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Rolf Belke

W. David Braun

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## **German Merger Control: A European Approach to Anticompetitive Takeovers**

*Dr. Rolf Belke\**

*W. David Braun\*\**

*European free-market countries recently have begun to enact more laws regulating mergers and joint-ventures, with Germany at the forefront. In this article, Messrs. Belke and Braun intensively analyze the German merger control law, including the criteria that necessitate a report to the German Cartel Office, its application of the substantive merger control rules, and possible exceptions to an anti-merger ruling. They also explore the impact of the German law on international mergers and joint-ventures. Finally, they discuss in detail the first two German Supreme Court decisions that construed the substantive rules and contrast them with similar American cases.*

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\* Universitätsdozent, University of Munich; J.D., 1966, University of Tübingen; M.C.L., 1966, Columbia University.

\*\* Research Assistant, Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich; A.B., 1972, University of Illinois; J.D., 1975, University of Notre Dame.

Because several foreign language periodicals are cited numerous times in the footnotes to this article, a shorthand abbreviation has replaced the usual shortened citation form coupled with a *supra* reference to a foregoing footnote. For ease of reference, the following shorthand abbreviations may be found in the cited footnotes: WuW, BB, and WRP are in note 2; FK is in note 8; KB is in note 9; LNS KOMMENTAR is in note 10; TB is in note 19. Further, since German case names are not easily distinguished by having the names of two parties separated by a *v.*, the names of German cases have been italicized and separated from the citation by a comma.

While the prohibition of mergers and acquisitions to prevent undue market concentration is a mature legal concept in the United States based on section 7 of the Clayton Act,<sup>1</sup> merger control in Europe is for the most part in the embryonic or adolescent stages with Germany leading the way. At the supranational level, the European Economic Community (EEC) has no general merger control statute and therefore has a very limited capability to prohibit anticompetitive mergers.<sup>2</sup> At the national level, only Britain,<sup>3</sup> France,<sup>4</sup> and Germany<sup>5</sup> have laws spe-

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<sup>1</sup> 15 U.S.C. § 18 (1976).

<sup>2</sup> Mergers may be attacked under article 86 of the Treaty of Rome, which provides in part that an "abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." Treaty establishing the European Economic Community, March 25, 1957, 295 U.N.T.S. 2. Mergers may be prohibited only to the extent "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." *Europemballage Corp. and Continental Can Co., Inc. v. EEC Commission*, COMM. MKT. L.R. 199, 225 (1973).

While article 86 has not yet been used with success to block mergers, article 85 has been applied successfully to attack joint ventures. This article prohibits "agreements between undertakings . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. . . ." *See Re Bayer Gist-Brocades*, Comm. Mkt. L.R. D98 (1976); SIXTH REPORT ON COMPETITION POLICY, §§ 53-59 (1976); C. BELLAMY & G. CHILD, COMMON MARKET LAW OF COMPETITION, 345-57 (1978); Huber, *Aktuelle Probleme des Gemeinschaftsunternehmens im deutschen und europäischen Wettbewerbsrecht*, 28 WIRTSCHAFT UND WETTBEWERB 677 (1978) [hereinafter cited as WuW]; Steindorff, *Zur Anwendbarkeit des Art. 85 Abs. 1 EWG-Vertrag auf Gemeinschaftsunternehmen in der EG-Praxis*, 32 BETRIEBS-BERATER 1613 (1977) [hereinafter cited as BB]. For discussion of the relationship between articles 85-86 and article 23, § 1, of the Free Trade Agreements between the EEC and the member states of the European Trade Association (EFTA), see Roth, *Die Wettbewerbsregeln in den Freihandelsabkommen der EWG*, 1978 WETTBEWERB IN RECHT UND PRAXIS 409 [hereinafter cited as WRP]. Article 66(1) of the European Coal and Steel Treaty provides for control over mergers in which one of the merging parties is a producer of coal or steel but has been rarely applied.

A proposed regulation for the general control of mergers in the EEC dated July 20, 1973, provides in part: "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 in so far as the concentration may affect trade between Member States." 16 O.J. EUR. COMM. (no. c 92) 2 (1973); COMPETITION LAW IN WESTERN EUROPE AND THE USA, vol. A\*, at CM.L.II-91 (D. Gijlstra & F. Murphy ed. 1977). Prospects of the Council adopting this proposed regulation in the near future are considered highly unlikely.

<sup>3</sup> Merger control was enacted in Britain in the Monopolies and Mergers Act 1965, c. 50, amended by The Fair Trading Act 1973, c. 41. *See* COMPETITION LAW IN WESTERN EUROPE AND THE USA, vol. A\*, at UK.L.I-5. An overview of merger control laws of many countries is found in OECD, COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICES 77-82 (1978).

<sup>4</sup> A merger control law was enacted in France in 1977. Loi No. 77-806, July 19, 1977, [1977]

cially directed at the control of mergers.

The German merger control statute is found in sections 22-24a of the Law Against Restraints of Competition, *Gesetz gegen Wettbewerbsbeschränkungen* (GWB). Adopted in 1973 as an amendment to the GWB, which dates from 1957,<sup>6</sup> the merger control provisions consist of two main bodies of law: a reporting system under sections 23 and 24a GWB, and the substantive law under sections 22 and 24 GWB. The act seeks to maintain market structures that make effective competition possible by prohibiting the creation or entrenchment of market power which is likely to harm the competitive process and its accompanying economic efficiencies. The fundamental principle is that the creation or strengthening of a market dominating position is to be prohibited whether or not that market power will actually be used to restrain competition.<sup>7</sup>

The reporting provisions as well as the substantive merger prohibitions of the German law may have significant implications for mergers involving American firms if they have a business connection with Germany. The following discussion of German merger control is therefore written particularly to provide information about the application of the German statute to such mergers and to enable American practitioners to file simple reports of mergers with the German Cartel Office as required by law. An examination of the German law is also of comparative law interest because it may provide a model for the further development of merger control in the EEC and the United States. Part I of the article presents an overview of the different reporting requirements for planned and consummated mergers. Part II is dedicated to

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J.O. 3833; Décret No. 77-1189, Oct. 25, 1977, [1977] J.O. 5223. It is only applicable to horizontal mergers resulting in a 40% market share and vertical and conglomerate mergers involving a 25% market share. Such mergers may be justified on competition grounds or the furtherance of economic and social progress, including the international competitiveness of the participating enterprises. For a discussion of the law, see Brault, *Current Developments in Competition Policies*, 22 ANTITRUST BULL. 157 (1977); Grauel, *Das französische Kartellgesetz vom 19. Juli 1977*, 28 WuW 751 (1978); Jeantet, *Loi sur le contrôle des concentrations économiques en France*, LA SEMAINE JURIDIQUE 2879, I Doctrine (1977).

<sup>5</sup> Second Amendment to the Law Against Restraints of Competition of August 4, 1973, [1973] BGBI I. 917.

<sup>6</sup> The Law Against Restraints of Competition, enacted on July 27, 1957, became effective on January 1, 1958. [1957] BGBI I. 1081. It superceded the decartelization laws that were introduced by the American, British, and French military governments after World War II. The merger control provisions, introduced in the Second Amendment, note 5 *supra*, had retroactive effect to June 7, 1973. Other minor amendments relating to application of merger control to the press were made in the Third Amendment of June 28, 1976. [1976] BGBI I. 1697. The full text of §§ 22-24a of GWB is found in Appendix I.

<sup>7</sup> *Kfz-Kupplungen*, 71 BGHZ 102, 115-16, WuW/E BGH 1501, 1506-07 (1978).

the substantive merger law. Part III suggests some ideas concerning the extraterritorial application of the law. Finally, Part IV describes and comments upon the first two German Supreme Court cases delivered in 1978 which interpreted the principles of the law in such difficult areas as conglomerate mergers and joint-ventures.

## I. THE REPORTING SYSTEM

### A. *Fundamentals*

The complicated statutory provisions for reporting mergers above a certain size or market share to the Cartel Office are found in two separate but related provisions, partly for historical reasons and partly because of different purposes. Section 23 GWB requires the reporting of certain *consummated* mergers. Section 24a GWB provides for compulsory and voluntary notification of *planned* mergers.

The reporting requirement for consummated mergers under section 23 was enacted before the Cartel Office had authority to prohibit mergers with two informational purposes in mind.<sup>8</sup> First, the Cartel Office was to be given notice of large mergers that might result in a dominant market position triggering enforcement of sections 22(4) and (5), which provide the Cartel Office with special authority over abusive conduct by market dominating enterprises. Second, the reporting of all important mergers to the Cartel Office would enable it to have a continuous overall picture of the concentration movement in German industry. Statistical experience based on this reporting system influenced, in part, the adoption of the 1973 merger control provisions.<sup>9</sup> While these legislative purposes of former section 23 are still valid today, they are now supplemented by the central purpose of alerting the Cartel Office to mergers *at the time of consummation* in order to facilitate their prohibition by administrative order of the Cartel Office if they are illegal under section 24. Application of this substantive merger control provision, however, is not dependent on the reporting requirements under either sections 23 or 24a, but rather can be applied whenever the Cartel Office becomes aware of a merger by whatever means.<sup>10</sup> The owners or

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<sup>8</sup> FRANFURTER KOMMENTAR § 23, ¶¶ 18-19 [hereinafter cited as FK].

<sup>9</sup> *Kettenstichnähmaschiene*, — BGHZ —, WuW/E BGH 1570, 1575-76 (1979). BEGRÜNDUNG ZUM REGIERUNGSENTWURF VOM 18.8.71 (Explanation of the Government's Proposed Law of August 18, 1971), BT-Drucks. VI/2520; BR-Drucks. 265/71, §§ 16-18 [hereinafter cited as GOVERNMENT'S EXPLANATION]. Relevant portions are found in Appendix II of W. KLEINMANN & R. BECHTOLD, KOMMENTAR ZUR FUSIONS-KONTROLLE (1977) [hereinafter cited as KB].

<sup>10</sup> FK § 24, ¶ 76; E. LANGEN, E. NIEDERLEITHINGER, & U. SCHMIDT, KOMMENTAR ZUM

other legal representatives obligated to make the report for the participating enterprises must provide the report without undue delay after consummation of the merger. If the merging enterprises provide a report without undue delay, then a statutory time limitation of one year is triggered within which the Cartel Office must determine whether to prohibit the merger.<sup>11</sup> This one year period upholds the interest of the merging enterprises in legal certainty so that business planning can go forward without eventual later prohibition of the merger.

The pre-merger notification provisions of section 24a require notification of a *planned* merger before consummation between very large enterprises.<sup>12</sup> The purpose of this rule is to make it possible for the Cartel Office to conduct an investigation at the earliest possible time of mergers between very large enterprises, as such giant marriages can cause very serious and long term deterioration of market structures and present particularly difficult problems of divestiture.<sup>13</sup> These large-firm mergers requiring pre-merger notification to the Cartel Office are governed by two important rules. First, the consummation of such a merger is preliminarily prohibited under section 24a until the Cartel Office reaches a decision on the legality of the merger, while this is not the case under the reporting provisions of section 23. This means that any legal actions taken to consummate large mergers are ineffective under civil law, pending decision by the Cartel Office.<sup>14</sup> Second, the Cartel Office is bound by a time limitation once complete notification is made under section 24a. Rather than a one year period being imposed, as under the reporting provisions of section 23, the notification provisions of section 24a trigger a four-month period within which the Cartel Office must determine whether to prohibit the merger. Upon expiration of this period, the Cartel Office may prohibit mergers in only a few exceptional circumstances.<sup>15</sup>

The pre-merger notification provisions under section 24a further

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KARTELLGESETZ § 23, ¶ 60 (5th ed. 1977) [hereinafter cited as LNS KOMMENTAR]. Other recently published commentaries on German merger control are found in H. EBEL, KARTELLRECHTSKOMMENTAR at §§ 23-24a; Emmerich, *Die bisherige Praxis zur Fusionskontrolle: Eine kritische Analyse*, 1978 DIE AKTIENGESELLSCHAFT 85, 118; H. MÜLLER, P. GISSLER & U. SCHOLZ, KOMMENTAR ZUM GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (KARTELLGESETZ) §§ 23-24a (1978); K. WESTRICK AND U. LOEWENHEIM, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN: KOMMENTAR §§ 23-24a (1978).

<sup>11</sup> GWB § 24(2); KB § 24, ¶ 138; FK § 24, ¶ 78.

<sup>12</sup> GWB § 24a(1).

<sup>13</sup> KB Einl. ¶ 18.

<sup>14</sup> GWB § 24a(4); KB § 24a, ¶ 99; *Weichshaum III*, WuW/E BGH 1556, 1557 (1978); *Metzeler Schaum*, WuW/E 1547 (1978).

<sup>15</sup> GWB § 24a(2).

provide for voluntary notification of smaller mergers which may or may not be subject to the reporting requirements of section 23. Those mergers are valid under civil law when consummated. The primary incentives for voluntary notification are avoidance of later divestiture proceedings and a quicker decision by the Cartel Office on the legality of the merger.<sup>16</sup>

With the different concepts of reporting under section 23 and pre-merger notification under section 24a in mind, these provisions can now be examined individually.

### *B. Reporting a Merger Under Section 23 GWB*

The fundamental purpose of section 23 is to provide the Cartel Office with information needed to follow all significant merger activity. Its detailed provisions define the term merger, tell which mergers based on market share and size criteria must be reported, and prescribe the content of the report.

#### *1. Definition of Merger*

The term merger is defined in section 23 (2) by four specific merger categories plus a fifth catch-all clause: (1) acquisition of assets and liabilities in whole or substantial part,<sup>17</sup> (2) acquisition of stock, (3) agreements resulting in or enlarging a combine (*Konzern*) under which one enterprise obligates itself to conduct its business for the account of another or transfer its profits to another, or the lease or transfer of a substantial part of a business, (4) identity of at least half of the membership of the governing board or management, and (5) any other relationship on the basis of which control of another enterprise is gained. The merger must occur between "enterprises" (*Unternehmen*) under German law, which may be defined as all natural and legal persons actively engaging in business activity as opposed to private consumers.<sup>18</sup>

Since stock acquisitions are the largest category of mergers reported to the Cartel Office, a closer look at the provisions relating to

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<sup>16</sup> GWB § 24a(1); KB § 24a, ¶ 37.

<sup>17</sup> In *Kettenstichnähmaschinen*, — BGHZ —, WuW/E BGH 1570, 1576 (1979), the Supreme Court decided that the conglomerate acquisition of only minor assets which may nevertheless have represented over 20% of a market for industrial back-stitch sewing machines could be considered a "substantial part" of the acquiree's business and thus subject to the reporting requirement under § 23(2)(1). A report is required if the conglomerate merger is likely to have any perceptible effect on a relevant market. The absolute size of the acquired assets, their value, number of employees, turnover, or market shares are not determinative alone.

<sup>18</sup> GWB § 23(2); FK § 23, ¶¶ 26, 29-30; LNS KOMMENTAR § 23, ¶ 35.

this form of acquisition is appropriate.<sup>19</sup> The acquisition of stock in another enterprise is deemed to be a merger when any of three levels of participation is reached: (1) acquisition of 25% of the voting capital, (2) acquisition of 50% of the voting capital, or (3) majority interest within the meaning of section 16(1) of the Stock Corporation Act.<sup>20</sup> An important aspect of this definition is that according to the first two alternatives, only the acquisition of voting capital is deemed to be a merger, while the third alternative relates to "majority interest" within the meaning of the Stock Corporation Act, which can be either a majority of voting rights *or* a majority of shares.<sup>21</sup> In practice, the critical threshold most frequently exceeded is 25% of the voting capital.

Of course, the failure to acquire enough shares to meet these formal rules on the level of stock participation does not free one from the duty to report a merger to the Cartel Office if the acquisition activity falls into one of the other four major categories, particularly the last alternative, which looks to whether "one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise."<sup>22</sup> Thus, other circumstances alone or in conjunction with holdings of less than 25% of an enterprise's voting capital can be deemed a merger. The provision requires only the possibility of a controlling influence and not the actual exercise of that influence.<sup>23</sup> A contract granting another enterprise control over the appointment of management, control over management decisions, control over purchases or sales such as through the conclusion of very long-term supply or sales contracts, loan contracts, or licensing agreements could fall under this provision.<sup>24</sup> This catch-all provision also applies to when "one or several" enterprises can exercise a controlling influence.<sup>25</sup> Therefore, an agreement or understanding by which three enterprises,

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<sup>19</sup> BERICHT DES BUNDESKARTELLAMTS ÜBER SEINE TÄTIGKEIT IM JAHRE 1978 ÜBER LAGE UND ENTWICKLUNG AUF SEINEM AUFGABENGEBIET (§ 50 GWB) 128 [hereinafter cited as TB]. In the year 1978 there were 558 mergers reported, of which 151 were asset acquisitions, 262 were stock acquisitions, 128 were joint-ventures, 13 were contractual links, and 4 were of other types. In the years 1973-1978 there were 503 asset acquisitions, 1099 stock acquisitions, 630 joint-ventures, 76 contractual links, 4 identity of management and 26 other types reported. *Id.*

<sup>20</sup> Section 16(1) of the Stock Corporation Act, [1965] BGBl I. 1089, provides:

If the majority of shares of a separate legal person is owned by another enterprise, or if another enterprise holds the majority of voting rights (majority holding), then the one enterprise is a majority owned enterprise, and the other is a majority interest enterprise.

<sup>21</sup> FK § 23, ¶ 50; KB § 23, ¶ 73.

<sup>22</sup> GWB § 23(2)(5).

<sup>23</sup> KB § 23, ¶ 133; LNS KOMMENTAR § 23, ¶¶ 20, 24-25. *See also AEG-Telefunken-Zanussi*, [1973] TB 70-71.

<sup>24</sup> FK § 23, ¶¶ 72-76; KB § 23, ¶¶ 133-142.

<sup>25</sup> GWB § 23(2)(5).



each with only 20% of the voting stock of another enterprise, obligate themselves to coordinate the exercise of their voting rights would fulfill this requirement. On the other hand, a controlling influence may exist even in the absence of such an agreement if other circumstances, such as common interests, equality of holdings, or family relationships, assure common action as if such an agreement existed.<sup>26</sup>

## 2. Market and Share and Absolute Size Criteria

While the term merger is very broadly defined, those mergers that must actually be reported to the Cartel Office are restricted by market share and absolute size criteria under section 23(1), which provides that:

A merger of enterprises shall be reported to the Federal Cartel Office without undue delay if:

1. within the entire territory in which this law applies or within a substantial part thereof, a market share of at least 20 percent is reached or increased as a result of the merger, or if a participating enterprise has a market share of at least 20 percent in another market; or
2. the participating enterprises had collectively at any one time during the last business year preceding the merger at least 10,000 employees, or during such period had a turnover of at least DM 500 million.

If one of the participating enterprises constitutes a controlled or controlling enterprise within the meaning of § 17 of the Stock Corporation Act or a combine enterprise (*Konzernunternehmen*) within the meaning

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<sup>26</sup> See *Seitz*, 62 BGHZ 193, WuW/E BGH 1307 (1974), (the German Supreme Court ruled that common control of acquired enterprise through several other enterprises each owned by the same family, assures common controlling influence; KB § 23 ¶¶ 143-150, 236-242). See also *Brost u. Funke*, — BGHZ —, WuW/E BGH — (1979) (the German Supreme Court ruled that the families Brost and Funke, which acquired enterprises through partnerships in which each family shared equally the paid-in capital and voting rights, were each "controlling" enterprise within the meaning of the second clause of sentence 2 of § 23(1) GWB, the wording of which is virtually identical to § 23(2)(5) GWB). The *Brost u. Funke* court stated that the legal form of those in control is not decisive; even individuals or groups of individuals may be deemed a controlling enterprise if they have a common bond of economic interest that is

strong enough to justify the serious concern that the stockholder or partner could exercise an influence that would have had anticompetitive effects. . . . Such a bond of economic interest outside the partnership may be founded solely on the controlling interest being held by several enterprises, leading to common market strategy planning and decisions.

*Id.*

This view is also based in part on the views expressed by the Economic Committee of the Bundestag on June 12, 1973. It stated that "a common intent by several enterprises to dominate [another enterprise] is required. This can also exist in cases in which a contractual agreement such as a voting or syndicate agreement (*Konsortialvertrag*) does not exist." BERICHT DES WIRTSCHAFTSAUSSCHUSSES DES BUNDESTAGS VOM 12.6 ZUM GESETZESENTWURF DER SPD-FDP FRAKTIONEN, BT-Drucks. 7/765, at 7 (relevant portions can be found in KB, app. III) [hereinafter cited as ECONOMIC COMMITTEE REPORT].

of § 18 of the Stock Corporation Act, then the enterprises linked in this manner are deemed to be a single enterprise for purposes of computing market shares, number of employees and turnover. . . .<sup>27</sup>

*a. Participating Enterprise*

The determination of market shares and absolute size criteria depend in large part upon the meaning of a "participating enterprise." The Cartel Office interprets this term to include the acquiror and acquiree enterprises, plus all of their controlled or controlling enterprises immediately *after* the merger. Thus, only the acquiree, the acquiror, and all of their controlled or controlling enterprises must be included in the calculation. The former owner of the acquiree is not included.<sup>28</sup>

*b. Market Share*

Under the first clause of the market share test in section 23(1)(1), a report must be made to the Cartel Office if a market share of at least 20% is reached or increased as a result of the merger. This part of the provision relates to markets commonly served by the merging enterprises, and thus is aimed at mergers between direct competitors, usually referred to as horizontal mergers. The second clause of the market share test requires that a report be made if the merger occurs between enterprises with a minimum market share of 20% in another market, and thus is aimed primarily at informing the Cartel Office of vertical and conglomerate mergers. Further, the market share must relate to a market covering all or a substantial part of Germany; foreign markets are not relevant.<sup>29</sup> Determination of market share is governed by section 22 GWB under which geographic and product market criteria sim-

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<sup>27</sup> The Stock Corporation Act, [1965] BGBI. I 1089, provides:

§ 17: Controlled and Controlling Enterprises

(1) Controlled enterprises are legally separate enterprises over which another enterprise (controlling enterprise) can directly or indirectly exercise a controlling influence.

(2) An enterprise which holds a majority interest in another enterprise is presumed to control that enterprise.

§ 18: Combines and Combine Enterprises

(1) If a controlling and one or more controlled enterprises are united under common control of the controlling enterprise, they constitute a combine; the individual enterprises are combine enterprises. Enterprises between which an agreement granting control exists (§ 291) or from which one is integrated into the other (§ 319) are to be treated as if united under common control. A controlled enterprise is presumed to constitute a combine with the controlling enterprise.

(2) If legally separate enterprises not controlled by one another are united under common control, they also constitute a combine; the individual enterprises are combine enterprises.

<sup>28</sup> Previously, the German Supreme Court had considered the seller of assets and liabilities also to be a participant in mergers. *Kettenstichnahmaschinen*, — BGHZ —, WuW/E BGH 1570, 1571-72, (1979), *overruling Zementmahlanlage*, 65 BGHZ 269, WuW/E BGH 1377 (1975).

<sup>29</sup> FK § 23, ¶ 89; KB § 23, ¶¶ 202-208. See text accompanying note 136 *infra*.

ilar to those employed in the United States are applied.<sup>30</sup> In the event an enterprise is unsure of its market share, the practice has developed to cooperate in good faith with the Cartel Office to help determine whether the critical 20% level has been reached.

*c. Absolute Size*

Absolute size is the alternative criterion to market share upon which the reporting requirement is based. A report must be made under section 23(1)(2) if the merging parties and their participating enterprises had collectively at any one time during the last business year preceding the merger: (1) at least 10,000 employees, or (2) a turnover of at least DM 500 million. Total employees and turnover are computed based on both domestic and foreign activities of the participating enterprises, not just on activities in Germany.<sup>31</sup>

*3. Informing the Cartel Office*

When a merger, as defined by section 23, occurs that fulfills either the 20% market share criteria or the absolute size criteria of 10,000 employees or turnover of DM 500 million, the merger must be reported to the Cartel Office without undue delay.<sup>32</sup> While the office can require that a report be filed in German, it will not ordinarily object to a report being filed in English. The Cartel Office then has one year in which to determine whether to prohibit the merger.<sup>33</sup> The report must indicate the form of the merger and give the identity, type and place of business, or residence for each participating enterprise.<sup>34</sup> To the extent that the report is required pursuant to either the market share or the absolute size criteria, the estimated domestic market share, including the basis of computation, must be disclosed as well as the number of employees and turnover, both domestic and foreign. If the merger is in the form

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<sup>30</sup> See text accompanying notes 59-82 *infra*.

<sup>31</sup> FK § 23, ¶ 110 and KB § 23, ¶¶ 110, 226 disagree with this interpretation, which is that of the Cartel Office, and prefer that the figures relate only to domestic totals. See note 139 *infra*. The minimum number of employees requirement is fulfilled if 10,000 employees are reached at any time during the previous business year. FK § 23, ¶ 102; KB § 23, ¶ 227. Turnover is defined by § 158 of the Stock Corporation Act, [1965] BGBI I. 1089, as follows:

(1) For enterprises whose branch of business activity is the production or manufacture of articles or distribution of goods, only the turnover from the production, manufacture or distribution of these articles or goods is to be reported as turnover.

(2) Turnover is to be reported after deduction of price discounts and rebates; other sums may not be deducted.

<sup>32</sup> GWB § 23(1).

<sup>33</sup> GWB § 24(2).

<sup>34</sup> GWB §§ 23(5)(1)-(2).

of the acquisition of stock, the number of shares acquired and the total number held must also be disclosed, including corresponding information for all controlled and controlling enterprises and a brief explanation of those relationships.<sup>35</sup> The Cartel Office also has the right to demand further information from the merging parties and their linked enterprises.<sup>36</sup>

Under a separate provision, section 46 GWB, the Cartel Office has authority to demand information and examine business documents of third parties as well as the subjects of its investigation. This provision further provides the Cartel Office with authority to conduct a search during ordinary business hours without judicial order if delay presents a danger of removal or destruction of documents. Otherwise, searches are subject to judicial order by a local court.<sup>37</sup>

#### 4. Sanctions

The Cartel Office may enforce the reporting requirement under section 23 by imposing an administrative fine of DM 3 - 2,000 under the Administrative Enforcement Act.<sup>38</sup> This administrative fine may be imposed at the discretion of the Cartel Office for failure to make a report or supplying incomplete information in the report. Before imposing each such administrative fine, the Cartel Office must make a demand upon the parties obligated and set a period within which it must be fulfilled, after which the administrative fine can be imposed.<sup>39</sup> The Cartel Office has concurrent authority to assess a single fine of up to DM 50,000 for willful or negligent failure to submit, late submission, or submission of false or incomplete information in connection with a report under section 23, or a request for information under section 46 GWB.<sup>40</sup>

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<sup>35</sup> GWB §§ 23(5)(3)-(4). According to the Cartel Office's announcement, *Submissions in Reports and Notifications Under §§ 23 and 24a GWB*, 1974 WuW 46 (reprinted in Appendix II), market shares, number of employees, and turnover need not be disclosed separately for every affiliated enterprise but can be reported collectively. Normally a list of all affiliated enterprises including name, legal form, place of business, type of business activity, and level of holdings will suffice.

<sup>36</sup> GWB § 23(6).

<sup>37</sup> GWB § 46.

<sup>38</sup> *Verwaltungsvollstreckungsgesetz* §§ 6, 11. See KB § 23, ¶¶ 287-288.

<sup>39</sup> *Verwaltungsvollstreckungsgesetz* § 13. When the Cartel Office learns about a merger that has not been reported, it often sends the merging enterprises a letter reminding them of their obligation to do so. A model letter frequently used by the Cartel Office is reprinted in Appendix IV.

<sup>40</sup> GWB §§ 39(1)(2), 39(2). Fines totalling DM 30,000 were imposed respectively against the president as an individual, and Korf Stahl AG, a corporation, for failure to make timely notification under the absolute size criteria of § 23. The report of the acquisition of 30% control over Korf

C. *Pre-Merger Notification Under Section 24a*

1. *Compulsory Notification*

The primary difference between notification of a plan to merge under section 24a and the reporting requirement under section 23 is that pre-merger notification must be made by very large merging enterprises in *advance* of the merger, and that the merger is preliminarily prohibited until the Cartel Office has received notification and has had the opportunity to investigate it for a limited time period. Notification is required under section 24a for mergers between enterprises if: (1) "the turnover of at least two of the enterprises participating in the merger amounted to DM 1 billion or more during the last completed business year," or (2) "the merger is to be effected pursuant to state law, by legislative enactment or by other sovereign act."<sup>41</sup> Computation of total sales and content of the notification are governed by the reporting provisions of section 23.<sup>42</sup> When such notification is made, the merger must be delayed for a minimum of one month. The Cartel Office is required to inform the parties within one month after receipt that it has commenced an investigation of the merger otherwise its authority to prohibit the merger expires. If the Cartel Office announces an investigation, the merger must be delayed a minimum of three more months, within which the Cartel Office must deliver its decision.<sup>43</sup> Under exceptional circumstances, this period can be extended.<sup>44</sup> A compulsory or voluntary notification, like a report, may be filed in English. Unlike a report, however, a notification is subject to a fee which normally costs DM 5,000-15,000.<sup>45</sup>

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Stahl on July 9, 1975, was intentionally delayed until Sept. 25, 1978, on the basis that publication of the report as required under § 10(1)(5) GWB might lead to undesirable effects on the business of the Korf group in a foreign country. The Cartel Office ruled that the opposing interest of the GWB takes precedence over the interest of enterprises in secrecy. Otherwise participating enterprises would themselves become the judge of whether the report was necessary. *Korf*, Feb. 2, 1979, Cartel Office slip op., Case No. B7-270000-U-81/78 (unpublished). See also *Thompson-Brandt*, May 9, 1978, Cartel Office slip op., Case No. B7-366100-U-46/78 (unpublished), discussed at note 138 *infra*.

<sup>41</sup> GWB § 24a(1).

<sup>42</sup> *Id.*

<sup>43</sup> GWB § 24a(2).

<sup>44</sup> GWB §§ 24a(2)(1)-(6).

<sup>45</sup> The maximum fee is DM 50,000. GWB § 80(3)(1). When a merger that was "notified" under § 24a is actually consummated, the obligation to "report" the merger under § 23 is applicable. If the merger is consummated as notified, the report needs only to state that and make reference to the prior notification.

## 2. Voluntary Notification

Voluntary pre-merger notification may also be made under section 24a by enterprises that do not fall within its compulsory notification provisions. However, voluntary notification does not exempt one from the obligation to report if section 23 is applicable. The major advantages of voluntary notification are that the difficulties of divestiture can be avoided and the shorter decisional period — essentially four months instead of the one year period in the case of a report under section 23 — is imposed on the Cartel Office.<sup>46</sup> The evidence to date does not indicate that these incentives have proved very effective. At the end of 1978, 2338 mergers had been reported under section 23. Only 448 had been notified under section 24a, of which 307 were compulsory and only 141 were voluntary.<sup>47</sup>

## 3. Sanctions

When pre-merger notification is compulsory under section 24a, the primary sanction for assuring that notification is made is contained in the law itself: the preliminary prohibition of the merger until notification is made and the Cartel Office has an opportunity to investigate the merger.<sup>48</sup> All legal transactions in violation of this preliminary prohibition are ineffective.<sup>49</sup> The Cartel Office also has the authority to impose a fine of up to DM 50,000 for willful or negligent submission of false or incomplete information in a compulsory notification under section 24a<sup>50</sup> or in connection with a request for further information under section 46 GWB.<sup>51</sup> The Cartel Office has further authority to impose a fine of up to DM 100,000 or, if higher, up to three times the additional receipts received as a result of the infringement, if false or incomplete information is furnished for the purpose of fraudulently obtaining merger permission for oneself or for another in the event of either com-

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<sup>46</sup> KB § 24a, ¶ 37.

<sup>47</sup> [1978] TB 115.

<sup>48</sup> GWB § 24a(1).

<sup>49</sup> GWB § 24a (4); *Weichschaum III*, WuW/E BGH 1556, 1557-59 (1978); *Metzeler Schaum*, WuW/E BGH 1547, 1547-48 (1978). Both decisions refer to the same case in which the merging parties failed to notify a merger plan subject to § 24a but later reported the merger after consummation under § 23. The Supreme Court held that under such circumstances the merger was preliminarily ineffective until one year after the report was submitted to the Cartel Office, which constitutes the period within which the Cartel Office has authority to prohibit the merger under GWB § 24(2).

<sup>50</sup> GWB § 39(1)(3) and § 39(2). The Cartel Office often sends a letter reminding the merging enterprises to notify the Office. See note 39 *supra*.

<sup>51</sup> GWB § 39(1)(1) and § 39(2).

pulsory or voluntary notification under section 24a.<sup>52</sup>

## II. THE SUBSTANTIVE LAW

Once a merger has been reported under section 23 or a merger plan has been notified under section 24a, it would seem the next step would be simply to apply the substantive law to determine whether the merger should be prohibited. The matter is not quite that simple. The mere fact that a merger falls within one of the reporting provisions does not indicate whether or not the merger is subject to prohibition. First, minimum size and impact criteria under section 24(8), which are different from those discussed above under sections 23 and 24a, restrict the prohibition of mergers only to those significant to the economy as a whole.<sup>53</sup> If the merger meets the minimum size and impact criteria, then a judgment must be made under sections 22 and 24 as to whether it is likely that the merger will create or strengthen a market dominating position. If the answer is in the affirmative, the Carter Office is required to prohibit the merger unless the merging parties prove that the merger will lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of the market domination.<sup>54</sup>

### A. *Minimum Size and Impact Criteria Under Section 24(8)*

Under any one of four absolute size conditions of section 24(8), a merger is exempted from prohibition by the Cartel Office:

1. if the participating enterprises collectively had a turnover of less than DM 500 million during the last completed business year; or
2. if an enterprise which had a turnover during the last completed business year of not more than DM 50 million affiliates with another enterprise; or
3. insofar as it is likely that the restraint of competition will not have effects within the entire territory in which this law applies or in a substantial part thereof; or
4. insofar as a market for goods or commercial services is concerned which had a sales volume of less than DM 10 million during the last completed calendar year.<sup>55</sup>

These provisions substantially narrow the number of mergers that can be prohibited. From the introduction of merger control in mid-1973 until the end of 1978, a total of 2,338 mergers had been reported, of

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<sup>52</sup> GWB §§ 38(1)(7), 38(4).

<sup>53</sup> See text accompanying notes 27-31 and 41-42 *supra*.

<sup>54</sup> GWB § 24(1).

<sup>55</sup> GWB § 24(8).

which 1,232 were investigated under section 24; and 1,106 were exempted from prohibition mergers under the minimum size and impact criteria. The second of these criteria, a small enterprise exemption freeing from prohibition mergers involving enterprises with a turnover of less than DM 50 million in the last business year, accounted for 919 of 1,106 exempted mergers. Moreover, 86% of the mergers so exempted in 1978 involved takeovers by giants with a yearly turnover exceeding DM 1 billion.<sup>56</sup> The Government has proposed an amendment to narrow this clause.<sup>57</sup>

## B. Market Domination Under Section 22 GWB

A merger can be prohibited under section 24 only if it is likely that it will create or strengthen a "market dominating position" within the meaning of section 22.<sup>58</sup> An enterprise or even an oligopolistic group of enterprises is considered to hold a market dominating position if it is not subject to any substantial competition or holds a commanding market position in relation to its competitors. Because of extreme difficulties of proof, presumptions of market domination based on market share were added to the law. It is also within the framework of this provision that the relevant market is determined.

### 1. Defining Product and Geographic Markets

Before any meaningful analysis can be made of the merger's effects on market structure, the relevant market must be determined. Under German antitrust doctrine, a relevant market is defined by product, geography, and time period.<sup>59</sup>

The relevant product market is defined as a rule by the goods or services which appear to the reasonable purchaser to be substitutable and are actually used in place of those goods and services.<sup>60</sup> However,

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<sup>56</sup> [1978] TB 17-18, 115. Section 24(8)(3), on the other hand, has not proved to be a loophole. Swabia, a county in the state of Bavaria, met the substantiality requirement. *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1541-42 (1978). The Cartel Office considered a part of the state Baden-Württemberg, including the city Stuttgart, to be substantial in the bank merger *Girokasse/Landessparkasse Stuttgart*. [1974] TB 40. The Cartel Office also considers West Berlin to be substantial. *Kaisers Kaffee/Carisch*, [1973] TB 67.

<sup>57</sup> [1978] TB 17-18, 115; *Gesetzesentwurf der Bundesregierung: Entwurf eines vierten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Sept. 27, 1978, BT-Drucks. 8/2136 (1978).

<sup>58</sup> GWB § 24(1).

<sup>59</sup> KB § 22, ¶ 7.

<sup>60</sup> *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1535 (1978). See also *Angaben bei Anzeigen und Anmeldungen nach §§ 23 und 24a GWB (Submissions in Reports and Notifications Under §§ 23 and 24a GWB)*, 1974 WuW. 46 (reprinted in Appendix II).



looking solely at the consumer's viewpoint will not be permitted to skew a realistic perception of the market if the seller's side provides a more accurate picture.<sup>61</sup> These benchmarks for determination of a product market approximate those followed by American courts based on the famous *Brown Shoe*<sup>62</sup> criteria. The major difference is that an examination of market indicia on the seller's side may be more important in determining the outer boundaries of a product market in the United States than in Germany, where the focus of attention is primarily on the purchaser's side.<sup>63</sup> Since it is relatively rare that differences on the seller's side (i.e., production facilities, distribution and sales methods) would exist without affecting the buyer's side (i.e., character, useful purpose or price of the goods), this subtle difference in approach to market definition should seldom affect the fundamental analysis. Both German literature and case law emphasize that the question of substitutability must not be judged theoretically but practically.<sup>64</sup> Some examples of separate relevant product markets are Vitamin B-12,<sup>65</sup> clinker bricks,<sup>66</sup> compact cars, middle-class cars, full-sized cars,<sup>67</sup> road asphalt, industrial asphalt,<sup>68</sup> standard-sized aluminum sheet, special-order aluminum sheet,<sup>69</sup> and electricity as distinguished from coal, oil and gas.<sup>70</sup> Single product markets have been found for all types of normal, bubbling and medicinal water,<sup>71</sup> new, imported and re-treaded

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<sup>61</sup> *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1535-36 (1978).

<sup>62</sup> In *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), the Supreme Court stated that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such submarkets may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

<sup>63</sup> *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1535 (1978).

<sup>64</sup> KB § 22, ¶¶ 23-24; *Papierfiltertüten II*, 51 BGHZ 371, 373, WuW/E BGH 990, 991 (1969); *Valium*, WuW/E BGH 1445, 1447-48 (1976); *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1535 (1978).

<sup>65</sup> *Vitamin B-12*, 67 BGHZ 104, WuW/E BGH 1435 (1976).

<sup>66</sup> *Klinker*, WuW/E BGH 726, 729-30 (1966).

<sup>67</sup> *Automarkt*, WuW/E BKartA 425 (1961).

<sup>68</sup> *Bitumen-Verkaufsgesellschaft*, WuW/E BKartA 1517, 1518 (1974); *Bituminöses Mischgut*, WuW/E BKartA 1753, 1754-55 (1978).

<sup>69</sup> *Kaiser-VAW*, WuW/E BKartA 1571, 1578 (1974).

<sup>70</sup> *Erdgas Schwaben*, WuW/E BKartA 1647, 1648 (1976); *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1534-35 (1978); *RWE-Energieversorgung Leverkusen*, WuW/E BKartA 1727, 1728 (1978); *BP-Gelsenberg*, WuW/E BKartA 1719, 1720 (1978).

<sup>71</sup> Unpublished opinion of the Cartel Office in Case No. B6 - 687910 - T - 238/74, referred to in KB § 22, ¶ 37.

tires,<sup>72</sup> and spare automobile parts sold through either the producer or repair shops.<sup>73</sup>

The relevant geographical market is governed principally by the orientation and mobility of customers, cost of freight, product perishability, and customer habits or tastes.<sup>74</sup> More expensive goods or services capable of easy transport such as medicines,<sup>75</sup> aluminum,<sup>76</sup> and automobile clutches<sup>77</sup> will inevitably have a large geographic market, usually an entire country. Less valuable goods or services that are not so transportable such as bricks,<sup>78</sup> cement,<sup>79</sup> asphalt,<sup>80</sup> or electricity<sup>81</sup> will usually be confined to a regional or local geographic market.

The relevant time period is an additional component to be investigated in determining the relevant market. In merger cases which require a prognosis of future competitive developments, the present time period is the basis for making a prognosis about the future. In most other kinds of antitrust proceedings, the relevant time period is when the alleged illegal act was committed, namely in the past.<sup>82</sup>

## *2. Definition of Market Domination*

Once the relevant market or markets have been determined, it must be judged whether a dominant position within the relevant market or markets will be created or strengthened as a result of the merger. Market domination is defined in section 22 GWB.

### *a. Competitive Conditions Tests Under Sections 22(1)-(2)*

The competitive conditions tests under section 22(1)-(2) are as follows:

- (1) An enterprise is market dominating within the meaning of this law if it, as a supplier or purchaser of a certain kind of goods or commercial services:

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<sup>72</sup> *Reifen*, WuW/E OLG 461, 463 (1962).

<sup>73</sup> *Registrierkassen*, WuW/E BGH 1238, 1241 (1972); *Original-VW-Ersatzteile*, 59 BGHZ 294, 302, WuW/E BGH 1233, 1237 (1972); *EDV-Ersatzteile*, WuW/E BGH 1288, 1291 (1973).

<sup>74</sup> KB § 22, ¶¶ 39-43; LNS KOMMENTAR § 22, ¶ 13.

<sup>75</sup> *Valium-Librium*, WuW/E OLG 1645, 1648 (1976).

<sup>76</sup> *Kaiser-FAW*, WuW/E BKartA 1571, 1578 (1974).

<sup>77</sup> *Kfz-Kupplungen*, 71 BGHZ 102, 108, WuW/E BGH 1501, 1502-03 (1978).

<sup>78</sup> *Klinker*, WuW/E BGH 726, 729 (1966).

<sup>79</sup> *Zementmahlanlage*, WuW/E BKartA 1667, 1667-68 (1976).

<sup>80</sup> *Bituminöses Mischgut*, WuW/E BKartA 1753, 1754 (1978), *rev'd on other grounds*, WuW/E OLG 2093 (1978).

<sup>81</sup> *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1536 (1978).

<sup>82</sup> KB § 22, ¶¶ 44-45; LNS KOMMENTAR § 22, ¶ 14; *Sportartikelmesse II*, 52 BGHZ 65, 68, WuW/E BGH 1027, 1029-30 (1969).

1. has no competitors or is not subject to any substantial competition; or
  2. has a commanding market position in relation to its competitors; in this connection, in addition to its market share, in particular its financial strength, its access to supply and sales markets, and its links with other enterprises as well as legal or factual barriers to the entry of other enterprises into the market are to be taken into consideration.
- (2) Two or more enterprises shall also be deemed market dominating insofar as, for factual reasons, substantial competition for a certain kind of goods or commercial services does not exist between them, either generally or in certain markets, and insofar as they jointly fulfill the conditions of subsection (1).<sup>83</sup>

Under the first alternative in section 22(1), the leading firm in a market may be dominant because of a lack of “substantial competition” if market power gives it such a latitude of freedom of conduct (*Verhaltensspielraum*) that it need not have substantial regard for the behavior of its competitors, customers, or suppliers.<sup>84</sup> In practice, an important indication of market domination is the lack of substantial price competition, such as the existence of parallel pricing or price leadership.<sup>85</sup> High market share or a wide difference between market shares or the leading firm and its competitors are also signs of market domination.<sup>86</sup> High barriers to entry may be further evidence that the leading firm has a latitude in pricing or other conduct tending to show market domination.<sup>87</sup>

Proof of such a latitude of freedom of conduct is frequently elusive, so in the 1973 amendment to the GWB the “commanding market position” alternative relating to a comparison between competitors in the relevant market was added to ease this burden. It avoids a general evaluation of the competitive environment by focusing on identifiable structural factors—market share, financial strength, access to supply and sales markets, links with other enterprises, and barriers to entry—whose comparison may show that a firm is dominant over its competitors. Market share is recognized as the most important criteria of mar-

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<sup>83</sup> GWB § 22 (1) to (2).

<sup>84</sup> KB § 22, ¶¶ 49-50; *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1536-37 (1978); *Kfz-Kupplungen*, 71 BGHZ 102, 111-16, WuW/E BGH 1501, 1504-07 (1978); *Valium*, 68 BGHZ 23, 29, WuW/E BGH 1445, 1449 (1976); *Vitamin B-12*, 67 BGHZ 104, 113-15, WuW/E BGH 1435, 1439-40 (1976).

<sup>85</sup> KB § 22, ¶ 48; *Kfz-Kupplungen*, 71 BGHZ 102, 112, WuW/E BGH 1501, 1505 (1978).

<sup>86</sup> *Kfz-Kupplungen*, 71 BGHZ 102, 112, 122, WuW/E BGH 1501, 1504, 1510 (1978).

<sup>87</sup> *Id.* at 112, WuW/E BGH 1501, 1505; *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1536 (1978).

ket power.<sup>88</sup> The lack of “substantial competition” under the first alternative is not a prerequisite to the “commanding market position” alternative and vice versa. A commanding position can give rise to market domination even if competitors are present and some competitive forces are at play in the market but the leading firm simply holds a paramount position over its competitors.<sup>89</sup>

*b. Market Domination By Oligopoly Under Section 22 (2)*

Market domination can also exist within an oligopoly under section 22(2), a provision intended to apply to markets in which two or more firms have substantial market shares and the rest of the market is divided among smaller enterprises. First, substantial competition must not exist between the jointly dominating oligopolists, who typically engage in parallel market conduct, most frequently regarding prices. Second, the oligopolists must collectively meet either of the alternatives in section 22(1), lack of substantial competition or commanding market position.<sup>90</sup>

The provisions of section 22(1)-(2) have not found broad application because of their complexity, difficulties of proof, and the availability of a presumption of market domination found in the next provision.

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<sup>88</sup> KB § 22, ¶ 82; *Kfz-Kupplungen*, 71 BGHZ 102, 122, WuW/E BGH 1501, 1510 (1978); *Valium-Librium*, WuW/E OLG 1645, 1651, 68 BGHZ 23, 29, WuW/E BGH 1445, 1449-50 (1976); *Babcock-Artos*, WuW/E BKartA 1653, 1655 (1976).

<sup>89</sup> *Vitamin B-12*, 67 BGHZ 104, 113-15, WuW/E BGH 1435, 1439-40 (1976). KB § 22, ¶¶ 74-77 takes a slightly different view that if a market dominating position exists under § 22(1)(1) because there is a lack of “substantial competition,” then § 22(1)(2) does not apply. Only if there is uncertainty about whether there is a lack of substantial competition does § 22(1)(2) apply to assist in making that determination. If substantial competition exists, there can be no market dominating position because it would contradict the meaning and purpose of § 22, particularly its later provisions which allow the Cartel Office to prohibit abuses of that position. In effect, a market dominating position does not exist unless there is such a lack of substantial competition that the position can be abused.

The authors disagree with this view because that is not how the German Supreme Court has interpreted § 22. The Supreme Court stated, “Under No. 2 it is therefore of no consequence whether an enterprise is exposed to no substantial competition; it suffices that competition exists and the enterprise in question holds a dominant position as to its competitors.” *Vitamin B-12*, 67 BGHZ at 115, WuW/E BGH at 1439 (1976). The Supreme Court has also stated that “the existence of competition and even of substantial competition [within the meaning of § 22(1)(1)] does not exclude the establishment of a commanding market position insofar as they [the parties] still possess a commanding latitude in their conduct as competitors. That is even possible where substantial competition still exists.” *Valium*, 68 BGHZ 23, 29, WuW/E BGH 1445, 1449 (1976).

<sup>90</sup> KB § 22, ¶¶ 93-106; LNS KOMMENTAR § 22, ¶¶ 33-35. In *Valium*, WuW/E OLG 2053, 2055-59 (1978), the Court of Appeals held that a lack of price competition alone sufficed to find an oligopoly member not subject to “substantial competition” under § 22(1)(2) even though internal shifting of market shares occurred within the oligopoly group because of “appreciable” innovation, quality and advertising competition.

*c. Presumption of Market Domination Under Section 22(3)*

The most important part of the market domination statute creates the presumption of market domination based on market share for both individual firms and oligopolies. The text of section 22(3) provides:

It is presumed that:

1. an enterprise is market dominating within the meaning of subsection (1) if it has a market share of at least one-third for a certain kind of goods or commercial services; this presumption does not apply if the enterprise had a turnover of less than DM 250 million in the last completed business year;
2. the conditions of subsection (2) are fulfilled if, with respect to a certain kind of goods or commercial services:
  - a) three or fewer enterprises have a combined market share of 50 percent or more; or
  - b) five or fewer enterprises have a combined market share of two-thirds or more;

this presumption shall not apply insofar as enterprises are concerned which had a turnover of less than DM 100 million in the last completed business year.<sup>91</sup>

Thus, it is presumed that a single enterprise is market dominating if it has at least one-third of a relevant market and has a minimum turnover of DM 250 million. Oligopoly enterprises with a turnover exceeding DM 100 million may also fall under the presumption of market domination. Three or fewer oligopolists with a combined market share of at least 50%, and five or fewer oligopolists with a combined market share of at least two-thirds, are deemed market dominating.

Most of the mergers that the Cartel Office has prohibited to date are based on application of this provision. It is a powerful rule, for it sweeps away at a stroke the need for the Cartel Office to go beyond the mere proof of market share to establish its case for market domination. The merging parties must then adduce evidence to cause the Cartel Office to investigate further and possibly remove the presumption. If no such evidence is forthcoming, the presumption of market domination is valid and attains substantive significance.<sup>92</sup>

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<sup>91</sup> GWB § 22(3)(1)-(2).

<sup>92</sup> GOVERNMENT'S EXPLANATION, *supra* note 9, at 24; *o.b. (Johnson & Johnson)*, WuW/E BKartA 1561, 1564-65 (1974); LNS KOMMENTAR § 22, ¶¶ 36-39. In theory, the Cartel Office could prohibit a merger solely under § 22(4)-(5) if the merger itself is an abuse of a dominant position under § 22(1) to (3). This would have the advantage of circumventing the minimum size criteria under § 23(8). The Monopolies Commission has suggested this approach. HAUPTGUTACHTEN I, *supra* note 26, § 961, at 539-40. For a general discussion of the applicability of § 22 GWB to abusive conduct, see Edwards, *American and German Policy Toward Conduct by Powerful Enterprises: A Comparison*, 23 ANTITRUST BULL. 83 (1978); Günther, *German Policy Toward the Market Conduct of Powerful Enterprises*, 8 J. OF REPRINTS FOR ANTITRUST L. &

3. *Creation Or Strengthening of Market Domination Under Section 24*

The core of German merger control is the statement that a merger is to be prohibited if "it is likely that a market dominating position will be created or strengthened as a result of a merger. . . ."<sup>93</sup> The first alternative does not require that a market dominating position exist at the time of the merger, but rather that a market dominating position is likely to arise in the future as a result of the merger. The second alternative requires that an already existing market dominating position is likely to be strengthened as a result of the merger.<sup>94</sup> The strengthening must only be perceptible and need not be substantial.<sup>95</sup> The German Supreme Court has stated that under either alternative a simple comparison of competitive relationships immediately before and after the merger will not suffice, but rather a prognosis must be made about likely future competitive developments caused by the merger.<sup>96</sup> The long-term effects must be examined because of the irreversibility of the structural changes that mergers cause.<sup>97</sup> In making this prognosis, the market share and other structural criteria of section 22(1)(2) and the presumptions based on market share of section 22(3) play an eminent role because merger control is directed against the deterioration of market structures. The act applies most stringently to horizontal mergers that eliminate a direct competitor,<sup>98</sup> and less stringently to vertical mergers that disrupt access to markets of customers or suppliers<sup>99</sup> or conglomerate mergers that eliminate potential competitors or foster the growth of financial strength and resources to a degree that potential competitors are discouraged from entering the market or existing com-

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ECON. 133 (1979); and Markert, *The Control of Abuses by Market-Dominating Enterprises under German Antitrust Law*, 11 CORNELL INT'L L.J. 275 (1978).

<sup>93</sup> FK § 24, ¶ 29; KB § 24, ¶¶ 12, 16.

<sup>94</sup> *Kfz-Kupplungen*, 71 BGHZ 102, 125, WuW/E BGH 1501, 1512 (1978); *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1536 (1978).

<sup>95</sup> *Kfz-Kupplungen*, 71 BGHZ 102, 117-18, WuW/E BGH 1501, 1507-08 (1978). This constitutes a longer term prediction than was envisioned in the *Government's Explanation*, *supra* note 9, at 29: "A prediction about future competitive developments is possible and necessary about whether it can be said on the basis of concrete circumstances that the conditions for competition created by the merger will worsen or improve at once."

<sup>96</sup> FK § 24, ¶29; KB § 24, ¶¶12, 16.

<sup>97</sup> *Id.*

<sup>98</sup> KB § 24, ¶ 34; LNS KOMMENTAR § 24, ¶ 8. *See also Anzag-Holdermann*, WuW/E BKartA 1747 (1978); *BP-Gelsenberg*, WuW/E BKartA 1719 (1978), *merger authorization granted*, WuW/E BMW 165 (1979); *Kaiser-VAW*, WuW/E BKartA 1571 (1974); *Veba-Gelsenberg*, WuW/E BKartA 1457, *merger authorization granted*, WuW/E BMW 147 (1974).

<sup>99</sup> KB § 24, ¶ 39. *See also Hoechst-UKW*, [1975] TB 38-39; *BP-Gelsenberg*, WuW/E BKartA 1719 (1978), *merger authorization granted*, WuW/E BMW 165 (1979).

petitors are dissuaded from effectively competing.<sup>100</sup> These issues will be dealt with in greater detail during the later discussion of the recent German Supreme Court decisions.<sup>101</sup>

“Trustworthy pledges” of enterprises participating in a merger to undertake measures to assure that it will not create or strengthen a market dominating position, or to secure improvements in the conditions of competition, are considered in the Cartel Office’s evaluation of likely future competitive developments. Typically, this is in the form of a promise by the merging enterprises to divest part or all of those operations which cause the merger’s anticompetitive results or to undertake other actions which may improve the conditions of competition leading the Cartel Office to agree not to prohibit the merger.<sup>102</sup>

#### 4. *Improvement of Competitive Conditions Under Section 24(1)*

Under the second clause of section 24(1), the Cartel Office is to prohibit the merger “unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of the market domination.” The merger must be permitted under this balancing clause if there is a high probability that equivalent improvement of conditions of *competition* will not take place without the merger. It is not the duty of the Cartel Office to show the expected competitive im-

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<sup>100</sup> *Kfz-Kupplungen*, 71 BGHZ 102, WuW/E BGH 1501 (1978); *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533 (1978).

<sup>101</sup> See text accompanying notes 150-219 *infra*.

<sup>102</sup> Discussions with the Cartel Office to avoid a confrontation may take place before reporting the merger is necessary, after which the agreed upon solution is reported and approved; or discussions may begin after reporting, giving rise to approval tied to conditions or restrictions in the form of a contractual promise by the merging parties. See *Hapag Lloyd-Bavaria Germanair*, [1978] TB 78-79 (merger between flight charter operators not opposed because of agreement to spin off a new, albeit smaller, flight charter operator); *DWK-KEWA*, [1978] TB 96-97 (merger between the only reproducers of waste from atomic power plants not opposed on condition that all German atomic power facilities have equal access to the new monopolist’s services). See also notes 107 and 142 *infra* (discussion of *Karstadt-Neckermann* and *Siemen-Osram*). The practice of negotiating “trustworthy pledges” has been approved by the German Supreme Court. *Weichschaum III*, WuW/E BGH 1556 (1978). The Antitrust Division of the U. S. Department of Justice, on the other hand, will not ordinarily engage in such negotiations until after it has filed a complaint requesting prohibition of the merger. Virtually the same result, however, can be achieved via the Business Review procedure, whereby the Antitrust Division may state its enforcement intentions regarding proposed business conduct. Antitrust Division Directive No. 2-68, 33 Fed. Reg. 2442 (1968), as amended by Antitrust Division Directive No. 14-73, 33 Fed. Reg. 34, 804 (1973). See *Reisenkampff & Gerber, German Merger Control: The Role of Company Assurances*, 22 ANTITRUST BULL. 889 (1977); *Satzky, Zusagen im Rahmen der Zusammenschlusskontrolle*, 141 ZEITSCHRIFT FÜR HANDELSRECHT UND WIRTSCHAFTSRECHT 554 (1977); *Wolter, Die Zusagenpraxis des Bundeskartellamts*, 1979 WUW 213.

provements; the burden of this proof rests on the merging enterprises. When such proof is made, it must be viewed as part of an overall examination by the Cartel Office of the effects of the merger on competition, including not only the improvements in the conditions of competition that are caused by the merger, but also the improvements that would probably have occurred even without the merger.<sup>103</sup> On the other hand, this does not open up an analysis of the overall effects of the merger on the economy since this judgment is made, if at all, by application to the Federal Ministry of Economics for merger authorization under section 24(3).<sup>104</sup>

A merger which leads to a dominant position in a particular market may improve the conditions of competition in some other way. If, for instance, an acquisition leads to a concentration of market power in the hands of the acquiror but leads simultaneously to deconcentration of a different market in which the seller competes, the competitive benefits and disadvantages must be weighed. On the other hand, the merger of two weak firms into a single larger and more "competitive" firm which simultaneously raises the level of market concentration is not to be confused with mergers that bring about real improvements in the conditions of competition.<sup>105</sup> The likelihood that a "failing company" merger would be appropriate for permission under this clause is rather low since most failing company mergers do not cause improvements in the conditions of competition. Such mergers are arguably justified on the basis of preserving jobs or because of other more general economic interests which are not relevant to this balancing clause.<sup>106</sup> In fact, the Cartel Office has concluded that the disappearance of a company from the market by business failure is a better competitive solution than to allow that company to be purchased by a competitor.<sup>107</sup> As a rule, therefore, failing company mergers are to be permit-

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<sup>103</sup> *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533, 1539-40 (1978); *KB* § 24, ¶¶ 51-57.

<sup>104</sup> GOVERNMENT'S EXPLANATION, *supra* note 9, at 29.

<sup>105</sup> *Haindl/Holtzmann*, WuW/E BKartA 1475, 1482 (1974).

<sup>106</sup> GOVERNMENT'S EXPLANATION, *supra* note 9, at 29.

<sup>107</sup> *Kaiser-VAW*, WuW/E BKartA 1571, 1581 (1974); *Babcock-Artos*, WuW/E BKartA 1653, 1655 (1976).

The Cartel Office has permitted two very substantial mergers because of weak or failing companies. One involved Karstadt, Europe's largest department store chain, acquiring the failing Neckermann, Germany's third largest mail-order house. Both firms ran department stores and major travel agencies. The merger clearly strengthened Karstadt's dominant position in the four-firm department store oligopoly in Germany (Karstadt, Kaufhof, Hertie and Horten), but the Cartel Office concluded the merger was justified under the "balancing clause" because of the pro-competitive effects of the merger in two other markets in which the firms were active, particularly because new entry was unlikely as a result of high barriers to entry. First, the merger would



ted, if at all, on the authority of the Federal Ministry of Economics on the basis of collateral benefits.

### 5. Appeals

After the Cartel Office has prohibited a merger, the merging parties have two routes of attack. The first route is to contest the validity of the Cartel Office's ruling by appeal to the courts.<sup>108</sup> The Court of Appeals conducts a new trial of facts and law, not a mere reexamination of the legal basis of the Cartel Office's decision.<sup>109</sup> Further appeal may then be taken on legal issues to Germany's highest court in civil matters, the Supreme Court (*Bundesgerichtshof*).<sup>110</sup> The second route is to apply to the Federal Minister of Economics for permission to merge on the basis of collateral benefits which the Cartel Office may not consider.<sup>111</sup> This second alternative is available either after the Cartel Office has issued its decision or the direct appeal route through the courts has been exhausted. The decision of the Economics Ministry may also be challenged before the Court of Appeals and the Supreme Court.<sup>112</sup>

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preserve the existence of Neckermann in the mail-order business (if Neckermann failed, only two meaningful competitors would remain, Quelle and Otto/Schwab); and second, the merger would preserve Neckermann's travel agency business (if Neckermann failed, the commanding market position of Karstadt's travel agency business, TUI, would be strengthened). The Cartel Office conditioned its permission on Karstadt disposing of its interest in TUI. The Cartel Office specifically stated that the preservation of jobs was not a factor in its decision to permit the merger, and further that that issue could only be dealt with by the Ministry of Economics in a request for merger authorization under § 24(3). [1976] TB 79-81.

The second case concerned the acquisition of Kaiser Aluminum Dosenwerk GmbH & Co. (held indirectly by Owens-Illinois, Inc., U.S.A.) by Gerresheimer Glas AG, which held a dominant position in the manufacture of glass bottles under the presumption of market domination criteria in § 22(3)(2)(a). Kaiser Aluminum's market, aluminum cans, was dominated by a single manufacturer several times the size of Kaiser. The merger tended to strengthen Gerresheimer by adding cans to its container assortment, but it also strengthened Kaiser to compete against the dominant producer of aluminum cans. The Cartel Office considered this benefit in the can market to outweigh the damage to competition in the bottle market. It did not specifically discuss the issue of cross-elasticity of demand between bottles and cans but appears to have viewed the two as separate but not wholly exclusive markets. [1974] TB 38. This was probably a correct analysis. Cans have not become the normal beer or soft drink container in Germany nearly to the extent they have in the United States. See the discussion of this very issue in *United States v. Continental Can Co.*, 378 U.S. 441 (1964). Unlike the German Cartel Office, the American Supreme Court has rejected the concept of countervailing market power as a merger defense. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963).

<sup>108</sup> GWB § 62(1).

<sup>109</sup> GWB §§ 62-72.

<sup>110</sup> GWB §§ 73-75.

<sup>111</sup> GWB § 24(3).

<sup>112</sup> GWB § 24(4); KB § 24, ¶¶ 254-273; LNS KOMMENTAR § 24, ¶ 40.

6. *Merger Authorization by the Federal Minister of Economics Under Section 24(3)*

The test to be applied by the Federal Minister of Economics under section 24(3) is far-reaching compared with that applied by the Cartel Office:

Upon application, the Federal Minister of Economics shall authorize the merger if, in the case involved, the restraint of competition is compensated by the overall economic advantages of the merger or if the merger is justified by an overriding public interest; in this connection, regard shall be given to the competitive capability of the participating enterprises in markets outside the territory in which this law applies. The authorization may only be granted if the extent of the restraint of competition does not endanger the principle of the market economy. The authorization may be subjected to restrictions and conditions. These may not be directed at placing the conduct of the participating enterprises under continuous supervision. § 22 remains unaffected.<sup>113</sup>

The test, therefore, consists of alternative justifications, either of which can be sufficient to justify a merger: (1) overall economic advantages, or (2) overriding public interest, if either outweighs the anticompetitive impact found by the Cartel Office. The Minister of Economics has stated:

The criteria "overall economic advantages" and "overriding public interest" require in each case that there exist a general policy justification for the merger. Authorization is to be granted only if these reasons are of great importance in that particular case, are proved concretely and if governmental assistance measures that would promote the competitive system are not possible. Here it is also to be taken into account that mergers basically result in long-term solutions that are not reversible. . . . Hence, under § 24(3) grounds for authorization must be based not only in view of their current importance, but also on high demands in regard to their foreseeable duration.<sup>114</sup>

The Minister is bound by the Cartel Office's findings as to whether a market dominating position is created or strengthened but exercises his prerogative in determining the weight to be given to those findings in making his evaluation.<sup>115</sup> The Minister usually requests an opinion from the Monopolies Commission to aid in his decisionmaking.<sup>116</sup>

Examples of overall economic advantages are rationalization measures, strengthening branches of industry important to the economy as a whole, and preservation of unhealthy or failing companies.

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<sup>113</sup> GWB § 24(3).

<sup>114</sup> *VAW-Kaiser*, WuW/E BWM 149 (1975).

<sup>115</sup> *Id.*; *BP-Gelsenberg*, WuW/E BWM 165, 166 (1979); *Babcock-Artos*, WuW/BWM 155 (1976); *Thyssen-Hüller*, WuW/E OLG 1937 (1978).

<sup>116</sup> GWB § 24b(5).

Some common examples of overriding public interest are positive social benefits (*i.e.*, the preservation of jobs), military need, promotion of health, or political interests (*i.e.*, maintaining business in West Berlin). These grounds are not valid if authorization would endanger the principle of a market economy. Views differ as to whether this danger is to be measured on the economy as a whole or in particular markets.<sup>117</sup> Only five decisions have been issued to date. The score is one denial and four approvals, three of which included restrictions or conditions.<sup>118</sup>

The most significant authorizations have come in the sensitive field of energy policy, beginning with the very first case the Minister of Economics heard, *Veba-Gelsenberg*.<sup>119</sup> The Cartel Office had prohibited the acquisition of 48.1% of the voting stock of Gelsenberg AG, the second largest German oil company, by Veba, the largest German oil company which was owned by the German government. The Cartel Office had concluded that the merger created or strengthened a market dominating position for Veba in a number of markets, including electricity, oil, and chemicals. Nevertheless, the Minister of Economics authorized the merger based on the grounds of an overriding public interest: assuring Germany's oil supplies. The government had just adopted an energy program in 1973 which was designed to achieve improved cooperation with the oil producing countries and which encouraged reorganization of German oil interests into the acquiree, Veba, in order to create a large German counterweight to the non-German oil giants with the financial strength and capacity to place it in the position to effectively assure German oil supplies. Veba's acquisition of Gelsenberg was seen as an indispensable first step in this reorganization because it would improve the outlook for successful dealings with the oil producing countries for assured quantities of oil as well as for a direct share in large oil projects. The merger authorization was not considered a threat to the principle of the market economy, for even after the merger the grouping of Veba and Gelsenberg would be counted only among the world's medium-sized oil companies in com-

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<sup>117</sup> See FK § 24, ¶¶ 119-121; KB § 24, ¶¶ 228-231. For a discussion of the failing company issue, see Möschel, *Die Sanierungsfusion im Recht der Zusammenschlusskontrolle* in Festschrift für Robert Fischer 487 (1979).

<sup>118</sup> The five cases are: *Veba-Gelsenberg II*, WuW/E BMW 147 (1974); *VAW-Kaiser*, WuW/E BMW 149 (1975); *Babcock-Artos*, WuW/E BMW 155 (1976); *Thyssen-Hüller*, WuW/E BMW 159 (1977); *BP-Gelsenberg*, WuW/E BMW 165 (1979).

<sup>119</sup> *Veba-Gelsenberg II*, WuW/E BMW 147 (1974). The Cartel Office opinion is *Veba-Gelsenberg*, WuW/E BKartA 1457 (1974).

parison with the other oil multinationals, many of which also sold in Germany.

The government's energy policy later showed indications of failure, which leads to the irony of the story. In 1978, Veba agreed to sell its interest in Gelsenberg to Deutsche BP, a German subsidiary of the multinational oil company British Petroleum, because the Gelsenberg oil operations proved a continuous source of financial losses. The Cartel Office prohibited this merger. It reasoned that first the merger would strengthen the existing dominant position of Ruhrgas, a 25% subsidiary of Gelsenberg. The link with BP would substantially improve Ruhrgas' gas supply network. Second, the merger would eliminate Deutsche BP from independent entry into the natural gas market. In view of Ruhrgas's dominant position, the Cartel Office considered it of particular importance that Deutsche BP not be eliminated as a potential independent entrant capable of deconcentrating the oligopolistic gas market, particularly in view of the fact that Deutsche BP had already made active attempts to diversify its German operations in several fields, including gas. In its latest decision, *BP-Gelsenberg*,<sup>120</sup> the Minister of Economics authorized this merger on the grounds of the overriding public interest in assuring supplies of natural gas to Germany. However, this authorization included detailed conditions which were designed effectively to prevent the new BP-Gelsenberg combination from controlling Ruhrgas.<sup>121</sup>

A contrasting case is the limited authorization granted when Thyssen AG agreed to acquire 100% of the shares of Hüller GmbH. The

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<sup>120</sup> *BP-Gelsenberg*, WuW/E BWM 165 (1979). The Cartel Office opinion is WuW/E BKartA 1719 (1978).

<sup>121</sup> *Id.* The conditions attached to the authorization revolve around a complexity of voting rights in Ruhrgas, the dominant German gas utility. After the merger, BP would have control of Gelsenberg's 25% participation in Ruhrgas. These voting rights were part of a voting pool agreement controlling over half of such rights in Ruhrgas, called the Bergemann Pool. Gelsenberg had relinquished its voting rights in an irrevocable proxy agreement to the other participants in the Pool, of which Gelsenberg was the leading participant. (The other participants held 14%, 7%, 4% and 3% of the voting rights in Ruhrgas.) In order to avoid BP gaining influence over Ruhrgas at the expiration of the proxy agreement, the Federal Minister of Economics imposed the following conditions when authorizing the merger:

1. Veba was required to offer its own 5% holdings in Ruhrgas to the Bergemann Pool. This would remove all influence of Veba, an oil concern, in Ruhrgas. Two steel companies in the Bergemann Pool agreed to purchase the holding.
2. BP was required to divest 16% of its 25% participation in Ruhrgas to avoid BP being the largest single voting force in the event that the Bergemann Pool agreement expires.
3. BP was required not to conclude any geographic market sharing agreements with Ruhrgas on gas service areas, as is ordinarily permitted utilities under German law. This would aid in keeping Ruhrgas and BP genuine competitors in the event BP chose to enter the German gas market.

firms competed against each other in the production of machine tools, but Hüller was near bankruptcy and probably could not have carried on operations without the financial strength a merger partner could supply. The loss of jobs was raised as justification for the merger, and the Minister of Economics rejected it on the grounds that the short-term preservation of jobs should not be permitted to endanger the competitiveness of German industry. Instead, he declared that flexible adjustment of market structure is needed, or otherwise an even worse loss of jobs would occur later. The justification accepted for granting partial authorization was to preserve the extraordinary technological potential of Hüller in the form of expert working teams required for the production of the specialized machinery that Hüller manufactured. If Hüller were permitted to fail, these teams would have broken up and their combined knowledge and experience would have been lost. This would in turn have reduced German competitiveness in foreign markets, a matter of fundamental importance to the German economy, particularly in fields of high technology such as Hüller's. These considerations were judged as sufficient justification for Thyssen to acquire 45% instead of all of Hüller's stock on the condition that Thyssen would not restrain or harm Hüller's technical capabilities. Hence, Thyssen was allowed to acquire a substantial interest in Hüller but only to the degree necessary to assure achievement of the political-economic justifications advanced for the acquisition. This meant Thyssen was required to dispose of 55% of the holdings it had acquired in Hüller.<sup>122</sup>

### III. APPLICATION OF GERMAN MERGER CONTROL TO INTERNATIONAL MERGERS

#### A. *The Scope of Territorial Application of the GWB*

The subject matter jurisdiction rule<sup>123</sup> and the unilateral conflicts rule<sup>124</sup> are contained together in section 98(2) GWB, which provides:

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<sup>122</sup> *Thyssen-Hüller*, WuW/E BWM 159 (1977). The Cartel Office opinion is *Rheinstahl Hüller*, WuW/E BKartA 1657 (1976).

<sup>123</sup> The subject matter jurisdiction of German administrative agencies may be exercised whenever German substantive law applies; it does not depend on physical presence or minimum contacts. G. KEGEL, *INTERNATIONALES PRIVATRECHT* 533 (4th ed. 1977); 4 K. NEUMEYER, *INTERNATIONALES VERWALTUNGSRECHT* 471 (1936); E. REHBINDER, *EXTRATERRITORIALE WIRKUNGEN DES DEUTSCHEN KARTELLRECHTS* 329-34 (1965); Markert, *The Application of German Antitrust Law to International Restraints of Trade*, 7 VA. J. INT'L L. 42, 65 (1967). There is no effective remedy, of course, if the party causing the domestic restraint neither transacts business nor has an agent or property in Germany. Shapiro, *The German Law against Restraints of Competition—Comparative and International Aspects*, 62 COLUM. L. REV. 201, 241 (1962).

<sup>124</sup> GWB § 98(2) is applied as a unilateral conflicts rule in international administrative law,

“This law applies to any restraint of competition which has an effect within the territory in which this law applies even if it is caused outside the territory in which this law applies.” The words “restraint of competition” are a collective designation for all the antitrust rules found in sections 1-37 GWB,<sup>125</sup> including the merger control provisions of sections 22-24a GWB. The starting point in determining whether the GWB is applicable to international mergers is whether they have an effect within German territory, *i.e.* a domestic market. In view of the diversity of conceivable repercussions of foreign restraints of competition in domestic markets, the German Supreme Court has decided to prevent a limitless extension of the GWB’s substantive provisions at the international level. In its *Ölfeldröhre* decision,<sup>126</sup> relating to application of German antitrust rules to international restraints of trade under section 98(2), the German Supreme Court stated:

Interpreting the meaning of domestic effect is to be determined in light of the protected interest (*Schutzzweck*) of the law generally and the particular applicable provision in question. . . . Hence, only such consequences of restraints of competition originating in foreign countries as infringe the field of protection of the applicable provision can be considered as having a domestic effect within the meaning of § 98(2).<sup>127</sup>

This limitation of section 98(2) is based on the view that the scope of the application of German antitrust rules must be measured by the overall objectives of the GWB in preserving free, competitive markets in Germany and in particular by the purposes of the applicable rule, in the case of merger control in limiting undue market concentration. It was not the task of the German lawmakers to preserve foreign markets free of competitive restraints and undue concentration.

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international criminal law, and private international law. E. REHBINDER, *supra* note 123, at 110. See also H. MULLER-HENNEBERG & G. SCHWARTZ, GEMEINSCHAFTSKOMMENTAR § 98(2), ¶ 9 (3d ed. 1974); I. SCHWARTZ, DEUTSCHES INTERNATIONALES KARTELLRECHT 28 (2d ed. 1968). Section 98(2) is the determinative conflicts rule in merger proceedings, which are of an administrative nature. E. REHBINDER, *supra* note 123, at 243-47.

<sup>125</sup> This is the generally accepted view, which is based on the legislative history, the group title “Scope of Application of the Law” to GWB §§ 98-105, and the function of § 98(2) as a conflicts rule. H. MULLER-HENNEBERG & G. SCHWARTZ, *supra* note 124, § 98(2), ¶ 4; Federal Cartel Office, *Domestic Effects of Mergers in the Context of § 98(2) GWB*, [1975] TB 45 (reprinted in Appendix III) [hereinafter cited as *Cartel Office Announcement*]; I. SCHWARTZ, *supra* note 124, at 29-30.

<sup>126</sup> 61 BGHZ 202, 25 BGHSt 208, WuW/E BGH 1276 (1973). In this decision the German Supreme Court declared the GWB to be not applicable to an international cartel between the only German pipe manufacturer and other foreign pipe manufacturers because the cartel’s quota and pricing agreements affected only foreign markets.

<sup>127</sup> *Ölfeldrohre*, 61 BGHZ 202, 25 BGHSt. 208, 212-13, WuW/E BGH 1276, 1279 (1973). The protected interest principle was borrowed from I. SCHWARTZ, *supra* note 124, at 128. FK § 23, ¶ 114 would go a step further to require a structural change in Germany such as increased market share, turnover, or number of employees.

If one follows this approach of Germany's highest tribunal to construe the reach of section 98(2) by the protected interest principle, then the scope of the reporting provisions of sections 23 and 24a differs from the prohibition rule of section 24, for their objectives are different. The interest protected by the reporting provisions is the flow of information to the Cartel Office about mergers which "may endanger the freedom of competition on the basis of absolute size and/or competitive importance."<sup>128</sup> Whether the merger must be prohibited because it actually creates or strengthens a dominant market position is irrelevant; the reporting provisions are merely to provide information which may trigger that inquiry. Hence, if a merger is capable of having any direct and perceptible impact on competition in a German market, then it must be reported.<sup>129</sup> The interest protected by the prohibition rule, on the other hand, is the preservation of competitive market structures. This means that for any merger to be prohibited under section 24, structural changes must occur that are actually likely to create or strengthen a market dominating position in Germany.<sup>130</sup>

### *B. Reporting or Notification of International Mergers*

The first alternative of the market share criteria under section 23(1)(1) applies when the merger causes a 20% market share level within Germany to be reached or increased. The domestic effect is evident: the merger causes increased concentration in a German market. No further effect need be shown because the protected interest of the law in following potentially anticompetitive concentration developments is clearly involved.<sup>131</sup>

The second alternative of the market share criteria under section 23(1)(1) applies when one of the enterprises participating in a merger holds at least a 20% market share in a German market which is not affected by the merger, i.e. a market not common to the merging parties.<sup>132</sup> In this case, the Cartel Office distinguishes domestic effect de-

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<sup>128</sup> *Organische Pigmente*, — BGHZ —, WuW/E BGH — (1979). See also *Brost & Funke*, — BGHZ —, WuW/E — (1979). ECONOMIC COMMITTEE REPORT, *supra* note 26, at 70. See also Bechtold, *Marktbeherrschung, Preiskontrolle, Fusionskontrolle*, [1974] DER BETRIEB 1945, 1950; Bollack, *Probleme der Meldepflicht von Zusammenschlüssen gemäss § 23 und der Aufgabebereich des Kartellamts*, [1967] WRP 253, 257; Kartte, *Die Anzeige von Unternehmenszusammenschlüssen nach der Kartellgestznovelle*, 15 BB 589, 596-97 (1966); [1973] TB 70-71.

<sup>129</sup> *Organische Pigmente*, — BGHZ —, WuW/E BGH — (1979).

<sup>130</sup> GOVERNMENT'S EXPLANATION, *supra* note 9, at 24-25; ECONOMIC COMMITTEE REPORT, *supra* note 26, at 7; FK § 24, ¶¶ 21, 29, 35; KB § 24, ¶¶ 12, 16.

<sup>131</sup> FK § 23, ¶ 121. Only domestic market shares are relevant; sales in foreign countries are not included in the calculation. FK § 23, ¶ 114; KB § 23, ¶ 204; LNS KOMMENTAR § 23, ¶ 62.

<sup>132</sup> *Schaumstoff II*, 54 BGHZ 311, 318, WuW/E BGH 1126, 1130 (1970).

pending on whether the merger occurs in Germany. Domestic effect is automatically present if the merger occurs in Germany, such as the acquisition of a German enterprise or the founding of a joint venture in Germany.<sup>133</sup> If the merger occurs outside of Germany, such as the acquisition of a foreign enterprise by a German enterprise or the merger of two foreign enterprises, further examination is necessary according to the Cartel Office. In such a case, a domestic effect is certainly present if a participating enterprise of either merging party is German and the structural elements for competition in Germany are affected, or if participating enterprises of both merging parties were active in the German market before the merger. Further, a domestic effect may be present if a participating enterprise of one of the merging parties was active in the German market before the merger and it is likely that a foreign participant will supply the German market or the know-how or industrial property rights of a domestic enterprise will be perceptibly increased.<sup>134</sup>

The same considerations apply in judging domestic effects under the absolute size criteria of sections 23(1)(2) and 24a.<sup>135</sup> An example is the recently decided *Organische Pigmente*<sup>136</sup> case in which Bayer AG with 4% of the German organic pigment market acquired the American organic pigment facilities of Allied Chemical Corporation, whose share

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<sup>133</sup> *Cartel Office Announcement*, *supra* note 125; FK § 23, ¶ 114.

<sup>134</sup> *Cartel Office Announcement*, *supra* note 125. Others have contended that in such a case both enterprises must also have been commercially active in Germany prior to the merger. Klaue, *Ausländische Unternehmenszusammenschlüsse und § 23 GWB*, 1965 WuW 15, 17; or even that domestic interests are not involved at all because the merger has not caused a change in domestic market share. FK § 23, ¶ 114. Another view is that a 20% market share held by any participating enterprise without more is enough to require a report. Kartte, *supra* note 128, at 596-97.

<sup>135</sup> *Cartel Office Announcement*, note 125 *supra*. See the discussion of *Korf*, note 40 *supra*. In *Foto Quelle*, [1974] TB 34, the Cartel Office ruled that the acquisition by a German enterprise of two foreign subsidiaries of another German enterprise had no effect in Germany and therefore need not be reported under § 23. The acquired enterprises were engaged in sales and developing of film in France and Holland through four sales operations and contracts with 30-40 drug stores.

<sup>136</sup> *Organische Pigmente*, — BGHZ —, WuW/E BGH — (1979). The Supreme Court also approved of other findings by the Court of Appeals which Bayer chose not to challenge before the Court: Bayer had contended it did not actually control the acquiree (1) because it was held through a chain of Bayer's subsidiaries (the acquisition was made by Harmon Colors Corporation, Trenton, a 100% subsidiary of Rhinechem Corporation, New York, a 100% subsidiary of Bayer International Finance N.W., Dutch Antilles, which in turn was a 100% subsidiary of Bayer AG, Germany), (2) because of the New Jersey corporations act, which provides that the board of directors of a corporation is the controlling body, and (3) because Bayer AG would be unlikely to want to exercise effective control in order to avoid undesirable tax repercussions (Bayer could be deemed a "permanent establishment" in the United States and thus become subject directly to American taxes). The Court of Appeals and Supreme Court agreed that only the *possibility* of control need to be shown. Whether control is actually exercised or not is irrelevant. See *Organische Pigmente*, WuW/E OLG 1993, 1994-95 (1978).



of that same market was a miniscule 0.2%. The Supreme Court nevertheless found that the merger must be reported because it had "perceptible direct effects" in Germany: Allied Chemical would be eliminated as a competitor and Bayer would gain access to valuable know-how that would assure it a better market position against its competitors.

Another issue under the absolute-size criteria is whether the turnover and employees to be included in the calculation are those within Germany or worldwide. Some writers contend that the absolute-size criteria must be fulfilled within Germany, and thus foreign turnover and employees are to be excluded from the calculation.<sup>137</sup> The practice of the Cartel Office, on the other hand, is to make no differentiation between foreign and domestic activities in making the calculation.<sup>138</sup> Although this view has not yet been tested in the courts, it reflects the better view because it is in harmony with both the wording of the law and its informational purpose.<sup>139</sup>

### C. *Prohibition of International Mergers*

The extent of the Cartel Office's authority under section 24(1) to take action against international mergers depends first on whether the merger has a domestic effect under section 98(2) GWB. According to

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<sup>137</sup> KB § 23, §§ 114-115. Others contend there is a sufficient domestic effect only if the absolute size characteristics change in Germany as a result of the merger. FK § 23, §114; E. REHBINDER, *supra* note 123, at 231. Another view is that a report must be made if the absolute size characteristics are fulfilled and at least one participant in the merger was active in the German market before the merger. Karte, *supra* note 128, at 596-97.

<sup>138</sup> In *Thompson Brandt*, May 9, 1978, Cartel Office slip op., Case No. B7-366100-U-46/78 (unpublished), the Cartel Office threatened to impose the maximum fine under the Administrative Enforcement Act of DM 2,000 against both merging parties for failure to report a foreigner's takeover of a German enterprise under the absolute size criteria. Thompson-Brandt, the French acquiree, fulfilled the absolute size criteria but contended that criteria applied only to German enterprises. The Cartel Office ruled against that argument, stating that "giant enterprises are subject to merger control even if they have their domicile in a foreign country and do not yet have any turnover in Germany but merge with a German enterprise or make an acquisition of a German enterprise under § 23(2) GWB." Slip op. at 3-4.

<sup>139</sup> KB § 23, § 218; *o.b. (Johnson & Johnson)*, WuW/E BKartA 1561, 1563 (1974); GOVERNMENT'S EXPLANATION, *supra* note 9, at 26. From the wording, legislative history, and sense of the law there is no basis on which to apply the absolute size criteria of § 23 or § 24a only to domestic business activities. The text of the law speaks of turnover and employees alone; no express limitation to the German market is referred to, as is the case under the market share criterion of § 23(1) (1), which immediately precedes it. In *Government's Explanation*, note 9 *supra*, it was emphasized that turnover and employees of linked enterprises domiciled outside of Germany are to be included in the calculation just as that of linked enterprises located in Germany. A further indication is the statement in § 23(1), sentence 3, that turnover in foreign currencies shall be converted into German marks at the official exchange rate. Restriction of the absolute size criteria to the domestic sphere would also create practical difficulties and diminish the value of § 23 and § 24a as clear, straightforward reporting rules.

the already discussed protected interest principle,<sup>140</sup> interpretation of domestic effect under section 98(2) is governed by the objectives of the law as a whole to preserve competitive markets, and in particular by the policy of the substantive provision, section 24 GWB, whose primary task is to prohibit mergers between enterprises that are likely to create or strengthen a market dominating position in a German market. So long as the merger is likely to have either of these effects, the protected interest has been infringed and the Cartel Office may take measures to stop the infringement. The issue then is to limit enforcement to German soil and select appropriate methods of eliminating the merger's undesirable effects.<sup>141</sup>

If a foreign enterprise acquires a German enterprise whereby a market dominating position is created or strengthened in Germany, then section 24 is applicable because the merger has the proscribed domestic effect. The Cartel Office can meaningfully apply the provisions of section 24 because one of the participants in the merger, here the acquiree, is directly subject to German law. If the Cartel Office chooses to prohibit the merger, under section 24(7) GWB it may declare the legal obligations under the merger agreement to be ineffective, impose a non-recurring or recurring penalty of DM 10,000 to DM 1 million, and even appoint a trustee to carry out dissolution of the merger. If a foreign acquiror has achieved control of the German enterprise by the acquisition of stock, then the Cartel Office may prohibit the parent from exercising voting rights in or receiving profits from the acquired enterprise.<sup>142</sup> These measures can also be applied to the acquisition of

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<sup>140</sup> See notes 127 and 136 and accompanying text *supra* (*Öldfeldröhre* and *Organische-Pigmente*).

<sup>141</sup> FK § 24, ¶¶ 69, 181; KB § 24, ¶¶ 322-326.

<sup>142</sup> GWB § 24(7). The same considerations would apply if a foreign enterprise acquires another foreign enterprise which has a German subsidiary, i.e. a participating enterprise under GWB § 23(3). Würdinger, *Arten und Formen der Unternehmenszusammenschlüsse i.S. der neuen §§ 23 bis 24 GWB*, 1973 WuW 731, 741-42.

The Cartel Office prohibited the founding of a joint venture between an American filmmaker and one of the largest German film theater chains. (Their identities were not disclosed.) The joint venture was prohibited because it would strengthen the market dominating position of the German theater chain in first-showings and drive-in theaters and threaten the competitive structure of small and medium-sized theater businesses. Because the joint venture partners voluntarily agreed to dissolve the joint venture, a formal prohibition order was not issued. [1977] TB 76.

In *Siemens-Osram*, [1975] TB 37-38, two mergers were investigated. When the General Electric Company notified its plan to acquire AEG-Telefunken's 57% interest in the largest German light bulb manufacturer, Osram GmbH, the parties agreed to take measures in order to avoid prohibition by the Cartel Office. The merger would have strengthened Osram's market dominating position by elimination of GE as an actual competitor (GE sold small quantities of light bulbs in Germany) and as a potential competitor (GE had shown interest in purchasing existing European light bulb manufacturers). The Cartel Office and the merging parties held discussions about

a foreign enterprise by a German enterprise.<sup>143</sup>

In the case of mergers between foreign enterprises consummated outside of Germany, simple application of the protected interest principle could lead to unreasonably broad application of German merger control outside German territory. One thinks of the borderline case in

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structural measures to promote competition, and agreed upon the following: Osram agreed to withdraw from existing joint ventures and other relationships with the second largest seller of light bulbs in Germany, Philips; agreed to offer smaller German light bulb manufacturers technical assistance; and agreed to divest its radium light operations, which held a market dominating position. When the merger agreement faltered, Siemens agreed to acquire Osram instead of GE. Siemens is probably the largest enterprise in Germany and is a leading manufacturer of electrical goods of virtually all kinds. The Cartel Office agreed to permit this merger based on the following conditions: Osram agreed to transfer control of a joint venture with Philips to a trustee; agreed to divest its share in three other joint operations with Philips; and agreed to withdraw from the general rebate cartel for electric lights, of which Philips was also a participant. Further, AEG-Telefunken, a major German electrical appliance manufacturer from which Siemens was to acquire the interest in Osram, agreed to no longer purchase light bulbs exclusively from Osram. Osram was permitted, however, to strengthen an existing contract on exchange of know-how and other technical information with Philips. [1975] TB 37-38.

<sup>143</sup> The merger itself can be prohibited if the acquiror is in Germany. If only a participating enterprise of the acquiror under § 23(3) is in Germany, then only that enterprise, and not the acquiror, could be reached by the prohibition order. *See* note 145 *infra*.

In *AEG-Telefunken-Zanussi*, [1973] TB 70-71, the Cartel Office determined § 24 applied to acquisition of a 25% participation by the German enterprise AEG-Telefunken in the Italian enterprise Zanussi. Both were leading manufacturers of electrical appliances in the EEC, and AEG had contracted substantial purchases of such appliances from Zanussi for three years before the merger. Together the enterprises met the market domination presumptions for certain classes of appliances. After the Cartel Office informed AEG that prohibition of the merger was likely, AEG reduced its participation to only 20%, thus falling below the 25% stock participation requirement defined as a merger under § 23(2)(2). The Cartel Office then examined whether the 20% participation combined with the sales agreement sufficed as "any other relationship" giving AEG "control" over Zanussi under § 23(2)(5), and concluded at that level AEG did not control Zanussi but that control could be achieved if the contractual relationship were substantially strengthened. At the time, AEG's purchases constituted 10% of Zanussi's entire production and the firms had a cooperation agreement in the field of household appliances.

In *SNMP-Hoechst*, [1976] TB 66-67, the Cartel Office decided there was no violation of GWB § 24(1) but that domestic effect was present in the acquisition of Société Normande de Matières Plastiques S.A. (SNMP) by Company Financière Chimico S.A. (CPC), a subsidiary of the German chemical giant Hoechst. SNMP had not sold polypropylene in Germany, but it had cooperated with two other French chemical manufacturers to produce polypropylene. Hoechst was the largest manufacturer of polypropylene in Germany with over one-third of the market. The Cartel Office decided not to intervene because the owners from which Hoechst's subsidiary acquired SNMP determined to construct their own polypropylene facility in Germany. Further, Hoechst already had more polypropylene capacity in Germany than that needed to supply over 100% of the German market, and yet had sold virtually no polypropylene in France to that point.

In *Schering-Phillips*, [1977] TB 64, the Cartel Office decided against prohibiting the acquisition of the assets of Philips-Duphar B.V. and N.V. Philips Gloeilampenfabrieken of Holland by Schering Ag, a German enterprise, as notified under GWB § 24a. The Cartel Office determined that the merger was unlikely to result in a market dominating position and the markets affected did not fulfill the minimum impact criteria under § 24(8)(4).

which two giant enterprises located outside Germany merge effecting a market dominating position in Germany based solely on their exports to Germany. Neither of the merging parties may have a permanent establishment or significant assets in Germany other than, for instance, a registered agent, a few employees, some industrial property rights, and merchandise stored in a rented warehouse. Under the protected interest principle, there can be no doubt that a domestic effect determinative for the application of section 24 would be present in such a case because the merger creates a dominant position in Germany. Although the Cartel Office has authority to take action against the merger, that action must be tempered according to the principles of international law, which are binding as part of German law under article 25 of the German Constitution.<sup>144</sup> Under those principles, the execution of sovereign acts of states is to be limited to the territory of that state. The enforceability of prohibition orders of the Cartel Office must therefore be restricted to German territory.<sup>145</sup> The Cartel Office's action can be directed only against such parts of the merging enterprises as are within reach of sovereign German authority, i.e. against their subsidiaries, affiliates, industrial property rights, or other property located in Germany. In view of the overriding interests of foreign states to prosecute their own national economic policies on their own soil, which might even be designed to promote concentration, the Cartel Office must determine on a case-by-case basis whether orders directed at the German parts of the merging enterprises can serve to substantially mitigate or eliminate the undesirable effects of the merger in Germany without unreasonably encroaching on the legitimate regulatory interest of foreign states.<sup>146</sup> To this end, section 24(6) provides for removal of the re-

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<sup>144</sup> GRUNDGESETZ art. 25 (W. Ger.).

<sup>145</sup> ECONOMIC COMMITTEE REPORT, *supra* note 26, at 6; FK § 24, ¶ 181; Markert, *supra* note 123, at 51, 65; Paul, *Unternehmenskonzentration und Antitrust Gesetzgebung in der BRD*, [1975] DER BETRIEB 1253.

<sup>146</sup> During 1978 the Cartel Office did not find it necessary to intervene against several acquisitions of American chemical facilities by German enterprises even though § 24 GWB was applicable. The Cartel Office noted that the primary competitive effects of these acquisitions would be felt in the American market. The acquisitions included: (1) raising the holdings of Friedrich Flick Industrieverwaltung KGaA in W.R. Grace & Co., New York, to above 25%; (2) the acquisition of over 30% of the capital of U. S. Filter Corp., New York, by the same enterprise; (3) the acquisition of the Pigment Division of Chemetron Corporation, Chicago, by Bayer AG (which Bayer abandoned when the acquisition was opposed by the Federal Trade Commission, Bayer agreeing to a consent order which became final June 6, 1979, [1979] TRADE REG. REP. (CCH) ¶ 21,584. Whereupon another German firm, BASF Wyandotte Corp. (2% of American organic pigment market) acquired Chemetron's Pigment Division (9% of American market), which led to another FTC complaint challenging that merger. [1979] TRADE REG. REP. (CCH) ¶ 21,553.); (4) the take-over of Miles Laboratories by Bayer (which has resulted in a FTC consent order under

straint of competition "in a manner other than through the re-establishment of the originally prevailing conditions."<sup>147</sup> This gives the Cartel Office reasonable discretion to formulate alternative solutions to preserve competitive markets without necessarily prohibiting the merger itself.<sup>148</sup>

Such a circumstance as described here will rarely occur. If the merger of two foreign enterprises consummated outside of Germany has the impermissible domestic effect, namely the creation or strengthening of a market dominating position in Germany, it is expected that the foreign enterprises will have a substantial presence in Germany through subsidiaries or affiliates.

When this is the case, section 23(3) GWB expressly provides that a merger between enterprises is also deemed to be a merger of the enterprises they control. Thus, even though the domestic subsidiaries, for instance, are not actually the merging parties, the Cartel Office is to consider them as merging parties and may prohibit them from falling under common control of the surviving foreign parent while leaving the foreign parents themselves free to merge. If, for example, two American computer manufacturers, each with a German subsidiary, reach a merger agreement to combine their worldwide operations that is likely to create or strengthen a market dominating position in Germany by uniting their German subsidiaries under common control, the Cartel Office could not prohibit the merger of the American parents but could require that one or both of the German subsidiaries be divested or take other action against their German property as previously discussed under section 24(6)-(7) GWB.<sup>149</sup>

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which Bayer agrees to divest all of Miles Laboratories' assets used primarily to manufacture, distribute, or sell allergic extracts in the United States since Bayer ranked first (35-40% market share) and Miles third (12% market share) in such sales. [1979] TRADE REG. REP. (CCH) ¶ 21,602; (5) raising the participation of BASF in Dow Badische Co., Williamsburg, from 50% to 100% as well as the take-over of GAF-Corp. organic colors and pigment facilities in Rensselaer, New York; (6) the acquisition of over 97% of the stock capital of Alcon Laboratories, Inc., Forth Worth, by the Nestle-Gruppe Deutschland GmbH; (7) the consolidation of Nease Chemical Corp., State College, with an American subsidiary of Rütgerswerke AG; and (8) the acquisition of the Chemical Products Division of Ashland Oil, Inc., Ashland, by Schering AG ([1978] TB 61-62). An agreement between the United States and Germany permits the exchange of information between the respective antitrust authorities on restrictive business practices. [1979] TRADE REG. REP. (CCH) ¶ 50,283. During 1978, information was exchanged concerning seven cases. [1978] TB 44.

<sup>147</sup> GWB § 24(6).

<sup>148</sup> FK § 24, ¶¶ 69-70; KB § 24, ¶¶ 322, 324-26.

<sup>149</sup> FK § 24, ¶ 71; KB § 24, ¶ 323; GOVERNMENT'S EXPLANATION, *supra* note 9, at 27; Ebel, *Novellierung des Gesetzes gegen Wettbewerbsbeschränkungen*, [1973] NEUE JURISTISCHE WOCHENSCHRIFT 1665, 1667-68.

#### IV. MERGER DECISIONS OF THE GERMAN SUPREME COURT

During 1978 the German Supreme Court (*Bundesgerichtshof*) issued its first two merger decisions. The first of these, the *Sachs* case,<sup>150</sup> has stirred considerable antitrust debate in Germany because prohibition of the merger was based on the theory that Sachs' dominant position in the motor vehicle clutch market would be strengthened solely by means of the acquiror's fivefold financial resources. The second case, *Erdgas Schwaben*,<sup>151</sup> which concerned the establishment of a joint venture gas utility by three existing utilities, is destined to stir debate about its discussion of balancing the improvement of competitive conditions against the disadvantages of the market domination caused by the joint venture. Both cases are of interest not only because they are the first decisions of the German Supreme Court, but also because they provide insights into key aspects of German merger control.

##### A. The GKN-Sachs Merger

When the British firm Guest, Keen & Nettlefolds Ltd. (GKN), a major manufacturer of automobile drive train and other steel-related products, made notification under section 24a of its plan to acquire 75% of the holdings in Sachs AG, the German Cartel Office prohibited the merger because it would strengthen Sachs' dominant position as manufacturer of clutches for motor vehicles.<sup>152</sup> The Court of Appeals (*Kammergericht*) later reversed this decision.<sup>153</sup> The Supreme Court, however, also reversed.<sup>154</sup> While employing different reasoning from that of the Cartel Office, the Court ultimately prohibited the merger.<sup>155</sup>

Although both GKN and Sachs were engaged in related lines of business in Germany, none of their products were in direct competition. The most important product of Sachs was motor vehicle clutches, which accounted for 36% of its turnover. GKN also produced clutches in England through a 100% subsidiary, Laycock Engineering Ltd., but

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<sup>150</sup> *Kfz-Kupplungen*, 71 BGHZ 102, WuW/E BGH 1501 (1978). Other discussions of the case are: Böhlke and Schöppe, *Der GKN-Sachs-Fall: Eine Bewährung der Fusionskontrolle?* [1978] DER BETRIEB 1113; Markert, Comment, [1978] Betriebs-Berater 678; Moosecker, *Fusionskontrolle und Rechts-sicherheit*, [1978] GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 517; Steindorff, *Zur Verstärkung einer marktbeherrschenden Stellung nach GKN/Sachs Entscheidung des BGH vom 21. Februar 1978 - KVR 4/77: Ein Beitrag zu komplementären Zusammen-schlüssen*, [1978] ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 778.

<sup>151</sup> *Erdgas Schwaben*, — BGHZ —, WuW/E BGH 1533 (1978).

<sup>152</sup> *GKN-Sachs*, WuW/E BKartA 1625 (1976).

<sup>153</sup> *Sachs*, WuW/E OLG 1745 (1976).

<sup>154</sup> 71 BGHZ 102, WuW/E BGH 1501 (1978).

<sup>155</sup> *Id.*

did not sell them in Germany. However, GKN produced and sold automobile drive-train components through a major German subsidiary, Unicardan, which it had acquired in 1971. The Cartel Office determined the relevant product markets to be clutch discs and clutch pressure plates sold to German automobile producers, excluding the replacement market and in-house production by automobile manufacturers. On this basis, the market share of Sachs during the years 1970-1975 ranged between 73.5% and 82.9% for clutch discs and 68.4% and 72.9% for clutch pressure plates. Although these market shares would not be directly affected by the GKN acquisition, the Cartel Office prohibited the merger on the basis that GKN's financial strength, some five times that of Sachs, would cause a perceptible strengthening of Sachs' existing market dominating position in the German clutch market under section 24(1) GWB.<sup>156</sup>

The Cartel Office found that GKN had much broader access to capital markets than Sachs because of its size and diversity, that GKN's existing fivefold financial strength would probably add more weight to Sachs' bargaining power with its customers, the automobile manufacturers, and that this financial strength would also be available to Sachs to defend against new entry by potential entrants into the German clutch market.<sup>157</sup> The Cartel Office further ruled that it need not be proved that the merging companies actually intend to employ these added financial resources to force existing competitors out of the market or discourage potential competitors from entering the market.<sup>158</sup> It was decisive alone, according to the Cartel Office's reasoning, "that the market dominating enterprise would be in the position to call upon the increased financial resources for defending against assaults on its market position."<sup>159</sup> The Cartel Office also noted that it was within the goals of merger control to prevent the growth by merger of a very strong international conglomerate such as GKN which held a strong market position in related fields of automotive components, particularly drive-train components.<sup>160</sup>

The Court of Appeals of Berlin (*Kammergericht*) reversed the Cartel Office's decision.<sup>161</sup> Although the Court of Appeals fundamentally agreed with the Cartel Office's view of Sachs as a market dominating

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<sup>156</sup> WuW/E BKartA at 1628.

<sup>157</sup> *GKN-Sachs*, WuW/E BKartA 1625, 1629 (1976).

<sup>158</sup> *Id.*

<sup>159</sup> WuW/E BKartA at 1629.

<sup>160</sup> *Id.* at 1630.

<sup>161</sup> *See* note 153 *supra*.

enterprise, it disagreed that GKN's financial strength would perceptibly strengthen Sachs' dominant market position.<sup>162</sup> The Court of Appeals required a prognosis about future competitive developments which "can not be abstractly based upon pure theoretical possibilities,"<sup>163</sup> but rather is to be founded "upon specific circumstances with a high level of probability that the expected advantages will materialize."<sup>164</sup> Applying this test, the Court of Appeals concluded it was unlikely that Sachs would need GKN's financial resources because Sachs already had more than sufficient resources at its disposal for any investments, research or price competition foreseeably needed.

A few years before the merger Sachs had borrowed DM 40 million without difficulty, confirming that it had adequate access to credit markets without GKN standing behind it. There appeared to be no reasons to expect the need for additional resources at all for price competition; for many years competition had focused principally on product quality and supply dependability while prices had remained practically identical. Further, there had not been a newcomer to upset the market with construction of a clutch manufacturing facility in Germany for over a decade despite rapid expansion of the German automobile industry in this period, and there did not appear to be any competitive threats waiting in the wings to enter the German clutch market. Existing German and potential foreign competitors were already so strong financially that any discouraging effects from GKN's financial resources would be minor. Besides, GKN was no financial giant, and it would be difficult in any event for GKN to transfer financial resources to Germany from England because of British exchange control regulations.<sup>165</sup>

Hence, the Court of Appeals concluded there seemed to be no concrete indication that Sachs would be strengthened in any material competitive aspect other than some general mistrust of size, which it declared would not be a proper basis for prohibiting the merger. Finally, the Court of Appeals rejected the argument that the merger of two large, diversified enterprises would lead to a general strengthening of their entire operations, permitting the development and introduction of particular strategies that otherwise would not be available. The Court said that such general economic consequences do not fall under sections 22 and 24 GWB unless effects can be shown in specific mar-

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<sup>162</sup> WuW/E OLG at 1753.

<sup>163</sup> *Id.* at 1754.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1755-56.



kets, and it could find none in this case. Thus, Sachs was already in such a safe market-dominating position with no prospects of even being challenged that the addition of GKN's financial strength was not material to its perpetuation.<sup>166</sup>

The German Supreme Court reversed the Court of Appeals' decision, determining that GKN's financial resources would in fact strengthen Sachs' market-dominating position.<sup>167</sup> The Supreme Court, however, did not accept the Cartel Office's proposition that GKN's financial strength could simply be presumed to expand Sachs's latitude of freedom of conduct (*Verhaltensspielraum*) and discourage both actual and potential competition. Instead, the Supreme Court reasoned that the decisive point was not whether GKN would actually place its financial resources at Sachs' disposal; rather, it was how existing and potential competitors would *perceive* that GKN's financial strength might be used against them at some future time if they attempted price competition with Sachs.

The Supreme Court fully accepted the proposition that Sachs held a market-dominating position. Based on the Supreme Court's market definition, the value of shipments of clutch discs and pressure plates to motor vehicle manufacturers, therefore excluding the in-house manufacturer Opel, Sachs had a market share of 78% for clutch pressure plates and 80% for clutch discs, well in excess of that needed for presumption of market domination under section 22(3) GWB.<sup>168</sup>

The Supreme Court found this presumption of market domination confirmed by Sachs' special access to customers, its longstanding supply relationships, and the inability of its sole actual domestic competitor, Lamellen und Kupplungsbau GmbH (LuK)—which was already producing at full capacity—to capture business from Sachs. Although LuK enjoyed a trust from motor vehicle manufacturers equal to that of Sachs, this did not negate finding Sachs a market-dominating enterprise. Sachs' persisting status as first supplier of clutches to the German automobile manufacturers, which limited themselves to only one or two suppliers, demonstrated that LuK had not been able to fully succeed in challenging Sachs. The Court also rejected the argument that the ability of LuK to enter the clutch market years ago contradicted finding that Sachs was market-dominating at the present. The evidence suggested, rather, that barriers to entry were high, and as between Sachs and LuK, Sachs was a virtually unchallengeable market

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<sup>166</sup> *Id.* at 1755, 1756-57.

<sup>167</sup> 71 BGHZ 102, WuW/E BGH 1501.

<sup>168</sup> *Id.* at 110, WuW/E BGH at 1503.

leader in Germany. Within the rest of Europe, there were only six other clutch manufacturers, and only one of these, Borg & Beck, a British clutch manufacturer, had made a significant attempt to capture a share of the German market. Borg & Beck had entered in 1974 and by 1975 had captured only 3-4% of the German market.<sup>169</sup>

The focal point of the case was whether the financial power of GKN, with some fivefold the turnover and profits of Sachs, would be likely to strengthen the market-dominating position of Sachs. The Supreme Court examined three issues related to whether GKN's financial resources would strengthen Sachs' market-dominating position: whether in the foreseeable future Sachs would need special resources for investment, research and, above all, for price competition; whether in such an event Sachs' existing resources would not already be sufficient; and whether competition from current importers or others that might possibly want to enter the market as newcomers would be discouraged as a result of the merger. The Supreme Court determined to prohibit the merger based on only the last of these, the discouragement of actual and potential competition.<sup>170</sup>

The Cartel Office had contended that a worsening of competitive conditions existed in this case in the perceptible raising of the *potential* of Sachs to discourage competition by a perceptible strengthening of its available financial resources. It should not be necessary to take the next step, namely to show further by concrete circumstances that there is a high likelihood that competition will *actually* be restrained as a result of the worsened competitive conditions.<sup>171</sup>

The Supreme Court refused to follow this reasoning. In its view, financial strength merely represented a precondition to widening the latitude of a market-dominating enterprise's freedom of conduct within a particular market. Before a merger is to be prohibited based solely on financial strength, the Supreme Court stated, "It must be discernible in which direction individual competitive schemes or strategies could be employed individually or collectively without being subjected to competition, or what competitive effects are likely from any of these kinds of conduct by market-dominating enterprises."<sup>172</sup> Further, it is sometimes necessary to look beyond the present to future effects:

Accordingly, in the usual case the position in the market existing before the merger is to be examined in view of the existing competitive circum-

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<sup>169</sup> *Id.* at 105, 108-13, WuW/E BGH at 1502-05.

<sup>170</sup> *Id.* at 113-14, WuW/E BGH at 1505-06.

<sup>171</sup> *Id.* at 114-15, WuW/E BGH at 1506.

<sup>172</sup> *Id.* at 117, WuW/E BGH at 1507.

stances and compared with the competitive circumstances *brought about by the merger*. However, the Cartel Office . . . is not limited to an assessment of the conditions of competition as they existed at the moment of the merger. Rather, a prediction about *future competitive developments* is then possible and also necessary if it can be concluded on the basis of concrete circumstances with high likelihood that the competitive circumstances created by the merger will change at once. If the comparison between competitive circumstances before and after the merger does not reveal a change in market-dominating position, then accordingly the future competitive developments should also be permitted to be included in the prognosis under the described strict preconditions . . . .<sup>173</sup>

The Court further stated:

[I]n the present case the comparison was limited to the competitive situation as it existed before and after the intended merger. The competitive circumstances created by the merger, in particular those affected among the structural criteria stated in § 22(1)(2) GWB, including those related to the enterprise's financial strength and affiliations, are to be examined for the influence they have on the latitude of freedom of conduct (*Verhaltensspielraum*) to employ particular methods of competition or develop varying market strategies. Under this approach the examination may not be limited to the effects that are likely to occur immediately in a particular case; rather, their long-term effects are to be considered because of the irreversibility of the structural changes brought about by the merger.<sup>174</sup>

Applying this rule to the GKN-Sachs merger, the Supreme Court found the decisive effects those impacting on existing and potential competitors.

While the Court of Appeals had determined that it was unlikely Sachs would need special financial means in the foreseeable future for investment, research, or price competition, and thus the addition of GKN's financial strength to Sachs would not change competitive circumstances, the Supreme Court chose to look at the merger from a different perspective, that of the existing and potential competitors. The Court stated:

What is decisive for the considerations that are controlling is only whether Sachs after the merger because of a different type of business policy and marketing strategy objectives within the framework of a conglomerate giant will be perceived as motivated and determined to defend against price competition with the help of increased financial strength *earlier and more vigorously* than would be the case if its independence were preserved. Under this approach, it is to be taken into consideration that a giant conglomerate enterprise as such, to the extent it is not merely holding a financial interest, does not follow the same market strategies as a

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<sup>173</sup> *Id.* at 117-18, WuW/E BGH at 1507-08 (emphasis is original).

<sup>174</sup> *Id.* at 118-19, WuW/E BGH at 1507-08.

single-product enterprise or, as here, a substantially smaller enterprise with a different conglomerate character.

. . . [T]he acquiring enterprise's substantial sales in related automotive components markets including the German market also induces competitors to consider an intense defense against their envisaged price competition to appear likely because failure to make such a defense could affect the consolidation of its position in the related markets it supplies.<sup>175</sup>

The Supreme Court believed that the major anticompetitive effects of the merger were to discourage price competition from existing and potential competitors because they would perceive Sachs as an even more imposing foe after the merger with GKN. The primary reason given by the Supreme Court for competitors to perceive Sachs as more imposing after the merger was that GKN and Sachs were commonly engaged in the supply of automotive components to the motor vehicle producers, thus giving GKN particular incentive to use its financial resources to defend against assaults on Sachs' market position in order to prevent repercussions in related markets that GKN served. Preserving the market structure existing before the merger offered a better chance for the reappearance of price competition in the German clutch market.

In the Supreme Court's view, the market in which price competition appears weakest and competition has shifted to product quality and supply reliability is the very market in which, according to the objectives of merger control, one must hold open the chances for return of price competition over the long run, perhaps by entry of potential competitors from foreign countries.<sup>176</sup> The Court pointed to the encouraging new entry of Borg & Beck, the British importer. Since the merger would create the perception that Sachs was even better prepared and determined to fight off competition than before, this would "decisively decrease the chances for renewal of price competition. This effect amounts to further securing and thereby strengthening of the market-dominating position of Sachs by the merger which justifies its prohibition."<sup>177</sup>

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<sup>175</sup> *Id.* at 120, 123, WuW/E BGH at 1509, 1511.

<sup>176</sup> *Id.* at 120-21, WuW/E BGH at 1509.

<sup>177</sup> *Id.* at 124, WuW/E BGH at 1511. GKN's 25% stock interest in Sachs was later sold to Deutsche Commerzbank AG. The Sachs family then sold off another 23% interest to Salzgitter AG, a government-owned steel manufacturer. This sale was not deemed a merger under § 23(2) GWB because Salzgitter could neither actually control Sachs nor was the necessary 25% voting stock threshold reached. The Sachs family announced that it intends to retain a majority interest in the business. *Süddeutsche Zeitung*, Nov. 6, 1978, at 10, col. 2. Since then Sachs acquired the Gas Spring Corp., Ohio, with annual sales of DM 30 million, and founded Fichtel & Sachs, Austria. *Süddeutsche Zeitung*, June 1, 1979, at 29, col. 2.

*B. Comment on the GKN-Sachs Decision*

The *Sachs* decision adopts the view that additional financial strength gained by merger which is likely to be perceived by actual and potential competitors as a further reason not to compete vigorously against a leading oligopolist constitutes the strengthening of a market-dominating position. The Supreme Court refused to require a finding that such effects would occur immediately or even that competition would deteriorate in the future. Rather, the decisive element appeared to be that the merger would reduce the chances for the reappearance of price competition over the long run in a market which had not experienced price competition for many years. In such a tight oligopoly as the German clutch market, the door had to be kept open as widely as possible to the reappearance of competition from existing competitors or the entry of new competitors. At first glance, this approach bears a striking resemblance to American "entrenchment" theory as developed in *Federal Trade Commission v. Procter & Gamble Co.*,<sup>178</sup> but as will become clear after a comparison of the decisions, the German decision is more far-reaching.

In *Procter & Gamble*, the largest manufacturer of laundry detergents in the United States, Procter & Gamble, acquired Clorox, which held 48% of the liquid bleach market and was subject to competition from only much smaller competitors.<sup>179</sup> Hence, Clorox held a dominant position in the liquid bleach market. Yet, Clorox was no conglomerate giant like the acquiror, Procter. Clorox was a one-product company with annual sales of only \$40 million while Procter sold over \$1 billion per year in a variety of product markets. After Justice Douglas emphasized that section 7 of the Clayton Act was designed to arrest anticompetitive effects of market power in their incipiency and that an examination is required of the merger's impact on competition, present and future, he declared in what has become known as the "entrenchment" theory, "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing."<sup>180</sup> This is resonant with the German Supreme Court's theory that the addition of GKN's financial strength to Sachs would discourage the renewal of

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<sup>178</sup> 386 U.S. 568 (1967).

<sup>179</sup> Market shares of competitors are given in the Court of Appeals decision, 358 F.2d 74, 79 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).

<sup>180</sup> 386 U.S. at 578.

price competition from existing or potential entrants at some time in the future.

But the similarities between the two cases end at that point. The sole anticompetitive effect in the *Sachs* case was the likelihood that both existing and potential competitors would in the future be less likely to compete vigorously with the acquiree because of its increased financial strength. The German Supreme Court relied on its own economic theory rather than on current or historical evidence combined with theory to predict future competitive developments.

In *Procter & Gamble*, on the other hand, the United States Supreme Court focused on specific ways in which increased financial resources were actually likely to be utilized to damage the competitive process, based in part on actual conduct.<sup>181</sup> Although the American and German Supreme Courts insisted that no present effects need be proved to prohibit the respective mergers, the U.S. Supreme Court noted, for instance, that after the Procter-Clorox merger Clorox had actually reduced prices, offered premiums, and increased advertising to stave off new entry based on price competition.<sup>182</sup> More importantly, new entrants would be reluctant to compete against Clorox because the massive resources of Procter & Gamble could be utilized in a decisively advantageous way, *i.e.*, through advertising, the “major competitive weapon in the successful marketing of bleach,”<sup>183</sup> to meet the short-term threat of a new entrant. An independent Clorox would not have enough resources at its disposal for such campaigns. Hence, the Court found concrete ways in which the acquiror’s financial resources had actually been used and probably would continue to be used to discourage existing and potential entrants. The German Supreme Court, on the other hand, was not concerned about whether additional financial resources would actually be used to stifle competition. Rather, it was concerned about how existing and potential competitors *perceived* the way in which these resources could be used against them—certainly a much more narrow basis on which to prohibit a merger.<sup>184</sup>

A no less dramatic difference between the decisions is that the *Procter & Gamble* case found an additional ground for prohibiting Procter’s acquisition of Clorox: Procter’s status as most likely potential entrant into the acquiree’s market. That is, Procter appeared to be the greatest threat of independent entry into the liquid bleach market

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<sup>181</sup> *Id.*

<sup>182</sup> 386 U.S. at 579 n.3.

<sup>183</sup> 386 U.S. at 579.

<sup>184</sup> 71 BGHZ at 119-22, WuW/E BGH at 1508-10.

based on Procter's successful independent entry into other markets, its active program of diversification into related product lines, the proximity of liquid bleach to its existing products (the result of selling to the same customers through the same channels of distribution and advertising and merchandising in the same manner), and the low cost and technical ease of entry into the liquid bleach market.<sup>185</sup>

No such examination was undertaken of the probability of independent entry by GKN into the German clutch market. If such an examination would have been made in the *Sachs* case, it probably would have revealed GKN as the most likely entrant into the German clutch market. Of Europe's nine clutch manufacturers, four were under common control and two were in-house producers. Ferodo of France, Europe's largest clutch producer, owned 37% interests in both LuK of Germany and Fraymon of Spain and a 100% interest in Valeo of Italy.<sup>186</sup> Because one of these holdings, LuK, was already present in the German market, it was highly unlikely any other members of the Ferodo group would stir up competition there. Two other clutch manufacturers, Opel and Fiat, produced in-house only for their own needs, and hence posed no immediate competitive threat. The only remaining producers were Borg & Beck of Britain, which was already exporting very small quantities to the German market, and GKN and Sachs, the merger partners.<sup>187</sup> Thus, GKN was the sole remaining European clutch manufacturer not yet in the German market for which there were no apparent obstacles to entry.

And just as importantly, there appeared to be objective motives for GKN to desire to enter the German market. Automotive production was expanding in Germany while it was falling in Britain. GKN was already a clutch manufacturer in Britain, so new investment could be kept to a minimum by simply exporting to the German market. GKN's larger British competitor, Borg & Beck, had already demonstrated the feasibility of this approach by its exports to Germany. Even if exporting proved unfeasible, GKN's decision to establish a new manufacturing facility for automatic drive train components in the United States indicated its ability to advance the necessary investment capital for a facility in Germany. Finally, GKN already had supply contacts with the German automotive manufacturers through its existing German subsidiary, Unicardan, which itself had built special clutches until

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<sup>185</sup> 386 U.S. at 580.

<sup>186</sup> 71 BGHZ at 105. This part of the opinion is not printed in WuW.

<sup>187</sup> *Id.*

1971.<sup>188</sup>

The German Supreme Court acknowledged that it was aware of the possibility of GKN as a potential independent entrant, but it could not consider this issue because the Cartel Office did not employ this as a basis for prohibiting the merger.<sup>189</sup> Instead, the Cartel Office was attempting to establish a pure entrenchment doctrine based exclusively on high market share combined with increased financial power. It did not fully succeed because the German Supreme Court required at least a prognosis about how financial power could be used in the future. The German prognosis, however, appears to be substantially less rigorous than its American counterpart. The *Procter & Gamble* decision rests upon discouragement of competition based on financial strength which had been and could be used in the future for price cutting and advertising plus loss of the acquiror as the most likely potential entrant.

The German Supreme Court, on the other hand, was satisfied with probable discouragement of future price competition based solely on competitors' perceptions that increased financial strength could be used against them supported by a believability factor that such financial strength would be used because the acquiror was a conglomerate enterprise engaged in closely related product lines and therefore would not idly watch erosion of its market position in any part of the automotive market. Depending on how one chooses to view the *Sachs* decision, it can be concluded either that the German Supreme Court appropriately advanced merger control doctrine by focusing on the very heart of the entrenchment theory, or that it failed to recognize the need for finding specific, concrete and predictable anticompetitive effects. In any event, the German Supreme Court has provided the Cartel Office with a powerful weapon in fighting one field of conglomerate acquisitions: a virtual *per se* prohibition against the acquisition by a financially stronger enterprise of a smaller enterprise holding a clearly dominant position in a closely related market.

### C. *The Erdgas Schwaben Joint Venture*

In *Erdgas Schwaben*,<sup>190</sup> the Cartel Office challenged an agreement

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<sup>188</sup> This part of the opinion is not printed in either BGHZ or WuW. It is found in the Court's original BGH slip op. KVR 4/77 at 6.

<sup>189</sup> 71 BGHZ at 113, WuW/E BGH at 1505. The Cartel Office intentionally avoided the argument that GKN was a potential independent entrant because GKN's German subsidiary, Unicardin, sold off its small clutch manufacturing to LuK in 1971, and because GKN claimed it wanted to buy Sachs for its superior technical capabilities. Both of these appeared to be strong arguments against GKN eventually entering the German clutch market on its own.

<sup>190</sup> \_\_ BGHZ \_\_, WuW/E BGH 1533.



between three utilities serving Swabia, a county within the German state Bavaria, to establish a joint venture in equal partnership to be known as "Erdgas Schwaben GmbH" for the purpose of supplying natural gas throughout Swabia. The three joint venture partners were Lech-Elektrizitätswerke AG (LEW), an electric utility directly serving 640,000 inhabitants and indirectly serving 686,000 of the total 1.5 million living in Swabia; the Aktiengesellschaft für Licht und Kraftversorgung (LK), a gas and electric utility serving small and medium sized towns in Swabia; and the City of Augsburg, which ran its own utility for supplying electricity, gas, water, and heat to its residents and those in nearby areas.<sup>191</sup>

The Cartel Office prohibited the Erdgas Schwaben joint venture on two grounds. First, it would place the supply of gas and electricity to much of Swabia under the common ownership of the electric utility, LEW, which might influence the joint venture not to introduce gas to compete effectively with its electricity. Stated in terms of the German law, the joint venture would strengthen the market-dominating position of LEW as a supplier of electricity by hindering potential competition between gas and electricity suppliers in Swabia.<sup>192</sup> Second, establishment of the joint venture created Erdgas Schwaben as the dominant supplier of gas in Swabia and prevented two of the joint venture partners, LEW and LK, from independently seeking to construct new gas facilities. LEW, the largest of the three partners, had even stated during its discussions with the Cartel Office that if the merger were prohibited, it would want to construct a gas utility of its own in Swabia. Thus, it was clearly a likely independent entrant into the gas market. The Cartel Office also concluded LK, already a gas utility, was likely to expand its gas services into new areas because of its substantial existing commitment to this sector and because it had the available financial means to expand.<sup>193</sup> The Cartel Office determined its competitive objectives could be achieved by excluding LEW from the joint venture. Thus, LEW alone was required to withdraw while LK and the City of Augsburg were permitted to continue the Erdgas Schwaben venture. The Court of Appeals affirmed<sup>194</sup> and the case was appealed to the Federal Supreme Court (*Bundesgerichtshof*).

The Supreme Court considered three principal issues: whether

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<sup>191</sup> This part of the opinion is not printed in WuW. It is found in the Court's original BGH slip op. KVR 6/77 at 3-5.

<sup>192</sup> *Erdgas Schwaben*, WuW/E BKartA 1647, 1647-49 (1976).

<sup>193</sup> *Id.* at 1649-50.

<sup>194</sup> *Erdgas Schwaben*, WuW/E OLG 1895 (1977).

merger control could be applied to the county Swabia as a “substantial part” of Germany within the meaning of section 24(8)(3) GWB; whether the relevant product market had been properly drawn; and whether under section 24(1) GWB the merger could be justified despite its anticompetitive effects based on resulting improvements in competitive conditions which outweighed the disadvantages of the market domination. The easiest of these issues was the question of whether the geographic scope of the merger was sufficient to justify application of the merger control provisions. LEW’s entire service area included 1.3 million residents and over 3000 square miles, roughly the county Swabia in the state of Bavaria. LEW was also the eighteenth largest electric utility out of some 676 in Germany and was owned by Germany’s largest electricity concern, so the strengthening of its dominant position would have a substantial impact within Germany. The Supreme Court rejected arguments that the regions directly affected by the merger were only those parts of Swabia LEW served directly with some half as many residents and two-thirds the land area or the even smaller region to be served by the newly-formed joint venture. The Court took the view that the effects of the merger were likely to be felt throughout LEW’s direct and indirect service areas, particularly by influencing the investment decisions made by the joint venture partners about whether Erdgas Schwaben would build in areas LEW served with electricity. Further, the joint venture involved an effect that was of broader significance, in view of the relationship between substitutable energy sources and the grant of utility monopolies which necessarily causes a high level of concentration and excludes competition between energy suppliers in neighboring markets.<sup>195</sup>

Definition of the relevant product market posed far greater problems. The Cartel Office had determined the relevant product market to be electricity generally, and the Court of Appeals had determined it to be energy used for certain household purposes (cooking and hot water but not home heating). The Supreme Court noted that more than 80% of the uses to which electricity is put cannot be fulfilled by other forms of energy, most notably in industrial uses. However, there was substantial direct competition between electricity and gas as an energy source for other major uses, particularly for heating, cooking, and hot water. The Supreme Court ruled that while the boundaries of a product market are determined as a rule by those kinds of goods or services that appear to be substitutable, and are in fact substitutable,

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<sup>195</sup> — BGHZ —, WuW/E BGH at 1541-42.

this approach does not require limiting the enquiry to only that portion of a market in which electricity is subject to competition from other energy sources.

Strict division of the electricity market from the standpoint of use for light and heat for various purposes of use by operation of the required energy transformers and limitation of the examination to those market segments neglects the meaningful enterprise-related fact that LEW is subject to no competition in 80% of its utility services because of a lack of competition in the industry and for technical reasons.<sup>196</sup>

Hence, the Supreme Court found electricity generally as the relevant product market.

Turning to the effects of the joint venture, the Court found that in those areas of Swabia in which LEW was already the dominant supplier of electricity, LEW's dominant position would be strengthened in the electricity market as a whole as well as in those market segments in which oil and gas presented substitutes. Although LEW was only a one-third partner in the joint venture, "LEW would be in the position to channel its decisions to correspond to a certain degree to its own interests through influencing other partners and refusing its necessary concurrence and thereby to restrain competition from gas as a substitute [for electricity]."<sup>197</sup> This ability to prevent the construction of new gas lines was a sufficient strengthening of LEW's market-dominant position to prohibit the merger even though defendants claimed gas could be a substitute for electricity in less than 4% of all electric power uses.<sup>198</sup> It was particularly important that competition be preserved between independent electricity and gas utilities because of the high level of market concentration and local monopolies of utilities.

The central issue of the *Erdgas Schwaben* case focused on the "balancing clause" of section 24(1): would the joint venture's pro-competitive effect of establishing a strong gas utility to compete with other available energy sources outweigh the anticompetitive effects of strengthening LEW's already dominant position as an electric utility and establishing a new gas utility that would be market-dominating? The Court was confronted with two possible interpretations of the balancing clause: first, that the merger can be justified if competitive conditions are likely to be better after the merger than before; and second, that the merger can be justified only if competitive conditions are likely to be better after the merger than before, *and* that an equal improve-

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<sup>196</sup> *Id.* at 1535-36.

<sup>197</sup> *Id.* at 1536.

<sup>198</sup> *Id.* at 1537.

ment in competitive conditions is not likely to have occurred without the merger. The Supreme Court chose the second view, which had been adopted by the Court of Appeals, and concluded further that the burden of proof rested on the defendants:

It is part of the merging enterprises' burden of proof to show that the expected improvements in the conditions of competition through the activities of the joint venture will be possible only with the merger accompanied by the strengthening of its market position. The Federal Cartel Office as well as the participating enterprises have pointed out that proof of particular future competitive developments in the described manner could only be made in detail with difficulty from their standpoint because it depends mainly on the basically incalculable individual conduct of enterprises in the future. This point of view must be taken into account. It is sufficient, if it can be said with high likelihood on the basis of relationships in the market at present or in the future on the basis on concrete circumstances according to general experience with economic behavior that a similar improvement of competitive conditions is not likely without the merger.<sup>199</sup>

Thus, in this case it had to be shown that the Erdgas Schwaben joint venture would not only have pro-competitive effects, but also that the construction of a gas utility of the size and scope of Erdgas Schwaben would not be likely to occur as quickly and effectively without the joint venture.

The Cartel Office maintained that the gas facilities already built by Erdgas Schwaben would continue in use and be expanded even if LEW's joint participation in the venture were prohibited, and that both LEW and LK would likewise continue to use and expand their own existing gas facilities. LEW would be prepared to build up a gas utility in Swabia in particular on account of its existing capabilities and its declaration of intent to do so during the Cartel Office proceedings. LEW countered that in any event it could not build up as quickly and effectively alone as by the joint venture. The other partner in the joint venture which the Cartel Office labelled as a likely potential entrant, LK, argued that alone it could not effectively enter the gas market. Only establishing an operation of optimal size combined with a sharing of the high risks would assure that gas effectively competed against oil.<sup>200</sup> The joint venture partners also maintained that the participation of LEW made substantial rationalization advantages possible for pipelines and rights of way, connections for gas supplies, technical service, customer relationships, organization and storage space.<sup>201</sup>

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<sup>199</sup> *Id.* at 1540.

<sup>200</sup> *Id.* at 1540-41.

<sup>201</sup> *Id.* at 1541.

The Supreme Court conceded that the participation of LEW might well bring real advantages that would assure that "gas will enter into competition with oil more quickly and effectively than would be the case without the merger,"<sup>202</sup> but it declined to make a final judgment. Instead it reversed and remanded to the Court of Appeals to hear further evidence from an expert witness about whether, without the rationalization advantages gained from LEW's participation in the joint venture, a similar improvement in competitive conditions between oil and gas would be likely, and issued this instruction:

Should it be shown that the competitive conditions in the heating market will be improved more quickly and effectively on the basis of the supply of gas by Erdgas Schwaben, then the Court of Appeals will have to examine whether the improvements brought about by this cooperation outweigh its accompanying disadvantages, namely the strengthening of LEW's market-dominating position, or even the creation of a market-dominating position by Erdgas Schwaben.<sup>203</sup>

The ultimate decision by the Court of Appeals, which might be made in early 1980, should provide further useful guidance on how the "balancing clause" is to be applied in practice.<sup>204</sup>

#### D. *Comment on Erdgas Schwaben*

The American law intervenes at a lower threshold of damage to the competitive process than does the German law, namely when a merger is likely to substantially lessen competition or tend to create a monopoly. Despite the apparently harsher American standard, the *Erdgas Schwaben* decision indicates that the German law may develop a similarly rigorous standard. This will depend in great measure on how the balancing clause is interpreted.

Roughly comparable American merger decisions from the 1960's indicate that the *Erdgas Schwaben* joint venture would probably be struck down in the United States. *United States v. El Paso Natural Gas*<sup>205</sup> is such a case. The Supreme Court required El Paso, which supplied 75% of all gas to the California market, to divest its acquisi-

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> After this article was submitted to the printer, settlement negotiations began in *Erdgas Schwaben*. LEW has offered to reduce its participation in the joint-venture from 33% to 23%, thus reducing its control below the 25% level defined as a merger under GWB § 23(2)(2). However, this could still constitute a merger under GWB § 23(2)(5). See text accompanying notes 23-26 *supra*. In any event, the Cartel Office may accept the reduction in LEW's influence over the joint-venture as sufficient to meet its competitive concerns. *Frankfurter Allgemeine Zeitung*, Nov. 16, 1979, at 16, col. 15.

<sup>205</sup> 376 U.S. 651 (1964).

tion of Pacific Northwest Pipeline Company. Pacific Northwest was considered a very likely independent entrant into California because it was the only nearby supplier of natural gas not yet in that market, and because before the merger it had attempted independently to negotiate a supply agreement with Southern California Edison. Only El Paso's responding price concessions prevented Pacific Northwest from successful entry. The Supreme Court declared that:

We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State. We repeat that one purpose of § 7 was "to arrest the trend toward concentration, the *tendency* to monopolize, before the consumers' alternatives disappeared through the merger . . . ."206

The facts of *El Paso* were more suited to prohibition than those of *Erdgas Schwaben*. *El Paso* not only involved a simple take-over, rather than a joint venture, which creates a new competitive force, but also the acquiror's business strategies actually had been affected by the acquiree. The case is nevertheless a strong declaration against acquisition of a clearly proven potential competitor. To this extent, the case parallels *Erdgas Schwaben*, for there LK and Augsburg were already gas suppliers and LEW was a self-admitting likely independent entrant into the gas market.

The first joint venture case to be decided by the Supreme Court under section 7 of the Clayton Act, *United States v. Penn-Olin Chemical Co.*,<sup>207</sup> turned exclusively on potential competition analysis. The Court struck down a joint venture between Pennsalt and Olin Mathieson designed to establish a new facility for the manufacture and sale of sodium chlorate in the southeastern United States market, where a tight oligopoly existed. Pennsalt had 57.8% of the market in sodium chlorate west of the Rocky Mountains and had sold substantial quantities of sodium chlorate in the target southeast market, principally on the basis of a sales agency contract with the other joint venture partner, Olin.<sup>208</sup> Therefore, this was basically a geographic extension merger for Pennsalt. Olin, on the other hand, did not produce sodium chlorate at all, but by virtue of its sales agency contract accounted for 8.9% of all sodium chlorate sales in the southeast.<sup>209</sup> Only two other suppliers competed in the oligopolistic southeastern market. The district court had found that Pennsalt and Olin were each capable of building its

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206 376 U.S. at 659.

207 378 U.S. 158 (1964).

208 *Id.* at 162.

209 *Id.* at 164.

own plant, but concluded it was unlikely that *both* Pennsalt and Olin would enter the southeast independently. The court, therefore, permitted the joint venture.<sup>210</sup>

The Supreme Court reversed this ruling, requiring further investigation of anticompetitive effects:

Certainly the sole test would not be the probability that *both* companies would have entered the market. Nor would the consideration be limited to the probability that one entered alone. There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter . . . . The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which can not be underestimated.<sup>211</sup>

Thus, the joint venture could be a violation not only if it prevented both firms from independent entry, but also if one firm would have entered independently while the other exercised a restraining influence on the oligopoly market by standing in the wings ready to enter at any time.

In *Erdgas Schwaben*, the German Supreme Court appears to take a more lenient attitude toward joint ventures than that in *Penn-Olin*. The Court seems to begin with the premise that if the joint venture prevents both LEW, on the one hand, and LK and Augsburg together, on the other, from independently entering the gas market. This may make the Erdgas Schwaben joint venture unlawful, but not automatically. A further balancing test has to be made as to whether the joint venture will improve the competitive environment, such as by making gas available more quickly and effectively as a new energy source, than without the joint venture. This aspect is totally lacking in the *Penn-Olin* analysis.

The closest American case to *Erdgas Schwaben* is *Northern Natural Gas Co. v. Federal Power Commission*,<sup>212</sup> in which a joint venture between Canadian and American natural gas companies was prohibited under the potential competition doctrine. Trans-Canada Gas wanted to transport natural gas from the Canadian border in northern Minnesota through Wisconsin and Michigan to Ontario to meet the increasing demand for gas in eastern Canada. A United States route promised the advantages of being more economical to build and expanding

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<sup>210</sup> 217 F. Supp. 110 (D. Del. 1963).

<sup>211</sup> 378 U.S. at 173-74.

<sup>212</sup> 399 F.2d 953 (D.C. Cir. 1968).

Trans-Canada's exports to the United States. Trans-Canada attempted but failed to negotiate a joint project with several United States companies, including American Natural, the dominant supplier of gas in Wisconsin and Michigan. It then submitted a proposal to the Federal Power Commission for constructing its own pipeline in competition with proposals from the complainant, Northern Natural, and a joint venture between American Natural and Midwestern Gas.

Before the Commission reviewed the proposals, American Natural and Midwestern Gas reached a joint venture agreement with Trans-Canada, withdrew their competing proposal and adopted Trans-Canada's. The Federal Power Commission accepted the Trans-Canada joint venture proposal and rejected the sole remaining proposal from Northern Natural, the sole bidder left out of the joint venture.<sup>213</sup> Northern Natural then filed suit complaining that this last-minute joint venture effectively eliminated potential competition between Trans-Canada and the already dominant American Natural.

The Court of Appeals accepted this argument in view of the fact that American Natural already supplied over 50% of the natural gas in Michigan and Wisconsin, and that Trans-Canada's original proposal contemplated sales of gas in this very area.<sup>214</sup> Further, it appeared probable that if Trans-Canada entered alone, it would seek to sell its excess gas in parts of northern Michigan not yet served by natural gas, and that American Natural would also choose to compete for that market.<sup>215</sup>

The position of American Natural as the dominant supplier of gas was somewhat comparable to that of LEW, the dominant electricity supplier in the *Erdgas Schwaben* case. Both were dominant suppliers within the geographic market in which the joint venture would operate. Both saw that expansion in the natural gas field was likely and chose to participate in that expansion in a manner affording a significant ability to protect their existing business from the competitive threat of that expansion.

In *Erdgas Schwaben*, the Cartel Office was particularly interested in establishing a principle that competing forms of energy should be kept in separate hands to foster competition between them.<sup>216</sup> It is

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<sup>213</sup> *Id.* at 962.

<sup>214</sup> *Id.* at 963.

<sup>215</sup> *Id.*

<sup>216</sup> This is based on discussions with officials of the German Cartel Office. The same rationale was used in *BP-Gelsenberg*, WuW/E BKartA 1719 (1978), *merger authorization granted*, WuW/E BWM 165 (1979).



noteworthy in this connection that in 1975 only one-third of the entire German public had gas available and the market was expanding rapidly.<sup>217</sup> Hence, under the Cartel Office's reasoning it was a new source of energy which should be expanded to offer price competition to electricity and oil. Evidence produced at trial indicated the Cartel Office's hopes for price competition were unrealistically high. The competitive overlap between gas and oil was only 4% of the entire electricity market, hardly a significant threat to LEW's electricity sales.<sup>218</sup> Further, LEW probably would not care about losing electricity profit to gas if gas were equally as profitable as electricity: the profits would merely pass through different hands but ultimately arrive in the same pocket. LEW's participation in Erdgas Schwaben, a monopolist, would tend to assure that very result.

The retrial will focus on the questions of whether the joint venture would tend to develop the gas market in Swabia faster and more effectively than if the joint venture were not permitted, and if so whether the improvements brought about by the joint venture outweigh its accompanying disadvantages, namely the strengthening of LEW's dominant position in the electricity market and the creation of Erdgas Schwaben with a dominant position in the natural gas market. The Supreme Court considered it likely that LEW's participation in the joint venture would lead to substantial rationalization advantages in the form of rights of way and centralized administration that might make it possible for gas to enter into more effective competition with oil and electricity. It suggested that on remand proof of rationalization advantages could be provided by an expert witness, and that the future competitive developments derived in part from these advantages could be predicted "according to general experience with economic behavior." While providing proof of the probable savings from rationalization measures is feasible, predicting their future *competitive impact* is another matter.

It is doubtful that the Court's suggestion of simply making a prediction of future competitive developments based on general economic experience will simplify matters; in any event that prediction will have to be based on a detailed examination of the specific plans of the Erdgas Schwaben joint venture and the likely alternative plans of the

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<sup>217</sup> Of all primary energy used, natural gas sources was only 0.8% in 1964, 10% in 1973, and 13.8% in 1975, when entire regions of West Germany, including northern Schleswig-Holstein, eastern Lower Saxony, western Rhineland-Palatinate, and northeastern and southern Bavaria (which includes Swabia) still had not been linked to a gas network. HAUPTGUTACHTEN DER MONOPOLKOMMISSION I: MEHR WETTBEWERB IST MOGLICH ¶¶ 615, 618, at 330-31 (1977).

<sup>218</sup> \_\_ BGHZ \_\_, WuW/E BGH at 1537.

members of the joint venture in the event LEW is excluded from participation. If concrete alternative plans do not exist, then the Court will have to guess at unspecified and perhaps unspecifiable alternatives, such as independent entry of LEW while LK and Augsburg also enter as partners, entry of only LEW, entry of only LK and Augsburg as partners, or failure of any one of them to enter. This is sure to present elaborate and frustrating problems of proof.

Even assuming that a prediction of future competitive developments can be made and the net results of the joint venture are favorable, there remains the task of balancing that net favorable impact against the strengthening of LEW's dominant position in the electricity market as well as the creation of Erdgas Schwaben as a monopolist in the gas market. The Court provides no guidance on how to balance the future advantages and disadvantages of a rationalized monopoly that will rapidly enter the gas market but which may have less competitive zeal because of close connections to a competing form of energy versus the slower future entry of a smaller, less rationalized gas supplier or suppliers that are more likely to adopt a competitive attitude.

The American courts have already become caught in a difficult balancing snare in judging potential competition cases.<sup>219</sup> The formulation of reasonable, clear, workable balancing rules is the great challenge which lies before the courts in this field on both sides of the Atlantic. It can only be hoped that the German Court of Appeals will shed new light on this area, but there is sound reason to remain skeptical about its prospects for mastering the challenge.

## V. CONCLUSION

German merger control has developed at a rapid pace. Some 23 mergers had been formally prohibited from the time of the law's enactment until the end of 1978.<sup>220</sup> In the same period two major Supreme Court decisions and five Economics Ministry decisions were issued. Vigorous application of the law is promoted by the body of merger in-

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<sup>219</sup> For discussion of the problems of potential competition analysis in judging mergers, see Bauer, *Challenging Conglomerate Mergers Under § 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, 58 B.U. L. REV. 199 (1978); Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1 (1977); Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453 (1976); Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231 (1968); Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections On the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

<sup>220</sup> [1978] TB 15. Eleven mergers were prohibited during 1978 alone.

formation triggered by the reporting provisions, the Cartel Office's active enforcement efforts, and a climate of opinion against permitting further market concentration. Despite the law, the merger movement continues. Still, it cannot be said that German merger control has been ineffective. The very existence of the reporting requirement and the possibility of prohibiting mergers leads to a business consciousness that mergers are subject to antitrust risk which tends to rechannel merger enthusiasm into less anticompetitive types of take-overs.

The law has weaknesses, but they have not been overlooked by the Monopolies Commission, which is required by statute to issue a report on concentration developments in Germany every two years and propose useful changes in the law. In order to strengthen the law, the Government submitted a draft amendment<sup>221</sup> dated May 17, 1978. Some major aspects of the proposal, are:

1. Amend the reporting provisions of section 23(2) so that in making the calculation of the seller's market share, employees and turnover, the wording makes clear that only those related to the assets being sold are considered; also amend the definition of merger so that the acquisition of less than 25% of the voting capital will be considered to be a merger if that holding combined with contractual or other relationships between the parties effectively gives the acquirer the same degree of control as if he held 25% of the voting capital.

2. Add a new section 23a to introduce a rebuttable presumption that a merger creates or strengthens a market-dominating position (i.e., a presumptive violation) if:

—An enterprise with turnover of at least DM 2 billion merges with another enterprise that:

- i. is active in a market in which medium-sized or small businesses represent two-thirds of the market and the merging enterprises would hold at least 5% of that market, or
- ii. is dominant in one or more markets which has a turnover of at least DM 100 million; or

—The participating enterprises have a combined turnover of at least DM 10 billion and at least two of the merging enterprises had a turnover of at least DM 1 billion.

3. Amend the minimum size and impact criteria of section 24(8) to exempt from merger control only those mergers in which:

- The participating enterprises had a combined turnover of less than DM 500 million; or
- An independent enterprise with turnover of less than DM 50 million is

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<sup>221</sup> *Gesetzesentwurf der Bundesregierung: Entwurf eines vierten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Sept. 27, 1978, at 4-5, BT-Drucks. 8/2136.

acquired, but the exemption would not apply if the acquiree had a turnover of DM 2 million or greater and the acquiror had a turnover of at least DM 1 billion; or

—The affected market has a turnover of less than DM 10 million in each of the preceding five years.<sup>222</sup>

These amendments would serve to do more than merely close loopholes in the law. The proposed section 23a might be a first step toward shifting the focus of German merger control away from the market domination principle to size criteria alone in the case of large-firm mergers. This is an approach for which the Cartel Office has been lobbying for some time.

The German merger control law is developing rapidly through the enforcement activities of the Cartel Office, decisions of the courts and legislative changes. It is not window-dressing but rather the most dynamic force in merger control outside the United States. Its drafting, enforcement, and interpretation have borrowed heavily from the American experience; but it is clearly setting its own independent course. Now perhaps Americans, as well as Europeans, will find useful ideas developing in the German experience from which they in return will be able to borrow.

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<sup>222</sup> *Id.*

# APPENDIX I

GWB §§ 22-24, 46\*

## Sec. 22. Market-Dominating Enterprises

- (1) An enterprise is market-dominating within the meaning of this law if it, as a supplier or purchaser of a certain kind of goods or commercial services:
    1. has no competitors or is not subject to any substantial competition;  
or
    2. has a commanding market position in relation to its competitors; in this connection, in addition to its market share, and in particular its financial strength, its access to supply and sales markets, its links with other enterprises as well as legal or factual barriers to the entry of other enterprises into the market are to be taken into consideration.
  - (2) Two or more enterprises are also deemed to be market-dominating insofar as, for factual reasons, substantial competition for a certain kind of goods or commercial services does not exist between them, either generally or in certain markets, and insofar as they jointly fulfill the conditions of subsection (1).
  - (3) It is presumed that:
    1. an enterprise is market-dominating within the meaning of subsection (1) if it has a market share of at least one-third for a certain kind of goods or commercial services; this presumption does not apply if the enterprise had a turnover of less than DM 250 million during the last completed business year;
    2. the conditions of subsection (2) are fulfilled if, with respect to a certain kind of goods or commercial services:
      - a) three or fewer enterprises have a combined market share of 50 percent or more; or
      - b) five or fewer enterprises have a combined market share of two-thirds or more;this presumption does not apply insofar as enterprises are concerned which had a turnover of less than DM 100 million during the last completed business year.
- § 23(1), sentences 2 to 7, apply analogously to the computation of market shares and turnover.

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\* Authors' translation. For alternate translations of the GWB, see COMPETITION LAW IN WESTERN EUROPE AND THE U.S.A., vol. A\*, at GER.L.-I (D. Gijlstra & F. Murphy ed. 1977); OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1976); R. MUELLER & H. SCHNEIDER, THE GERMAN LAW AGAINST RESTRAINTS OF COMPETITION: BILINGUAL EDITION WITH INTRODUCTION (1973); and A. RIESENKAMPPFF & J. GRES, LAW AGAINST RESTRAINTS OF COMPETITION: TEXT AND COMMENTARY IN GERMAN AND ENGLISH (1977).

- (4) In regard to market-dominating enterprises, the Cartel Authority shall have the powers referred to in subsection (5) insofar as such enterprises abuse their market-dominating position in the market for these or other goods or commercial services.
- (5) Under the conditions of subsection (4), the Cartel Authority may prohibit abusive conduct of market-dominating enterprises and declare agreements to be ineffective; § 19 applies analogously. Prior thereto, the Cartel Authority should call upon the participants to cease and desist from the abuse to which objection was raised.
- (6) Insofar as the conditions of subsection (1) are fulfilled by a combine enterprise (*Konzernunternehmen*) within the meaning of § 18 of the Stock Corporation Act, the Cartel Authority may exercise its powers under subsection (5) with respect to each enterprise in the combine.

### § 23

- (1) A merger of enterprises shall be reported to the Federal Cartel Office without undue delay if:
  1. within the entire territory in which this law applies or within a substantial part thereof, a market share of at least 20% is reached or increased as a result of the merger, or if a participating enterprise has a market share of at least 20% in another market; or
  2. the participating enterprises had collectively at any one time during the last business year preceding the merger at least 10,000 employees, or during such period had a turnover of at least DM 500 million.

If one of the participating enterprises constitutes a controlled or a controlling enterprise within the meaning of § 17 of the Stock Corporation Act or a combine enterprise (*Konzernunternehmen*) within the meaning of § 18 of the Stock Corporation Act, then the enterprises linked in this manner are deemed to be a single enterprise for purposes of computing market shares, number of employees and turnover; if several enterprises, on the basis of an agreement or otherwise, act together in such a manner that they can jointly exercise a controlling influence over a participating enterprise, then each of them is deemed to be a controlling enterprise. Sections 158(1) and (2) of the Stock Corporation Act apply to the computation of turnover; turnover from sales and services between the enterprises which are connected within the meaning of sentence 2 (internal turnover), as well as value-added tax and excise duties, shall not be taken into consideration; turnover in foreign currencies shall be converted into German marks (DM) at the official exchange rate. With respect to credit institutions and building and loan associations, there shall be substituted for turnover one-tenth of the total assets of the last completed business year, and in respect to insurance companies, premium income received during the last completed business year. The total assets shall be reduced by those items which reflect holdings in affiliated enterprises within the meaning of sentence 2; premium income shall be the income from the insurance and reinsurance business, in-

cluding amounts ceded to reinsurers. For enterprises whose business consists in whole or in part of distribution of goods, only three-fourths of the turnover shall be taken into consideration. For enterprises whose business consists in whole or in part of printing, or in the publishing or distribution of newspapers or periodicals or their constituent parts, their turnover shall be multiplied by a factor of twenty. Sentence 6 remains unaffected.

(2) The following transactions are deemed to be a merger within the meaning of this law:

1. the acquisition of the assets and liabilities of another enterprise in whole or in substantial part by consolidation, transformation or other means;
2. the acquisition of shares in another enterprise, if such shares alone or together with other shares already held by the enterprise:
  - a) amount to 25% of the voting capital of the other enterprise; or
  - b) amount to 50% of the voting capital of the other enterprise; or
  - c) give the enterprise a majority participation within the meaning of § 16(1) of the Stock Corporation Act.

The shares held by the enterprise are also deemed to include those shares which are owned either by a linked enterprise within the meaning of subsection (1), sentence 2, or by another for the account of any one of these enterprises and, if the owner of the enterprise is a sole proprietor, also those shares which are included in other assets of the owner. If several enterprises simultaneously or successively acquire shares of another enterprise to the extent described above, this is also deemed to be a merger between the participating enterprises (joint venture—*Gemeinschaftsunternehmen*) with respect to those markets in which the other enterprise is active. If a person or an association of persons, neither of which is an enterprise, holds a majority participation in one enterprise and acquires shares in another enterprise, to that extent he, she or it is deemed to be an enterprise.

3. agreements with another enterprise by means of which:
  - a) a combine (*Konzern*) within the meaning of § 18 of the Stock Corporation Act is created, or the group composing the combine is enlarged; or
  - b) the other enterprise obligates itself to conduct its business for the account of the enterprise or to transfer its profits in whole or in part to the enterprise; or
  - c) the business of the other enterprise is leased or otherwise transferred in whole or in part to the enterprise;
4. placing of the same persons, to the extent of at least one-half of the members, on the supervisory board, on the board of management, or on such other corporate organ as may be authorized to conduct the management of enterprises;
5. any other relationship between enterprises on the basis of which one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise.

(3) A merger is also presumed to exist if the participating enterprises have

previously been merged within the meaning of subsection (2), unless the merger does not lead to a substantial strengthening of the already-existing enterprise relationship. It does not constitute a merger if a credit institution, in connection with the formation or capital increase of an enterprise or otherwise in the course of its business, acquires shares of another enterprise for the purpose of selling such shares in the market, provided that it does not exercise voting rights arising from such shares, and provided that the sale is made within one year; in connection with the formation of an enterprise, the exercise of voting rights in the first shareholders' meeting after the formation does not constitute a merger. If an enterprise participating in a merger constitutes a linked enterprise within the meaning of subsection (1), sentence 2, then the controlling enterprise as well as those enterprises by which the controlling enterprise is controlled are deemed to be participants in the merger. If two or more enterprises merge, this also is deemed to be a merger of the enterprises they control.

- (4) The report shall be required by:
  1. in the case of a merger, consolidation or transformation, the owners of the transferee enterprises or the newly-formed enterprise or their representatives, and, in the case of legal persons or partnerships, those persons who are authorized to act as representatives by law or by the articles of association;
  2. otherwise,
    - a) the owners of the enterprises participating in the merger; and
    - b) in the case of subsection (2), nos. 1 and 2, also the sellers or their representatives, and, in the case of legal persons or partnerships, those persons who, by law or by the articles of association, are authorized to act as representatives; in the cases of letter (b), subsection (3), sentence 3, applies analogously.
- (5) The form of the merger shall be indicated in the report. The report shall further contain the following information regarding each participating enterprise:
  1. name or other designation and place of business or legal residence,
  2. type of business,
  3. insofar as the conditions of subsection (1), sentence 1, are fulfilled, the market share including the basis for its computation or estimation, the number of employees and the turnover; in respect of credit institutions and building and loan associations, the total assets, and with respect to insurance companies, the premium income shall be substituted in place of the turnover,
  4. should shares of another enterprise (subsection (2), no. 2) be acquired, the amount of those acquired and of the aggregate participation.

If a participating enterprise constitutes a linked enterprise within the meaning of subsection (1), sentence 2, then the information required pursuant to sentence 2, nos. 1 to 3, shall also be given with respect to the enterprises so connected, and the combine (*Konzern*) relationships and the controlling and participation relationships among the connected enterprises shall be reported.



- (6) The Federal Cartel Office may demand information from each participating enterprise regarding market shares, including the basis for their computation or estimation, as well as turnover for a certain kind of goods or commercial services which the enterprise realized in the last business year preceding the merger. If a participating enterprise constitutes a linked enterprise within the meaning of subsection (1), sentence 2, then the Federal Cartel Office may also demand information regarding the enterprises so connected; it may also demand information from the linked enterprises. § 46(2), (5), (8) and (9) as well as § 47 apply as appropriate. The Federal Cartel Office shall set a reasonable time limit for the furnishing of such information. The powers of the Federal Cartel Office pursuant to § 46 remain unaffected.

#### § 24

- (1) If it is likely that a market-dominating position will be created or strengthened as a result of a merger, the Cartel Authority shall have the powers specified in the following provisions unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of the market domination.
- (2) If the conditions of subsection (1) are met, the Federal Cartel Office must prohibit the merger. The Federal Cartel Office may prohibit a merger as soon as the plan for the merger has become known to it; the Federal Cartel Office may prohibit completed mergers only within one year after receipt of the complete report pursuant to § 23; § 24a(2), sentence 2, nos. 1 and 5-6 apply as appropriate. Prior to such prohibition the highest authorities of the states in which the participating enterprises maintain their legal residence shall be given the opportunity to present their views. If the Federal Cartel Office has issued the order pursuant to sentence 1, it is impermissible to complete the merger without permission of the Federal Minister of Economics or to participate in completion of the merger; legal transactions violating this prohibition are invalid; this provision does not apply to agreements concerning a merger, consolidation, transformation, integration or formation of an enterprise nor to enterprise agreements within the meaning of §§ 291-292 of the Stock Corporation Act once they have become legally effective by entry in the Commercial Register or the Cooperative Societies Register. A completed merger which has been prohibited by the Federal Cartel Office shall be dissolved unless the Federal Minister of Economics grants authorization for the merger.
- (3) Upon application, the Federal Minister of Economics shall authorize the merger if, in the case involved, the restraint of competition is compensated by the overall economic advantages of the merger or if the merger is justified by an overriding public interest; in this connection, regard shall be given to the competitive capability of the participating enterprises in markets outside the territory in which this law applies. The authorization may be granted only if the extent of the restraint of

competition does not endanger the principles of the market economy. The authorization may be subjected to restrictions and conditions. These may not be directed at placing the conduct of the participating enterprises under continuous supervision. Section 22 remains unaffected.

- (4) The application for granting authorization for the merger shall be submitted to the Federal Minister of Economics in writing within a period of one month. The period shall commence with the service of the order of the Federal Cartel Office referred to in subsection (2), sentence 1; if the order of the Federal Cartel Office is appealed within the period provided for in § 65(1), sentences 1 and 2, then the period for the application for authorization shall commence on the date on which the order of the Federal Cartel Office becomes final. The Federal Minister of Economics should decide on the application within four months following the expiration of the periods for the application for authorization referred to in sentences 1 and 2. Prior to the decision, the highest authorities of the states in which the participating enterprises maintain their legal residence shall be given an opportunity to present their views.
- (5) The Federal Minister of Economics may revoke the authorization, amend it by ordering restrictions, or subject it to conditions if the participating enterprises contravene a duty connected with the authorization. The Federal Minister of Economics may withdraw the authorization if the participating enterprises have obtained it through fraud, threat, bribery or through the furnishing of information incorrect or incomplete in a material respect.
- (6) The dissolution of a completed merger may also consist in removing the restraint of competition in a manner other than through the re-establishment of the originally prevailing conditions. The Federal Cartel Office shall order the measures necessary for dissolution of the merger if:
  1. its order referred to in subsection (2), sentence 1, has become final; and
  2. the participating enterprises had filed an application for granting authorization with the Federal Minister of Economics and the rejection of such application or, where subsection (5) applies, the revocation or withdrawal has become final.

In so doing, while safeguarding the interests of third parties, those measures shall be ordered which accomplish the objective with the least expense and the least burden for the participants.

- (7) To enforce its order, the Federal Cartel Office may in particular:
  1. by imposing a non-recurring or recurring penalty of DM 10,000 to DM 1 million, cause those required to dissolve the merger to carry out the ordered measures without undue delay;
  2. prohibit the exercise of voting rights from shares of a participating enterprise which are held or attributed to another participating enterprise, or subject the exercise of such voting rights or the manner of such exercise to permission of the Federal Cartel Office;
  3. declare agreements effecting mergers as designated in § 23(2), nos. 1 and 3, to be ineffective; this does not apply to agreements concerning a merger, consolidation, transformation, integration or forma-

tion of an enterprise nor to enterprise agreements within the meaning of §§ 291-292 of the Stock Corporation Act once they have become legally effective through entry in the Commercial Register or in the Cooperative Societies Register;

4. appoint a trustee for the dissolution of the merger who shall make the required declarations for the obligated parties and carry out the required measures to dissolve the merger; in this connection, the extent to which the rights of those concerned shall be suspended during the duration of the fiduciary relationship shall be specified; §§ 664 and 666-670 of the Civil Code are to be applied analogously to the legal relationship between the trustee and such obligated parties; the trustee may claim reasonable compensation from such obligated parties.

(8) Subsections (1)-(7) do not apply:

1. if the participating enterprises collectively had a turnover of less than DM 500 million during the last completed business year; or
2. if an enterprise which had a turnover during the last completed business year of not more than DM 50 million affiliates with another enterprise; or
3. insofar as it is likely that the restraint of competition will not have effects within the entire territory in which this law applies or in a substantial part thereof; or
4. insofar as a market for goods or commercial services is concerned which had a sales volume of less than DM 10 million during the last completed calendar year.

Section 23(1), sentences 2-7, are to be applied in computing turnover.

- (9) Subsection (8), sentence 1, nos. 2 and 3 is not applicable to the extent that competition is restrained within the meaning of subsection 1 in the business of printing, or in the publishing or distribution of newspapers or periodicals or their constituent parts.

### § 24a

- (1) Notification of the plan of a merger may be given to the Federal Cartel Office. Notification of the merger plan must be given to the Federal Cartel Office if the individual turnover of at least two of the enterprises participating in the merger amounted to DM 1 billion or more during the last completed business year; further, notification of the merger plan must be made if the merger is to be effected pursuant to state law, by legislative enactment or by other sovereign act. Section 23 applies analogously to the notification, provided that when § 23(1), sentence 1, no. 2, and § 23(6) are applied, the date of the notification shall be substituted for the date of the merger, and provided further that in cases of a merger, consolidation or transformation, representatives or persons authorized to represent the enterprises participating in the merger shall be obligated to make the notification. The notification is deemed to be effected only if it contains the information referred to in § 23(5). Section

46(8) and (9) as well as § 47 apply analogously to the information and documents obtained in connection with the notification.

- (2) If notification of the merger plan has been made to the Federal Cartel Office, the Federal Cartel Office may prohibit the merger only if it informs whoever has given the notification within one month after receipt of the notification that it has undertaken an examination of the merger plan, and further, if it issues the order pursuant to § 24(2), sentence 1, within four months after receipt of the notification. The Federal Cartel Office may also prohibit the merger after the expiration of the four months if:
1. the enterprises participating in the merger have agreed to an extension of the period; or
  2. the merger is completed even though the one-month period referred to in sentence 1, or, if the Federal Cartel Office has made a communication pursuant to sentence 1, the four-month period specified herein, has not expired; or
  3. the merger is completed in a manner other than as notified; or
  4. the merger has not yet been completed and the circumstances, on the basis of which the Federal Cartel Office has refrained from making a communication pursuant to sentence 1 or from prohibiting the merger pursuant to § 24(2), sentence 1, have substantially changed; or
  5. the Federal Cartel Office has been caused, by incorrect or incomplete information given by the enterprises participating in the merger or by another, to abstain from making communication pursuant to sentence 1 or from prohibiting the merger pursuant to § 24(2), sentence 1; or
  6. information pursuant to §§ 23(6) or 46 was not supplied or not supplied in due time thereby causing the Federal Cartel Office to act as referred to in no. 5.
- (3) The notification of the merger plan shall not affect the obligation to report the merger pursuant to § 23; in the report pursuant to § 23, reference may be made to the materials submitted in the notification of the merger plan.
- (4) If notification of a merger plan is to be made pursuant to subsection (1), sentence 2, it is prohibited either to complete the merger or to participate in the completion of the merger prior to the expiration of the one-month period referred to in subsection (2), sentence 1, and if the Federal Cartel Office has made a communication pursuant to subsection (2), sentence 1, prior to the four-month period therein referred to or its agreed-upon extension; legal transactions violating this prohibition are invalid; this provision does not apply to contracts concerning a merger, consolidation, transformation, integration or formation of an enterprise nor to enterprise agreements within the meaning of §§ 291-292 of the Stock Corporation Act once such contracts have become legally effective through entry in the Commercial Register or in the Cooperative Societies Register.

§ 24b

- (1) A Monopolies Commission is established to regularly give its opinion on the developments of business concentration in the Federal Republic of Germany and on the administration of §§ 22-24a. It shall consist of five members who must have special knowledge and experience in the fields of economics, business administration, social policy, technology or commercial law.
- (2) The members of the Monopolies Commission may not be members of the government or a legislative body at the federal or state levels, or of the civil service at the federal or state levels, or of any other legal person formed under public law, with the exception of university professors and members of an academic institute. Furthermore, they may not be representatives of a business association or of an organization of employers or employees, nor have a regular employment or service contract with such association or organization. Furthermore, they may not have held such positions during the year preceding their appointment to the Monopolies Commission.
- (3) In its advisory opinion, the Monopolies Commission should assess the prevailing status of business concentration as well as its foreseeable development in the light of economic policy, and in particular competition policy, and evaluate the administration of §§ 22-24a. It should also indicate such amendments of the pertinent provisions of this law as it deems to be necessary.
- (4) The Monopolies Commission is bound only to the mandate established by this law and shall carry on its activity independently. If a minority holds dissenting views when an opinion is drafted, it may express them in the opinion.
- (5) The Monopolies Commission shall issue an opinion every two years on or before June 30 covering the conditions prevailing during the last two preceding full calendar years, provided that the first opinion shall be prepared upon the expiration of the second full calendar year following the entry into force of the Second Law to Amend the Law Against Restraints of Competition. In addition thereto, it may in its discretion prepare additional opinions. The Federal Government may instruct the Monopolies Commission to deliver additional opinions. The Monopolies Commission shall submit the opinions to the Federal Government without undue delay and shall publish them. The Federal Government shall comment to the legislature on the opinions rendered pursuant to sentence 1. The Federal Minister of Economics may also request an expert opinion from the Monopolies Commission in individual cases which are submitted to him for decision pursuant to § 24(3).
- (6) The members of the Monopolies Commission shall be appointed by the President of the Federal Republic upon nomination by the Federal Government. One member shall retire from office as of July 1 of each year in which an opinion is to be rendered pursuant to subsection (5), sentence 1. The order of retirement shall be determined by lot in the first meeting of the Monopolies Commission. The President of the Federal Republic shall, upon nomination by the Federal Government, ap-

point a new member on each such occasion for a term of four years. Reappointments shall be permitted. The Federal Government shall consult with the members of the Monopolies Commission before nominating new members. The members shall be entitled to retire from office by giving notice to the President of the Federal Republic. In the event that a member retires prematurely, a new member shall be appointed for the term of office of the retired member; sentences 4 to 6 apply analogously.

- (7) The decisions of the Monopolies Commission shall require the approval of at least three members. The Monopolies Commission shall elect a chairman from among its members. The Monopolies Commission shall establish its own rules of procedure.
- (8) The Monopolies Commission shall be provided with an office. The office's activities shall comprise the passing on and compiling of source materials, making technical preparations of sessions of the Monopolies Commission, and the printing and publication of the opinions as well as handling other administrative matters as may occur.
- (9) The members of the Monopolies Commission and the staff personnel are obligated to keep discussions secret, as well as the working papers which the Monopolies Commission has designated as confidential. The duty of secrecy also extends to information supplied to the Monopolies Commission and designated as confidential.
- (10) The members of the Monopolies Commission shall receive a lump sum compensation as well as reimbursement of their travelling expenses. These shall be determined by the Federal Minister of Economics subject to agreement by the Federal Minister of the Interior. The costs of the Monopolies Commission shall be borne by the Federal Republic.

#### § 46

- (1) Insofar as necessary to perform its duties under this law, the Cartel Authority may:
  1. request information from enterprises and associations of enterprises regarding their economic condition;
  2. inspect and examine business documents maintained by enterprises and associations of enterprises during normal business hours;
  3. request information from business and professional associations about their articles of association and resolutions as well as the number and names of members to whom the resolutions are directed.
- (2) Owners of enterprises or their representatives, and in the case of legal entities, partnerships and associations without legal capacity, persons designated as representatives by law or articles of association, as well as the representatives appointed pursuant to § 36(2), are obligated to furnish requested information, to submit business records and to permit the examination of such business records as well as entry into the offices and business premises.
- (3) Persons authorized by the Cartel Authority to carry out the examina-

- tions may enter the offices of enterprises and associations of enterprises. The right of Article 13 of the Constitution is restricted to that extent.
- (4) Searches may be conducted only pursuant to an order of the local judge in whose district the search shall be made. Sections 306-310 and 311a of the Code of Criminal Procedure apply, as appropriate, to an appeal from such an order. If danger will result from delay, the persons referred to in subsection 3 may conduct the necessary search during normal business hours without judicial order. An on-the-spot record showing the essential results of the search shall be made which, in cases where no judicial order was issued, shall also show the facts which led to the assumption that danger would result from delay.
  - (5) The person obligated to furnish information may refuse to answer questions if the answer would expose him or one of his relatives, as defined in § 383(1)-(3) of the Code of Civil Procedure, to the danger of criminal prosecution or of proceedings under the Law on Administrative Offenses.
  - (6) The Federal Minister of Economics or the highest state authority shall request information by means of individual written order; the Federal Cartel Office shall make such requests by decree. The legal basis, the subject matter, and the purpose of the request for information are to be stated therein and a reasonable time period must be specified within which the information is to be provided.
  - (7) The Federal Minister of Economics or the highest state authority shall order examination by means of an individual written order; the Federal Cartel Office shall make such orders by decree with the consent of the President [of the Cartel Office]. The time, legal basis, subject matter and purpose of the examination shall be stated in the order.
  - (8) Repealed.
  - (9) Knowledge and documents obtained by information supplied pursuant to subsections (1)(1) and (1)(3) or by measures pursuant to subsection (1)(2) may not be used in tax assessment proceedings or administrative fine proceedings for minor tax or exchange control offenses as well as in proceedings involving criminal tax or exchange control offenses; the provisions of §§ 93, 97, 105(1), 111(5) in connection with § 105(1) as well as § 116(1) of the Tax Code (Abgabenordnung) are not applicable to that extent. Sentence 1 shall not apply to proceedings for criminal tax offenses as well as connected tax assessment proceedings if there is an overriding public interest in carrying on such proceedings, or if the person required to give information or the person acting on its behalf have willfully given false information.

## APPENDIX II

### Cartel Office Announcement: Submissions in Reports and Notifications under §§ 23 and 24a GWB\*

Merger control, as introduced by the Second Amendment to the Law Against Restraints of Competition (§§ 24 and 24a of the GWB), covers both consummated mergers, which are to be reported to the Federal Cartel Office without undue delay, and merger plans. The latter may be notified by the participating enterprises to the Federal Cartel Office before consummation; they must be notified beforehand if at least two of the participating enterprises each had a turnover of DM 1 billion or more in the last completed business year. Notifications, as opposed to reports, are subject to fees. A report, which must also be prepared for merger plans that have been notified but are then consummated, will be published in the Federal Register (*Bundesanzeiger*) (§ 10(1)(5) GWB) with the names of the firms, domicile, and types of business as well as the form of the merger. In certain circumstances, the Federal Cartel Office will prohibit mergers. In doing so, it is bound to observe certain time limits for issuing a decision, namely one year in the case of mergers that have been reported and four months in the case of merger plans that have been notified. These time limits shall begin to run upon the receipt of the fully completed report or notification at the Federal Cartel Office.

#### A. Required Information

A report under § 23(1) sentence 1 GWB and a notification under § 24a (1) sentences 1 and 2 GWB must include the information enumerated in § 23 (5) GWB. In particular, the following details are required:

##### 1. Information About the Merger

The report or the notification must indicate which enterprises have been merged or are about to be merged. It shall further state in what manner the merger shall take place (§ 23(5) sentence 1 GWB); to the extent that the merger is based on contracts it is appropriate to attach certified copies or photocopies of these contracts.

When shares are acquired pursuant to § 23(2)(2) GWB, the amount of the shares acquired and the aggregate participation shall be stated (see § 23 (2)(2) sentences 2 and 4 GWB for calculation of the aggregate participation). If the merger is already consummated, then the date of consummation (*i.e.*, the date when it was entered, as required, in the Commercial Register) shall be stated.

##### 2. Information About the Enterprises

The information enumerated below shall not only be given for domestic enterprises but also for foreign participating or linked enterprises.

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\* [1974] WuW 46; KB, Appendix V. For an alternate translation see COMPETITION LAW IN WESTERN EUROPE AND THE U. S. A., vol. A\* at GER.L.III-1 (D. Gijlstra & F. Murphy ed. 1977).



2.1 The name of the firm (or other designation), the domicile (or the place of establishment) and the type of business shall be stated for each individual participating enterprise and for each individual enterprise linked with a participating enterprise. In order to identify the type of business, state at least the exact stage of business (*i.e.*, manufacturing, wholesaling) and the exact field (not generally, such as "metal-working" but more specifically, such as "manufacture of builder's hardware"); in every case it is appropriate to give a complete report of the range of goods or services supplied by the enterprise.

2.2 Pursuant to § 23(5)(3) GWB, the following shall be submitted for each individual participating enterprise, including the enterprises linked with it:

2.2.1 The highest number of employees at any point in time during the last completed business year before the merger (in the case of reports of consummated mergers under § 23(1) sentence 1 GWB) or within the last completed business year before the notification (in the case of notification of merger plans under § 24a(1) sentences 1 and 2 GWB).

2.2.2 The turnover in the last completed business year before the merger (in the case of reports of consummated mergers under § 23(1) sentence 1 GWB) or in the last completed business year before the notification (in the case of notification of merger plans under § 24a(1) sentences 1 and 2 GWB).

2.2.3 The market shares including the basis for their calculation or estimation.

Hence, the number of employees, turnover and market shares must be stated for each enterprise participating in the merger, including a collective submission for the enterprises linked with it, but this need not be given separately for each individual linked enterprise.

If all the participating enterprises taken together, including the enterprises linked with them, do not fulfill one of the criteria of § 23(1)(1) or § 23(1)(2) GWB (10,000 employees, DM 500 million turnover, 20% market share), then the information under this criterion may be omitted for all enterprises. When calculating market shares there may, in individual cases, be doubts regarding the definition of the market (see no. 4 below). On this account, in the interest of the completeness of reports and notifications, it is advisable to submit information about market shares and market definition even if the 20% threshold is not reached.

2.3 If a participating enterprise is linked with another participating enterprise, or with a third enterprise, then the relationships with the combine (*Konzern*) and the control and shareholding relationships between the linked enterprises shall be submitted.

#### B. Explanation of Particular Terms

The provisions on reports and notifications employ particular terms in a precisely defined sense which is not always synonymous with that used in provisions in other fields of law. This is especially true of the following terms:

##### 1. Participating Enterprises

Which enterprises participate in a merger depends on how the merger is concluded. Participants are, for example:

1.1 The firms merged with one another by way of amalgamation or transformation;

1.2 The acquiror in the case of the acquisition of shares, and the enterprise whose shares have been acquired;

1.3 The parties to the agreement in the case of agreements between enterprises within the meaning of § 23(2)(3) GWB;

1.4 The enterprises whose management bodies are occupied by the same persons in the case of identity of persons in the management bodies under § 23(2)(4) GWB;

1.5 The enterprises which are able to exercise a controlling influence over another enterprise, and the enterprise controlled by this influence, in the case of other types of links between enterprises within the meaning of § 23(2)(5) GWB.

## 2. Linked Enterprises

This term does not coincide with the equivalent concept under the Stock Corporation Act (*Aktiengesetz*). Pursuant to § 23(1) sentence 2 GWB, the following are linked with a participating enterprise:

2.1 Enterprises which in relation to a participating enterprise are controlled or controlling enterprises within the meaning of § 17 of the Stock Corporations Act;

2.2 Enterprises which combine enterprises (*Konzernunternehmen*) within the same combine (*Konzern*) as a participating enterprise (§ 18 of the Stock Corporation Act);

2.3 Enterprises over which the participating enterprise is able to exercise a controlling influence jointly or with other enterprises by agreement or otherwise;

2.4 Enterprises which are able to exercise a controlling influence, jointly with other enterprises, by agreement or otherwise, over a participating enterprise.

## 3. Turnover (§ 23(1) sentences 3-6)

Calculation of turnover shall be based on § 158(1) and (2) of the Stock Corporations Act. Value added tax and excise taxes shall not be included. Foreign turnover shall also be included; turnover in foreign currencies shall be converted into German marks at the official exchange rate. When submitting information about the turnover of several linked enterprises, the receipts from the supply of goods and services between them (internal sales) shall be excluded.

Insofar as the business operations of an enterprise consist of the distribution of goods (trade), only three-quarters of the turnover shall be taken into account. Turnover does not exist in this sense if the goods produced or processed by an enterprise are purchased and resold by another enterprise linked with the first.

In the case of insurance companies, the premium income shall be substituted for turnover. This income shall be construed as the receipts from the insurance and reinsurance business, including amounts ceded to reinsurers.

In the case of credit institutions and building and loan associations (*Bausparkassen*), one-tenth of the balance sheet total shall be substituted for the turnover. If information for several linked credit institutions or building and loan associations is to be submitted, the balance sheet totals shall be reduced by the amounts shown in the books as holdings in linked enterprises. If a

statement should be made for the total turnover of a group of enterprises of which, in addition to the other enterprises, a credit institution or a building and loan association forms a part, then one-tenth of the balance sheet total of the credit institution or building and loan association shall be added to the other turnovers (§ 23 (1) sentence 4 GWB).

#### 4. Market Shares

Calculation of market shares shall be derived from sales in the entire territory in which this law applies (*i.e.*, the Federal Republic of Germany including West Berlin). If an enterprise is not in business in the whole of the Federal Republic or its market position shows considerable regional differences, then it is necessary for information to be given for the market shares in individual regional sales areas in addition to those for the Federal Republic.

The latest statistical information shall be used for the calculation of market shares.

The calculation of market shares may be based on sales volume or value of goods sold. It is appropriate to submit a calculation based on both of these methods.

Only those goods or commercial services that are substitutable from the point of view of the purchaser as regards their quality, use and price may be considered substitutable. In the case of industrial products, the classification system of the Systematic Index for Industrial Statistics (*Systematisches Verzeichnis für Industriestatistik*) with its six- or seven-digit goods headings may provide a point of reference. Frequently, however, heterogeneous products are condensed into one heading so that a further subclassification is necessary. Regarding credit institutions, the breakdown of central bank (*Bundesbank*) statistics, according to the individual lines of business, may be taken as a basis for the purpose of defining markets. When calculating the market shares to be stated, a rigorous subdivision of the markets will not prejudice enterprises as regards the findings which will be made about positions of market dominance.

#### C. Legal Consequences

Any person who wilfully or negligently fails to file a report without undue delay pursuant to § 23(1)-(5) GWB, or who submits false or incomplete information, shall be judged to commit an offense under § 39(1)(2) GWB. This is punishable by a fine of up to DM 50,000. The same applies in the case of false or incomplete information submitted in a notification under § 24a(1) sentence 2 (§ 39(1)(3) GWB). In addition, a notification pursuant to § 24a(1) sentences 1 and 2 GWB shall not be considered to be effected if it fails to contain the required complete information (§ 24a(1) sentence 4 GWB). The time limits under § 24(2) sentence 2 and § 24a(2) GWB for the prohibition of a merger by the Federal Cartel Office shall not begin to run.

Subject to review by the courts, the competent Decision Section of the Federal Cartel Office shall decide upon the completeness of the information submitted in a report or notification. The courts and the Decision Sections are not bound by the considerations stated above. In the case of notifications pursuant to § 24a(1) sentences 1 and 2 GWB, it is advisable to seek an opinion from the Decision Section as to its completeness prior to the submission of the notification. In this manner, the participating enterprises obtain certainty that

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the merger may be prohibited only within a maximum period of four months after submission of the notification (Exceptions: § 24a(2) sentence 2 GWB).

## APPENDIX III

### Cartel Office Announcement: Domestic Effects of Mergers in the Context of § 98(2) of the GWB

The protective purpose (*Schutzzweck*) of the respective applicable substantive provision of the law must be drawn upon in interpreting the meaning of domestic effect under § 98(2) GWB (*Ölfeldrohre*, July 12, 1973, 61 BGHZ 202; 25 BGHSt 208).

The purpose of §§ 23 GWB *et seq.* is to deal with concentration because it can lessen competition. The term “restraint of competition” in § 98 (2) GWB is the collective designation for all of the substantive rules of the GWB relating to restraints of competition. In view of §§ 23 GWB *et seq.*, the restraint of competition under § 98(2) GWB is the act of merging itself. Hence, it does not matter whether the intensity of domestic competition is actually diminished as a result of the merger.

- A. Domestic effects under § 98(2) GWB are therefore present *in any event if* the act of the merger occurs in Germany (*i.e.*, acquisition of the assets and liabilities or the shares of a domestic enterprise, foundation of a domestic joint venture—even if the purchasers or founders are foreign enterprises). A merger occurring in a foreign country is deemed a merger between the German subsidiaries of the participating enterprises (§ 23(3), sentence 4 GWB).
- B. Mergers *occurring in a foreign country* have domestic effects if the structural preconditions for domestic competition will be influenced by the merger, and at least one domestic enterprise (even subsidiaries or other linked enterprises) participates.
  1. For mergers occurring in a foreign country *between only two directly participating enterprises* (all acts of the merger with the exception of the creation of joint ventures—*i.e.*, acquisition of the assets and liabilities or the shares of a foreign enterprise by a domestic enterprises):
    - a) domestic effects are present if both enterprises were already active in the domestic market before the merger directly or via subsidiaries, permanent establishments or importers;
    - b) domestic effects may be present if only one enterprise was active in the German market before the merger, but for instance:
      - aa) after the merger it is likely that one of the foreign participants will import supplies into Germany on the basis of technical production (pre- or post-production steps) or product line relationships. The likelihood of future supply to the domestic market usually depends on whether similar or like products are already an object of trade between the participating states and no technical or administrative barriers stand in the way;

- bb) as a result of the merger the know-how of a domestic enterprise will be perceptibly increased or industrial property rights are available to it.
2. For the *formation of joint ventures* in a foreign country, domestic effect depends primarily on the production and geographic activities of the joint venture. Whether domestic effects are present in this case is governed in view of the activities of the joint venture by the principles enumerated under B(1), whereby the production techniques and/or product line relations are to be judged by the relationship between the joint venture and the domestic participants.

Further, the formation of a joint venture in a foreign country may also have domestic effects if:

- a) one of the foreign enterprises participating in the joint venture was active domestically beforehand in the joint venture's field of activity or it is likely with sufficient probability that it would become active domestically without the joint venture (*cf.* B(1)(aa));
- b) the domestic enterprise participating in the joint venture increases its production capacity via the joint venture to an extent that thereby the available capacity for domestic supply is perceptibly changed (substitution of domestic export production by export production in foreign countries). The requirement for perceptibility here is usually that the domestic participant held a strong market position before the merger.

## APPENDIX IV

### Cartel Office Merger Inquiry Letter (English translation and German original)

FEDERAL CARTEL OFFICE

1000 BERLIN 61  
Mehringdamm 129  
(am Platz der Luftbrücke)  
Telephone (030) 69 01-1

Re: U.S.A. corporate acquisition  
of F.R.G. GmbH

Dear Sir:

Your enterprise is obligated under § 23(4) GWB to report this merger to the Federal Cartel Office if the enterprises participating in it collectively had world wide turnover of at least DM 500 million and/or had a market share of at least 20 % in a domestic market in the last business year before the merger (§ 23(1), sentence 1 GWB). To the extent a participating enterprise is a controlled or controlling enterprise under § 23(1), sentence 2 GWB, all controlling or controlled enterprises are to be considered as a single enterprise for purposes of computing market share and turnover. As a rule the Federal Cartel Office uses a participation of at least 50% as the basis for an enterprise link in this sense. It is therefore requested that you provide the following information—separately for each participating enterprise—as required under § 23(5) GWB:

- Name, place of business and type of business,
- linked enterprises,
- domestic market shares (to the extent the participating enterprises including linked enterprises *together* reach at least 20%),
- number of employees,
- level of turnover.

Further, market shares, number of employees and turnover are to be submitted collectively for the enterprises linked to the enterprises participating in the merger.

If the acquired enterprise had a turnover of less than DM 50 million, then it is requested that the turnover of the seller also be reported for purposes of considering the minimum size criterion (§ 24(8)(2) GWB).

The following applies to the calculation of turnover: Turnover in foreign currencies is to be computed according to the official exchange rate into German marks. In place of turnover for credit institutions and building and loan associations, one tenth of the total assets, and with respect to insurance companies, the premium income are to be substituted for turnover; three-fourths of

the turnover of businesses engaged in the distribution of goods and 20 times the turnover of publishing enterprises are to be provided.

If you can not provide full information for the other participating enterprises, please provide their addresses.

BUNDESKARTELLAMT

1000 BERLIN 61  
Mehringdamm 129  
(am Platz der Luftbrücke)  
Fernruf: (030) 69 01-1

Betr.: Zusammenschluss USA  
Corp./BRD GmbH

Sehr geehrte Herren,

Ihr Unternehmen ist nach § 23 Abs. 4 GWB verpflichtet, diesen Zusammenschluss beim Bundeskartellamt anzuzeigen, wenn die hieran beteiligten Unternehmen insgesamt im letzten vor dem Zusammenschluss endenden Geschäftsjahr weltweit Umsatzerlöse von mindestens 500 Mio DM bzw. im Inland auf einem Markt Anteile von mindestens 20 % hatten (§ 23 Abs. 1 Satz 1 GWB). Soweit ein beteiligtes Unternehmen ein abhängiges oder herrschendes Unternehmen im Sinne von § 23 Abs. 1 Satz 2 GWB ist, sind für die Berechnung der Marktanteile und der Umsatzerlöse alle herrschenden und abhängigen Unternehmen als einheitliches Unternehmen anzusehen. Das Bundeskartellamt geht bei einer Beteiligung von mindestens 50% in der Regel von einem Unternehmensverbund in diesem Sinne aus. Ich bitte Sie daher—getrennt für jedes beteiligte Unternehmen—um die folgenden nach § 23 Abs. 5 GWB erforderlichen Angaben:

- Firma, Sitz und Art des Geschäftsbetriebes
- verbundene Unternehmen
- Marktanteile im Inland (soweit die Beteiligten einschliesslich der verbundenen Unternehmen *zusammen* mindestens 20 % erreichen)
- Zahl der Beschäftigten
- Höhe der Umsatzerlöse

Marktanteile, Beschäftigtenzahl und Umsatzerlöse sind ferner zusammengefasst für die mit den Beteiligten verbundenen Unternehmen anzugeben. Hatte das erworbene Unternehmen Umsätze von weniger als 50 Mio DM, so bitte ich, zur Prüfung des Anschlussstatbestandes (§ 24 Abs. 8 Nr. 2 GWB) auch die Umsatzerlöse des Veräusserers mitzuteilen.

Für die Berechnung der Umsätze gilt folgendes: Erlöse in fremder Währung sind nach dem amtlichen Kurs in Deutsche Mark umzurechnen. An die Stelle der Umsatzerlöse treten bei Kreditinstituten und Bausparkassen ein Zehntel der Bilanzsumme, bei Versicherungsunternehmen die Prämieinnahmen; Handelsumsätze sind mit drei Vierteln, Presseumsätze mit dem Zwanzigfachen in Ansatz zu bringen.

Sofern Sie über die anderen beteiligten Unternehmen keine vollständigen Angaben machen können, bitte ich um deren Anschriften.