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ARTICLES

Competition and/or Efficiency: A Review of West German Antimerger Law as a Model for the Proposed Treatment of Efficiency Promotion Under Section 7 of the Clayton Act

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I. INTRODUCTION

As many commentators have noted,¹ the end of Ronald Reagan's presidency likely will engender a renewed debate concerning the proper level of government intervention in business integrations.² During the

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¹ See Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where are We Coming From? Where are We Going?* 62 N.Y.U.L. REV. 936 (1987); Ponsoldt, *Introduction to a Retrospective Examination of Antitrust During the Reagan Administration*, 33 ANTITRUST BULL. 201 (Symposium) (1988).

² See *Tougher Antitrust Stance Expected*, N.Y. Times, Apr. 4, 1988, at D1, col. 3 ("Enforcement of Antitrust laws is likely to become significantly more aggressive, particularly regarding mergers, no matter which party wins the White House in November.") The debate will not be limited to the United States. See generally, Lieberknecht, *United States Companies in Foreign Joint Ventures*, 54 ANTITRUST L.J. 1051, 1071-78 (1985). The mega-merger movement has triggered discussions in

past eight years, the number and size of corporate mergers have risen astronomically.³ Such unchallenged mergers have occurred while the Reagan Administration and the Democrats in the United States Congress ("Congress") have debated the appropriateness of merger control laws, both in testimony at oversight hearings and in conflicting proposals for amending Section 7 of the Clayton Act ("Section 7").⁴

Although the underlying debate is profoundly political, reflecting different views of the role of democratic government in regulating wealth distribution,⁵ the political debate largely has focused upon narrower economic and legal questions: whether unrestrained merger activity presumptively increases the economic efficiency of the merged firms and of the markets, and, if so, whether such efficiency promotion precludes, or should preclude, government intervention. The latter question frequently is subsumed within the assertion that "competition" — the statutory goal — necessarily is the equivalent of efficiency.⁶

Germany regarding the possible need to further strengthen the German merger control law, amended as recently as 1980, possibly leading to the challenge of mergers between large German firms solely because of the size of the resultant entity. See, Willeke, *Fuenf Punkte zur Fusionskontrolle*, *Frankfurter Allgemeine Zeitung* [hereinafter, FAZ] Feb. 17, 1986, at 37, col. 1.

³ See Krattenmaker & Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 213 (1988). According to W.T. Grimm & Co. (a United States consulting firm), the total value of merger transactions in 1985 rose to an all-time record level of \$179.6 billion, which was 47% higher than the 1984 record of \$122.2 billion. There were 3,000 merger announcements in 1985, which amounted to an 18% increase over the 2,543 deals in 1984; See 50 *Antitrust & Trade Reg. Rep.* (BNA) No. 1257, at 492-93 (March 20, 1986).

⁴ See, e.g., *Oversight Hearing on the Antitrust Division of The Department of Justice Before the Subcommittee on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986); *Compare*, H.R. 1515, 99th Cong., 2d Sess. (1985) and H.R. 1075, 99th Cong., 2d Sess. (1985) with S. 2160, 99th Cong., 2d Sess. (1985) and H.R. Rep. No. 4247, 99th Cong., 2d Sess. (1986) (Merger Modernization Act of 1986). The conflicting views regarding merger control have spread to Europe in recent years. See *Europe's Merger Plans Called Inadequate*, *Wall St. J.*, Apr. 11, 1988, at 24, col. 1.

⁵ See Ponsoldt, *Democracy and Capitalism Collide* (Letter), *N.Y. Times*, Jan. 9, 1987, § A. at 26, col. 4; Scalia, *The Role of The Judiciary in Deregulation*, 55 ANTITRUST L.J. 191 (1986); Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982); Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 353 (1985).

⁶ Perhaps the best known expression of this view comes from Robert Bork:

A policy of rivalry for its own sake, and in spite of the costs of industrial fragmentation, would outlaw monopoly no matter how gained. The statute's focus upon the process by which monopoly is achieved suggests a different value premise . . . 'Competition' may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.

R. BORK, *THE ANTITRUST PARADOX*, at 57, 61 (1978). Bork's further equating of consumer welfare with maximized allocative efficiency and aggregate societal wealth demonstrates an indifference to wealth distribution between consumers and sellers and between large and small businesses. See, Lande, *supra* note 5, at 67, n.2. Bork, in any event, does not deal with the actual legislative history of the Sherman and Clayton Acts, which recognized "competition" simply to mean business rivalry, which often was furthered by, in Bork's words, "fragmentation" of the markets. See generally, H.

The Reagan Administration's refusal to challenge mergers, relying upon an efficiency rationale, has been sharply criticized for intolerably undermining the existing rule of law.⁷ Most observers today recognize that efficiency considerations should play a role in merger enforcement, particularly as markets have expanded beyond national boundaries. However, the existing state of the law, developed primarily between 1950 and 1974, regards efficiency as virtually irrelevant.⁸

The purpose of this Article is to demonstrate the need for legislative change in the Clayton Act. Such change should be based upon the merger control legislation enacted in the Federal Republic of Germany ("Germany"), which explicitly recognizes an appropriate role for the efficiency effects of mergers but, at the same time, often subordinates the role of efficiency to the quite separate goal of protecting competitive markets, when those goals conflict. This Article first will briefly summarize the existing state of United States antimerger law, insofar as Section 7 of the Clayton Act and its history incorporate efficiency considerations. The Article then will review the German merger control legislation, particularly focusing upon the efficiency considerations under Sections 22-24a of the Gesetz gegen Wettbewerbsbeschränkungen ("GWB"), and, finally, will suggest that the German model constitutes an appropriate compromise between the libertarian and populist extremes in the United States.⁹

THORELLI, THE FEDERAL ANTITRUST POLICY—ORGANIZATION OF AN AMERICAN TRADITION, at 226-27, 564-68 (1955).

⁷ Compare Scalia, *supra* note 5, with Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163 (1988). See also Flynn, *The "Is" and "Ought" of Vertical Restraints After Monsanto*, 71 CORNELL L. REV. 1095, 1102-24 (1986).

⁸ See *infra* notes 24-50 and accompanying text. By contrast, efficiency considerations always have played a role in German merger control law. See, e.g., Belke and Braun, *German Merger Control Law: A European Approach to Anticompetitive Takeovers*, 1 NW. J. INT'L L. & BUS., 371 (1979); Note, *Trust Busting with a German Accent: The Control of Corporate Merger and Acquisitions Activities Under Increasingly Aggressive West German Law*, 19 VA. J. INT'L L. 595 (1979).

⁹ See *infra* notes 17, 51-58 and accompanying text. The German Monopolies Commission published its sixth report on developments in German merger control law on July 7, 1986. The FAZ summarizes this report in *Mega-Mergers Are A Political Danger*, FAZ, July 9, 1986, at 11, col. 3 (Authors' Translation):

The Commission contends that the merger control law does not allow a sufficient control of conglomerate mega-mergers. Such large mergers could not only be assessed according to their effects on a particular market. Rather, an overall examination is needed, also taking into consideration the risks for society arising from the conglomeration of political power. On the one hand these risks result from the possibility that this power could be used to exert an uncontrolled influence on the decisions of political institutions, on the other hand the conduct of big mergers inevitably has consequences on the overall economy. Large-scale decisions of enterprises are not only to be examined in regard to the principle of private autonomy; they also affect the public interest.

Especially external expansion would be critical, since it would constitute an especially fast and efficient strategy for the build up of big corporate entities. Internal expansion should be regarded as positive from the perspective of the overall economy since the creation of new

II. AN OVERVIEW OF MERGER CONTROL LAW

Since merger control law was first introduced in both the United States¹⁰ and West Germany,¹¹ opponents of those laws have argued continuously that the preservation of a competitive process leads to sacrifices in business efficiency. Only a very large firm can be in the best position to realize significant efficiencies and to be internationally competitive. Thus, businessmen have contended that measures to prevent concentration in the industries of those two nations frustrate the goal of attaining merger-engendered efficiencies and technological progress.¹²

To a limited extent, the German legislature accepted those arguments. Under Section 24(3) GWB, firms can rely upon the social desirability of efficiencies as a defense to an otherwise anticompetitive merger. Nevertheless, the strict prerequisites for such a defense, and its place in merger analysis, suggest that the preservation of a competitive structure is conceived to be the main safeguard for the efficiency-yielding potential of firms. Sacrificing competition for business efficiency remains the exception.

United States antimerger law lacks such a defense. The law does not break with the principle of competition and rejects any endorsement of anticompetitive mergers in order to gain a result which would otherwise be expected from an unconcentrated market. As one commentator has stated: "Faced with the choice between promoting cost savings of firms with economic power and protecting freedom and opportunity of firms without economic power, the Supreme Court declared that the law

capacities would broaden the supply on markets and, thus, lead to the enhancement of competition. On the other hand, external expansion results in the acquisition of market shares and capacities by which the number of independently operating enterprises is reduced and the competitive pressures are diminished.

The Commission, therefore, suggests a more efficient control of big mergers directed against the dangers of this kind of concentration. A better *accountability* could be a first step: The Federal Cartel Office should be obliged to publish the leading reasons for *not* challenging a big merger. Since the presumptive rules (introduced by the 1980 Amendment to the GWB) had proved to be ineffective, one should think about giving up the intervention criterion of market domination for a limited group of big mergers.

¹⁰ Section 7 of the Clayton Act was enacted in 1914 (Ch. 323, § 7, 38 Stat. 730, 731-32 (1914)) and amended by the Celler-Kefauver Act (Ch. 1184, 64 Stat. 1125 (1950))(codified as amended at 15 U.S.C. § 18 (1982)).

¹¹ The German merger control law was enacted in 1974. Second Amendment to the Law Against Restraints of Competition of August 4, 1973, [1973] Bundesgesetzblatt I [BGBl.I] 917.

¹² See Note, "Substantially To Lessen Competition . . .": *Current Problems of Horizontal Mergers*, 68 YALE L.J. 1627, 1654 (1959)(summarizing and discussing earlier complaints against antitrust). See also J. DIRLAM & A. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY, 10-11 (1954); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1144 n. 13 (1981)("the 'new' criticism of antitrust is, in fact, not new."). For a summary of German literature on this topic, see I. SCHMIDT, WETTBEWERBSTHEORIE UND POLITIK, 56-68 (1981).

favored the latter."¹³ Moreover, a post-merger firm's increased efficiency has sometimes become the rationale for condemning, rather than upholding, a merger.

In the early 1970s the economic conditions in both Germany and the United States began to change dramatically: domestic firms faced fierce competition from abroad which, in turn, led to high levels of unemployment. The call for more business efficiency became louder.¹⁴ Despite similar economic problems, the merger control policies of the two nations began to differ substantially in the methods each employed to achieve increased efficiency. German merger control law and policy continued to adhere to the concept of preserving a competitive market structure conducive to economic rivalry among numerous market participants, which in turn would lead to productive and allocative efficiency. In contrast, United States merger control policy, in practice, has shifted away from this principle and regards increased autonomy of firms as a superior route to efficiencies. Non-intervention in the marketplace is preferred over measures which constrain concentration of the marketplace, regardless of the existing state of the law. Thus, German law and practice have consistently reflected a compromise between regulation and non-intervention, while United States practice has deviated radically from its more interventionist legal premises.

Stated very briefly, the competitive effects examination under Section 7 is undergoing a change in focus from a structuralistic analysis of the long-term consequences of an industry's market structure to an efficiency analysis of the hypothesized short-term effect of a merger on the industry's output and prices.¹⁵

The reasons for this shift in United States merger control policy can be found in a conservative political ideology and its resulting change in the balance of power among economists.¹⁶

¹³ Fox, *supra* note 12, at 1142.

¹⁴ See Fox, *The 1982 Merger Guidelines: When Economists are Kings*, 71 CALIF. L. REV. 281, 283 (1983).

¹⁵ See Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984)(delineating this development).

¹⁶ See Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 5 (1980); see also Fox, *supra* note 14, at 283, 297.

III. UNITED STATES MERGER CONTROL LAW: A SUMMARY OF EFFICIENCY CONCERNS WITHIN SECTION 7 OF THE CLAYTON ACT

A. Statutory Language of Section 7 of the Clayton Act

The first issue to be examined is whether the actual language of Section 7 permits the consideration of efficiency gains as a justification for a merger. The wording alone of Section 7 offers no clear indication. The provision is broadly phrased to prohibit mergers, or a series of mergers, which might "substantially lessen competition." In contrast to Sections 22-24a of the German Law Against Restraints of Competition, Section 7 gives no explicit guidance for the analysis of anticompetitive effects which may result from a merger.¹⁷ Instead, Section 7 leaves the task of defining the term "substantially to lessen competition" to the courts. "Competition" can be defined in many ways, and thus the objectives of Section 7 can be interpreted very differently. Depending upon the outlook adopted by the particular court, an efficiency defense can be either permitted or rejected.

Assuming that procompetitive effects¹⁸ would actually be achieved through merger-induced efficiency gains, those effects clearly should constitute a part of the "anticompetitive effects" analysis required by Section 7. Logic suggests that a procompetitive merger cannot be anticompetitive.¹⁹ However, if evaluation of certain criteria (such as market share data, the level of concentration, or the existence of barriers to entry) have led to the conclusion that a merger in a relevant market is anticompetitive, it is difficult to conceive how the merger still can be justified by procompetitive effects in the same market. Furthermore, the question arises whether power gains of a merger in one market can be balanced against procompetitive effects caused by the same merger in another market.

The statutory language of Section 7 is ambiguous, neither compelling nor foreclosing the consideration of efficiencies in merger analysis.

¹⁷ Sections 22-24a, Gesetz gegen Wettbewerbsbeschränkungen [GWB] (German Merger Control Law)(requiring a higher threshold for challenging a merger than does Section 7 of the Clayton Act) defines market power as a superior market position of an enterprise in relation to its competitors. It points to certain indicators of the existence of such a position and allows efficiencies justifications rebutting the presumptive illegality of a merger.

¹⁸ Regardless of whether "competition" is defined merely by output restriction (welfare) theory or understood in a structural sense.

¹⁹ Rogers comes to the same conclusion by examining the question whether Section 7 precludes any substantial lessening of competition caused by a merger or whether the statute is directed to substantial lessening of competition on balance, and argues the latter. Rogers, *The Limited Case for An Efficiency Defense in Horizontal Mergers*, 58 TUL. L. REV. 503, 507-10 (1983).

Consequently, the statute must be examined in conjunction with its legislative history in order to determine the proper role of efficiency considerations in merger enforcement.

B. Legislative History

Congress did not agree on precise standards for the competitive effects test prescribed by the Clayton Act, but instead left such a determination to the courts.²⁰ It is, therefore, necessary to examine the congressional concerns which prompted the enactment of the Clayton Act and the Celler-Kefauver Amendment,²¹ and to identify the dominant values of United States merger control law. The analysis will focus on whether Congress acknowledged that a merger which leads to a gain in market power could also enhance the achievement of efficiencies.

1. Congressional Concerns Other Than the Promotion of Economic Efficiency²²

Congress' dominant concern, prompting the 1950 Celler-Kefauver Amendment, was the rising industrial concentration in the United States economy.²³ Alarm about the economic, social and political effects of this change in market structure was the common spirit emerging from the committee reports and debates. The legislators aimed at dispersing economic power and viewed competition as a process requiring numerous participants and decentralization.

The political consequences of the ongoing merger movement were clearly a major congressional concern: it was feared that the domination of United States industry by a few corporate giants could lead to totalitarianism. An over-concentration of economic power in a handful of corporations would not be tolerated by the public and therefore would lead to increased government control.²⁴

²⁰ Bok, *Section 7 of The Clayton Act and The Merging of Law and Economics*, 74 HARV. L. REV. 226, 237 (1960)(pointing to the paucity of remarks concerning the specifics of how the act was to be applied).

²¹ Ch. 1184, 64 Stat. 1125 (1950)(codified as amended at 15 U.S.C. § 18 (1982)).

²² The legislative history of the 1914 Clayton Act and of the 1950 Celler-Kefauver Amendment will be jointly taken into account in the following analysis.

²³ H.R. REP. NO. 1191, 81st Cong., 1st Sess., 2 (1949); S. REP. NO. 1775, 81st Cong, 2nd Sess. 3 (1950).

²⁴ See, e.g., 96 CONG. REC. 16452 (1950)(remarks of Sen. Kefauver). See also *id.* at 16,503-04 (statement of Sen. Aiken); *id.* at 16,446 (remarks of Sen. O'Mahoney). Concerning the political ramifications of high levels of concentration, see the remarks of President Franklin D. Roosevelt in a message to the Congress entitled *Message From President Franklin D. Roosevelt to the Congress Transmitting Recommendations Relative to the Strengthening and Enforcement of Antitrust Laws* (April 29, 1938), reprinted in 4 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTI-

Antitrust law was intended to prevent any firm from having undue access to the political system.²⁵ In this respect the statement by Representative Celler (one of the co-sponsors of the 1950 Celler-Kefauver Amendment) points to the history of cartelization and concentration of industry in Nazi Germany, arguing that the industrial monopolies brought Hitler to power and the world into war.²⁶ That statement exemplifies the way the lack of antitrust law in Germany during the 1930s served as a negative example, thereby influencing the development of United States merger control law.

The social implications of high levels of concentration of economic power were repeatedly addressed in the congressional debates: legislators lamented that the destiny of the people would be determined by the decisions of persons who lived far away.²⁷ Local initiative and civic responsibility would be diminished.²⁸ Congress preferred a society that was composed of small, independent, decentralized businesses.²⁹

A similar aim of the deconcentration policy favored by the legislature was the preservation and enlargement of the freedom of business opportunity. This objective has both economic and non-economic ("populist") implications.³⁰ The "chances of the average man to make a place for himself in business" were to be preserved.³¹ The individual who wishes to become an entrepreneur should have free access to the markets; his chances should not be restricted by barriers to entry. This freedom of action for the small entrepreneur was to be secured by maintaining a market structure conducive to competition, by limiting the discretion of large corporations, and by placing those corporations under the discipline of the market.³²

TRUST LAWS AND RELATED STATUTES 3404-06 (1982). For similar concerns expressed in the legislative history of the 1914 Clayton Act, see 51 CONG. REC. 9086 (1914)(remarks of Rep. Kelly); *id.* at 9167 (remarks of Rep. Nelson).

²⁵ For commentaries acknowledging the congressional concern for political values, see Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060-65 (1979); Bok, *supra* note 20, at 235.

²⁶ 96 CONG. REC. 11486 (1949)(statement of Rep. Celler).

²⁷ 95 CONG. REC. 11495 (remarks of Rep. Bryson). The same concern was also expressed by the United States Supreme Court in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 315 (1963).

²⁸ See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 541-42 (1973)(Douglas, J., concurring in part).

²⁹ 95 CONG. REC. 11486 (1949)(remarks of Rep. Celler).

³⁰ For a discussion emphasizing the economic issues, see Sullivan, *The New Merger Guidelines: An Afterword*, 71 CALIF. L. REV. 632, 636 (1983). For a discussion of the "populist" issues, see Pitofsky, *supra* note 25, at 1056.

³¹ 95 CONG. REC. 11506 (1949)(remarks of Rep. Bennett).

³² Freedom of opportunity was a major theme in the legislative history of the 1914 Clayton Act. See 51 CONG. REC. 15867 (1914)(remarks of Sen. Reed); *id.* at 9197 (1914)(remarks of Rep. Taggart).

An economic concern, which is evident in the legislative history of the Clayton Act and the Celler-Kefauver Amendment, is that mergers which would create or increase market power would lead to supra-competitive pricing and would directly harm consumers. In contrast, the promotion of rivalry among numerous firms for a greater share of the market would "protect consumers from paying artificially high prices."³³ Legislative steps to prevent trends towards economic concentration in their incipiency were considered the best guarantee against "unfair exploitation."³⁴ Put into purely economic terms, Congress wanted to protect consumers from unfair transfers of wealth from buyers to sellers.³⁵

2. *The Improvement of Economic Efficiency as a Congressional Concern*

Evidence of congressional concern with allocative inefficiency cannot be found in the legislative history of the 1914 Clayton Act nor the 1950 Celler-Kefauver Amendment.³⁶ The legislators did, however, discuss the extent to which the antimerger statutes could affect productive efficiency.³⁷ The majority in Congress believed that an anti-concentration policy would enhance corporate efficiency.³⁸ A possible conflict between the goals of dispersing economic power and of achieving corporate efficiency — through mergers generating efficiencies as well as contribut-

³³ 95 CONG. REC. 11506 (1949)(remarks of Rep. Byrne); *see also id.* at 11493 (remarks of Rep. Carroll).

³⁴ *Id.* at 11506 (remarks of Rep. Bennett).

³⁵ Fox states:

While Congress expected all of the people to get the political benefits of a decentralized economic system, in the sense that decentralization would tend to stave off fascism, socialism and communism, Congress preferred exploited consumers to exploiting producers and it preferred profit opportunities for 'new men, new energies, and a new spirit of initiative' to profit opportunities for entrenched persons or firms with power or leverage.

Fox, *supra* note 14, at 296 n.104.

³⁶ The implications of the allocative efficiency model should be explored further with respect to the validity of Oliver Williamson's market power/efficiency theory for merger analysis. At this point Fox's remarks, *supra* note 35, should be modified insofar as Congress most probably would have welcomed the achievement of allocative efficiency as the by-product of the competitive process. In an earlier article Fox develops this concept of efficiency which is in accord with the legislative history and precedent: "An environment which is conducive to vigorous rivalry" would also enhance efficiency and progressiveness. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1154, 1169 (1981).

³⁷ Opponents of the bill lamented a major threat to the efficiency of both large and small firms. *See, e.g.*, 95 CONG. REC. 11487 (1949)(remarks of Rep. Goodwin).

³⁸ *See, e.g.*, 95 CONG. REC. 11,486 (1949)(remarks of Rep. Celler); *id.* at 11,493 (remarks of Rep. Carroll)(stating that free competition "safeguards . . . the development of new types of business and industry"); *id.* at 11,723 (1949)(remarks of Rep. Yates)(stating that in a concentrated market "big concerns will adopt a live and let live policy towards each other at the sacrifice of their efficiency and their progress").

ing significantly to economic concentration — was not squarely addressed. One can only speculate whether Congress would have regarded the achievement of efficiencies as justification for mergers resulting in market power gains.

As demonstrated above, the legislative record reveals a dominant concern with the social, political and other non-efficiency economic effects of the rising industrial concentration in the United States economy. The principal goal of the antimerger statutes was the dispersion of economic power. Thus, it can be inferred that Congress in 1950 would not have been willing to forego its market power concerns in order to increase corporate efficiency: the legislators were willing to risk efficiency losses in order to prevent a possible increase in market concentration. The legislative history suggests a clear inclination to resolve the above-mentioned conflict in favor of a strict antimerger policy, not allowing an efficiency defense.³⁹

Some commentators, however, contend that Congress placed a significant emphasis on efficiency as a goal of antimerger policy and did not preclude an efficiency defense,⁴⁰ that Congress believed that when efficiency exists, it should weigh in favor of a merger.⁴¹ However, the evidence offered to support this contention is not convincing.⁴² The fact that efficiency concerns were incorporated into prior legislation in 1941 and 1943⁴³ does not reveal a clear legislative intent favoring mergers which promote efficiencies. Those earlier bills were considered prior to the influential 1948 Federal Trade Commission report examining the merger movement in United States industry.⁴⁴ Congress, confronted with the report's information, was principally concerned with this change in market structure. It can reasonably be concluded that effi-

³⁹ See Ponsoldt, *The Expansion of Horizontal Merger Defenses After General Dynamics: A Suggested Reconsideration of Sherman Act Principles*, 12 LOY. U. CHI. L.J. 361, 398 (1981)(calling the efficiency defense a "section seven anomaly"); Bok, *supra* note 20, at 307, 318. Bok suggests that "perhaps more explicit guidance should be demanded from Congress before adopting an interpretation which could block really important increases in efficiency," yet he does not believe there is a substantial likelihood that efficiencies will be generated by mergers and stresses the alternative avenue of internal expansion open to companies. *Id.* at 318-319. See also Pitofsky, *supra* note 25, at 1064.

⁴⁰ 4 P. AREEDA & D. TURNER, *ANTITRUST LAW* § 941b, § 903, § 904 (1980)(demonstrating the limited role of non-economic values in the legislative history).

⁴¹ Muris, *The Efficiency Defense under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 402 (1980).

⁴² For a comprehensive criticism of Muris's analysis, see Lande, *supra* note 5, at 132-33.

⁴³ See S. DOC. NO. 35, 77th Cong., 1st Sess. (1941); S. 577, 78th Cong., 1st Sess. (1943); and H.R. 1517, 78th Cong., 1st Sess. (1943).

⁴⁴ FTC, REPORT ON THE MERGER MOVEMENT: A SUMMARY REPORT, 1948, reprinted in E. KINTNER, *supra* note 24, at 3436.

ciency justifications were consciously deleted.⁴⁵

Furthermore, Congress' intention to permit mergers between relatively small firms, enabling them to offer increased competition to larger companies,⁴⁶ is not sufficient evidence for the above-mentioned point of view.⁴⁷ Section 7 only forbids mergers which would lead to a "substantial" lessening of competition. Mergers between small companies do not have such an effect, for they do not result in a firm with a sufficient degree of market power to threaten competition. Apparently, Congress merely intended to exempt *de minimis* mergers.⁴⁸

Thus, it can be concluded that Congress' dominant concerns in 1950 were the political, social and economic effects of the rising industrial concentration in United States industry following World War II. The legislators aimed at the dispersion of economic power in order to preserve a market structure composed of numerous participants. Any concern for the achievement of corporate efficiency was secondary. It follows that, although the conflict between the goals of dispersing economic power and achieving corporate efficiency was not squarely addressed, Congress would not have regarded the achievement of efficiencies as justification for a merger contributing to economic concentration. Indeed, the legislators were willing to risk efficiency losses in order to prevent a possible increase in concentration.

The United States Supreme Court's interpretation of the Congressional purpose of the Clayton Act during the 1960s has been consistent with the above summary of legislative history.⁴⁹ Neither Congress nor the Supreme Court has reversed course with respect to the role of eco-

⁴⁵ For a discussion of the difficulty of drawing conclusions from the prior history of unsuccessful bills, see Bok, *supra* note 20, at 251; *see also* Lande, *supra* note 5, at 132.

⁴⁶ *See, e.g.*, 95 CONG. REC. 11488 (1949)(statement of Rep. Celler); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 6-7 (1949).

⁴⁷ *But see* P. AREEDA & D. TURNER, *supra* note 40, § 904, at 12-13; Muris, *supra* note 41, at 399.

⁴⁸ Lande, *supra* note 5, at 132.

⁴⁹ *See, e.g.*, Federal Trade Commission v. Procter and Gamble Co., 386 U.S. 568 (1967); United States v. Philadelphia National Bank, 374 U.S. 321, 371 (1963); *See generally* E. SULLIVAN, ANTI-TRUST LAW 630-31 (1977). In a Section 1 Sherman Act case filed prior to the enactment of Section 7 of the Clayton Act, the Supreme Court disregarded the issue of efficiencies. United States v. U.S. Steel Corp., 251 U.S. 417, 443-44 (1919). The defendant, United States Steel Corporation, formed by the merging of approximately 180 separate firms, had contended that there was a "necessity for integration, and rescue from the old conditions — from their improvidence and waste of effort; and that, in redress of the conditions, the Corporation was formed, its purpose and effect being 'salvage not monopoly.'" *Id.* at 443. For a discussion relating this decision to the new 1984 Merger Guidelines of the United States Department of Justice, see Miller, *Notes on the 1984 Merger Guidelines: Clarification of the Policy or Repeal of the Celler-Kefauver Act?*, 29 ANTITRUST BULL. 653, 659 (1984).

conomic efficiency in United States antimerger law.⁵⁰

IV. WEST GERMAN MERGER CONTROL LAW: SECTIONS 22-24A GWB

To ascertain the role of efficiency considerations and other values in German merger control law, a different mode of analysis than that employed in the evaluation of United States merger control law is necessary. There are two reasons for this. First, the statutory language of Sections 22-24a GWB is much more explicit than Section 7. The legal structure of the German antimerger statutes and their legislative history clearly reveal when, and under which conditions, efficiency considerations should be incorporated into the legal analysis of mergers. The significance of the judicial decisions lies in interpreting these provisions and determining their parameters. Second, the role of precedent (*stare decisis*) is a unique feature of Anglo-American law and is alien to the German legal system. In practice, however, the decisions of the German Bundesgerichtshof ("supreme court") are generally followed by the lower courts.⁵¹

Section 24(1) GWB and Section 24(3) GWB provide ways to integrate efficiency justifications into the legal examination of mergers. An analysis could, therefore, immediately focus on the contents of these two statutes. This procedure, however, is not advisable. The construction of these statutes and the assessments of their limits, depends heavily upon the policy and the goals of German merger control law.

Thus, in the discussion which follows, first the legislative history of German merger control law will be reviewed in order to gain insight into the purposes of Sections 22-24a GWB. Then, the role of efficiency considerations in Sections 24(1) GWB and 24(3) GWB will be examined.

A. Legislative History and Objectives of German Merger Control Law

The German merger control law was enacted in 1973 as an amendment to the Law Against Restraints of Competition.⁵² The antimerger provisions can be separated into two principal bodies of law: the report-

⁵⁰ See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562, 569-70 (1972) (Court rejected the efficiency argument, implying that such a defense had been foreclosed by earlier decisions). See also 4 E. KINTNER, *FEDERAL ANTITRUST LAW*, § 34.13 at 181, § 35.27 at 233 (1984).

⁵¹ See generally, U. IMMENGA & E. MESTMACKER, *GWB-KOMMENTAR ZUM KARTELLGESETZ*, § 23, no. 30(1981).

⁵² Second Amendment to the Law Against Restraints of Competition of August 3, 1973, [1973] *BGBI* 917. The Law against Restraints of Competition was enacted on July 27, 1957 and became effective on January 1, 1958. [1957] *BGBI* 1081.

ing provisions under Sections 23 and 24a GWB and the substantive provisions under Sections 22, 23a and 24 GWB. Although this statutory structure will be surveyed more carefully below, this much shall be stated here: under section 24(1) GWB, the Cartel Office is empowered to prohibit mergers which are likely to create or strengthen a market-dominating position. As under Section 7, the threshold inquiry is directed toward the effects a merger is likely to have on competition. United States law, however, intervenes at a lower degree of competitive impact than does the German law; namely, when a merger is likely to lessen competition substantially or will tend to create a monopoly.

There were two fundamental reasons for the enactment of the German antimerger statutes. First, official inquiries into the concentration of the German industry had led to a greater awareness of the growing merger-movement.⁵³ Additionally, a change in government had occurred in 1969. The Social Democratic Party ("SPD"), in coalition with the liberal party ("FDP"), had taken control for the first time in German post-war history. In his first address to parliament, Chancellor Willy Brandt announced that the GWB should be modernized and supplemented by preventive merger control provisions.⁵⁴

The final draft of the antimerger law stated that "problem number one of antitrust policy today is not any more cartelization but concentration." Concentration was seen to be "dangerous" for both economic and socio-political reasons.⁵⁵ The economic concern was based on a structure-conduct-performance paradigm: a high level of concentration would lead to reduced use of competitive parameters and ultimately to bad performance by the firms in the marketplace, yielding less efficiency and technical progress. Thus, an unconcentrated market structure was perceived to be the best guarantor for both higher productive and allocative efficiency. Furthermore, the socio-political implications of an increased concentration were envisaged: private economic power could constitute a threat to a free market economy which ultimately would endanger political democracy.⁵⁶ The principal goal of the legislators was, therefore, the

⁵³ See, e.g., KONZENTRATIONSENQUETE, DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES [BT-Drucks.] IV 12,320 (1964); Bericht des Bundeskartellamtes ueber seine Taetigkeit im Jahre 1968 (Federal Cartel Office, Annual Report, 1968) BT-Drucks. V 14236 (1969).

⁵⁴ Verhandlungen d. 6. Deutsche Bundestages, 5. Sitzung, Stenographischer Bericht October 28, 1969, at 23B (Congressional Record of the Lower House of the 6th Federal German Parliament).

⁵⁵ Entwurf eines Zweiten Gesetzes zur Aenderung des GWB, (Draft of the Second Antitrust Law Reform Act of 1973), BT-Drucks. VI 12520 (1971). The identical draft was reintroduced to parliament after the reelection of the SPD-FDP coalition in November 1972, BT-Drucks. 7/76, at 16 (1973).

⁵⁶ However, the legal criteria for examining the effect of the merger on competition (Sections 22

dispersion of economic power in order to maintain the market structures which make effective competition possible.

This objective was carried further in the Fourth Amendment to the Law Against Restraints of Competition of April, 1980, which strengthened the German merger control law.⁵⁷ Official inquiries by the Monopolies Commission ("Commission")⁵⁸ into the concentration of the German industry triggered this development of the law. The Commission concluded that merger control had been unsuccessful in preventing certain kinds of market concentration. Furthermore, the controls had not been sufficiently effective in the case of non-horizontal mergers.⁵⁹ As a result, the following provisions were enacted. First, the small enterprises exemption of section 24(8) GWB was narrowed considerably. Under the old exemption, mergers involving enterprises with a turnover of less than 50 million Deutschmarks ("DM") were exempted from prohibition. The aim of this clause was to enable small and medium-sized businesses to be sold or to merge at a good price. This profitable possibility favors small entrepreneurship and would encourage newcomers to enter such markets.

The exemption, however, turned out to be counter-productive, for big corporations systematically acquired small and medium-sized enterprises. Of the 42% of all mergers exempted under section 24(8) GWB in 1978, 85% of those mergers involved corporate giants with a yearly turnover exceeding DM1 billion.⁶⁰ This development increased the trend towards concentration in markets composed of small and medium-sized corporations. Small companies were deterred from staying independent and competing against their vertically integrated rivals, and many viewed combining with a strong firm as the only means of survival.⁶¹ Thus, the exemption provided in Section 24(8) GWB no longer applies to those mergers in which the acquiring enterprise has at least a DM1 billion

and 24(1)) do not directly refer to the socio-political importance of the merged company. The principal criteria is the creation or enhancement of a market-dominating position.

⁵⁷ Fourth Amendment to the Law Against Restraints of Competition of April, 1980, [1980] BGBl.I 458.

⁵⁸ The Monopolies Commission (Monopolkommission) is required by Section 24b GWB to issue a report on concentration developments in Germany every two years and to give opinions concerning pending cases. MONOPOLKOMMISSION, HAUPTGUTACHTEN 1973/1975 (Monopolies Commission, Main Report 1973/1975)(2d ed. 1977); MONOPOLKOMMISSION, HAUPTGUTACHTEN 1976/1977 (1978); MONOPOLKOMMISSION, HAUPTGUTACHTEN 1978/1979 (1980).

⁵⁹ The major reason was that the presumptive rule of market domination was based on market share data.

⁶⁰ MONOPOLKOMMISSION, HAUPTGUTACHTEN 1973/1975, *supra* note 58, at no. 925.

⁶¹ See U. IMMENGA & E. MESTMACHER, *supra* note 51, at § 23, no. 31, 34; EMMERICH, KARTELLRECHT, 256 (3d ed. 1979).

turnover and the acquired enterprise's turnover does not exceed DM4 million.

The same concern for small and medium-sized businesses led to the enactment of Section 23a(1)(1)(a) GWB.⁶² Under that provision, the creation or strengthening of market domination will be assumed where an enterprise with a turnover of DM2 billion merges with another enterprise in a market in which small and medium-sized enterprises have a two-thirds share of the market and the merger would lead to a market share of at least 5%.

The second presumptive rule enacted in 1980 is Section 23a(1)(1)(b) GWB and is aimed primarily at better prevention of vertical and conglomerate concentration: market domination shall be presumed where an enterprise with a DM2 billion turnover merges with an enterprise which has a dominant position in one or more markets in which overall turnover exceeds DM150 million. Between 1973 and 1980, German merger control was not entirely successful in preventing large enterprises from acquiring a market-dominating corporation in a market unrelated to the activities of the acquiring firm. The difficulties can be explained by the fact that the German merger control policy was mostly geared to market share data and the degree of concentration in a specific market. The policy did not sufficiently take into account the negative competitive effect arising when a leading firm in one market is acquired by a powerful firm, thereby entrenching the acquired firm's leading position.⁶³

The third relevant provision, Section 23a(1)(2) GWB, presumes market domination when the participating enterprises together have a DM12 billion turnover and at least two of the combining enterprises each have a DM1 billion turnover. The legislators were concerned with the accumulation of such resources because of their influence on the concentration climate in the country. It was thought that usually these kinds of so-called "marriages of elephants" would lead to a market dominating effect.⁶⁴

The presumptions of Section 23a GWB, adopted in 1980, seem to imply a merger policy focused purely on size. Their practical relevance, however, is limited: once the conditions of these provisions are met, the Federal Cartel Office ("FCO") can tentatively presume the creation or

⁶² Regierungsbegründung zu dem Entwurf eines Vierten Gesetzes zur Änderung des GWB, BT-Drucks. 8/2136, at 21.

⁶³ MOSCHEL, *GESETZGEGEN WETTBEWERBSBESCHRÄNKUNGEN*, 554 (1983); EMMERICH, *supra* note 61, at 257; U. IMMENGA & E. MESTMACKER, *supra* note 61, at § 23, no. 29.

⁶⁴ Bericht des Ausschusses für Wirtschaft zu dem Entwurf eines Vierten Gesetzes zur Änderung des GWB (Report of the Committee on Economics on the Draft of the Fourth Amendment to the Law against Restraints of Competition), BT-Drucks. 8/3690 (1980).

strengthening of a market dominating position. After the merging parties adduce evidence, the FCO must further investigate these factors for an assessment of the merger's competitive effect. Only when the investigation leads to a "non liquet" situation (where a doubt remains as to the merger's competitive effect), does the presumption of market domination become relevant and attain substantive significance.⁶⁵ The presumptive rules of Section 23a GWB, however, do indicate that the size of a firm's resources shall play a more significant role in the assessment of the competitive effects, particularly in the case of vertical and conglomerate mergers.

To summarize, the Fourth Amendment to the Law Against Restraints of Competition of 1980 shows the legislature's concern with the deterrent effect which mergers involving big enterprises can have on small entrepreneurship. The increasing amount of vertical and conglomerate mergers was perceived to be a threat to competition in German industry. The fight against concentration was therefore strengthened, in order to preserve a market structure with numerous enterprises conducive to effective competition, by prohibiting the creation or entrenchment of market power. A market which protects the ability of smaller firms to compete will attract new companies and therefore stimulate greater competition. Thus, German merger control law contains more than a mere economic dimension. A chief function of its policy, directed towards the dispersion of economic power, is the protection of the freedom of economic activity.⁶⁶

B. The Role of Efficiency Considerations in Section 24(1) GWB and Section 24(3) GWB

Mergers which lead to efficiency gains are relevant on three different levels of the legal analysis under Section 24 GWB: first, concerning the question of whether or not the merger leads to the creation or reinforcement of a market dominating position (Section 24(1) GWB); second, concerning the question of whether the merger leads to an improvement in the conditions of competition which outweighs the disadvantages of market dominance (the balancing clause in Section 24(1) GWB); and

⁶⁵ See MOSCHEL, *supra* note 63, at 551; U. IMMENGA & E. MESTMACKER, *supra* note 51, § 23 No. 7. But see Baur, *The Control of Mergers Between Large, Financially Strong Firms in West Germany*, 136 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 444, 454 (1980).

⁶⁶ "[The statute's] purpose is to secure freedom of competition and to eliminate economic power where that power impairs the effectiveness of competition, interferes with its tendencies to improve economic performance and endangers the best protection of consumer interest." Government Report Accompanying the Bill for a Law Against Restraints of Competition, 21 (1954).

third, in the context of the public interest exemption in Section 24(3) GWB.

1. Efficiencies as Another Basis for Invalidating a Merger

In German merger control law, efficiency gains play a significant role in determining whether a merger leads to the creation or reinforcement of a market-dominating position. However, the fact that the combination of two companies' resources leads to cost savings is, by itself, irrelevant in the context of Section 24(1) GWB. The determinative factor is the impact of these efficiencies on the competitive conditions and on the structure of the particular market.

This point can be clarified by examining the formulation of the anticompetitive-effects test put forth in Section 24(1) GWB in connection with Section 22 GWB. According to these statutes the FCO shall prohibit a merger if it can be expected that the merger will create or strengthen a position of market domination. An enterprise or an oligopolistic group is market-dominating if it is not subject to any substantial competition or has a superior market position in relation to its competitors. The latter alternative has become decisive in merger control enforcement because it constitutes a lower threshold of competitive restraint and is much easier to prove than the lack of substantial competition.

The "superior market position" test necessitates a comparison between competitors in a particular market — a firm has market power if it has a latitude of freedom of conduct in developing its market strategies and in determining its market behavior.⁶⁷ Section 22(1) Nr.2 GWB provides some examples of such market dominance: in addition to the enterprise's market share, particular regard shall be given to its financial strength, its access to supply and sales markets, its corporate ties to other enterprises, as well as to legal or factual barriers to market access for other enterprises. The significance of these indicators may be influenced by efficiencies of a firm.

For example, a merger which leads to significant efficiency gains may increase barriers to entry in the relevant market. Such a result is possible if the minimum efficiency scale of a firm is raised through the achievement of economies of scale or if the firm gains absolute cost advantages, such as technological economies (mostly by sampling patents)

⁶⁷ Judgment of Feb. 21, 1978, Bundesgerichtshof [BGH] 28 Wirtschaft und Wettbewerb, Entscheidungssammlung zum Kartellrecht. [WuW/E] 1501, 1507; YUENGST, MARKTBEHERRSCHUNGSBEGRIFF UEBERRAGENDE MARKSTELLUNG (§ 22(1) NR. 2 GWB) UND DIVERSIFIKATION, 71 (1980).

or capital cost economies (by gaining better access to financial markets). It is undisputed that these effects deteriorate the structure of a market and may — together with other factors such as market share and concentration indicators — lead to the prohibition of a merger. Small potential entrants may be deterred from entering the market for fear that the competitive advantages of the larger firms may be so significant that the small firms could be driven out of the market. In turn, efficiency-induced cost savings may grant the larger enterprises additional pricing flexibility with which to combat potential new entrants.

Particularly obvious is the connection between efficiency gains and a better access to supply and sales markets. Here, competitive advantages can be achieved by minimizing transactional costs through economies of integration (such as may result from the combination of the former enterprises' distribution networks). These advantages may allow the merged firm to dominate the market since other non-integrated rivals will be foreclosed from competing for the merged firm's share of the relevant market. The number of independent suppliers will decline and lead to a market structure less conducive to effective competition.

Any other competitive advantage generated by efficiencies of a merged firm must also be taken into account when evaluating its market position. The enumeration of factors in Section 22(1) Nr. 2 GWB is not comprehensive. In addition to financial economies, technological, management and plant — as well as multi-plant — economies must be considered.⁶⁸ All of these advantages may serve to further entrench the dominant position of an enterprise, or to create such a position, by discouraging smaller competitors from competing aggressively.⁶⁹

The following decisions of the German supreme court — two involving horizontal mergers, and three involving product extension mergers — illustrate the importance of efficiencies in the context of the anticompetitive effects test in Section 24(1) GWB. A more comprehensive description of these cases is necessary for a better assessment of the role this factor plays in the overall examination of whether a market-dominating position will be created or reinforced by the merger. As under United States case law relating to Section 7, the German supreme court has examined the anticompetitive effects of efficiencies in the context of entrenchment cases: cost advantages gained by an acquired firm are viewed as anticompetitive when the acquired firm is likely to become more dominant through its acquisition by a larger, deep pocket buyer.

The *Kloekner-Becorit* case involved a merger between two produ-

⁶⁸ YUENGST, *supra* note 67, at 136-39.

⁶⁹ BGH, 28 WuW/E 1501, 1510.

cers of equipment used in coal mines. The FCO prohibited this merger under Section 24(1) and Section 24(2)(1) GWB because the resulting company, Kloeckner-Becorit GmbH, would dominate the market for hydraulic shaft extension equipment in Germany.⁷⁰ The court of appeals affirmed the FCO decision and based its judgment on two structural factors. First, Kloeckner-Becorit GmbH would have a 42% market share, which was significantly higher than the 30.7% share of its next strongest competitor. Second, the merging companies would combine their technological capabilities in mining engineering, which would enable Kloeckner-Becorit to enhance its technological innovation, "thereby satisfying the needs of the consumer to a higher degree."⁷¹

On appeal, the supreme court upheld the court of appeals' contention that technical efficiencies could convey a competitive advantage upon the merged company.⁷² Such efficiencies, the supreme court concluded, should be considered in examining whether a market-dominating enterprise would be created.⁷³ The supreme court, however, disagreed with the court of appeals' contention that a dominant market position could be solely determined on the basis of market shares (being the most "market related" structural factor), as long as other circumstances did not exclude a dominant latitude of freedom of conduct.⁷⁴ The supreme court held that market share indices did not have such outstanding significance. Even though the court of appeals had considered the technical efficiencies generated by the merger, its analysis had placed too great an emphasis on the market shares. All other significant structural factors should have been duly considered. Therefore the supreme court reversed and remanded to the court of appeals for further investigation into these matters.

In the merger case of *Muenchener-Anzeigenblaetter*, the advertisement newspaper Muenchener Wochenblatt, a wholly-owned subsidiary of the national newspaper Sueddeutsche Zeitung, acquired three of its competitors in Munich. After the FCO prohibited this merger and the court of appeals affirmed, the case was appealed to the supreme court.⁷⁵ In 1982 the supreme court held that through its acquisition, the Muenchener Wochenblatt had achieved a paramount market position, as defined in Section 22(1) Nr.2 GWB, in three geographic submarkets for advertisement newspapers in Munich. The creation of such a market-

⁷⁰ Judgment of Dec. 15, 1978, Bundeskartellamt [BKartA] 30 WuW/E 1831.

⁷¹ *Id.* at 2184-85.

⁷² Judgment of Dec. 2, 1980, BGH, 31 WuW/E 1749.

⁷³ *Id.* at 1751-52.

⁷⁴ Judgment of Aug. 28, 1979, Oberlandesgericht [OLG], 30 WuW/E 2182, 2185.

⁷⁵ Judgment of Feb. 16, 1982, BGH, 32 WuW/E 1905.

dominating enterprise, the court determined, should be prohibited in accordance with Section 24(1) GWB.⁷⁶ The court's finding was also based, to some extent, upon the market shares which would be achieved by the merger. The court stressed that in some cases only the overall consideration of the factors in Section 22(1)(2) GWB would lead to the assumption of a market-dominating position.⁷⁷ Here, the Muenchener Wochenblatt was backed by the considerable financial strength and the strong position in the daily newspaper market of its parent corporation. The Sueddeutsch Zeitung would be able to offer economic and technical assistance to its subsidiary, such as by providing additional staff or cooperation with its advertisement department. With the efficiencies achieved through these shared resources, and the increased market shares resulting from the acquisitions, the Munchener Wochenblatt would achieve a paramount position in the market for advertisement newspapers in Munich, and so the court barred the merger.⁷⁸

In October, 1984, the supreme court considered the *Gruner & Jahr-Zeit* case. The publishing house Gruner & Jahr sought to acquire an interest in *Zeit*, a highly reputed weekly political newspaper. The FCO had challenged this merger on three grounds.⁷⁹ First, the paramount market position of *Stern* (published by Gruner & Jahr) in the illustrated magazines market would be further strengthened. Second, the market-dominating position of *Spiegel* (in which Gruner & Jahr held a 24.9% interest) in the weekly political magazines market would be reinforced. Both of these contentions were based on the restraints of the remaining competition that existed because of the overlapping contents of these publications. The possibility of developing a joint concept would strengthen their market positions and improve their advertisement business. Third, the FCO contended that the merger would create a dominant position for *Zeit* in the weekly political newspaper market.

The court of appeals reversed the FCO decision on all three grounds. On appeal, the supreme court⁸⁰ upheld the court of appeals' judgment concerning the first two issues, but reversed and remanded the issue of *Zeit*'s dominant market position. *Zeit* occupied a share of at least one-third of the market for weekly political newspapers. Even if that share were presumed not to be market-dominating prior to the merger, a paramount market position could be created once *Zeit* was

⁷⁶ *Id.* at 1906.

⁷⁷ *Id.* at 1908. In two of the three geographic submarkets, the new market shares were below the presumptive threshold of 33 1/3%. *Id.*

⁷⁸ *Id.*

⁷⁹ Judgment of Jan. 9, 1981, BKartA, 31 WuW/E 1863.

⁸⁰ Judgment of Oct. 2, 1984, BGH, 35 WuW/E 2112.

combined with Gruner & Jahr's⁸¹ other publications and resources.⁸² Specifically, the FCO had focused on certain cost advantages which Zeit would gain after merging with the publishing house, such as better access to the archives and photo material of the powerful magazine Stern as well as more efficient administrative services.⁸³ The substitution competition by the national daily newspapers would affect Zeit, as well as all of its competitors, in the same way. It was therefore competitively neutral on the market for weekly political newspapers and could not hinder the creation of a market-dominating position by Zeit.⁸⁴

A 1985 conglomerate merger case, *Edelstahlbestecks*, involved the takeover of the Wuerttembergische Metallwarenfabrik AG ("WMF") by the Rheinmetall Beteiligungsgesellschaft ("Rheinmetall").⁸⁵ Rheinmetall is a member of a powerful Roechling-group with ample resources, which is active in the metal working industry. WMF enjoyed numerous structural advantages: a market share exceeding 30% for high-grade steel cutlery, the high market prestige of the WMF brand name, cost-effective production in the Far East, and a market where the closest competitor had only one-fourth of the WMF market share. These factors all led the supreme court to find that WMF was market-dominating.⁸⁶ Although the merger did not increase WMF's market share, the court held that the existing dominant market position would be further secured and consolidated by Rheinmetall's financial resources.⁸⁷

In a press statement, Rheinmetall had declared its intention to support WMF and to increase WMF's capital in order to enable it to expand. After the merger, WMF had in fact stepped up its investments and announced further investments. The court argued that the competitors would perceive the new WMF as even more motivated, and determined, to defend itself against any form of competition than if it remained independent. Thus, the court concluded, actual and potential competition would be discouraged, and the merger would lead to a reinforcement of WMF's market-dominating position and should therefore

⁸¹ As well as the financial resources of Gruner & Jahr's powerful parent corporation, Bertelsmann-Verlag.

⁸² BGH, 35 WuW/E at 2123-24.

⁸³ BKartA, 31 WuW/E at 1863.

⁸⁴ BGH, 35 WuW/E at 2122.

⁸⁵ Judgment of June 25, 1985, BGH, 35 WuW/E 2150. The case was appealed to the supreme court after the FCO had challenged the merger. See Judgment of Mar. 4, 1981, BKartA, 31 WuW/E 1867, and the Court of Appeals had affirmed that decision. See Judgment of Sept. 9, 1983, OLG, 34 WuW/E 3137.

⁸⁶ BGH, 35 WuW/E 2154-56.

⁸⁷ *Id.* at 2156-58.

be prohibited.⁸⁸

The entrenchment-doctrine of the German supreme court was further enforced by the FCO in the *IBH-Wibau* case.⁸⁹ The acquiror, IBH, was a financially strong producer of construction equipment. With a high, and steadily increasing, market share, Wibau was considered market-dominating among asphalt mix producers. Other structural indicators could not rebut this presumption, for the market competitors lacked larger financial resources, and the market barriers were relatively high. The FCO determined that IBH's financial resources, and the improved access to the selling market resulting from the merger, would strengthen Wibau's market-dominating position by discouraging actual and potential competition. Wibau would be able to use IBH's distribution network, its distribution experience, its knowledge of the market, and client contracts. These distribution efficiencies would be enhanced by the fact that the combined production programs of IBH and Wibau would yield an all-embracing range of products. Once again, the German supreme court concluded that the efficiencies which would be achieved would lead to the deterioration of the market structure, and the merger should, therefore, be invalidated.

In summary, German antimerger statutes, as well as the German supreme court's interpretation of those statutes, acknowledge that efficiency gains leading to competitive advantages for a merged firm may have negative effects on the conditions of competition in a particular market. In this respect efficiencies can, therefore, be an additional basis for invalidating a merger.

2. *The Balancing Clause in Section 24(1) GWB*

Even if a merger is likely to create or strengthen a market-dominating position, under Section 24(1) GWB, the FCO must nevertheless approve the transaction if the participating enterprises can prove that the merger will also improve the conditions of competition, and that those improvements will outweigh the disadvantages of any potential market dominance. Before turning to the specific role of efficiency considerations under Section 24(1) GWB, however, some general remarks concerning this provision are appropriate.

Usually, an improvement in competitive conditions cannot occur in the same market in which a merger leads to a dominating position. In determining whether to prohibit a merger, the FCO is making a prognosis about the likely future competitive developments which will result

⁸⁸ *Id.* at 2157.

⁸⁹ Judgment of July 3, 1981, BKartA, WuW/E 1892.

from the merger in the relevant market. If the merger will improve competitive conditions in this market, a presumption of market dominance can be avoided. However, the competitive conditions in a dominated market will be improved only in the case of "failing company" mergers.⁹⁰

The balancing clause in Section 24(1), thus, was justified primarily by the argument that mergers which lead to market-dominating positions frequently have a beneficial effect upon competitive conditions in different markets.⁹¹ The deterioration of competitive conditions caused by the creation of market domination in the one market must therefore be balanced against any improvement in competitive conditions in other markets.⁹² In contrast, the United States Supreme Court rejected this concept of "countervailing power" for Clayton Act purposes, while apparently accepting it as a principle of "Rule of Reason" analysis under the Sherman Act.⁹³ The competitive conditions balancing clause is therefore a uniquely German feature of merger control law.

The "competitive conditions" language of Section 24(1) GWB implies that the FCO may only evaluate aspects of competition in certain markets, and is prohibited from analyzing the effects of the merger on the overall economy.⁹⁴ The latter judgment is made, if at all, upon application, by the Federal Minister of Economics in the context of Section 24(3) GWB. German merger control law distinguished clearly between the evaluation of competition by the FCO and of effects upon the public interest by the Federal Minister of Economics ("the Minister"). The FCO, nevertheless, has exceeded its scope in many instances and has considered overall economic policy goals, such as avoidance of unemployment or improvements in the regional or sectoral economic structure.⁹⁵

Furthermore, the wording of Section 24(1) GWB implies that — as in the case of the determination of market domination — only structural factors are relevant. For example, an improvement in the conditions of competition is only possible if the merger leads to a favorable market

⁹⁰ See U. IMMENGA & E. MESTMACKER, *supra* note 51, at § 24, no. 120; MOSCHEL, *supra* note 63, at § 11, No. 890.

⁹¹ Regierungsbegründung zu dem Entwurf eines Zweiten Gesetzes zur Änderung des GWB, BT-Drucks. VI/2520, at 29.

⁹² The German legislature has demanded a comparison between two non-comparable factors. No measures exist for this balancing approach. The judgment of the Federal Cartel Office is therefore left to its own discretion.

⁹³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. at 370; Ponsoldt, *supra* note 39.

⁹⁴ See MOSCHEL, *supra* note 63, at § 11, No. 887; U. IMMENGA & E. MESTMACKER, *supra* note 51, at § 24, No. 116.

⁹⁵ See EMMERICH, *supra* note 61, at 262, 264; Note, *supra* note 8, at 616.

structure guaranteeing more competition.⁹⁶ Purely internal, microeconomic, advantages caused by a merger, such as efficiencies, which enable the firms to enhance their market position should, therefore, not be considered in the context of Section 24(1) GWB. Consequently, the achievement of efficiencies at the firm level must have some impact on the structure of the market, thereby improving the conditions for competition; such impact, however, is not presumed but must be proven by the particular facts. Thus, merger-caused efficiencies must guarantee a more effective rivalry in order to be permitted under Section 24(1) GWB.⁹⁷

The leading case examining the balancing clause is *Erdgas Schwaben*. In 1976 the FCO challenged the establishment of a joint venture between the electricity supply enterprise Lech Elektrizitaetswerke AG ("LEW"), the gas and electric power supplier Aktiengesellschaft fuer Licht und Kraftversorgung ("LK"), and the City of Augsburg, which had set up its own gas and electric utility company. The purpose of the joint venture, named Erdgas Schwaben GmbH ("Erdgas"), was to supply natural gas to Swabia, a region in the German state of Bavaria. Each partner received a one-third ownership interest. The FCO prohibited the merger,⁹⁸ claiming that the joint enterprise⁹⁹ would lead to a strengthening of the dominant market position of LEW in the electricity supply market in Swabia.¹⁰⁰ Additionally, a market-dominating position for Erdgas in the Swabian gas supply market would be created because LEW and LK would be eliminated as potential competitors.¹⁰¹

The court of appeals affirmed the decision of the FCO,¹⁰² and the supreme court agreed that the merger would reinforce LEW's existing dominant market position in the electricity supply market.¹⁰³ LEW would be able to influence the decisions of the joint venture according to its own interests, despite owning only one-third of Erdgas.¹⁰⁴ As a result, the powerful electricity supplier would be able to prevent the construc-

⁹⁶ See MOSCHEL, *supra* note 63, at § 11, at 887; U. IMMENGA & E. MESTMACKER, *supra* note 61, at 115, 116.

⁹⁷ Judgment of Dec. 12, 1978, BGH, 29 WuW/E 1533, 1538, 1541 (1978); Judgment of Feb. 18, 1985, BKartA, 35 WuW/E 3469, 3473; Judgment of May 29, 1974, BKartA, 24 WuW/E 1517, 1521; Judgment of Feb. 4, 1974, BKartA, 24 WuW/E 1475, 1481; Judgment of June 8, 1984, BKartA, 34 WuW/E 2143, 2147.

⁹⁸ Judgment of Mar. 9, 1976, Bkarta, 27 WuW/E 1647.

⁹⁹ The joint venture was considered a merger according to § 23(2) No.2(a) GWB and § 23(2)(3) GWB.

¹⁰⁰ BKartA, 27 WuW/E at 1648-49.

¹⁰¹ *Id.*, at 1649-50.

¹⁰² Judgment of Mar. 23, 1977, OLG, KG, 28 WuW/E 1895.

¹⁰³ Judgment of Dec. 12, 1978, BGH, 29 WuW/E 1533.

¹⁰⁴ *Id.* at 1536.

tion of new gas lines, especially during the initial investment phase.¹⁰⁵ Thus, LEW would be able to hinder the substitution competition between gas and electricity and could thereby strengthen its own market-dominating position.

The court then focused on the balancing clause contained in Section 24(1) GWB.¹⁰⁶ The three enterprises had claimed that the planned joint venture would lead to improvements in competitive conditions because gas could now enter into substitution competition with fuel oil in the central heating market. This procompetitive effect, they argued, would outweigh any anticompetitive effects resulting from their endeavors.

The court held that approval under Section 24(1) GWB can only be granted if competitive conditions are likely to be better after the merger, and if a similar improvement in competitive conditions is not likely without the merger. The merging enterprises had the burden of proving that no alternatives existed which would have enabled gas to enter into competition with oil as quickly and effectively as under the planned joint venture.¹⁰⁷

On this point, the FCO had contended that LEW and LK were able to build a gas utility in Swabia independently. Both companies replied that the optimal plant size, and the sharing of the high risks, necessary to assure effective competition with the fuel oil industry, could only be accomplished by the proposed joint enterprise.¹⁰⁸ The supreme court concluded that the court of appeals had failed to consider adequately the parties' contention that the merger would lead to substantial efficiencies. The three companies had contended that LEW's participation in the enterprise would improve technical services and customer relationships, lead to the common use of rights of way, render possible the common organization of meter reading and customer credit services, and create further overhead economies.¹⁰⁹ These microeconomic advantages, the court determined, might actually enable gas to enter into competition with fuel oil more quickly and effectively than would be the case without the merger, and the supreme court reversed the court of appeals judgment. The court stated, however, that on remand, an expert witness should be called to present evidence on the extent of possible efficiencies and their future competitive impact. If only the participation of LEW in the joint venture would lead to an improvement in competitive condi-

¹⁰⁵ *Id.* at 1536-38.

¹⁰⁶ *Id.* at 1538-41.

¹⁰⁷ *Id.* at 1540.

¹⁰⁸ *Id.* at 1540-41.

¹⁰⁹ *Id.* at 1541.

tions, "then the court of appeals will have to examine whether the improvements brought about by this cooperation outweigh its accompanying disadvantages."¹¹⁰

In two earlier cases the FCO had outlined the limits of efficiency justifications in the context of the Section 24(1) GWB balancing clause. In the *Haindl-Holtzmann* case, the FCO prohibited the merger of two major domestic newsprint producers.¹¹¹ Prior to this proposed merger, the level of concentration in the German newsprint market was already sufficient to presume a market-dominating oligopoly as defined in Section 22(3) Nr.2.a. GWB. The merged firm, together with its two remaining competitors, would control two-thirds of the market. The FCO argued that the Haindl-Holtzmann company would prevent an expansion of capacity, thereby further restricting the output of newsprint. Foreign competition in this market from Scandinavian companies was already restricted by the European Economic Community-imposed import duties. Thus, the FCO concluded, the merger amounted to a further strengthening of this oligopoly's market-dominating position.¹¹²

The newsprint producers had attempted to justify the proposed merger under the balancing clause of Section 24(1) GWB. They claimed that the larger merged firm would have better access to capital funds, yielding more investment resources, and thereby strengthening the firm's competitiveness. Nevertheless, the FCO determined that while the combined resources of both firms may cause an improvement in the market position of the planned firm, the merger would not improve the structure of the domestic newsprint market. That latter conclusion is decisive in the Section 24(1) GWB balancing test. Furthermore, the FCO found no conclusive evidence supporting the companies' contention that without the merger they would have to exit the market, and that a higher degree of market concentration would thus occur if the merger were not approved.¹¹³

In the *Bitumen-Verkaufsgesellschaft* case, the FCO challenged the establishment of a joint venture between four large oil refiners to be known as Bitumen-Verkaufsgesellschaft for the purpose of selling liquid asphalt.¹¹⁴ Prior to the planned merger, the largest sellers on the market for liquid asphalt had a superior market position in relation to their smaller competitors, with a combined market share of 50%. The parallel

¹¹⁰ *Id.*

¹¹¹ Judgment of Feb. 4, 1974, BKartA, 24 WuW/E 1475.

¹¹² *Id.* at 1480-81.

¹¹³ *Id.* at 1481-82.

¹¹⁴ Judgment of May 29, 1974, BKartA, 24 WuW/E 1517.

increase in their prices, as well as in their market share, showed that no substantial competition existed between this group of companies. Thus, the FCO deemed these enterprises to be market-dominating according to Section 22(2) GWB.¹¹⁵ The joint venture would result in another seller of the same size as the oligopolists and, therefore, lead to a further strengthening of the market-dominating oligopoly.

The FCO rejected the parties' contention that the joint venture would lead to improvements in conditions of competition and that these improvements would outweigh the disadvantages of market dominance. Although the enterprises had claimed that the establishment of the joint venture would lead to the achievement of substantial efficiencies, the FCO determined that efficiency gains at the firm level could only be taken into consideration in the context of the structure of the market.¹¹⁶ Consequently, it had to be determined whether the newly created firm would be able to enter into competition with the companies which had controlled the market previously, thereby lessening the existing oligopoly.¹¹⁷

The FCO saw "no realistic grounds" for supposing such a development.¹¹⁸ If a new company were added "to the transparent market for the relatively homogeneous product liquid asphalt, the interdependence between the equally strong offerors would increase."¹¹⁹ Beneficial market effects accruing from the joint venture, thus, were not probable.

More recently, the FCO applied the supreme court holding in *Erdgas Schwaben* to two similar factual situations in the energy supply market. In *Gasversorgung-Schwanewede*, the Stadtwerke Bremen AG ("StdW") and the gas utility Gasversorgung Wesermuende GmbH ("GWM") had agreed to establish a joint venture in equal partnership, to be known as Gasversorgung Schwanewede GmbH ("GV SchW") which would supply gas to Schwanewede, a small community outside of Bremen.¹²⁰ The electric utility Ueberlandwerke Nord Hannover AG ("UNH"), which monopolized the supply of electricity in that town, held a 50% interest in GWM. The FCO argued that UNH, through its interest in GWM, would be able to influence the decisions of the planned joint venture, especially during the opening of the gas supply market, and would be likely to try to protect itself from the competitive threat of this alternative energy source by preventing the introduction of gas supply

¹¹⁵ *Id.* at 1520.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1520-21.

¹¹⁸ *Id.* at 1522.

¹¹⁹ *Id.* at 1521.

¹²⁰ Judgment of Feb. 28, 1983, BKartA, 34 WuW/E 3007.

into certain areas.¹²¹ Thus, the potentially remaining competition on the energy supply market would be restrained, if not eliminated. The market-dominating position of UNH in the electric supply market in Schwanewede would consequently be strengthened.

The FCO rejected the parties' argument that the merger would lead to substitution competition between gas and fuel oil and therefore should be approved according to Section 24(1) Alt. 2 GWB.¹²² The utility companies had not proven that an equal effect was not likely to occur as quickly and effectively without the joint venture. On the contrary, the FCO concluded:

The partners of the planned Gasversorgung Schwanewede were able to establish a gas supply in Schwanewede independently by taking a normal entrepreneurial risk [since StdW and GWM operated gas utilities in neighboring towns without the help of partners]. UNH's and StdW's intention to minimize the entrepreneurial risk by setting up a joint venture may make sense from the companies' point of view. These thoughts should however, not lead to the legalization of competitively objectionable effects from a merger.¹²³

Similarly, the case of *Thueringer Gas-Westerland* involved a joint venture between the only electric supply utility (Stadtwerke Westerland) and the only gas supplier (Thueringer Gas AG) on the island of Sylt. The resulting company (Stadtwerke Westerland GmbH) would have offered all of the main controlled energy in this geographic market. The FCO prohibited this merger, for substitution competition between the two energy sources — gas and electricity — would have been eliminated and Stadtwerke Westerland's market-dominating position in the electricity supply market would have been strengthened.¹²⁴ The FCO emphasized that in a highly concentrated market, only minor further deteriorations of the market structure justify applying Section 24(1) GWB.¹²⁵

In February 1985, the court of appeals reversed the FCO's decision,¹²⁶ holding that competition between gas and electricity on the sub-markets for central heating, central warm water supply, decentralized warm water supply, and cooking was either nonexistent or not substantial. The merger-caused restraint of competition would therefore be insignificant.¹²⁷ On the other hand, the joint venture would have beneficial

¹²¹ *Id.* at 3008.

¹²² *Id.* at 3009-10.

¹²³ *Id.* at 3010.

¹²⁴ Judgment of Sept. 9, 1983, BKartA, 34 WuW/E 3010.

¹²⁵ *Id.* at 3011, 3013.

¹²⁶ Judgment of Feb. 18, 1985, OLG, KG, 35 WuW/E 3469.

¹²⁷ *Id.* at 3471-73.

effects upon the competitive conditions in the submarket for central heating. In that market, one fuel oil supplier held an 80% market share. The merger would enable gas suppliers to enter into competition with fuel oil suppliers more quickly and effectively than without the merger.¹²⁸ The court of appeals based its judgment upon an extensive discussion of the efficiencies generated by the joint venture and concluded that efficiencies, "with which an enterprise could challenge its dominant competitor, should be considered in the context of the balancing clause in Section 24(a) GWB, if one could expect that this increased competitiveness were, in fact, employed."¹²⁹ The court found that the electric utility Stadtwerke Westerland had prominent access to the consumer, for the owners of existing houses already had a long-lasting contact with the company. In addition, builders of new houses would need to select an energy supplier, and because of that pre-existing relationship, the joint enterprise would have a better chance to sell gas than an independent gas supplier. Furthermore, distribution economies were possible because Stadtwerke Westerland was well-staffed in all parts of the island, and other overhead economies and administrative synergies would result as well.

The court conceded that it was "impossible to assess the extent of these rationalization advantages."¹³⁰ However, according to general economic experience, the efficiencies would have an appreciable market effect. Since lively competition was expected in the submarket for central heating, the companies would make use of their increased competitiveness, and the joint venture would be better able to enter into competition with the dominant fuel oil supplier in this market. Therefore, the court of appeals concluded that the insignificant anticompetitive effects of the merger were outweighed by its procompetitive effects.

Claims of efficiencies leading to an increased competitiveness also play a role in the context of so-called catch-up mergers in oligopoly situations. In several cases the FCO permitted mergers, even though the presumptive thresholds of illegality were passed, if the merger would reduce the distance between the merging enterprises and the market leader. The enforcement agency believed that the resulting, more symmetrical, oligopoly would constitute an improvement in the conditions of competition. One illustrative example is the *Benteler Niederrheinstahl* case. By acquiring a 50% share of NRS-Niederrheinstahl GmbH, the Benteler group obtained the second highest market share, though still falling short

¹²⁸ *Id.* at 3473-74.

¹²⁹ *Id.* at 3473.

¹³⁰ *Id.* at 3474.

of the market leader Mannesmann. The prohibition of this merger would have led to a further strengthening of Mannesmann's market-dominating position. Allowing the combined enterprises to catch up with Mannesmann, thus creating a more balanced market structure, was seen to be an improvement in the conditions of competition on the particular market.¹³¹

This enforcement practice of the FCO has been heavily criticized,¹³² especially by the Monopolies Commission ("the Commission").¹³³ The practice, in effect, legitimizes all mergers creating market positions below the level of the market leader, and would entail further concentration in the particular market, since the remaining oligopolists would now aim at reaching the market leader's market share through a merger, without having to fear a prohibition order from the FCO. A more concentrated, narrower oligopoly would increase oligopolistic interdependence and the chances for collusion between the firms. Catch-up mergers would, furthermore, impair the competitiveness of the remaining independent enterprises. This would be detrimental to the conditions of competition since the remaining oligopolistic competition would be preserved by these firms.

The Commission found support for its position in United States merger control law and enforcement practices.¹³⁴ The Commission stressed that Section 7 of the Clayton Act is intended to prevent restraints of trade in their incipiency, and thereby intervenes at a lower degree of competitive impact than the German antimerger statutes. Justifications for anticompetitive mergers were not available under United States law. This comparison would show the general impact of the FCO's practice on competition policy.

In summary, internal, microeconomic advantages, such as efficiencies, enhance a merged firm's market position, but they do not necessarily affect the structure of a market. Therefore, in general, they cannot be considered within the context of Section 24(1) GWB. However, it has been shown that the achievement of efficiencies on the firm level can have a beneficial impact on the structure of a market, thereby leading to the improvement of competitive conditions in the sense of Section 24(1) GWB. This demonstrates the ambivalent nature of concentration in in-

¹³¹ Benteler Niederrheinstahl, TB BKartA 1976, BT-Drucks. 8/704, p. 44.

¹³² Immenga, *Schwerpunkte de Vierten Novelle zum Gesetz gegen Wettbewerbsbeschränkungen*, 1980 NEVE JURISTISCHE WOCHENSCHRIFT [NJW] 1417, 1421; CATRANIS, DIE AUFGABE DER ZUSAMMENSCHLUSSKONTROLLE, 99-100 (1981).

¹³³ MONOPOLKOMMISSION, HAUPTGUTACHTEN 1976/77 *supra* note 58, No. 428-36; MONOPOLKOMMISSION, HAUPTGUTACHTEN 1980/81, No. 626-32.

¹³⁴ MONOPOLKOMMISSION, HAUPTGUTACHTEN 1976/77, *supra* note 58, No. 434.

dustries. Both anticompetitive and procompetitive effects can evolve from this phenomenon and must be given weight in the legal analysis of mergers.

3. *The Public Interest Exemption in Section 24(3) GWB*

If the FCO has vetoed a merger, a second line of defense is available to the participating enterprises under Section 24(3) GWB. Upon application, the Federal Minister of Economics ("the Minister") may permit the merger, if the restraint of competition is balanced by the overall economic advantages of the merger, or if the merger is justified by an overriding public interest. Competitiveness outside Germany should also be considered. This public interest exemption, however, states that the authorization may only be granted if the extent of the restraint of competition does not endanger the principle of the market economy. Insofar as the restraint of competition by the merger is concerned, the decision of the FCO is binding. However, the Minister exercises discretion in determining the weight to be given to those findings in making his evaluation.¹³⁵ Overall economic advantages can include the strengthening of industrial branches important to the economy as a whole and the achievement of efficiencies from a merger. The most important overall economic advantage, however, is the preservation of unhealthy or failing companies. Overriding public interests can be positive social benefits, such as the preservation of jobs, the promotion of the public health, military necessity, or other political interests. Nevertheless, the Minister has intervened in very few cases. In a single case the Minister refused permission,¹³⁶ in five others the permission was granted, most with restrictions or conditions attached to it.¹³⁷

Section 24(3) GWB, in effect, constitutes a compromise. It pays tribute to the conservative German legal and political communities which had prevented the introduction of a merger control law since the

¹³⁵ See Judgment of Feb. 7, 1978, OLG, 28 WuW/E 1937.

¹³⁶ Judgment of June 26, 1975, Bundesminister Fur Wirtschaft [BWM], 25 WuW/E 149 (1975).

¹³⁷ The permission was granted in the following cases: (1) in the VEBA/Gelsenberg II merger in 1974, on the basis of assuring Germany's oil supplies, for the enterprises would still be only medium-sized on the world scale even after the merger, Judgment of Feb. 1, 1974, BWM, 24 WuW/E 147; (2) in the Babcock/Artos merger in 1976, with the purpose of preserving jobs in economically weak regions, Judgment of Oct. 17, 1976, BWM, 27 WuW/E 155; (3) in the Rhein Stahl Thyssen/Huller Hille merger in 1977, with a partial authorization, for the purpose of preventing a further loss of jobs by saving a failing company and preserving the extraordinary technological potential of Huller, of great importance for German exports, Judgment of Aug. 1, 1977, BWM, 27 WuW/E 159; (4) in the VEBA/BP merger for the purpose of protecting the long-term energy supply for Germany, Judgment of Mar. 5, 1979, BWM, 29 WuW/E 165; (5) in the IBH/Wibau case, for the purpose of enhancing international competitiveness, Judgment of Dec. 9, 1981, BWM, 32 WuW/E 177.

early 1950s. Especially during those first years of antitrust efforts, the German industry asserted its historically powerful position¹³⁸ in order to fight any attempt to establish an effective antitrust law, including measures to prevent concentration in German industry.¹³⁹ These forces were assisted by the conservative Christian Democratic Union party, which held power until 1969. The primary concern voiced against antimerger statutes was the possible loss of merger-caused efficiencies. The 1957 report of the Committee for Economic Policy of the German Parliament expressed a fear that the full development of the tendency towards optimal plant size could be hindered by a merger policy.¹⁴⁰ The addition of Section 24(3) GWB to the merger control law enacted in 1973 demonstrates that the Social Democratic/Free Democratic party also felt obliged to make concessions to German industry.

The German legislature has not given competition absolute priority over other policy considerations. In reference to efficiency considerations in the context of Section 24(3) GWB, the following can be stated: generally German merger control law views efficiencies as the result of a free competitive process. A market composed of a multitude of enterprises was perceived to be the best guarantee for both higher productive and allocative efficiency. Section 24(3) GWB, however, acknowledged that a conflict may exist between the goals of achieving corporate efficiency and dispersing economic power, in the case of a merger leading to market domination while also generating significant efficiencies. To a limited extent, the provision breaks with the principle of freedom of competition and instrumentalizes mergers in order to achieve a higher degree of corporate efficiency. For example, an otherwise anticompetitive concentration process is allowed in order to gain a result which would otherwise be expected from an unconcentrated market.¹⁴¹

¹³⁸ During the Nazi regime, an actual merging of private and public power in the administration of cartels had taken place. The industry participated in boycotts and collective discrimination against outsiders in order to discipline them "in the public interest." Mestmacker, *Competition Policy and Antitrust: Some Comparative Observations*, 136 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFTEN 387, 388 (1980).

¹³⁹ Only pressure from the allies led to the inclusion of merger control provisions into the first governmental draft of the Law against Restraints of Competition in 1952. The enacted law in 1957, however, did not include antimerger provisions.

¹⁴⁰ SCHRIFTLICHER BERICHT DES AUSSCHUSSES FÜR WIRTSCHAFTSPOLITIK ÜBER DEN ENTWURF EINES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN (Report of the Committee for Economic Policy of the Bundestag) BT-Drucks. II/3644 at 27.

¹⁴¹ The term "instrumentalization" of anticompetitive practices is used by Immenga and Moschel. U. IMMENGA, *POLITISCHE INSTRUMENTALISIERUNG DES KARTELLRECHTS?* (1976); MOSCHEL, *supra* note 63, at § 11, No. 714. The French merger control law is a good example of an extended instrumentalization: its public interest approach justifies mergers on competition grounds or the furtherance of economic and social progress, including international competitiveness. Loi No.

The language and legislative history of Section 24(3) GWB, as well as the purpose of German merger control law, however, clarify that this provision can only be applied in a very limited manner. The following remarks outline these limitations regarding the significance of efficiencies in the context of 24(3) GWB.

Many of the limitations accruing from the public interest exemption in Section 24(3) GWB have already been voiced in the legislative history. The government report accompanying the bill for the Second Amendment of the Law against Restraints of Competition in 1971¹⁴² stated that the criteria of "overall economic advantages" and "overriding public interest" require in each case, the existence of a general policy justification for the merger. Authorization should only be granted if these reasons were of great importance in the particular case, were proven concretely, and if governmental assistance measures promoting the competitive system were not possible. It should be remembered that mergers basically result in long-term solutions that are not reversible. Under Section 24(3) GWB, grounds for authorization would have to be based upon high demands with regard to their foreseeable duration.¹⁴³

The wording of the public interest exemption, "overall economic advantages," like merger-caused efficiencies of the participating enterprises, cannot justify an otherwise anticompetitive merger.¹⁴⁴ Thus, the microeconomic advantages must lead to some kind of beneficial macroeconomic effect. This is undoubtedly the case if, as a result of their cost savings, the merged enterprises lower prices or if they improve the quality of their products. The application of Section 24(3) GWB should, however, not be preconditioned on such conduct, since internal efficiencies achieved by enterprises are one of the major reasons for macroeconomic growth in a country: the efficiency of an economy is only the sum of the efficiencies of the enterprises of which it is composed.¹⁴⁵ If the efficiency of an economy is considered to be an overall economic advantage, this should also apply to the efficiencies achieved at the firm level. The only qualitative restriction which Section 24(3) GWB requires

77-806, July 19, 1977 [1977], Journal Officiel de la Republique Francaise [J.O.] 3833, La Semaine Juridique [J.C.P.] III No. 45,979; Decret No. 77-1189, Oct. 25, 1977, J.O. 5223, J.C.P. III No. 46,344.

¹⁴² REGIERUNGSGRUNDUNG ZU DEM ENTWURF EINES ZWEITEN GESETZES ZUR ANDERUNG DES GWB, BT Drucks. VI/2520, p. 31.

¹⁴³ *Id.*; for almost identical remarks by the Federal Minister of Economics, see VAW/Kaiser, BWM, 25 WuW/E at 149 (1975).

¹⁴⁴ See U. IMMENGA & E. MESTMACKER, *supra* note 51, at § 24, No. 226; MOSCHEL, *supra* note 63, at § 11, No. 899; Monopolkommission, Sondergutachten 3, Kaiser VAW 55, 56 (1975).

¹⁴⁵ See Knopfle, *Gesamtwirtschaftliche Vorteile eines Zusammenschlusses und Ubertagendes Interesse der Allgemeinheit als Zulassungskriterien*, 24 WuW 5.

is that the merger leads to real economies in production, procurement or distribution. Resource savings have to be achieved. Pecuniary efficiencies, leading to lower costs but not real resource savings, do not constitute an overall economic advantage.¹⁴⁶

Since Section 24(3) GWB requires a macroeconomic relevance of the particular merger, certain quantitative restrictions are implied: the microeconomic advantages accruing from the merger must reach a sufficient level in order to be viewed as "overall economic advantages." Thus, only significant efficiencies can justify a merger under the public interest provision.¹⁴⁷

Furthermore, the efficiencies must be unique to the merger. This requires a determination as to whether the efficiency gains can be achieved without creating competitive problems, such as a takeover by a firm outside the industry or a takeover by a firm with a small market share. Additionally, the possibility of internal growth by the enterprises must be examined. This restrictive precondition of an efficiency justification under Section 24(3) GWB can be inferred from the wording of the provision, requiring that the overall economic advantages have to outweigh the restraint of competition.¹⁴⁸

When balancing the anticompetitive consequences of a merger with any efficiency gains which might constitute an overall economic advantage, the Federal Minister of Economics must consider that anticompetitive mergers result in long term detrimental effects on the competitive process. The resulting disadvantages can permanently affect both consumers and competitors. In contrast, the microeconomic advantages of efficiencies may only last for a short period of time.¹⁴⁹

Those principles are illustrated in the "VAW-Kaiser" case. In December 1974, the FCO struck down a planned merger plan between Kaiser Aluminum ("Kaiser"), a multinational enterprise active in the aluminum industry, and VAW, the leading manufacturer of aluminum in Germany.¹⁵⁰ The merger would have resulted in the reinforcement or creation of market-dominating positions in several specialized aluminum markets.¹⁵¹ Kaiser and VAW argued that the merger would lead to im-

¹⁴⁶ Pecuniary efficiencies are achieved when large firms pay lower prices for their inputs than small firms because of their superior bargaining power or credit worthiness.

¹⁴⁷ See BWB, 25 WuW/E at 151; IMMENGA, *Nationale Fusionskontrolle, Auslandswettbewerb und die Erhaltung Internationales Wettbewerbsfähigkeit*, RIW/AWD, 577, 580 (1981).

¹⁴⁸ MOSCHEL, *supra* note 63, at § 11, No. 900.

¹⁴⁹ See MONOPOLKOMMISSION, HAUPTGUTACHEN 1973/1975, *supra* note 58, at 56.

¹⁵⁰ Judgment of Dec. 23, 1974, BKartA, 25 WuW/E 1571.

¹⁵¹ In some of these submarkets for aluminum products, the market-dominating position of VAW, in others, the market-dominating oligopoly on these markets would have been strengthened.

provements in the conditions of competition; since otherwise, both companies would have to discontinue production and leave those markets. However, if the merger were consummated, the number of aluminum product producers would only be reduced by one. The FCO rejected this argument, because the enterprises had not shown conclusively that both of them would be forced to exit the markets.

In January 1975, Kaiser and VAW applied to the Minister for permission to merge under Section 24(3) GWB. The Minister asked the Commission to give its opinion concerning the case, as provided in Section 24a(5)(7) GWB. Kaiser and VAW had claimed that operating efficiencies could be achieved through specializing their plants producing semi-finished aluminum products. The production facilities could be modernized and completed by shifting machines.¹⁵² By bundling the orders, the productive capacities could be better utilized, resulting in a decrease of per unit costs. These efficiencies fulfilled the quantitative and qualitative restrictions of Section 24(3) GWB. The Commission, therefore, acknowledged that the merger would lead to an overall economic advantage. The efficiencies could also strengthen the international competitiveness of Kaiser and VAW, which in turn would benefit the overriding public interest.¹⁵³ However, the Commission determined that almost the same efficiency gains could have been achieved in the field of semi-finished aluminum products by a cooperative venture between the two companies.¹⁵⁴ This alternative would have created fewer competition problems, since a long-term change in the market structure could have been prevented. Consequently, the resulting efficiencies were not unique to the merger. The Commission also found that the other positive effects of the merger, such as securing the jobs in the industry, did not outweigh the restraints on competition which would result from the merger.¹⁵⁵

In his order of June 1975 the Minister of Economics refused to consider the job security element since a prognosis on long-term employment effects of the merger, or its prohibition, were too uncertain, and the rationalization measures of the companies may nevertheless lead to dismissals.¹⁵⁶ Furthermore, the Minister came to the same conclusions on the other elements as did the Monopoly Commission, and refused to permit the merger.

¹⁵² MONOPOLKOMMISSION, SONDERGUTACHTEN 3, 53 (1975).

¹⁵³ *Id.* at 71.

¹⁵⁴ The claimed economies of scale were, however, rejected by the Commission, for prior to the merger, Kaiser and VAW had belonged to the largest aluminum producers of the western world. *Id.* at 67.

¹⁵⁵ *Id.* at 72-74.

¹⁵⁶ See BWM, 25 WuW/E at 151-52 (1975).

In summary, although Section 24(3) *GWB* breaks with the principle of competition and instrumentalizes anticompetitive mergers in order to achieve a higher degree of corporate efficiency, several restrictions which can be derived from the legislative history, the language, and the purpose of Section 24(3) *GWB*, diminish the scope of an efficiency defense available under this provision.

The German legislature has, therefore, acknowledged that effective competition is the best guarantee for the achievement of productive efficiency, since it compels rationalizations and, most importantly, compels the firms to reduce prices and improve the quality of their products. In contrast, if an anticompetitive merger were allowed on the basis of the possible efficiencies which might accrue from it, the participating enterprises might lose their interest in achieving efficiencies and lowering prices.

V. CONCLUSION

The value-basis of the United States and the West German merger control law is very similar. In both countries, the legislatures' dominant concerns which prompted the enactment of the antimerger statutes were the political, social and economic effects of a rising concentration in the respective countries' industries. The principal goal was to disperse economic power in order to preserve a market structure composed of numerous participants and to protect the freedom of economic opportunity for the market participants. In both countries the concern for the achievement of efficiencies was secondary.

The United States Congress did not squarely address the conflict between the goals of dispersing economic power and achieving corporate efficiency through a merger which would contribute significantly to economic concentration as well as generate efficiencies. In view of the principal concerns with the effects of concentration, it can, however, be inferred that Congress would not have regarded the achievement of efficiencies as justification for an anticompetitive merger. Additionally, the United States Supreme Court decisions concerning Section 7 of the Clayton Act have precluded the availability of an efficiency defense under existing United States merger control law.

In contrast to United States merger control law, the German merger control law has provided two ways to incorporate efficiency justifications into the legal analysis of mergers. In both situations, however, the scope of such an efficiency defense is very limited. In the context of the Section 24(1) *GWB* balancing clause, purely internal microeconomic advantages, such as efficiencies, do not constitute an improvement in the conditions

of competition required by this provision. The achievement of efficiencies at the firm level must have some impact on the structure of the market in order to be considered under Section 24(1) GWB.

The public interest exemption in Section 24(3) GWB acknowledges that a conflict may exist between the goals of achieving corporate efficiency and dispersing economic power. Consequently, the provision breaks with the principle of competition and allows an efficiency defense. However, the wording and legislative history of Section 24(3) GWB, as well as the purpose of German merger control law, severely limit the number of cases in which possible efficiencies might justify an anticompetitive merger under this public-interest exemption.

The development of United States merger control law should borrow from the German experience with its efficiency justifications, especially with respect to Section 24(3) GWB, and thereby formulate a legislative compromise between the existing populist and libertarian extremes. The basis for such a fertilization is the similar approach of both laws toward prohibiting anticompetitive mergers, and the laws' similar objectives. However, the discussion of the utility of an efficiency defense in United States merger control law is strictly *de lege ferenda*, since such a possibility is not available under Section 7 of the Clayton Act.