²⁴GWB §§ 25-27.

²⁵GWB § 25 (1), as amended 1973.

comparable agreements. This is the sort of solution which accords well with the German legal mind; it brings with great formal logic an oversight into the purview of previously determined consequences.²⁶

The *Teerfarben* decision has thus been reversed. The insurmountable problem of having to prove some sort of enforceable agreement, imposing obligations on the parties thereto, has been eliminated and, although the practical problems of proving conscious parallelism are not to be minimized, collusive agreements affecting competition are now clearly illegal under German law. The Cartel Office is now able to attack such collusive parallel behavior under substantially lightened evidentiary circumstances.

III. Resale Price Maintenance Rules

A. Abolition of the Price Maintenance

Agreement Register

Of interest to branded-goods manufacturers selling in Germany through a German distribution network is the fact that the 1973 Amending Act abolished the resale price maintenance agreement register, formerly kept by the Cartel Office.²⁷ As a consequence of this change, effective January 1, 1974, only resale price maintenance agreements covering publications are allowed.

The Act's provisions governing resale price maintenance agreements again illustrate the compromise between the regulatory concepts mentioned earlier. Section 15 (left unchanged by the 1973 amendments) states the Act's general rule:

Agreements between enterprises with respect to goods or commercial services relating to markets located within the area to which this Act applies are null and void insofar as they restrict a party to them in its freedom to determine prices or terms in contracts which it concludes with third parties in regard to the goods supplied, other goods, or commercial services.

Section 16, prior to amendment, then followed with an exemption from the foregoing prohibition for publications and branded goods, provided certain strict statutory provisions were met. The agreements concerning branded goods were required to be registered with the Cartel Office; agreements regarding publications did not (and, under the 1973 amendments, still do not) require such registration. The other statutory conditions for qualifying for the exemption were quite similar to the conditions now imposed on resale price

²⁶Cf. Von Mehren, *The Judicial Process in the United States and Germany—A Comparative Analysis*, Festschrift für Ernst Rabel 67 (1954). The German legal system is greatly concerned with assuring that the legal consequences of particular behavior is statutorily known beforehand. This concern is reflected in the concept of the "Rechtsstaat," a concept somewhat akin to the American due-process doctrine of definiteness, although because of the essentially statutory nature of the German legal system the former concept plays even a stronger role in the German system than the latter plays in the American. This concern also is a major distinction between the German and American anti-trust law structures.

²⁷1973 Amend. Act, Art 1 (6); now GWB §§ 16-18, as amended.

recommendations under the 1973 Amending Act, as discussed below. The Cartel Office also had supervisory powers over the abuse of resale price maintenance agreements.²⁸

Although resale price maintenance systems have played a very large role in Germany's retail economy²⁹—a much larger role than they have in the United States, where their legality has varied from state to state—they have come under increasing legal and political attack and, even before the passage of the 1973 Amending Act, the legal effectiveness of practically every resale price maintenance agreement for branded goods was open to doubt. Changing patterns of distribution (chiefly the decline of small shops, whose proprietors appreciated the protection afforded by uniform pricing, and the rise of supermarkets and discount department stores, whose profits are based more on large volume than on a high mark-up) probably constitute the fundamental economic reason for the breakdown of these systems.

The legal protection accorded resale price maintenance agreements, however, has always existed under "the sword of Damocles,"³⁰ in the form of a judicially-developed requirement that the system be a completed and closed one and not leave any, even theoretical, loop-holes for special prices.³¹ Thus if, after export, a German branded good could be re-imported into Germany by a retailer not a party to the applicable price maintenance agreement and sold there by him at a price different from that specified in the agreement, then the entire price maintenance system for that good in Germany became legally void. When in 1966 the European Court of Justice held in the *Grundig-Consten* case that prohibitions against re-export in exclusive dealership agreements contravened Article 85 of the EEC Treaty,³² the sword came clearly into view. The Federal Cartel Office thereafter increasingly took the position that, because of the "open EEC flank," branded goods which were exported by German manufacturers could not be made the subjects of legally protected price maintenance agreements. In the words of a spokesman for branded goods

²⁸GWB § 17. Supervisory powers over the abuse of resale price maintenance agreements covering publications are still in force after the 1973 amendments.

²⁹As of December 31, 1970, 171,766 different branded items were the subjects of price maintenance agreements on file with the Cartel Office. Recommended prices were filed for another 297,395 items. 1970 TÄTIGKEITSBERICHT DES BUNDESKARTELLAMTS at 155. "Since the decision of the Bundestag to forbid retail price maintenance took effect, increasing numbers of brand manufacturers are withdrawing their price maintenance registrations with the Cartel Office in Berlin—or simply not registering in the first place. On August 6, according to the Cartel Office, there were still 172,526 price maintained articles registered by 751 manufacturers, of which alone 84,438 were for vehicle parts and supplies. A good four weeks later, by the middle of September, there were 716 manufacturers still registered, with 164,685 articles, of which 84,390 were vehicle parts." Freese, *Durch die Maschen des Gesetzes*, Die Zeit, Sept. 21, 1973, at 33.

³⁰Frankfurter Allgemeine, April 2, 1973.

³¹On the doctrine of "Lückenlosigkeit," see generally 2 MÜLLER-HENNEBERG AND SCHWARTZ, *supra* note 13, at ann. to § 16 GWB.

³²Etablissements Consten v. Société Union Nationale des Economies Familiales (UNEF), S.A.R.L., 2 CCH COMM. MKT. REP. ¶ 8046 (1966).

manufacturers: "By means of this theory [the Cartel Office] has not only hung the sword of Damocles over the head of retail price maintenance, it has also let it fall."³³ The 1973 amendment abolishing Section 16's exemption for price maintenance agreements for branded goods may, therefore, simply have given the German system a decent burial.³⁴

B. Resale Price Recommendation Rules

The repeal of the authorization for price maintenance agreement systems was accompanied by the legislative introduction of a stricter regulatory regime for price recommendation systems.³⁵ Many of the statutory prerequisites which had previously applied to price maintenance agreements have now been transferred wholesale, under Section 38a of the revised Act, to price recommendations.

Prior to the 1973 Amending Act, price recommendations to distributors were always permissible if it was specified that the recommended price was not mandatory. Such price recommendations could be registered—and the Cartel Office took the position that they should be registered³⁶—but such registration (under old Section 16 (4) of the Act) was not a requirement for their validity.

The situation as to the permissibility of price recommendations has been changed by the 1973 Amending Act Section 38 of the Act (again the basic prohibitory provision, within the scheme of our earlier reference to the Act's regulatory principles) was amended to include as offenders against the Act enumerated therein, one who:

- (11) delivers recommendations which result in an evasion through uniform behavior of a prohibition contained in this Act or a prohibition issued by the Cartel Authorities pursuant to this Act, or
- (12) recommends to the purchasers of his goods that specific prices be directed to or be offered to or that specific types of price stipulations apply to the further retailing of his goods.

There again immediately follows, in the new Section 38a, a specific exemption from the prohibited behavior for:

- Non-binding price recommendations by an enterprise for the resale of its branded goods, which stand in competition with comparable goods of another producer, if:
 - (a) such recommendations are expressly indicated as non-binding and no economic,

³³Statement by Dr. Martino of the German Brand Names Association (Markenverband), quoted in *Frankfurter Allgemeine*, April 2, 1973.

³⁴For a discussion of the problems of this example of interaction between EEC and municipal law, see Ebb, *The Grundig-Consten Case Revisited: Judicial Harmonization of National Law and Treaty Law in the Common Market*, 115 U. PA. L. REV. 885 (1967).

³⁵1973 Amend. Act, Art. 1 (15) & (16); now GWB § 38 as amended & § 38a. A brief German discussion of the new rules is Böge, *Die unverbindliche Preisempfehlung für Markenwaren*, (1973) *DER BETRIEB* 1733 (Sept. 7, 1973).

³⁶Bekanntmachungen Nr. 7/66 (Announcement No. 7/66) des Bundeskartellamts, *Bundesanzeiger*, February 9, 1966.

- social or other pressure is applied to effectuate their enforcement, and
- (b) the recommended price can be expected to correspond to the price asked by the majority of the receivers of the recommendations.

The definition of "branded goods," taken over from the old Section 16(2), includes goods which display a distinctive mark, indicating their origin, and for which the producer warrants their uniform or improved quality and can include certain agricultural products, despite minor variations in such products' quality.³⁷

The balance of the exemption then goes on to regulate more precisely the right to make such "non-binding" price recommendations. Specifically, the Cartel Office is granted the power to declare such recommendations to be an "abuse" of the exemption, if:³⁸

- (a) they keep prices uneconomically high, prevent them from falling, or restrict the production or distribution of such goods;
- (b) they serve to deceive consumers as to the prices actually charged in the majority of cases;
- (c) they considerably exceed the actual asked prices in the majority of cases; or
- (d) specific enterprises or groups of purchasers are discriminated against with respect to the marketing of such price-recommended goods.

As a practical matter, the Cartel Office itself expects to have great difficulty exercising these supervisory powers.³⁹ At least under the prior provisions, price maintenance agreements and (many) price recommendations were registered with the Office, giving it some indication of their contents. Under the revised Act, this will no longer be the case. The new merger control responsibilities will also sap the limited strength of the Cartel Office. It therefore hopes for the assistance of consumer organizations in policing the new price recommendations systems.

C. Responses to the Abolition of Resale Price Maintenance

The close connection between the manufacturers of brand name products and the retailers of those products, especially in connection with pricing decisions, is, of course, nothing new, nor is it a relationship peculiar to Germany. The consuming public tends to look to the reputation of the manufacturer much more than to that of the retailer, from whom it actually purchases the product, when it purchases a brand name product. The driver of a Ford automobile, for example, undoubtedly knows who manufactured his car, yet will recall only with difficulty the name of the dealer who sold it to him. The law has recognized this consumer expectation in numerous ways, of which the area of product liability is perhaps the most dramatic example. It should therefore be acknowledged that

³⁷GWB § 38a (2) (new).

³⁸GWB § 38a (3) (new).

³⁹Handelsblatt, August 9, 1973, at 1.

the manufacturers of brand name goods have a legitimate interest in the ways in which their products are retailed—including the prices at which they are retailed. The German brand name manufacturers have responded to the repeal of the price maintenance agreement register, understandably enough, by seeking alternative methods of retail distribution that continue to permit them to retain fundamental control over the retail prices of their products. Three basic methods are available.

First, retail price recommendations may be made. The legal requirements governing the making of such recommendations have been outlined above. Many of those branded goods which in Germany were previously marketed through systems of price maintenance agreements are now gradually being marketed instead through systems of price recommendations.

The primary legal problem posed by attempting to utilize the price recommendation device as a substitute for retail price maintenance agreements is the dilemma posed in the amended Act's resale price recommendation rules themselves. Under Section 38a, the recommendations must be "non-binding": it would thus be desirable, from an evidentiary standpoint, if there was some deviation from the recommendations. Uniform compliance would constitute evidence that pressure of some sort was being applied to the retailers in violation of Section 38. Under Section 38a (3)(a), however, it is an abuse of the exemption if the recommended price deceives consumers as to the actual prices charged in the majority of cases. Thus, the price-recommending manufacturer is faced with the almost impossible task of making certain that his recommendations are followed—but not too much!

In connection with this first alternative to price maintenance agreements, it should be noted further that the Bundestag, by resolution, has instructed the government to submit to it a report concerning the consequences of the new non-binding price recommendations exemption provisions after they have been in effect for three years.⁴⁰ There is a strong belief in Germany that after this report is received even this exemption for non-binding recommendations will be legislatively abolished. With this belief goes a desire among many manufacturers not to tie-in with an alternative that may well be as doomed as the old resale price maintenance agreements system itself.

A second alternative for the branded goods manufacturer is to enter the retail market directly through the establishment (or expansion) of manufacturer-owned retail outlets. This alternative is already an actuality for many manufacturers in certain industries—particularly in the wearing apparel fields, where for example, it has long been customary for shoe manufacturers to own their own chains of retail shoe stores. Although this alternative appears to be under consideration by a number of manufacturers, it presents insurmountable

⁴⁰ BUNDESTAGSDRUCKSACHE 449/73, dated June 13, 1973.

administrative control problems to most firms. Even those capable of handling the administrative problems are also usually deterred from it by the commitment of long-term capital that it would normally require.

Between the extremes of price recommendation systems and the establishment of manufacturer-owned retail outlet chains stands the third alternative, that which appeals to many branded goods manufacturers as the most practical solution to their new pricing control problem: various forms of retail "agency" relationships.

The first such relationship (commonly described as a *Vertriebsbindung*) involves the use of an agent who transacts business on his own behalf and in his own name, often carrying on business as a sole distributor of a manufacturer's products. The agent himself is variously known as a *Vertragshändler*, *Eigenhändler*, or *Konzessionär*. He is, in many ways, the German equivalent of the American "licensed dealer," and is found, as in America, typically in the cosmetic field.

A second "agency" relationship involves the so-called *Kommissionsagent*, a dealer acting in his own name on a permanent basis for his "principal," thus forming a part of the latter's sales organization and—even more—the so-called *Handelsvertreter*, a commercial agent or sales representative acting on behalf and in the name of the principal.

It has been traditional doctrine that pricing instructions from a principal to agents are exempt from Sections 15, 16 and 18 of the *Kartellgesetz*, on the grounds that the restraints normally prohibited by those sections are essential elements of agency relationships, protected by the German Civil and Commercial Codes.⁴¹

For some time Daimler-Benz has marketed the Mercedes in Germany through dealerships which have had the legal status of *Kommissionsagenten*: *i.e.*, orders are taken for the account of the manufacturer—at prices set by him—rather than for that of the dealer. The dealer's profit then takes the form of a commission. With the end to retail price maintenance agreement systems approaching, other automobile manufacturers, which had relied on the latter system, have now also considered making their dealers commission agents. That alternative is logically suited to the sale of more expensive goods and avoids the capital commitment difficulties of establishing a network of "factory-owned" outlets.

⁴¹ 2 MÜLLER-HENNEBERG AND SCHWARTZ, *supra* note 13, at ann. 22-24 to § 15 GWB (pp. 24-27). It should be further noted that restrictive agreements with true commercial agents (including *Handelsvertreter*), who do not bear any of the economic risks of their selling activities, are also exempt from Article 85 of the EEC Treaty, which prohibits agreements which prevent, restrict or distort competition within the Common Market. The relationship between principal and agent is regarded as not being "between enterprises" within the meaning of that Article. See EEC Commission, Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents, Dec. 24, 1962, 1 CCH COMM. MKT. REP. ¶ 2697.

The Federal Cartel Office, however, has indicated its displeasure at this prospect and, in a September warning addressed primarily to Volkswagen, stated that it would regard such a "conversion" as an attempt to evade the revised Act's prohibition against resale price maintenance agreements. The Cartel Office's dispute with VW was founded on the theory that the proposed conversion would constitute an abuse of a market-dominating position under Section 22 of the Kartellgesetz, in that the price competition expected by the Bundestag on the dealer level following the repeal of the retail price maintenance provisions would be defeated. Secondly, the Office took the position that, as some of the dealers were opposed to the conversion, its imposition on them would also constitute a discriminatory practice by a market-dominating enterprise, in contravention of Section 26 (2). Following a series of conferences between representatives of the Cartel Office and VW, the latter bowed to the threats of administrative action by the former and abandoned its conversion plan, at least temporarily.⁴²

Another, albeit substantially smaller, German automobile manufacturer, Bayerische Motoren Werke AG (BMW), has, to date, achieved more success with its comparable dealer conversion proposal. BMW submitted its proposed standard *Vertriebsbindung* agreement to the EEC Commission for either negative clearance or exemption under Article 85 of the EEC Treaty, which generally prohibits agreements restricting competition. Because of the current general importance of the issues involved in this sort of agency relationship, the Commission seized upon the BMW application as its opportunity to rule thereon, at least for purposes of the automobile industry. In November, 1973, reportedly following appropriate consultation with the West German anti-trust authorities, the Commission issued a preliminary ruling, essentially approving the exclusive licensed agency concept for the automobile industry.⁴³ In that ruling, the Commission holds that the restrictions on competition caused by such a relationship are outweighed by protection and security thereby afforded to consumers, so as to justify an exemption from Article 85's general prohibition. The importance of this protection and security relative to the sales and servicing of automobiles was emphasized by the ruling, which leaves open questions relating to the validity of this type of marketing system for other types of products (*e.g.*, cosmetics, televisions and household appliances). A key provision of BMW's proposed standard dealer agreement is the restriction and protection of each dealer's sales territory—a restriction which obviously has significant consequences for price competition. The BMW agreement and the Commission's handling of it are strikingly comparable to the approval of

⁴²Press Release of the Federal Cartel Office of October 15, 1973, "Umstellung des Vertriebssystems durch Volkswagenwerk," [1973] WuW 745-746 (Nov. 1973).

⁴³*Chancen für den BMW-Mustervertrag*, Frankfurter Allgemeine Zeitung, Nov. 22, 1973.

territorial restrictions granted in the U.S. Supreme Court's *White Motor* case.⁴⁴

The EEC ruling on the BMW standard dealer agreement might very well be a substantial "breakthrough" that could determine the nature of the marketing systems for at least higher-priced consumer goods in Germany in the future. Although not a total replacement for retail price maintenance, assignment of exclusive dealership territories could solve many of the marketing control problems presently seen by many brand-name manufacturers, and probably most of those with the highest sales volume.

The long-range consequences of the recent statutory changes in the area of resale prices maintenance rules for Germany's retail trade—and especially for its economy of small shops dealing mostly in the lower-priced branded goods—must be awaited before judgment on the changes can be rendered. The network of small, independent branded goods shops has played a significant role in the economic history of modern Germany. The owners of those shops and the manufacturers who have served them, as might be expected, fear the worst. They believe that the statutory changes in this area may spell their end and mean the final triumph of the newer mass-marketing system, represented by the supermarkets and the discount department stores.

IV. Controls Over the Abuse and Achievement of Market Power

A. Historical Background

Since its enactment in 1957, the Kartellgesetz has focused itself on its prohibitory regulatory principle (with a complementary emphasis on the licensing principle), rather than on its supervisory aspects. This has been, of course, a matter of emphasizing one of the aspects of its compromise structure over the others. But the emphasis has been more than accidental. Part of this focus has resulted from the previously mentioned German desire for legal certainty: there is more apparent certainty in prohibition and licensing principles than there is in that of supervising abuses. This focus has furthermore been the product of the post-war political and economic environment out of which the Act initially emerged.⁴⁵

While the principle of prohibition still plays an important role in the Act's total structure (and in some ways has been strengthened, for example through the outright prohibition of resale price maintenance agreements), it is the principle of regulating abuses caused by market imperfections within the economic system that has been emphasized by the 1973 Amending Act. This legislative shift of emphasis can be most clearly seen in the two related areas of

⁴⁴The *White Motor Co. v. U.S.*, 373 U.S. 252, 83 S.Ct. 696 (1963).

⁴⁵See generally 3 BLAKE, *supra* note 1, at 83-99.

the Act to which we now turn: the provisions affecting so-called "market-dominating" enterprises⁴⁶ and those concerning the concentration of enterprises through mergers and acquisitions.⁴⁷

Before we deal with the actual statutory changes and innovations in these two areas, however, a brief digression into the historical aims of the Kartellgesetz and into the changes that have affected German society and, as a consequence, the objectives of the 1973 Amending Act will be helpful in illuminating these developments.

Prior to the 1973 Amending Act, the Federal Cartel Office had limited powers to prevent the abuse of market power resulting from a market-dominating or monopoly position.⁴⁸ It possessed no power, however, to prevent a firm from obtaining such a position through mergers or acquisitions. The Act did require that mergers or acquisitions of a specified size be reported to the Cartel Office, but it lacked authority to prevent the achievement of the concentration itself.⁴⁹

The relative weakness of these prior regulatory provisions reflected the "anti-cartel" nature of the concerns of the authors of the original Act. The European cartel developed in the last decades of the nineteenth century out of economic conditions similar to those which in America gave rise to the trust. The European cartel and the old-fashioned American trust are essentially the same genus. Both terms conjure up images of Judge Gary of U.S. Steel (or his German counterpart) sitting at his dinner table with his competitors, dividing up markets and protecting price margins. In addition to its strong connotative overtones, the term cartel does retain a denotative meaning: it is a "combination of economic enterprises [usually achieved through means of a specific agreement] of the same economic level (*i.e.*, a horizontal agreement), for the purpose of exercising control (through elimination or reduction) of competition."⁵⁰ The cartel — and the trust — is, in short, an economic institution of a contractual nature through which a number of allegedly competitive enterprises attempt to protect their own continued survival through the collusive maintenance of prices and other aspects of their competitive environment, usually to the consumer's detriment.

While the American trust evoked a relatively quick negative response from the Populist feelings of the late nineteenth century, resulting in a relatively long history of American governmental anti-trust activity, the German response to the cartel was quite different. Germans were accustomed to entrepreneurial cooperation. The middle class viewed the institution of the cartel as protection

⁴⁶1973 Amend. Act, Art. 1 (8), now GWB § 22, as amended.

⁴⁷1973 Amend. Act, Art. 1 (9) now GWB §§ 23-24, as amended.

⁴⁸GWB § 22, prior to 1973 amendments.

⁴⁹GWB §§ 23-23, prior to 1973 amendments.

⁵⁰CREIFELDS, RECHTSWÖRTERBUCH 574 (C.H. Beck 1968).

against "cut-throat" competition and against the big unitary industrial enterprises. Others saw it as a simple extension of the concepts of agricultural and small-trade cooperatives. Even the industrial proletariat in Germany (which in America accepted the Populist views of the evil nature of the trust) accepted cartels as being a stage of capitalism that had to be tolerated until the industrial system could be revolutionized. Since Germany in modern times has always been a nation heavily dependent upon foreign trade, the country furthermore generally felt that the dangers posed by cartel agreements were offset by the need to be competitive in foreign markets and by the competition offered within Germany itself by foreign firms. From a jurisprudential standpoint, the doctrine of freedom of contract (*Vertragsfreiheit*) also played a significant role in preventing the enactment of anticartel legislation. Cartels were viewed by most legal scholars as simple exercises of the right to enter into contractual obligations.⁵¹ Finally, the ideas of economic autarchy resulting from the isolation imposed by two major wars and through the ideology of the Third Reich encouraged the cooperation between nominally competitive enterprises.

Following the Second World War, with the encouragement of the Western Allies, a reaction to the cartel system established itself in the new Federal Republic of Germany.⁵² Under the philosophical and administrative economic leadership of Professor Ludwig Erhard and the government of the Christian Democratic Party, the free play of competition, maintained and regulated in the public interest, came to be regarded as the most efficient and democratic road to German economic recovery.⁵³ For different philosophical reasons, the Social Democratic Party, then in opposition, but hostile to massive economic power in private hands, accepted (albeit occasionally with reluctance) this general thesis and the philosophy of the *Soziale Marktwirtschaft* became the economic theory of the post-war recovery.

It was the philosophy which inspired the dominant regulatory principles of the original Kartellgesetz. As an economic theory it basically favored the free play of economic forces, subject only to certain clearly defined limits. Agreements which restricted that free play were undesirable and were to be prohibited.⁵⁴ But the limits to free play were also to be clearly set forth in the

⁵¹The question of the constitutionality of Section 2 GWB, under the provision of Article 2 of the Basic Law [*Grundgesetz*] guaranteeing freedom of contract, has been raised even in recent years. See Benisch, *Ist das Kartellverbot grundgesetzwidrig?*, 9 DER BETRIEB 37 (1956).

⁵²The American, British and French military governments all had enacted essentially similar Decartelization Ordinances for their respective Zones in 1947. These provisions remained in effect until the GWB came into force in 1957. See 3 BLAKE, *supra* note 1, at 95-97.

⁵³See ERHARD, *DEUTSCHLANDS RÜCKKEHR ZUM WELTMARKT* (Econ-Verlag 1953) for one Prof. Erhard's formulations of the "neo-liberal" economic philosophy of the *Soziale Marktwirtschaft*.

⁵⁴See Explanatory Memorandum to the Government Bill for the Act Against Restraints of Competition (Begründung zum Regierungsentwurf), BUNDESTAGSDRUCKSACHE 1138 (1958), reprinted in MÜLLER-HENNEBERG AND SCHWARTZ, *GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN*.

statute, so that they could be easily known by business enterprises and, when violated, prosecuted in accordance with traditional concepts of criminal prosecution and "due process" (*Rechtsstaatsprinzip*).

Germany's economic recovery from the Second World War has, however, now been an accomplished fact for more than a decade. Since the end of the recovery period, the Social Democratic Party has replaced the Christian Democratic Party as the parliamentary majority. The goal of economic efficiency, associated with the need to provide society with its necessities at the best (and, therefore, most competitive) price, has been replaced by a goal of smoothing some of the rough edges from the economic facts of life. Competition itself is increasingly seen from the standpoint of the world market and defined from within the framework of the European Common Market. Threats to the individual's economic freedom are more and more perceived as coming from ever-larger units of economic endeavor. All of these circumstances, according to prevailing public opinion, require a higher degree of "fine tuning" of the economy by the government: in short, what is seen as needed now is a greater degree of supervisory regulation.

These political and economic developments and changing attitudes are reflected in the 1973 Amending Act—especially in the shift from a prohibitory to a supervisory concept of regulation. In the words of the Government's message accompanying the 1972 draft of the Amending Act:

Competition policy problem number one today is no longer one of "cartelization," but instead is one of the concentration of business enterprises. As a means for the realization of economic and technical progress, merger agreements are often necessary. At the same time, however, the necessity has grown for public competition policies that prevent excessive concentration and achieve effective controls over market-dominating power.⁵⁵

B. Regulation of Market-Dominating Enterprises

"Market-dominating" ("marktherrschend") is the classificatory concept used by the Kartellgesetz to regulate the exercise of market power. A finding that an enterprise is market-dominating or in a market-dominating position subjects that firm to possible regulatory consequences for the abusive exercise of its market power that a non-market-dominating firm normally need not fear.

More specifically, the cartel authorities may step in to prohibit abusive

KUNGEN: GEMEINSCHAFTSKOMMENTAR 1149 (1st ed. 1958). The initial CDU government draft of the GWB was even much more oriented towards a philosophy of prohibition than the eventual Act turned out to be. The licensing concepts can be thought of as a compromise in favor of the Federation of German Industries and the supervisory concepts as one in favor of the Social Democratic Party.

⁵⁵Explanatory Memorandum to the Government Bill for the Second Act Amending the Act Against Restraints of Competition (Begründung zum Regierungsentwurf), BUNDESRATSDRUCKSACHE 265/71, (1971) WuW 531, 544.

conduct by a market-dominating enterprise under the supervisory powers granted to it in Section 22 (4) and (5) of the amended Act. The question of what constitutes such "abusive conduct" as is subject to these supervisory powers is not answered by the Kartellgesetz itself. Examples of abuses which have been subject to injunction by the Cartel Office include tying contracts, large profit margins, and long-term leases and conditions of use. The broad test for whether such terms are abusive is whether they could otherwise be obtained in a "fair-bargaining" situation.⁵⁶ The administrative discretion permitted in the determination of abusive conduct by a market-dominating firm is very high, as the current actions by the Cartel Office discussed below illustrate, and this supervisory authority resulting from a finding of market-domination is therefore generally regarded by business interests a severe consequence.

Particularly interesting—and controversial—at the moment are efforts to utilize the market-power abuse provision of Section 22 as an instrument of government economic stabilization policy. Two current actions by the Federal Cartel Office illustrate these efforts. One, directed against Braun AG, the manufacturer of (among other things) the very popular electric shaver, has resulted in a significant public discussion over the objectives of this provision of German anti-trust law. The second, directed against the major oil companies, has the same policy implications as the first, but in forms even more intensified by popular emotions. Both cases illustrate the close relationship that current economic problems—in these cases, the disturbing rate of inflation that is affecting the major industrial nations and the "energy crisis"—can have to the enforcement of anti-trust law. Both also serve to illustrate the expansive role that the Cartel Office sees for itself under the supervisory power of Section 22.

Shortly after the legislative repeal of authorization for resale price maintenance agreements, Braun AG, which had had several disputes with the cartel authorities during the preceding year over its pricing policies, announced that it was terminating all such agreements which it had with its retail distributors. Thereafter it further announced an increase in the domestic wholesale price of its electric shavers. The Federal Cartel Office responded to the latter move by instituting an administrative action against Braun, on the theory that Braun was abusing its dominant position in the electric shaver market through the price increase. The Office requested information from Braun regarding its pricing practices, including details concerning unit costs, gross profit per unit, and expenditures for advertising and sales promotion.

Almost immediately after news of "the *Braun* case" became public, it focused attention of the German business community on the issue of the extent to which

⁵⁶See Explanatory Memorandum to Government Bill (1955), *supra* note 54. Abuses regarding prices and conditions were described by the message accompanying the Draft as those which "differ considerably from those which would be, had effective competition existed and for which no economic justification exists." *Id.*, at 1092.

the Cartel Office has a price control function under the supervisory power granted to it by Section 22. Public criticism of the Cartel Office's action against Braun was led by the *Frankfurter Allgemeine Zeitung*, one of Germany's leading newspapers and probably the most respected, in terms of its reporting of business and economic news.⁵⁷ The essence of that criticism is that the price control action implied by the *Braun* case is not sanctioned by the purpose of the Kartellgesetz and that the use of that Act as a means of "holding down" prices, by requiring a manufacturer to justify his pricing on the basis of his costs, represents an undesirable departure from the spirit of Germany's post-war economic and social order. In this view, the *Braun* case perverts the Kartellgesetz, by shifting its function from the protection and encouragement of private enterprise to the assurance of "fair" prices, as determined primarily from a cost accounting standpoint.

The *Frankfurter Allgemeine's* criticism did not go unnoticed by the personnel of the Federal Cartel Office. In a two-part response thereto, Dr. Kurt Markert, director of the Office's division responsible for the *Braun* case, defined and defended the Office's price control theory under Section 22.⁵⁸ Therein, Dr. Markert expresses the view that "abusive is any conduct of a market-dominating enterprise that leads to market consequences, which would not have been achieved, measured by a degree of probability bordering on certainty, under conditions of substantial competition." Applying this premise, he concludes that the Cartel Office is statutorily justified in controlling the prices of market-dominating enterprises, at least to the extent of keeping them at a level which would have prevailed, had substantial competition existed. The requests for cost accounting information, furthermore, were relevant in the *Braun* case, if for no other reason than that Braun had publicly stated that its price increases were made necessary by its increased costs. Dr. Markert believes that "where the State . . . passively accepts a condition of ineffective competition (e.g., market-dominating enterprises), it should substitute a State control [mechanism] in the place of the unavailable control through competition." This position, Dr. Markert maintains, is supported by both the language and the legislative history of the Kartellgesetz.

The consequence of this argument is that, where the competitive price mechanism is unavailable to protect the consumer, a regulatory price system, imposed by the government, must be instituted. What emerges from this consequence is a regulatory system requiring price justification by all market-dominating enterprises—a system comparable to that imposed upon

⁵⁷See especially *Das Kartellamt ist kein Preiskommissar*, *Frankfurter Allgemeine Zeitung*, Nov. 19, 1973.

⁵⁸Market *Das Bundeskartellamt darf Preise kontrollieren*, *Frankfurter Allgemeine Zeitung*, Dec. 19, 1973, at 21, and *Die Frage nach den Kosten ist nicht gänzlich irrelevant*, *Frankfurter Allgemeine Zeitung*, Dec. 20, 1973, at 15.

public utilities and other regulated industries in the United States.⁵⁹

Following on the heels of the *Braun* case, in December, 1973, the Federal Cartel Office, presumably responding to public pressure to "do something" about the gasoline price increases that accompanied the beginning of the "energy crisis," commenced an investigation of the pricing policies of the major oil companies. As in the *Braun* case, the Office issued requests for cost and price information to eleven oil producers as well as to sixteen importers. The theoretical justification for the oil price investigation also rests on the same grounds as the case against *Braun*.⁶⁰

This is the second time within a five-year period that the Cartel Office has initiated action against the oil industry. When gasoline prices failed to return to their previous levels after resolution of the 1967 Middle East conflict, after supplies had returned to their pre-conflict levels, the Office instituted its first action against the companies, as joint market-dominating enterprises, for abusive pricing conduct under Section 22. (The Cartel Office, as a matter of fact, now refers to its 1967 action against the oil companies as precedent for its position in the *Braun* case.) The obvious intent of the 1967 case was to compel the oil companies to lower their retail prices. The action succeeded in that respect, in that, as a consequence of the investigation, the companies subsequently "voluntarily" reduced their prices and the action was discontinued.⁶¹ Whether the 1973 investigation can also achieve a similar desired effect is doubtful. Since the "oil crisis" is a worldwide phenomenon, it is more likely that compulsory lower prices in West Germany would only serve to divert oil to other, higher bidding, nations. The German Federal Government appears to be well aware of that possibility and the 1973 action against the oil companies may be as much for consumer "show" as for effective price regulation.⁶² Should that be the case, the oil case is an illustration of the demagogic dangers involved in attempting to utilize the Kartellgesetz as an instrument of stabilization policy, especially under conditions of economic and political pressure.

In addition to control over the exercise of market power by dominating enterprises, such firms are further circumscribed in their ability to expand by the new merger control provisions outlined below.

The 1973 Amending Act has substantially increased the control that the Federal Cartel Office can exercise over such market-dominating enterprises.⁶³ This has been accomplished through a revision of the definition of

⁵⁹Compare Market's arguments with the analysis of GALBRAITH, *THE INDUSTRIAL STATE* (1967).

⁶⁰For a discussion of the 1973 action against the oil companies, see Eglau, *Zum Nichtstun verdammt*, *Die Zeit*, Dec. 21, 1973, at 25.

⁶¹1967 TÄTIGKEITSBERICHT DES BUNDESKARTELLAMTS at 41.

⁶²See Eglau, *op.cit.*, note 60.

⁶³1973 Amend. Act, Art. 1 (8), (12), and (15), now GWB § 22, § 26 and § 38 (1) (8), respectively, as amended.

"market-domination," by the application of certain prohibitions normally applicable to only market-dominating enterprises to certain other firms, and by the broadening of the Cartel Office's power to levy fines.

1. NEW DEFINITION OF MARKET-DOMINATION

The Act now defines an enterprise as "market-dominating" insofar as it (a) is without substantial competition in the relevant market, or (b) is in a "paramount" ("überragende") market position in relation to its competitors, considering relevant factors regarding both the enterprise and the structure of the market.⁶⁴

The definition obviously presents a great many issues which are subject to diverse conclusions. The first alternative test of market-domination has been in the Act since 1957 and its meaning, although fluid, has assumed denotative content for Kartellrecht practitioners. It involves two determinations, both of which are also familiar, at least as to the general nature of their problems, to American lawyers: the identification of the relevant market and a determination of the existence or non-existence of substantial competition. As to determining the relevant market, it should be noted that, under the first test, a diversified enterprise could be market-dominating in one product market but not in others. The inclusion of the second alternative test by the 1973 Amending Act makes such separate determinations more difficult, but still logically possible. Generally, according to the Cartel Office, market determination is made "according to the function exchangeability of the products offered and demanded on the market."⁶⁵ (The Office does have a tendency to narrow a market, however, as far as substitute products are concerned.) The determination of the existence or lack of substantial competition within a market, as in the United States, is generally made with regard to the economic theory of "workable competition."⁶⁶

The second alternative test of market-domination, that relating to enterprises in a "paramount market position," is new with the 1973 Amending Act.⁶⁷ In

⁶⁴ GWB § 2 (1), as amended:

An enterprise is market-dominating within the meaning of this Act insofar as it, as the vendor or vendee of a particular type of goods or commercial services, (1) is without competition or without substantial competition, or (2) holds a paramount market position in relation to its competitors. In addition to its market share, the following factors are to be considered (in determining whether an enterprise holds a paramount market position): the enterprise's financial power, its access to the supply and distribution markets, its affiliations with other enterprises, as well as the legal or actual restrictions imposed upon other enterprises on entry into the market. *See generally* Knöpfle, *Die marktbeherrschende Stellung nach der Neufassung des § 22 GWB*, 26 DER BETRIEBSBERATER 1177 (Sept. 20, 1973), for an excellent discussion of the revised definition of market-domination, especially (at 1177-1179) relating to the new paramount market position clause.

⁶⁵Opinion of the Federal Cartel Office of August 11, 1961, WuW/E BKartA 425, at 427.

⁶⁶*See generally* the watershed formulation of J.M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940).

⁶⁷1973 Amend. Act, Art. 1 (8), now GWB § 22 (1) (2), cited *supra* note 64.

determining whether an enterprise occupies a "paramount" position, the Act now calls for the consideration of characteristics in addition to competition within a specific market: financial strength, access to supply or distribution resources, and affiliation with other enterprises of the enterprise in question are to be considered, as well as the legal or actual barriers to entry into the market by other enterprises.

The relative vagueness of the term "paramount" (despite the statutorily specified tests) constitutes a significant further extension of the concept of supervisory regulation in the Kartellgesetz—and, to the opponents of this trend, the introduction of additional "indefinite legal categories."⁶⁸ Whether the fears reflected in this correct observation will also turn out to be correct remains to be seen.

As was the case prior to the 1973 amendments, Section 22 (2) of the Act declares two or more enterprises to be jointly market-dominating where an oligopolistic situation exists. Thus, each such firm can be treated as market-dominating where there is no substantial competition between them and where there is no substantial or only minimal outside competition.

The 1973 amendments introduce several significant presumptions regarding market-domination:⁶⁹

- (1) A single enterprise is deemed to be market-dominating when it controls one-third ($\frac{1}{3}$) or more of a market and has annual sales of more than DM 250 million.
- (2) Three or fewer enterprises together are deemed to be market-dominating when they together have one-half ($\frac{1}{2}$) or more of the market, except as to such enterprises with annual sales of less than DM 100 million.
- (3) Five or fewer enterprises are deemed to be market-dominating when they together have two-thirds ($\frac{2}{3}$) or more of the market, except as to such enterprises with annual sales of less than DM 100 million.

It is not yet totally clear whether the presumptions under (2) and (3) will apply to the other enterprises in their "group," where one of the enterprises involved lacks the required annual sales. These are only presumptions, however, and, as such, may be rebutted by evidence by the allegedly market-dominating enterprises. Market-domination may, however, also be found to exist even in the absence of the presumptive criteria, which, again, serve primarily to strengthen the hand of the Cartel Office in supervising the activities of firms in oligopolistic markets.

2. RESTRICTIONS AGAINST DISCRIMINATION

As previously explained, the German Act does not generally prohibit "discriminatory" business practices. The significant exceptions to this rule are such discrimination which has as its purpose an object which, if made the subject

⁶⁸Poeche, *Bilanz der Kartellnovelle: Dirigistische Anstazpunkte unverkennbar*, MARKTWIRTSCHAFT, August 1973, 24 at 25.

⁶⁹1973 Amend. Act, Art. 1 (8), now GWB § 22 (3), as amended.

of an agreement, would violate some provision of the Kartellgesetz (e.g., certain concerted practices and non-exempted resale price maintenance recommendations).

Subsection 1 of Section 26 of the Act, which sets forth one of these specific prohibited discriminatory abuses, has been amended to strengthen its prohibition against the "inducement" of other firms to refuse to sell to or purchase from third firms, with the intention of unfairly harming the "inducing" firm's competitor. This practice is defined as a boycott under German law. The prior language of Section 26 (1) had used the term "to induce," while the 1973 Amending Act has substituted therefore "to ask," thereby making illegal the mere unilateral act of requesting another to sever relations or refuse to deal with the third party, regardless of the other's response to that request.

Subsection 2 of Section 26 was also amended. As in the past, it initially provides that:

Market-dominating enterprises . . . shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises nor, in the absence of circumstances justifying such discrimination, treat such enterprise, directly or indirectly, in a manner different from the treatment accorded to similar enterprises.

The amendment of Section 26 (2) involved an extension of this "non-discrimination" provision to other enterprises, in addition to market-dominating enterprises, to the extent that their customers or suppliers have no "reasonable possibilities to switch to competitors." For purposes of discriminatory practices, therefore, what might be described as a lesser degree of "market-domination," which is easier to establish probatively, is sufficient to justify intervention by the cartel authorities.

3. INCREASED AUTHORITY TO LEVY FINES

In addition to the supervisory authority granted by Section 22 to the Cartel Office to prohibit the abuse of dominant positions and to invalidate abusive contracts, the Act since the 1973 amendments now further provides that a person who willfully violates the discrimination prohibitions contained in Sections 25 and 26 shall be liable for a fine which may be as high as DM 100,000.⁷⁰ This again strengthens the hand of the government in dealing with the abuse of market power.

The truly new set of consequences resulting from being in a market-dominating position relates to the Cartel Office's new powers to control mergers. Mergers which result in market-dominating positions or which strengthen already existing positions are, under the 1973 Amending Act, to be prohibited.

⁷⁰ 1973 Amend. Act, Art. 1 (15), now GWB § 38 (1) (8), as amended.

C. Merger Control

Probably the most significant change in the Cartel Act in 1973 is the enactment of new provisions designed to achieve effective government control over mergers and other "concentrations of enterprises." Although there is an area of legal uncertainty about what constitutes a "completed" merger, the new merger control provisions, by the terms of the Amending Act, apply to all mergers not completed before June 7, 1973.⁷¹ As a general proposition, then, these new merger control provisions are now in effect.

The lack of legal power to systematically control the concentration of market power, either under domestic German law or under the anti-trust rules of the EEC, has been the subject of lively intellectual debate in Germany for two decades.⁷² The original government bill for the Kartellgesetz had already emphasized the lack of symmetry in enacting a statute which attempted to control cartel agreements between nominally competitive enterprises but which did nothing to control the concentration of power within the hands of a single economic unit.⁷³ When the Act was adopted in 1957 the government's original proposal of a requirement that major mergers be first "validated" by the Cartel Office was rejected, on the grounds that such a validation system would prevent the rationalization that was then deemed necessary for the German economy⁷⁴ and a merger reporting provision, which still forms the core of the Act's merger provisions, was adopted instead.⁷⁵ In 1964 the Social Democratic Party, then still in opposition, also proposed measures regarding merger control for inclusion in the 1965 Amending Act, which were not adopted.⁷⁶

The attitude towards mergers and large concentrations of economic power in Germany—it might as easily be said in Europe and throughout the world—has grown substantially more negative in the past few years.⁷⁷ It is therefore

⁷¹1973 Amend. Act, Art. 4 (1). The "completion" of a "merger" involves complex questions under German law relating to (in American terminology) the transfer of title to goods or securities, the physical delivery thereof, and the effective date of contractual obligations. For a discussion in German of some of these questions as they relate to the applicability of the merger control provisions, see Dörinkel & Kermer, *Zur Anwendung der Fusionskontrolle ab 7. Juni 1973*, [1973] DER BETRIEB 1285 (July 6, 1973).

A German outline commentary on the 1973 Amending Act's merger control provisions in general is Röhling, *Die Fusionskontrolle nach dem neuen Kartellgesetz*, (1973) DER BETRIEB 1585 (Aug. 17, 1973).

⁷²Recent German literature discussing the questions involved in merger control, both in the German and EEC context, is voluminous. A relatively brief discussion, which includes a selection of alternative statutory proposals and a discussion of the economic problems, is KLAUE *et al.*, *ZUR PROBLEMATIK DER FUSIONSKONTROLLE* (Athenäum Verlag 1971).

⁷³See Explanatory Memorandum to Government Bill (1955), *supra* note 54, at 1167.

⁷⁴See Report of Economic Committee on Bill Against Restraints of Competition, June 22, 1957 (Schriftlicher Bericht des Bundestagsausschusses für Wirtschaftspolitik), BUNDESTAGSDRUCKSACHE 3644, cited in MÜLLER-HENNEBERG AND SCHWARTZ, *GESETZ GEGEN WETTBEWERBS-BESCHRÄNKUNGEN: GEMEINSCHAFTSKOMMENTAR*, § 18, 1191 (1st. ed., 1958).

⁷⁵GWB § 23, both prior to and after the 1973 amendments.

⁷⁶BUNDESTAGSDRUCKSACHE IV/2337.

⁷⁷See *e.g.*, above at note 55; Michael Jungblut, *Hexenjagd auf Multinationale*, *Die Zeit*, August

probably no accident that 1973 has seen the introduction of merger control provisions in Germany and the first serious attempts towards their adoption in the entire European Economic Community, but rather a part of a larger trend towards the circumscription of large concentrations of private capital.

The Act as amended does not forbid all mergers, but only those which would create or strengthen a market-dominating position. Its effects on possible acquisitions by multinational firms, however, is expected to be very great, since such firms or their subsidiaries will very frequently be in such a market-dominating position or be of such a size to make a possible merger a prohibited one. American firms operating in Germany tend frequently to be one of two basic types.⁷⁸ Many of them are subsidiaries of giant multinational corporations and as such could conceivably be considered to hold "paramount" market positions under the revised definition of market-dominating enterprises. Another very large group are producers or distributors of products that are the result of high technology research and development work in the United States. Depending upon how narrowly their respective markets are defined to be, they can be held to be holders of large market percentages. Both of these types of American firms are, therefore, vulnerable to the merger control provisions of the revised Kartellgesetz.

1. NEW DEFINITION OF MERGER

The Kartellgesetz, as revised by the 1973 Amending Act, defines the term "merger" or "concentration" (in German "Zusammenschluss") very broadly. Specifically included within the definition, set forth in subsection 2 of Section 23, are:

- (1) Acquisitions of either all or a significant part of the assets of another enterprise, either through a formal merger with that enterprise, through reorganization, or through other means.
- (2) Acquisitions of an equity interest in another if such interest, either alone or in connection with other interests already held by the acquiring enterprise:
 - (a) amounts to the achievement of 25% of the acquired enterprise's voting capital;
 - (b) amounts to the achievement of 50% of the acquired enterprise's voting capital;
 - (c) gives the acquiring enterprise "majority ownership" within the meaning of §16 (1) of the Stock Corporation Act.⁷⁹

31, 1973, at 25 (commentary on U.N. study of multinational business); and 1 U.S. Department of Commerce, *The Multinational Corporation*, at 3-7 (1972). In November, 1973, the EEC Commission submitted to the Council of Ministers a series of proposals for the control of the "undesirable" activities of multinational corporations. Among the proposals was a repetition of the EEC merger control regulation discussed below. "A key objective of the commission's paper is to speed government action on a number of proposals it made as many as three years ago. By putting these proposals in the context of multinational activities, a political issue in many countries, officials hope they will gain more rapid acceptance." *International Herald-Tribune*, Nov. 7, 1973, at 9.

⁷⁸DIVO INSTITUTE FOR ECONOMIC RESEARCH, *AMERICAN SUBSIDIARIES IN GERMANY*, 176-180 (CCH 1969).

⁷⁹GWB § 23 (2) (2), as amended, also now includes certain "attribution of ownership" rules (e.g., the private share holdings of a sole proprietor who is an entrepreneur are to be included in making

- (3) Agreements with another enterprise through which:
 - (a) an affiliated group ("Konzern") within the meaning of §18 of the Stock Corporation Act is created or expanded;⁸⁰
 - (b) the other enterprise obligates itself to turn its profits over to the acquiring enterprise or to conduct its business for the account of the acquiring enterprise; or
 - (c) the business of the other enterprise is completely or in significant part used or managed by the acquiring enterprise.
- (4) The creation of "interlocking" supervisory boards, management boards, or similar corporate boards of directors, where an identity of one-half (½) or more of the members is created.

In addition to these specifically mentioned types of concentration, the definition of merger now also concludes with a "fail-safe" clause to sweep in the creation of "every other connection or relation of enterprises, through which one or more enterprises can directly or indirectly exercise a dominating influence on another enterprise." Obviously the authority of the Cartel Office to supervise mergers and other forms of inter-enterprise cooperation under this fail-safe clause is very great which is exactly what the legislator intended it to be.⁸¹

It is important to observe that the new definition even covers joint ventures and the other "simultaneous or sequential acquisition of stock in another enterprise by several otherwise unrelated enterprises."⁸² The scope of the new definition of merger in this respect has been astonishing, even to German jurists conversant with the anti-trust law field.

2. FILING OF A MERGER

Under Section 23 of the amended Act, mergers must be immediately reported to the Federal Cartel Office if:

these calculations, as well as the holdings of "controlled" or "controlling" enterprises) and the "joint enterprise" provision, mentioned below. Regarding § 16 (1) of the Stock Corporation Act, see JUENGER & SCHMIDT, *GERMAN STOCK CORPORATION ACT* (English trans.) § 16 (1) (CCH 1967), and the discussions of the uniquely German body of law dealing with *Konzernrecht* found in Haskell, *The New West German Law of "Related Business Units,"* *THE BUSINESS LAWYER* 421 (1969), and Bringezu, *Parent-Subsidiary Relations under German Law,* 7 *THE INTERNATIONAL LAWYER* 138 (1973).

⁸⁰Regarding § 18 of the Stock Corporation Act, see JUENGER & SCHMIDT, *supra* note 79, at § 18.

⁸¹See Report of Economic Committee on the Bill for the Second Amending Act to the Act Against Restraints of Competition, June 13, 1973 (Bericht des Ausschusses für Wirtschaft), BUNDESTAGSDRUCKSACHE 7/765, reprinted in (1973) WuW 581 (August, 1973), at 589:

The Committee dealt especially thoroughly with the comprehensive scope of Subsection 2 (5) (of Section 23) . . . As a result of the (statutory) change, it is intended to be guaranteed that the establishment of indirect power of control through mutually coordinated commitments, a stock voting agreement, for example, can also be dealt with as "concentrations." The Committee was unanimous that (this provision) will thus encompass factual as well as formal legal relationships. It avoided an exclusively express delineation (of the types of relationships covered), in order not to open possibilities for avoidance of (the statutory provision) through (the cataloguing of) forms of agreements between enterprises.

For a good discussion of the new definition of "concentration," see Würdinger, *Arten und Formen der Unternehmenszusammenschlüsse i. S. der neuen §§ 23 bis 24 GWB*, (1973) WuW 731 (Nov. 1973).

⁸²GWB § 23 (2) (2), as amended. Certain exceptions to this rule are applicable to banks, in particular with respect to their underwriting activities. See GWB § 23 (3), as amended.

- (1) within the total territorial jurisdiction of this Act or within a significant part thereof, a market share of 20 percent is reached or increased as a result of the merger, or if one of the participating enterprises has a market share of 20 percent of another market, or
- (2) the participating enterprise taken together at any particular time in the last fiscal year preceding the merger employed at least 10,000 persons or during that time period had sales of at least DM 500 million.

This "filing" is essentially a simple registration requirement, designed to provide the Cartel Office with the background information necessary for it to carry out its supervisory functions over market-dominating enterprises and, since the 1973 Amending Act, its injunctory powers over prohibited mergers. By filing, of course, an enterprise immediately "red flags" itself for special surveillance.

The filing must include precise data as to such tests which under the Act require the filing, including the bases for estimates which may be made, if any. Incorrect statements are subject to fines.⁸³ Notice of the filing of a merger with the Cartel Office is to be published in the Federal Gazette (*Bundesanzeiger*); such publication is also an innovation of the 1973 amendments.⁸⁴

It will be noted that the market-percentage test of the filing requirement clearly refers to the German market. This is unclear with respect to the tests regarding the number of employees or annual sales of an enterprise. The better view appears to be that these tests too refer only to employees in Germany and sales in Germany.⁸⁵ The issue is, however, unsettled.

⁸³GWB § 23 (5) & (6), as amended; GWB § 38 (1) (7), as amended.

⁸⁴GWB § 10 (1) (5), as amended. Certain special provisions regarding the filing requirement are included for making the applicable determinations for banks and insurance companies and for dealing with the issues involved in their portfolio ownership of securities. See GWB § 23 (1) (2), as amended.

⁸⁵See KLAUE, *UNTERNEHMENSZUSAMMENSCHLÜSSE NACH § 23 DES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN MIT UND ZWISCHEN AUSLÄNDISCHEN UNTERNEHMEN* (limited printing of doctoral dissertation submitted to the Faculty of Law and Economics of the University of Mainz, 1967). Unfortunately, despite the very practical importance of the issues to foreign enterprises, the questions of what employees and what sales of multinational corporations are to be considered in determining whether a filing obligation exists have not been dealt with authoritatively. Klaue's dissertation is the most extensive discussion of the issues presently available.

The tests regarding the number of employees or annual sales were first introduced into the GWB by the 1965 amending act. Klaue analyzes their scope in light of § 98 (2) GWB, which defines the limits of the extraterritorial applications of the Act. That section reads:

This Act shall apply to all restraints of competition which have effects in the area in which this Act applies, even if they result from acts done outside this area.

Klaue's carefully reasoned conclusion, that the employee and sales tests must apply only to employees or sales within Germany, is supported by the legislative history of these tests, which indicates that they were introduced as secondary "assistance criteria" for the market-share test. As such, Klaue reasons, they in themselves lack the weight, necessary under the jurisdictional concepts of private international law, to subject foreign enterprises to the filing requirement.

For a contrary conclusion, see Ebel, *Novellierung des Gesetzes gegen Wettbewerbsbeschränkungen* (pt. 2), (1973) *NEUE JURISTISCHE WOCHENSCHRIFT* 1666 (Sept. 18, 1973), at 1666.

See also Seidl-Hohenveldern, *The Limits Imposed by International Law on the Application of Cartel Law*, 5 *THE INTERNATIONAL LAWYER* 279 (1971).

3. PROHIBITION OF MERGERS

Under the terms of the amended Kartellgesetz, the Federal Cartel Office must now prohibit a merger which can be expected to create or strengthen a market-dominating position⁸⁶ *unless* the participating enterprises can prove that:

- (1) the merger will improve competition, and
- (2) such improvements in competition outweigh the disadvantages of market-domination.

No order prohibiting or enjoining a merger may be issued by the Cartel Office after the expiration of one year after the date of a complete and full filing.⁸⁷

The only other exception from the basic prohibition of mergers which create or strengthen market-dominating positions may be granted by the Federal Minister of Economics for mergers where the negative effects on competition will be outweighed by general economic advantages or can be justified by "a paramount public good," giving due consideration to the structure of the market outside of Germany.⁸⁸ This provision is clearly a compromise with those political forces which regarded the new German merger control provisions as being too restrictive. The examples that have usually been mentioned in connection with permission for a merger under this exception relate to the maintenance of the general level of employment, the protection of key industries, and the encouragement of domestic firms that must compete in the world market. It can easily be seen, however, that this "public interest" test leaves the Economics Minister with a good deal of discretion in approving or disapproving mergers.

⁸⁶GWB § 24 (1) & (2), as amended.

⁸⁷ GWB § 24 (2), as amended.

⁸⁸GWB § 24 (3), as amended. There is a certain amount of irony in the fact that one of the first major merger proposals to be prohibited by the Federal Cartel Office (and probably one of the first which will be subsequently granted an exception by the Federal Minister of Economics) was one proposed by the German Federal Government itself! For some time—since well before the beginning of the present "oil crisis"—the German government has been interested in creating a major German-controlled oil company. The government had achieved control of one substantial company, Veba AG, and intended to purchase the controlling interest of another, Gelsenberg AG, after which it planned to merge the two firms, thereby creating the desired major company. In compliance with the new merger control provisions, the parties to the plan, including the Federal Finance Ministry, submitted it to the Cartel Office for clearance. On January 8, 1974, the Cartel Office announced that it found it necessary to prohibit the proposed merger, since it would create a market-dominating position and since the proponents of the plan had failed to show competitive improvements which outweighed the disadvantages of creation of that position. In its communication to the plan's participants, the Cartel Office made reference to the possibility of their application for an exemption by the Economics Minister. In all likelihood such an application will be made and an exemption will be granted. (The Economics Minister's personal view of the proposal is presumably reflected by the belief that he was to have become chairman of the supervisory board of Gelsenberg AG after acquisition of it by the Government!) *See Gelsenberg: Bonn gibt sich selbst den Segen*, Handelsblatt, Jan. 9, 1974, at 1. *See also* Mundorf, *Veto aus Berlin*, *id.*, at 3.

4. ADVANCE CLEARING OF MERGER PROPOSALS

A merger proposal may always be submitted for clearance with the Federal Cartel Office and must be so submitted if at least two of the parties thereto each had annual sales during their last fiscal years of DM 1 billion or more.⁸⁹ Such submission sets into motion certain relatively short (one to four months) deadlines for action on the proposal by the Cartel Office, during which time it must either approve or disapprove the proposed merger.⁹⁰ Submission then serves to estop the Office from later attempting to enjoin a completed transaction. (Submission does not, however, modify the "filing" requirement under Section 23, which, of course, exists for a different purpose, that of supervising existing market-dominating entities.)

It should be noted that the deadlines set for Cartel Office action on a submission may be extended with the consent of the parties requesting the clearance and that informal requests from the Office for such extensions are expected to be common, especially in the near future, since the Office is not yet adequately staffed to deal with the number of clearance requests expected.⁹¹ In order to obtain a desired clearance, firms participating in a proposed merger should be prepared for careful consultations with the Cartel Office's staff, in order to convince the Office that the statutory prerequisites for allowing the merger exist. Since the burden of proof is on the parties requesting the clearance, it can be expected that the Office will be inclined to deny such clearance in any doubtful case.

5. "DE MINIMIS" MERGER EXEMPTIONS

The amended Act includes an important clause exempting certain types of mergers, regarded as *de minimis*, from the prohibition. Thereunder a merger is exempt if:

- (1) the total annual sales of the merging enterprises during their last fiscal year was less than DM 500 million;
- (2) an enterprise with annual sales of no more than DM 50 million is acquired by another enterprise;
- (3) only a regional part of the German market is affected by the market-domination; or
- (4) the relevant market for goods or services in the last calendar year had sales of only DM 10 million.⁹²

The lawyer who discovers that his particular merger problem involves one of these fact situations can thus safely proceed with the proposal without having to try to unravel the Gordian knots of the merger definition and "market-

⁸⁹GWB § 24a (1), as amended.

⁹⁰GWB § 24a (2), as amended.

⁹¹*Kartellnovelle: Dem Hammer fehlt der Stiel*, Handelsblatt, Aug. 6, 1973, at 1.

⁹²GWB § 24 (8), as amended.

domination"—probably much to his relief and that of his client. The knots, however, will remain, as the supervisory power of the Cartel Office grows.

V. Some Other Changes in the Kartellgesetz

Before concluding our discussion of the revision of the Kartellgesetz, two (for foreign enterprises) relatively minor provisions of the 1973 Amending Act still deserve some mention.

A. Cooperation between Small Enterprises

The major exceptions from the Act's Section 1 prohibition against horizontal agreements restraining competition numerically have been Section 5's exemption for "rationalization cartels" and Section 5a's exemption for "specialization cartels."⁹³ Both of these types of cartel agreements are permitted by the statute on the theory that the increases in productivity and efficiency and the consequent improvements in the satisfaction of consumer demand resulting from their existence outweigh the adverse consequences of restricted competition. "Rationalization cartels" include agreements to "regulate" markets with erratic demand patterns, especially agricultural markets dealing in perishable products. "Specialization cartels," a particular species of rationalization cartels, involve agreements between independent firms under which individual firms each produce only a part of a product line and then sell through a common marketing system. Under the exceptions to Section 1, the Cartel Office is empowered to permit outright price fixing and joint selling and purchasing arrangements but it must also give its prior approval to such rationalization and specialization cartels and thereby affirm that the specific agreement involved meets the above-mentioned theoretical test.⁹⁴

According to Cartel Office critics, the Office tended to interpret the enabling language of Sections 5 and 5a too narrowly and therefore strike down proposed agreements which, again according to such critics, were within the spirit and intent of the Sections to encourage desirable cooperation between smaller firms, in order for them to meet competition from large enterprises.⁹⁵

As a consequence of this criticism, the 1973 Amending Act introduced into the Kartellgesetz a new Section 5b, designed to facilitate cooperation between small and medium-sized enterprises, for the purpose of increasing their general economic efficiency.⁹⁶ The new Section provides as follows:

⁹³GWB § 5a, added to the Act in 1965 to permit specialization agreements under less stringent conditions than they had formerly been subjected to under § 5.

⁹⁴See generally 6 MÜLLER-HENNEBERG AND SCHWARTZ, *supra* note 13, at cases annotating §§ 5 and 5a.

⁹⁵Poeche, *supra* note 68, at 24.

⁹⁶The intent stated in the government's Explanatory Memorandum, *supra* note 55, at 545.

Section 1 does not apply to agreements and decisions, the object of which is the rationalization of economic processes through a method other than that designated in Section 5a (*i.e.*, other than through specialization) having inter-enterprise cooperation as its object, provided that market competition is not thereby significantly adversely affected and the agreement or decisions serves to promote the general economic efficiency of small or middle-sized enterprises.

As with rationalization agreements, agreements under Section 5b must be reported to the Cartel Office and take effect three months after such filing, unless the Office specifically objects thereto on the grounds that the particular agreement does not meet the conditions of the exemption.⁹⁷ Areas of cooperation expected to be covered by the new exemption include common advertising efforts, joint purchasing and sales activities, and the exchange of certain types of market information. The practical significance of the exemption is, of course, yet to be determined, particularly in view of its limitation to small and medium-sized enterprises and in view of the new prohibition of concerted practices.

B. *Establishment of a Monopoly Commission*

The second "minor" addition to the Kartellgesetz resulting from the 1973 Amending Act and deserving some mention here is the authorization of the establishment of a "Monopoly Commission."⁹⁸ During the stage when various proposals for the legislation which eventually resulted in the 1973 Amending Act were being debated, it was widely suggested that the Monopoly Commission, instead of the Federal Cartel Office or the Ministry of Economics, be given jurisdiction over the merger control provisions of the revised Act. Advocates of this proposal had expressed the view that an "independent agency" would be a more impartial supervisor of the merger provisions than the "more politically sensitive" Office or Ministry. The statutory role for the Commission that emerged in the 1973 Amending Act was thus a compromise between the advocates of this position and those who wished to keep jurisdiction in the hands of the traditional authorities. The Commission is charged with the task of the "regular examination of the development of concentration of enterprises in the Federal Republic of Germany and the application of [the Act's provisions dealing with market-dominating enterprises and merger control]." The Federal Government may request the Commission to undertake special studies of particular concentration problems and the Federal Minister of Economics may also seek the Commission's advice regarding his powers to authorize individual mergers, which are otherwise prohibited, on grounds of "the public interest." A complete report on concentration activities, including

⁹⁷GWB § 5b (2) and (3).

⁹⁸1973 Amend. Act, Art. 1 (9), now GWB § 24b.

possible recommendations for legislative changes, is to be issued by the Commission every two years.

The Commission itself is composed of five members; the statute also authorizes the organization of a Commission staff. The Commission is an independent agency, not under the supervision of the Federal Cartel Office or any of the regular government ministries and responsible primarily for its biennial report. Because of the professional qualifications for membership on the Commission specified by the statute and the stipulated requirement that Commission members be free from direct government, union or trade association affiliations, the initial appointments to the Commission required a relatively thorough personnel search.⁹⁹ While it will obviously require some time yet before the new Commission and its staff become functioning parts of the German anti-trust control system, it is hoped that the Commission's reports and recommendations will play a significant independent role in future policy decisions, particularly at the legislative level.

VI. The Kartellgesetz in a European Context

The Kartellgesetz, along with the other German legislation dealing with economic competition, attempts, through its various rules and regulatory authorizations, to establish within the Federal Republic of Germany a legal structure which enables the theoretically proper functioning of a modified free enterprise system. To this point, we have viewed that structure primarily from the standpoint of the internal German economy only. Germany today, however, is increasingly a part of a larger economic and political whole, made up of the European Economic Community. As such, an examination of the Kartellgesetz alone, without reference to the competition rules of the Community, makes almost as little sense as an examination of the unfair trade practices laws of New York State alone, without reference to American Federal legislation. Before turning to recent developments in the area of EEC regulation, it is probably worthwhile to raise a few questions (even if without attempting to answer them)

⁹⁹See *Bonn sucht noch zwei "Monopolkommissare,"* Handelsblatt, Aug. 23, 1973, at 1, and *Monopolkommission bald einsatzbereit,* Handelsblatt, Nov. 2, 1973, at 5. The initial appointees to the Commission have generally received a favorable public reaction, despite the fact that the majority of the Commission is thought to lean towards an "anti-merger" attitude. The five appointees are: (1) Economist Erhard Kantzenbach, President of the University of Frankfurt, author of a leading economic study of competition (*Die Funktionsfähigkeit des Wettbewerbs*, 1966); (2) Law Professor Ernst-Joachim Mestmäcker, former Rector of the University of Bielefeld, a specialist in the field of legal regulation of the economy and author of a new (1973) commentary on European competition law, *Europäisches Wettbewerbsrecht*, of which an English edition is being planned; (3) Dieter Fertsch-Rover, a Frankfurt businessman who has served as chairman of the highly reputable Arbeitsgemeinschaft selbständiger Unternehmer (Society of Independent Businessmen); (4) Erich Mittelsten Scheid, a manufacturer whose views are expected to mirror those of the German industrial community; and (5) Josef Murawski, the labor relations director for a major steel concern, whose views are expected to be representative of the German labor unions.

about the present-day significance of the German legislation within the larger European context.

The competition policies of the several EEC member States vary widely, ranging from the relatively free enterprise approaches of Germany and Great Britain to the state-owned, monopoly enterprise approach of Italy. Public opinion in Europe, even within each member State of the Community, is sharply divided over the virtue of economic competition. While it is probably true "that economically the Rome Treaty is basically a Treaty for more competition,"¹⁰⁰ the EEC regulations themselves jurisdictionally can affect only the larger, European-wide enterprises and the Community policy of promoting enterprises large enough to compete on a continental basis, and thereby meet the "American challenge,"¹⁰¹ can frequently be in conflict with the other Community policy of promoting competition. Because of the various degrees of market monopoly within national markets, the problem of delineating the relevant market for the application of anti-trust rules is a difficult one under both the EEC rules and the German statute.

It is this problem that critics of the stricter German rules most frequently raise when questioning the efficacy of the Kartellgesetz: how meaningful can the German concepts of market-domination and merger control be, when the German enterprises which are restricted thereby must meet competition from, for example, an Italian monopoly that is not restricted by any anti-trust legislation?

Beyond the complex issue of achieving legislative harmony between the member States lies the even more complex issue of achieving a sociological harmony between the differing attitudes of the peoples of those States towards comparable legislative prescriptions. In this regard the analogy of "tax morality" comes quickly to mind: in northern Europe a statutory tax rate of 50 percent means, pretty much, 50 percent; in southern Europe a 50 percent statutory rate can frequently mean only a 25 percent effective rate. In the area of anti-trust regulation only the most primitive steps have been taken toward legislative harmonization of the national anti-trust laws of the member States and the issue of harmonizing attitudes towards legislative policies for the encouragement of economic competition has hardly been considered at all.

Under such circumstances, ask the critics of the Kartellgesetz and its 1973 amendments, what is the economic purpose in increasing the regulatory power of the Federal Cartel Office? Why should German business enterprises be limited in their ability to dominate their domestic markets when, on a European

¹⁰⁰Mussard, *The Regulation of Restrictive Business Practices Under the Common Market Treaty* (INT'L & COMP. L.Q. Supp. No. 4, 1962), 17.

¹⁰¹For a discussion of efforts to encourage the organization of continental-wide business enterprises through "legal harmonization," see STEIN, *HARMONIZATION OF EUROPEAN COMPANY LAWS* (1971).

scale, their competitors are free to establish captive domestic bases, which enable them better to compete on the European and world markets? The answers to these questions will determine the future of the German *Marktwirtschaft*. The questions themselves also help to explain the keen interest of German economic and legal scholars in the progress of developing an effective European system of anti-trust law.

VII. Recent Merger Control Activities by EEC Institutions

A. *The Europemballage Case*

The control of mergers has not interested the German government alone. It has also received increasing attentions from the Commission of the European Communities, in its capacity as administrator of the EEC's anti-trust rules, and from the European Court of Justice, the Communities' judicial arm.¹⁰² Most noteworthy have been the efforts of the Commission to breathe life into Article 86 of the EEC Treaty, which prohibits taking improper advantage of a dominant position within the Common Market or a substantial part thereof.

With somewhat strained reliance on the language of this Article, the Commission has developed an "abuse-aimed merger" theory, which holds that it is an abuse of a market-dominating position if an enterprise creates or increases a dominant position by acquiring another enterprise.¹⁰³

This abuse-aimed merger theory recently received significant support from the European Court of Justice in the widely-reported action by the Commission against Europemballage, the European holdings subsidiary of Continental Can Corporation. In 1969 Europemballage took control of the German container firm Schmalbach-Lubeca Werke AG, which in turn, in 1970, took over the Dutch company Thomassen en Drijver Verblifa N.V. Continental Can's licensees also had significant portions of the packaging markets in France and Italy. The Commission took the position that the 1970 Dutch take-over was an abuse of a dominant position in the Common Market and therefore a violation of Article 86.¹⁰⁴

¹⁰²The literature now available in English on EEC competition policy and its enforcement is voluminous. For a brief overview the reader is referred to either Zaphiriou, *European Anti-Trust Law*, in *EUROPEAN BUSINESS LAW* (Sweet & Maxwell 1970) or Dietz, *Enforcement of Anti-Trust Laws in the EEC*, 6 *INTERNATIONAL LAWYER* 742 (1972). Lengthier studies are RAHL, *COMMON MARKET AND AMERICAN ANTITRUST* (1970) and DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY* (CCH 1968). A brief discussion of the administration of EEC competition law is Graupner, *Commission Decision-Making on Competition Questions*, 10 *COMMON MARKET LAW REVIEW* 291 (Aug. 1973). On the judicial aspects of the enforcement of EEC law generally, see BRINKHORST & SCHERMERS, *JUDICIAL REMEDIES IN THE EUROPEAN COMMUNITIES* (Fred B. Rothman & Co., 1969).

¹⁰³The "abuse-aimed merger" theory was first articulated by the Commission in 1966. See EEC Commission, *Concentration of Firms in the Common Market* (Information Memorandum No. P-1/66), reprinted in 2 CCH *COMM. MKT. REP.* ¶ 9081 (1966).

¹⁰⁴For a summary of the Commission's statement of its views on the Europemballage situation,

When oral presentations were made before the Court of Justice in November, 1972, the Court's Advocate General, whose opinion is frequently determinative, in what appeared to be a major defeat for the Commission, adopted the essential theoretical positions of Continental Can and argued against the doctrinal soundness of the abuse-aimed merger theory:

It . . . follows from Article 86 that the Treaty tolerates even the absence of *all* competition, *i.e.*, a complete monopoly. This may be said, in my opinion, since Article 86 obviously does not distinguish between different degrees of market domination and since it does not, like section 2 of the Sherman Act, which was perfectly familiar to the authors of the Treaty, declare the very attempt to create a monopoly situation prohibited. Moreover, it is significant that Article 86, unlike Article 66 of the [European Coal and Steel Community] Treaty and Article 85 (3) (b) of the EEC Treaty, precisely does not contain the reservation that "genuine competition" should not be prevented (Article 66 of the ECSC Treaty) or that there should be no opportunity to eliminate competition in respect of a considerable part of the products in question (Article 85 (3) (b) of the EEC Treaty). . . . Consequently, the challenged decision must be annulled on the ground that it has no legal basis in Article 86 of the Treaty.¹⁰⁵

Secondarily, the Advocate General contended that the Commission had further failed to prove that Continental Can (through Europemballage and Schmalbach Lubeca) held a market-dominating position.

The Court announced its ruling in the case on February 21, 1973.¹⁰⁶ In a judgment of great importance for the constitutional law-making powers of the Court itself (and one reminiscent of the judicial approach of Chief Justice John Marshall in *Marbury v. Madison*), it held that, from the facts regarding market structure and shares used by the Commission as the grounds for its conclusion, the Commission was in error in concluding that Continental Can dominated its market. In accepting the Advocate General's secondary argument, the Court annulled the Commission's decision against Continental Can and Europemballage. More significantly, however, the Court then went on to accept the doctrine of the abuse-aimed merger:

To resolve this problem [of the applicability of Article 86 to mergers] it is necessary to resort to the spirit, structure and working of Article 86 and to the system and aims of the Treaty. . . . In the absence of express provisions, it cannot be supposed that the Treaty, which in Article 85 prohibits certain decisions of normal associations of undertakings restricting but not eliminating competition, intended in Article 86 to permit undertakings, by merging into an organic unit, to obtain such a dominant

see " 'Continental Can' Will Be Invited to Give Up Control of the Dutch Firm 'Verblifa' by the European Commission," *Europe*, March 15, 1971. Continental Can's response to that position is summarized in " 'Europemballages' Does Not Share the Commission's Views on Its Claimed Abuse of a Dominating Position on the Market," *Europe*, March 25, 1971.

¹⁰⁵Submissions of the Advocate-General (Herr Karl Roemer), reported in *Europemballage Corporation and Continental Can Company Inc. v. E.C. Commission* (case No. 6/72), (1973) *COMM. MKT. L.R.* (Part 68) 199, at 202 (April 1973); 2 *CCH COMM. MKT. REP.* ¶ 8171.

¹⁰⁶*Europemballage Corporation and Continental Can Company Inc. v. E. C. Commission* (European Ct. of Justice Judgement of Feb. 21, 1973), *supra* note 105, at 219. See Case Note, 10 *COMMON MARKET LAW REVIEW* 316 (Aug. 1973).

position that any serious possibility of competition is almost eliminated. . . . There may therefore be abusive behaviour if an undertaking in a dominant position strengthens that dominant position so that the degree of control achieved substantially obstructs competition, *i.e.*, so that the only undertakings left in the market are those which are dependent on the dominant undertaking with regard to their market behaviour.

Article 86 has thus been established as an instrument for at least the partial control of market-dominating mergers.

*B. Proposed EEC Regulation for
the Control of Mergers*

Based on the authority which it finds in Article 86, supplemented by the "enabling" and "purpose" provisions of Articles 87, 235 and 3(f), the Commission announced on July 18, 1973, that it had completed preparation of a draft Council Regulation for the systematic control of mergers in the Common Market.¹⁰⁷ The draft is being reviewed at the time of this writing by the European Parliament, which must indicate its consent, and also by a study committee established by the Council of Ministers. It will then be considered by the Council of Ministers itself, which has ultimate authority over the promulgation of such Regulations.¹⁰⁸ The Commission had expressed the hope that this legislative process could be completed in time for the Regulation to become effective on January 1, 1975, a hope which now appears unlikely to be fulfilled. Although it clearly does not yet constitute law, the proposed Regulation is of interest to German businesses and to foreign enterprises doing business in Germany, particularly in view of the recent German developments in the field of merger control.

The proposed EEC Regulation exhibits clearly the influence of the German Kartellgesetz in its 1973 amended form. The Regulation's basic provision, found in its Article 1, provides that:

Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the Common Market, whereby they acquire or enhance the power to hinder effective competition in the Common Market or in a substantial part thereof, is incompatible with the Common Market insofar as the concentration may affect trade between member-States. The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.

¹⁰⁷Draft Regulation of the E.C. Council Concerning Control of Concentrations Between Undertakings, EEC Comm'n Doc. Com. (73) 1210 final (18 July 1973), (1973) Comm. Mkt. L.R. D205 (Sept. 1973); 2 CCH COMM. MKT. REP. ¶9586 (hereinafter cited as Draft Reg.).

¹⁰⁸This is in essence the usual legislative process for the adoption of "Community law." For a brief description of the process, see NOËL, *HOW THE EUROPEAN ECONOMIC COMMUNITY'S INSTITUTIONS WORK* (Community Topics 27, European Community Information Service 1968).

The jurisdictional prerequisites provided in this basic provision, that at least one EEC enterprise be involved and that trade between member States be affected, are the normal ones for this type of EEC Regulation. In cases where these prerequisites are met and where a prohibited merger is contemplated or occurs, the Commission is granted power to enjoin or to order divestiture of the concentration.¹⁰⁹

Otherwise prohibited mergers may be exempted from the application of the Regulation by the Commission, if they are determined to be "indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community."¹¹⁰ The similarity of this provision to that in the amended Kartellgesetz which grants exemption power to the Federal Minister of Economics in "public interest" cases is clear. Also like the German Act is the *de minimis* exemptions provision of the proposed Regulation, exempting mergers in which the participating enterprises have combined annual sales of less than 200 million EEC units of account¹¹¹ (presently approximately 240 million) and less than twenty-five percent (25%) of the relevant market in any member State.

"Concentration" is broadly defined. It includes any acquisition of "control" of another firm which permits the acquiring enterprise to determine how the acquired enterprise shall be managed.¹¹² "Hindrance of competition," the proposed Regulation's other key phrase, as can be seen from the foregoing quotation of its Article 1, is also not precisely defined. Both terms leave the Commission—and the Court of Justice—with substantial discretion over which combinations of enterprises to exert the prohibitory authority proposed to be granted.

The proposal, again parallel to the revised Kartellgesetz, calls for the prior notification of certain large mergers to the Commission.¹¹³ Mergers falling into this category are those which involve enterprises having combined annual sales of 1 billion EEC units of account (presently approximately \$1.2 billion), including all sales of parent and subsidiary companies. Following notification of the proposed merger, the participating enterprises must then wait a period of three months for its consummation, during which time the Commission may take action against it.¹¹⁴ If the Commission takes no action during this waiting

¹⁰⁹Draft Reg., Art. 3, especially para. 3:

Where a concentration has already been put into effect, the Commission may require, by decision taken under paragraph 1 or by a separate decision, the undertakings, or assets acquired or concentrated to be separated or the cessation of common control or any other action that may be appropriate in order to restore conditions of effective competition.

¹¹⁰Draft Reg., Art. 1, para. 3.

¹¹¹One EEC unit of account is presently equivalent to the value of 0.88867088 grams of fine gold, or the gold value of the U.S. dollar in 1958. See Budget Regulation of the Community of July 30, 1968, Art. 17 (I), (1968) *Official Gazette* L 199.

¹¹²Draft Reg., Art. 2.

¹¹³Draft Reg., Art. 4, para. 1.

¹¹⁴Draft Reg., Art. 7.

period, the proposed merger may be regarded as approved. Another *de minimis* merger provision exempts from the prior notification requirement those mergers which involve the take-over by billion unit-of-account enterprises of enterprises with annual sales of less than 30 million units of account.¹¹⁵ Such take-overs, however, still remain subject to the general prohibition against "competition-hindering" mergers of the proposed Regulation's Article 1.

Since German industry is already subject to similar, and stricter, anti-trust handicaps, the proposed EEC Regulation does not meet with strong objections in the Federal Republic. While the thought of additional regulation is not, of course, in itself appealing, the possibility that the new EEC rules will be a first step toward equalizing anti-trust regulatory burdens between business enterprises in the Common Market is welcomed by many German business and legal observers. The proposal has been received in Italy and, to a lesser degree, in France, on the other hand, by relatively strong opposition. Neither of the latter two countries have comparable anti-trust legislation. Great Britain, also having monopoly legislation, has an attitude towards the proposal similar to that prevailing in Germany. It is clear that the proposed Regulation will face substantial opposition before it takes effect as law, and then only after much debate and amendment. In the course of that debate, the balance of continental Europe will undoubtedly be learning a good deal about anti-trust policy from the German experience.

¹¹⁵Draft Reg., Art. 4, para. 2.