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A SYMPOSIUM ON TRADE REGULATION AND PRACTICES

"CARTELS" UNDER THE NEW GERMAN CARTEL STATUTE

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Introduction

On January 1, 1958, the "Cartel Statute" of the Federal Republic of Germany[1] became effective. American interests in this event are threefold:

(1) During the past decade Americans have tried to convince the Western world that in an industrial, democratic society legislation of the American antitrust type is imperative. Is the German cartel statute a piece of legislation of this type?

(2) The enactment of the statute brings to an end the application of Law No. 56 enacted by the American Military Government on January 28, 1947. The Paris Treaty between the Allied Powers and Germany provided that the Allied "cartel laws," though administered by the German Minister of Economics, should remain in effect until the German legislature could agree on a new statute.

(3) The statute will vitally affect trade between America and Germany as well as the operation of sizable American controlled enterprises there.

The new German statute deals with the factual situations covered by section 1 of the Sherman Act,[2] sections 3 and 7 of the Clayton Act,[3] the Webb-Pomerene Act,[4] the Miller-Tydings Act,[5] as well as parts

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1. The statute, enacted on July 27, 1957 (published in the Federal Statute Book BGBl. I p. 1081) becomes effective on Jan. 1, 1958, on the basis of § 109(1) of the statute. Up to now, two commentaries are available, by Eugen Langen and Harold Rasch. The American observer should also consult the excellent article by Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 U. PA. L. REV. 617 (1957).
2. 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 (1952).
3. 38 STAT. 731 (1914), as amended, 15 U.S.C. §§ 14, 18 (1952).
4. 40 STAT. 516 (1918), 15 U.S.C. §§ 61-65 (1952).
5. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

of section 5 of the Federal Trade Commission Act.[6] It is not an act authorizing dissolution of monopolies (section 2 of the Sherman Act);[7] it desires to be no Robinson-Patman Act (section 2 of the Clayton Act).[8] The German statute, in what it provides and in what it omits, has to be understood as a part of the system of German law, private and public.

The private law in Germany has formulated certain basic rules governing the behavior of monopolies and the methods of competition.[9] The courts have held, for example, (a) that the monopolist is obliged to supply customers depending on him with necessary goods and services;[10] (b) that a trade association or monopoly may not, under the terms of sale, immunize itself from sellers' liabilities; (c) that exclusive dealing clauses may not be used in an excessive way.[11] Other court decisions, however, have supported cartel trends.[12] The coordination of these cases and the principles behind the new statute will raise difficulties.

The cartel statute deals—as American antitrust law does—with agreements between or behavior of private enterprises. The basic law does not give the competitive economy or any other economic form the express character of a constitutionally guaranteed order. Huber[13] and Geiger[14] have in fact concluded that the constitutional guarantee of the freedom to enter contracts outlaws any rule which prohibits cartel contracts. The constitutionality of the new statute, however, has not been doubted. The prevailing opinion appears to accept Biedenkopf's suggestion[15] that the cartel statute has been enacted as a legislative interpretation of the constitutional guarantee of contractual freedom which demands an "order of free determination

6. 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45 (1952).
7. 26 STAT. 209 (1890), as amended, 15 U.S.C. § 2 (1952).
8. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952).
9. Section 826: (138 BGB (Civil Code of 1896)) "Whoever, by methods inconsistent with good morals, intentionally afflicts another person with damage, is obliged to make restitution for such damages." Section 138 I: "Any legal act violating principles of good morals, is void."
10. RGZ (Reichsgericht in Zivilsachen) 132, p. 216; 133, 391. Nipperdey, Kontrahierungszwang und diktierter Vertrag (1920).
11. As to exclusive dealing contracts between breweries and innkeepers see RG 152, 215; as to uniform agreed condition of sale, etc., see Palandt, BGB (16. ed. 1951) § 138 (5) (a). BOEHM, WETTBEWERB UND MONOPOLKAMPF raised first the import of the meaning of "fair" and "unfair" competition on cartel law. The general clause of § 1 UWG requires clarification of the relation between "fair" competition and economic order.
12. See especially the interpretation of the Gesetz gegen den unlauteren Wettbewerb (UWG) of June 7, 1909 (BGBL. p. 499).
13. HUBER, DIE VERFASSUNGSPROBLEMATIK EINES KARTELLVERBOTS, GUTACHTEN S 10 (1955).
14. GEIGER, GRUNDGESETZLICHE SCHRANKEN FUR EINE KARTELLGESETZGEBUNG S 6 (1955).
15. BIEDENKOPF, FREIHEITLICHE ORDNUNG DURCH KARTELLVERBOT, AKTUELLE GRUNDSATZFRAGEN DES KARTELLRECHTS (1957).

of the individual, protected against unlicensed interference from private powers."

It is important to realize that the enactment of this statute, while a compromise in every respect, is the expression of an ideological movement aiming at a free competitive order. The post-World War II success of Germany's reconstruction is indeed the result of a liberation from the chains of a planned economy, accomplished under the leadership of Ludwig Erhard, Minister of Economics, and the teaching of the "Freiburg School" (Eucken and Boehm). The American policy in Europe has partly strengthened this ideology while, on the other hand, a rather unfortunate method of deconcentration in the banking, coal and steel fields has had a weakening influence. Germany's economic interests today call for relatively open import markets. While the liberalization of import tariffs and restrictive import provisions is at present a matter of dispute between the German government and the members of GATT, one cannot doubt the prevailing German interest in open trade. The boom and the immediate post-war technological upswing has permitted some opening of oligopolistic markets: Grundig with 20,000 employees has successfully penetrated the highly cartelized radio and television field; Hans Glas (GmbH Dingolfing) has entered the field of big manufacturers of small cars (Goggomobil) and Quelle (GmbH) has become a counterpart of Sears & Roebuck. In the field of craftsmanship perhaps no other decision of the American High Commission in Germany has been considered as economically beneficial as the decision of General Lucius Clay directing the local governments to freely admit refugee-craftsmen, irrespective of the state's economic need.[16] The Federal Constitution[17] guarantees to all Germans the freedom to elect their occupation and their place of work. In view of substantial economic strides made under the Clay decision, some courts have interpreted this constitutional rule as a complete barrier to new statutory restraint in the admission to occupation. The statute regulating craftsmanship follows the principle of freedom of action but with certain compromising tendencies.[18] Despite these compromise provisions the law has been generally interpreted as keeping the lines of trade free from governmental regulation.[19] A movement led by retail firms to regulate, once more, admission to the retail trade was defeated, largely through the efforts of Ludwig Erhard, Germany's

16. BOLDT, GEWERBEORDNUNG UND GEWERBERECHTLICHE NEBENGESETZE 445, 485 (L. ed. 1956).
17. Art. 12 Grundgesetz (GG).
18. Statute regulating craftsmanship (Handwerksordnung) of September 14, 1953 (BGBl. I. 1411).
19. II D. VOLKSWIRT 2406 (1957). Craftsmanship in Germany remains a major force. In 1956 Germany had 751,599 "craft" firms with 3624 million employees, or 15 such firms per 1000 inhabitants.

Minister of Economics.[20] It is necessary to keep these facts in mind before one evaluates the new statute. Its language allows the executive and the courts much latitude in its enforcement and they may be influenced by these existing trends.

Scope of Application

As in the United States, public regulation of many fields of business limits substantially the field in which the competitive order is maintained and in which the cartel statute is to be applied or fully applied. There are express exemptions as well as practical limitations to the impact of the statute. The statute itself enumerates those fields which are fully or partially excepted from its operation. Many of these are also subject to special regulation in the United States. The fields of energy (electricity, water, gas, atomic power),[21] insurance and banks,[22] railroads, airlines, shipping and mail,[23] and agriculture[24] are exempted since fully regulated on the basis of a planned economy. In these fields the agencies dealing with "cartels" can intervene only if special abuses can be shown, and then only with the co-operation of the agencies entrusted with the general supervision of these fields. The American law on insurance and banking shows similar methods. Coal and steel are to a large extent subject to special rules of competition and cartels, provided for in chapter VI of the Treaty on the European Steel and Coal Community of April 18, 1951.[25] Also all fields affected by the integration into the European Common Market *(infra)* may, concurrently with the German statute, be subject to the rules of competition and restraint of competition contained in article 85 of the Treaty of the European Common Market.

The entire field of labor relations is outside the Act. The Minister of Economics pointed out that German labor law is based on the freedom of association and the idea of the contracting parties, *i.e.*, labor and management, being free to set their own labor rules without governmental interference. The factual impact of the substantially monopolistic labor union (Deutscher Gewerkschaftsbund) on competition is not covered by the statute. Statutes have given this single union a fifty per cent participation in the management of steel and coal[26] and an influence in the election of one-third of the members of the board of supervisors, entrusted with election and supervision of management

20. TUCHFELDT, GEWERBEFREIHEIT ALS WIRTSCHAFTSPOLITISCHES PROBLEM 80 (1955).
21. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 101 (1957).
22. *Id.* § 102.
23. *Id.* § 99.
24. *Id.* § 100.
25. II BGBl. 445 (1952).
26. Letter of the Federal Minister of Economics to a number of attorneys, July 21, 1956, reprinted in WuW BWM 41 (1957).

in other corporations.[27] These facts point up a potential trend in the direction of concentration which, up to now, has not been followed.

Section 98 (1) of the statute declares the act applicable to enterprises, fully or partially owned, administered or run by governmental agencies. However, the actual enforcement of the statute against those enterprises is bound to be influenced by the fact that local and state governments have very large shares in the ownership of business, *e.g.*, forty per cent of the automobile production, eighty-five per cent of aluminum, seventy-five per cent of lignite. In these fields prosecution may not be aggressive because politically inexpedient.

Basic Provisions

The statute provides, in a nutshell, the following: (1) Horizontal cartels are unlawful unless expressly permitted by statute or licensed under special statutory authorization. Insofar as they are permitted, they may be dissolved by decree whenever abuses occur or the period for which the license has been granted comes to an end. (2) In the field of vertical restraints resale price maintenance is lawful if minimum requirements are fulfilled;[28] exclusive dealing arrangements or tying contracts are permissible and may be enjoined only if they unfairly restrict certain persons and substantially lessen competition.[29] Otherwise vertical agreements leading to restraints are void.[30] (3) Enterprises which have a position of market domination are subject to special supervision; they may not acquire additional footholds in such markets unless licensed.[31]

Substantive law is so closely interrelated with its enforcement that an American observer can successfully evaluate these rules only if he realizes that these rules are being executed in a society which has no: (a) courts of equity which may prevent the recurrence of violation of the law and establish conditions consistent with the law; (b) watchdog administrative agencies of the Federal Trade Commission type; (c) congressional hearings to examine the law on the basis of past experience.

The German statute—to be interpreted under German procedural and administrative organization—uses the following methods of execution:

(1) Agreements or acts declared unlawful by the statute cannot be enforced by any ordinary court or arbitration tribunal.[32] Any act

27. Statute as to codetermination in Coal and Steel of May 24, 1951, BGBl. I 347.
28. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY §§ 16, 17 (1957).
29. *Id.* § 18.
30. *Id.* § 15.
31. *Id.* §§ 22, 23.
32. *Id.* § 91.

of discrimination or threat designed to bring about results outlawed by the statute,[33] or any inducement of others to boycott, can be prosecuted.[34]

(2) Fines (not of criminal law character) may be imposed, on motion of the executive agency, by the Court of Appeals in Berlin (Kammergericht)[35] on anyone who acts, intentionally or negligently, in a manner inconsistent with the statute or decree issued thereunder.[36]

(3) A Cartel Office,[37] established in Berlin under general supervision and instruction of the Minister of Economics, may license certain acts or agreements[38] or declare unlawful and enjoin certain acts or agreements[39] or raise objections within a definite period of time against certain otherwise lawful acts or agreements.[40] The Cartel Office may command the doing of a positive act in but one case: it may demand the acceptance of an enterprise as a member of a professional or trade association. Under supervision of the Cartel Office trade practice rules may be provided for.[41] The decree and decisions of the Cartel Office are subject to judicial review of the Kammergericht[42] and eventually of the Bundesgericht.[43]

(4) The Federal Minister of Economics, in addition to his general power of supervision over the Cartel Office, may, subject to judicial review, grant emergency licenses.[44]

(5) Private suits for damages may be brought against cartel members (jointly) or dominating enterprises who intentionally or negligently violate the statute or a decree issued thereunder, "provided the aim of the pertinent statutory provision is the protection of this particular plaintiff."[45]

Horizontal Agreements

This paper is principally devoted to a discussion of the horizontal agreement. Horizontal agreements in restraint of competition, or a recasting of organization having the same effect, whatever their form, are covered by the German concept "cartel." Vertical command, as

33. *Id.* § 25.
34. *Id.* § 16.
35. In case the state cartel agency acts, the fine is imposed by the state Court of Appeal.
36. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY §§ 38(1), 81 (1957).
37. *Id.* § 84.
38. *Id.* §§ 4, 5, 6(2), 7.
39. *Id.* §§ 12(2), 17, 18, 22, 23.
40. *Id.* §§ 2(3), 3(3).
41. *Id.* § 28.
42. *Id.* § 62(D).
43. *Id.* § 73.
44. *Id.* § 8.
45. *Id.* § 35.

for example in a "combine,"[46] does not establish a "cartel." The principal rule as to cartels is to be found in section 1 under the heading "Cartel Agreements and Cartel Resolutions," which reads as follows:

> Agreements entered by enterprises or associations of enterprises for the purpose of accomplishing a common purpose, as well as resolutions of associations of enterprises, are ineffective, as far as they are adapted to influence, by restraint of competition, production or market conditions in the trade in merchandise or commercial services. This rule is not applicable if legal rules provide otherwise.[47]

This formula represents a compromise between the "Boehm-draft," asking for a general prohibition of all cartels, and the "Isay-draft," which, in harmony with traditional German policy, would legalize cartels unless abuse of power is shown. In spite of the more complicated language, section 1 establishes the same principle as section 1 of the Sherman Act. The use of the concept "competition" instead of "trade" has more ideological than practical importance.

Section 1 covers all types of "contracts" and "resolutions" traditionally used in Germany for the purpose of cartelization such as the outright agreement between competitors to restrain competition, the inclusion of provisions in a corporate statute which binds all shareholders to a certain method of use of their products, or the agreement to buy or sell through joint agencies. The use of certain organizational set-ups such as the incorporated association[48] does not give legal shields against the application of the act. The fact that the members *are* being bound is decisive, whatever the mechanism.

It should be noted that the rule refers to "enterprises" rather than persons. The precise meaning of this term must soon be resolved, for the problem of "intercombine" agreements (between two members of the same "combine family") is bound to arise. The concept "enterprise" should include the integrated combine as a whole, therefore, intra-combine agreements are not covered by section 1, while agreements between combines or corporations belonging to *different* combines are subject to this provision.

The Cartel Office and courts must soon determine whether section 1 embraces only those agreements which "actually" restrict competition or covers all agreements which "may tend" to restrict competition. Under the former interpretation all "small" cartels would be exempt from the law since their actual effect on competition would be neg-

46. A "combine" may be defined as an economic entity, vertical in structure and comprised of corporations, partnerships or other business associations unified in a central authority by various legal devices.

47. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 1 (1957).

48. Eingetragener Verein—E.V.

ligible.[49] This interpretation, it is feared, would tend to subvert the underlying policies and purposes of the act. Under the latter view, all "cooperatives," which of their nature "may tend" to restrict competition, but which are of vital importance to Germany in the craft and consumer goods industry, would appear to be per se illegal. But a reasonable solution of the co-operative problem may be found without sacrificing the substance of section 1. An instance is reported[50] in which the leading agricultural association of Germany had established a "milk support fund" to be administered by a managing corporation. The Minister of Economics refused to recognize this fund as a new enterprise since one of its purposes was to keep goods in storage to regulate the market in the interest of its members. The Government thus recognizes that a "new enterprise" must come into being as a distinct economic entity, with its own goodwill and as an independent participant in competition. By this interpretation a sound distinction can be made between co-operatives which have the character of a cartel and those which have not.

Section 1[51] declares agreements of a restrictive character "ineffective." Unfortunately, section 1 does not use the word "void." In German legal language agreements are called "for the time ineffective" (schwebend unwirksam) whenever the final effectiveness requires the license of a governmental agency or the approval of another person such as a principal or guardian.[52] Generally, grant of approval or license legalizes the agreement retroactively as of the date of entering the approved or licensed agreement.[53] If, however, the license or approval is denied, the agreement is considered void *ab initio*.[54] It is essential to know whether the word "ineffective" in section 1 has this technical meaning; if it has, all cartel agreements for which a license may be obtained, are not void or illegal so long as the decision on the license is pending and every party violating the terms of an agreement "for the time ineffective" risks liablity if the license is granted later. The courts may be called upon to decide these issues, then, (1) If the Cartel Office asks the Court of Appeals Berlin (Kammergericht) to impose a fine on the ground that a partner to an agreement has performed such agreement before the grant of a license, (2) if a part-

49. See LANGEN, DAS KARTELLGESETZ 5 (1957).
50. Request of the BWM (Bundeswirtschaftsministerium) to the Deutscher Bauernverband, April 4, 1956.
51. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 1 (1957).
52. A typical instance is to be found in § 108 I BGB: "Whenever a minor enters an agreement without the required approval of the guardian the effectiveness of the agreement depends on the approval of the guardian." The courts interpreted the license of a governmental agency, *e.g.*, having jurisdiction over currency matters, as parallel to the case of approval of a guardian. Palandt, § 134(2)b.
53. I BGB § 184 (1952).
54. RG 162, 1: BGH 1, 302.

ner to such an agreement is sued after the license is granted for damages resulting from acts committed during the preliminary period, or (3) if, during the critical period, a petition for an injunction is brought by one of the partners against the other partners.

Since the statute liberally allows the granting of licenses, temporary lawfulness may develop in a host of cases. The Cartel Office may grant licenses for horizontal agreements:

(1) to meet a decrease of sales resulting from a substantial change of demand, "provided the cartel appears to be necessary to accomplish a planned adaptation of capacity to the new demand and the regulation takes place under full consideration of public welfare and national economy";[55]

(2) to accomplish a substantial increase of the capacity of the participating enterprises by means of better technique, efficiency and organization and to improve thereby the supply of necessary goods and provisions;[56]

(3) to regulate competition in foreign markets, even if the domestic market is affected;[57]

(4) to regulate imports.[58] In an exceptional case the Minister of Economics himself may grant a license to any cartel whenever the restraint of competition appears to be necessary to support prevailing interests of "public welfare and national economics."[59] Furthermore, certain cartels become "effective" if, within a period of three months after the filing of an agreement with the Cartel Office, no objection is raised to agreed uniform conditions of sale, which shall not include price fixing[60] and agreed grants of discount as consideration for special services.[61]

In all these cases the "ineffectiveness" issue may be raised. What, during the pre-license period, or the period during which the cartel remains subject to governmental objection are the obligations of the partners to each other and to the Cartel Office? The clarification of this issue will be symptomatic of the general interpretation of the statute. Analysis may also shed light on the German legal approach to problems of statutory interpretation.

It is suggested that the courts may adopt the following approach: The prevailing rule as to the economic order is the outlawing of cartels. This rule is in force unless the questioned activity is exempt or stat-

55. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 4 (1957).
56. *Id.* § 5 (Rationalisierungs Kartell).
57. *Id.* § 6 II (Export Kartell mit Inlandwir Kung).
58. *Id.* § 7.
59. *Id.* § 8.
60. *Id.* § 2 (Konditionen Kartell).
61. *Id.* § 3 (Rabatt Kartell).

utorily authorized. One of the purposes of the licensing system is to have a careful investigation in advance of any interference in the prevailing order. It might therefore be logical to decide that—until the license is granted—no agreement comes into force and no one is bound before this date. However, this interpretation is excluded by the language of the rule of section 13 II, which provides that in all cases of eventual licensing under section 8 each participant in the agreement may rescind the agreement for cause. Since it is not possible to withdraw from non-existing agreements, we are unable to say that nothing is binding before the grant of the license. The question remains in what manner are the parties bound? Full weight should be given to the importance of the right of partners to rescind the agreement under section 13. Full weight should as well be given to the fact that, under sections 2 and 3, agreements effecting condition cartels and discount cartels are not effective until the end of the three-month period. It is apparent that the legislature, which does not require a positive license in the latter case, considers it less dangerous and gives it automatic effect if no objection is filed within three months. Since, before the end of the period, the agreement is entirely ineffective, the partners would be entirely free during that time. But the traditional meaning of "ineffective until licensing" in the more dangerous cases would have a far-reaching effect. If a party may be retroactively bound, and then sued for a breach of contract occuring during the preliminary period, he cannot dare risk noncompliance during that period. Such an agreement would be, as a practical matter, fully effective. That, surely, cannot be the intention of the statute. A more logical view is that during the preliminary period the only legal duty imposed upon the parties is that of cooperation in the prosecution of the license application; under this view, licensed cartel agreements would become effective only upon approval and without retroactive effect, just as are the automatically approved agreements.

The American reader may feel that I have unduly belabored a rather technical point of law. I do this only because I am convinced of its real and practical importance. Cartel-minded contractors will undoubtedly attempt to coerce compliance during the preliminary period on the basis of the traditional meaning of the term "ineffective." The problem will bulk large in future litigation.

Statutory Exemptions and Licenses

An American observer who reads the list of possible licenses, express or implied, and the statutory exemptions will find them rather far-reaching. One has to consider, however, that statutory rules to be executed by an executive agency, under ministerial instructions,

have to be very definite, since continental administrative law accords limited discretion to the administrator. Many points have to be expressly stated which American law has left to the determination of the courts at a later date.

The most far-reaching power of the Minister of Economics which permits him to grant a license without co-operation of the Cartel Office if restraint of competition appears to be necessary to support prevailing interests of public welfare and national economy,[62] calls for special explanation. Section 8 itself contains the warning that this

> power shall only be exercised in a case in which one is confronted with an immediate danger to a part of the economy, and if other statutory or political measures cannot be applied or at least not be applied in time and if restraint of competition is adapted to overcome the danger.

The license shall only be granted in particular cases of far-reaching impact. The American practice as applied in the Suez crisis shows that extreme national emergencies may call for temporary exceptions not otherwise authorized by statute. The so-called "Legalitatsprinzip" binds a German public official to apply statutory rules to all facts which become known to him. Apparently section 8 is to be applied only in similar emergency situations such as, for example, an inflationary situation following the outbreak of a brush fire war.

Once the Cartel Office has been in operation for some time, unilateral interference by the Minister of Economics under section 8 should become impractical since in Germany, even more than elsewhere, existing administrative machinery has a substantial weight of its own, demanding recognition and consultation before steps in its administrative area are taken.

Among other exceptions the American observer will find a familiar one: the Webb-Pomerene type of association. The act permits agreements in restraint of competition which promote the maintenance and increase of exports into markets outside of Western Germany.[63] The German export cartel exemption goes beyond the American exemption. A German export cartel may enter into agreements with foreign enterprises as to a foreign market. An export cartel having no domestic effects becomes effective in Germany upon the filing of a pertinent report with the Cartel Office.[64] This office, however, shall grant ("hat zu erteilen") a license to enter export cartels, even if

62. *Id.* § 8.

63. The statutes enacted in the German Federal Republic give consideration to the division of Germany by speaking of the "Territories in which this statute is to be applied." In the text for purposes of clarification we speak of Western Germany.

64. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY §§ 6 I, 9 II (1957).

they have domestic effect, provided such regulation is necessary to maintain the intended regulation of the foreign markets (markets outside Western Germany).[65] Therefore, the German licensee may enter into agreements dividing world markets.

It is obvious that in this latter case a heavy burden is imposed upon the Cartel Office. Many petitions no doubt will be filed under section 6 II on the ground that the markets, for instance, of Switzerland, Austria and England (not included in the European market treaty) have to be regulated despite domestic effects. The determination of the Cartel Office as to whether the domestic effect is necessary to accomplish the effect in the foreign market has to be difficult, especially if foreign and domestic producers join. Cartel experts know that restrictive agreements entered into between domestic and foreign enterprises usually have domestic effects, indeed would never be made without them. Why should foreign and domestic partners join if not both effects are reached? The Cartel Office under this formula will therefore have to approve many such export cartels.

In section 6 III the Cartel Office is instructed, however, that it "shall" not grant such licenses, whenever the agreement may lead to a "substantial" restraint of competition within Western Germany. The interest in maintaining a domestic competitive economy prevails over the interest in foreign regulation. Furthermore, no domestic regulation whatever is permissible unless it is necessary to accomplish the planned regulation of foreign markets. The Cartel Office, which must apply these principles to a factual situation, will find itself in a precarious position. The tests will necessitate most difficult value judgments. The pressure on the Office will be very strong.[66]

Section 1 permits, under license, cartels between importers, "if the German buyers do not find substantial competition between sellers." In the raw materials field, especially in the field of coal, one finds import cartels which are at the same time export cartels. The American observer will find the eventual strengthening of coal-import cartels of importance since at this time America is the principal supplier of coal which is not sufficiently produced within the territory of the European Coal and Steel Community. The recent appearance of Polish coal in world markets makes import cartels especially important since dealing with governmental monopolies of the Polish type cannot take

65. *Id.* § 6 II.

66. Interesting examples are to be found in the practice of the BWM under the Allied legislation: BWM 38: License of IX/17/1956 to ten German producers of aluminum foil to join a European cartel; BWM 55: License of I/12/1957 to an association for the support of export of iron bathtubs; BWM 57: License of II/1/1957 granted to six "Hauer"—exporters to enter an export cartel. These licenses provide that in case of enactment of the German cartel statute a new license is to be applied for as far as required under the statute.

place on a competitive basis and necessarily calls for cartelization.

The provisions on export and import cartels pose interesting questions from an American point of view. Some European writers have recently most bitterly attacked the alleged extraterritorial effect of American antitrust legislation. But the German statute and other European trade regulation statutes show that such extraterritorial effect is a logical result of such legislation in an influential commercial nation.

Section 98 II of the German statute states expressly: "This statute is applicable to all restraints of competition which have an effect in territory for which this statute has been enacted (Western Germany), even if they are the result of actions which take place outside of this territory." Does that mean that American Webb-Pomerene organizations exporting goods to Germany may be subject to the German statute? Does the American rule on extraterritorial effect mean that German import coal cartels or licensed or permissible export cartels are subject to the American statute? At present no general answer can be given, but under certain conditions, it may well be that German export and import cartels lawful under their statute, are subject to attack in the United States, while American organizations such as those in the coal field may be subject to investigation under German law.

The problem of export and import cartels under sections 6 and 7 is of special importance in view of the Treaty on the European Common Market of March 25, 1957. The treaty, which came into operation on the same day as the Cartel Statute, on Jan. 1, 1958, contains far-reaching rules on competition. It has become German domestic law. In regard to export and import cartels the specific question arises: can the automatic legalization of export cartels having no domestic effect, or the legalization of other cartels by license, take place whenever exports to or imports from the five other partner nations[67] are involved? If so, the cartel expert may easily employ export or import cartels to subvert the basic purpose of the European treaty, which is gradually to abolish tariffs and quantitative restrictions in European trade.

One of the most discussed questions today is whether the European treaty has any *immediate* effect on export or import cartels in Germany or in any of the other member nations. The language of sections 6 and 7 of the cartel statute does not appear to be helpful. Section 6 III forbids the issuance of a license to an export cartel affecting domestic trade if such issuance is contrary to principles contained in German international agreements. No reference is found in section 7

67. France, Italy, Belgium, Netherlands and Luxemburg.

(import cartels) or in section 6 I ("pure" export cartels having no domestic effect). The definite rules of the European Treaty, as provided in section 85, outlaw all attempts to bring back restraints in "inter-European trade" by cartels, which have been abolished by the general commercial provisions of the treaty. The general rule of section 85 (1) outlaws

> all agreements between enterprises or resolutions of associations of enterprises or behavior of enterprises co-ordinated with each other, which are adapted to restraint of trade between member nations and which aim at or effect a prohibition, restraint or falsification of competition within the common market.

All these agreements are declared "inconsistent with the common market" and are, therefore, prohibited. On the list of examples we find: "Restraint or control of production, markets, technical progress or of investments"[68] and "division of markets or of sources of supply."[69] No doubt, export or import cartels lawful under sections 6 and 7 would become unlawful in Germany, insofar as trade with the member nations is involved. However, it is argued that section 87 (1) provides that the Council (the executive agency of the common market) shall, within a period of three years, or after the end of this period with a qualified majority, issue "all decrees and rules necessary for the realization of section 85" and that, therefore, until the issue of these rules, no European law as to competition is in existence. This position has been presented in different member countries by several writers.[70] However, the member governments cannot overlook the fact that section 88 obliges each of them to decide on the legality of agreements, resolutions and commercial behavior in conformity with their own rules of law and the provisions of section 85 "until the enactment of rules under section 87." It is suggested, though not without hesitation, that Germany is bound to adapt the execution of sections 6 and 7 of the cartel statute to the needs of the common market. This means that whatever steps have been taken under the commercial policy of the European Treaty cannot be set back by arrangements of export or import cartel character.

We turn now to other cartels subject to licenses, most of which are of a basically domestic character. An important exemption is that accorded a "rationalization" cartel,[71] that is, a cartel adapted to raise

68. TREATY ON THE EUROPEAN COMMON MARKET, March 25, 1957; "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY, §§ 85(a), 85(b).
69. *Id.* § 85(1)(c).
70. SPENGLER, GUTACHTEN ZU SEC. 85 FF DES EUROPA-VERTRAGES (Veroeffentlichurg des Bundes der Deutschen Industrie).
71. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 5 (1957) (Rationalisierungs Kartell).

substantially the capacity or efficiency of the participating enterprises and thereby more effectively meet demand. Again we find the Cartel Office operating under the vaguest instructions: "the result of such rationalization must remain in a reasonable ratio to the restraint of competition resulting from it."[72]

A typical technique employed in compromise legislation is that of connecting a most far-reaching rule with a perfectly harmless provision, although the two rules have really nothing in common. We find the provision on "rationalization cartels" following the provision permitting horizontal agreements for the purpose of establishing a uniform application of standards often declared lawful in the United States under the "rule of reason." A rationalization cartel is related to this type of cartel only in that both relate to rational action. It is feared that a large number of traditional cartels will find protection under section 5 II. The recent practice of the Minister of Economics gives a good indication of the line to be expected. On May 29, 1957, shortly before the final adoption of the statute by the Bundestag, the Ministry granted a license to a cartel of this type. Deringer, in his annotation,[73] points out that section 5 II closely follows the language of the original legislative draft upon which the decision was based. It is to be expected, therefore, that the Cartel Office will follow a similar line. In the cited case the licensed agreement permitted seventy per cent of all producers of "pottery" to use the device of a joint sales agency as well as limited methods of quotas and price fixing. Under the agreement the joint sales agency, the Steinzeug-Handelsgesellschaft m.b.H. in Hanover, may enter into exclusive agency contracts with each producer who undertakes to pay a contractual fine of triple the price of goods sold through other channels. While generally the customer may name the producer whose products he would like to receive, the agent selects the producer if the customer is silent. The agent "is obliged to distribute the order among the enterprises represented by him under full consideration of their capacity to supply those goods." The agent is bound to give the producer proof that on the basis of his capacity he has been given full consideration. If the producer can prove that he has not been given full consideration, he may terminate this contract upon the giving of three-months notice. The agreement can only be performed if the agent has an agreed list of capacities and quotas. In preparation for execution of such a program the producer is bound to submit statistics on the available stocks and on the program of production. The price fixing is accomplished by a uniform price list prepared by the agent, who may only raise prices if seventy-five per cent of the producers of the goods sold during the last year desires it

72. *Id.* § 5 II.
73. Com. WuW BWM 87 (1957).

or decrease prices if twenty-five per cent suggest such action.

Section 5 (3) of the statute permits utilization of the syndicate device[74] only

> whenever the purpose of rationalization cannot be accomplished otherwise, provided the rationalization is desirable in the public interest and if the success of rationalization stands in a reasonable ratio to the restraint of competition resulting from it.

In the Steinzeug agreement it has been assumed (1) that supply of a sufficient number of different types and qualities could only be guaranteed through centralization; (2) that centralization is needed to reasonably utilize the means of transportation and to bring about a proper distribution of orders. The cartel section of the Ministry of Economics felt that this situation justified the grant of a license. The government, however, imposed the condition that customers are to be supplied under the same conditions, in the scope of the capacity of the producers, and under consideration of the economic urgency of the supply.

A "rationalization" cartel can be licensed whenever it appears to be in the interest of a reasonable development of industry. There need be no economic emergency or crisis. However, the statute does provide for two cases of licensing in emergency situations.

We have already referred to the extraordinary power of the Minister of Economics under section 8. Another type of emergency license may be granted by the Cartel Office in the case of the so-called "crisis cartels" (Strukturkrisenkartell). The language of section 4, in which this form of a cartel is provided for, would not be sufficient in itself, if we were not provided with the background of the statute published by the committee which prepared it. Section 4 sets out the following requirements for the grant of this license:

(1) The existence of a substantial (nachhaltig) change in demand for a product and a decrease of the turnover resulting from such change.

(2) The necessity of such a horizontal agreement to accomplish a planned adaptation of the capacity to the demand.

(3) A desirable effect of granting the license, taking into consideration the public welfare and the national economy. The official reasoning points out:[75]

> The grant of the license under section 4 cannot be justified by every

74. A "syndicate device" may be defined as a central buying or selling organization in restraint of trade.

75. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 4, comment p. 26 (1957).

> decrease of turnover. It is necessary to establish that the emergency is the result of economic developments in the course of the ups and downs of the business cycle.

This means that such decrease of the turnover is of temporary nature. A license shall not be granted whenever a definite change of the demand develops, for instance, as a result of a final change in consumer demand or in the pattern of raw material supply. Cartels under section 4 are not supposed to be a remedy whenever structural changes of the economy disturb particular enterprises or even entire fields of industry. Langen refers to a recent case in the flour industry.[76]

The observer of cartel development may suggest that very often conditions which do not justify the grant of a license under section 4 will be presented to the Cartel Office under section 5, under which the applicant for a license has to present much less evidence in regard to the causes of the difficulties. Section 5 practically places the burden on the Cartel Office to show that the grant of the license would interfere more with the general competitive economy than is justified by the particular interest of the petitioners. As explained in the committee reports the burden is on the petitioner to show that the economic causes of his trouble are exactly those which are outlined in section 4. This close relation between these two types of cartels, *i.e.*, sections 4 and 5, touches a problem which, because of the many different forms of lawful, permissible or licensed horizontal agreements, will undoubtedly assume considerable importance in the practice of the German cartel lawyers.

Uniform Conditions of Sale

Up to now we have discussed problems relating to quantity or quality, to production or marketing. We now consider restraints in conditions of sale.

The statute provides for monitoring of agreements on uniform conditions of sale (Konditionenkartell), with the exception of price-fixing agreements,[77] and the supervision of so-called discount cartels (Rabattkartell).[78] The Cartel Office can prevent the legalization of such cartels by filing objections within a period of three months after such agreements have been reported.[79] The objection of the Cartel Office against the Konditionenkartelle may only be based on "abuse of the market position resulting from such cartel" or if the agreements are in violation of any "international agreements which Germany entered and

76. Gesetz 67, 68, discussing § 4.
77. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 2 (1957).
78. *Id.* § 3.
79. *Id.* § 9.

which are inconsistent with Konditionenkartellen."[80]

Uniform conditions of sale are of more significance in Germany than similar agreements would be in the United States. In Germany, for several decades, each large enterprise has sold exclusively under its own conditions of sale which are usually printed on the back of the order or its acceptance. The courts have supported the development of this custom by declaring these conditions binding, for example, on a buyer who, at an earlier date, did business with the seller under the buyer's general conditions,[81] or in the field of banking, insurance and transportation. Support of this custom was extended even to customers who had never received a copy of these conditions of business on the ground that customers have to expect that businessmen in these fields will not act otherwise.[82] The courts have given support to horizontal agreements on uniform conditions of sale, generally legalized by section 2, by holding that published conditions agreed on by associations are binding on buyers from a member since buyers should realize that such member, presumed to be loyal to his cartel obligation, would never do business unless under the conditions of his cartel.[83] These conditions of business are based on the fact that most rules of the Civil Code, *i.e.*, those on sales, are binding, if the parties to the contract have not declared otherwise. The associations try to minimize risks to the buyer or customer resulting from transactions. The courts in supporting this development have on the other hand reserved the right to examine the contents of these conditions where the public interest or the interests of the parties involved require protection or limitation.[84] The uniform condition of the freight companies (Allgemeine Spediteurbedingungen) shows how much disagreement can develop in regard to the determination whether in a particular case the private and public interests are sufficiently protected.[85] The importance of these problems grows, if associations of businessmen of different levels consort to agree on uniform conditions of sale. If it should be, for instance, lawful for the retailers, wholesalers and producers of the electrical industry to agree on uniform conditions covering the entire trade, the consumer could be placed in a rather precarious position. Section 2 speaks of uniform conditions without giving any determination of how far this uniformity may go. Whenever leading enterprises of different levels join in the preparation of uni-

80. *Id.* §§ 2, 12.
81. SCHLEGELBERGER, III HANDELSGESETZBUCH § 346 n. 30 (3 ed.).
82. RGZ 170, 233; 171, 43; BGHZ 12m 136.
83. RGZ 95, 93 and 112, 2581; *compare* for the entire problem RAISER, DAS RECHT DER ALLGEMEINEN GESCHAFTSBEDINGUNGEN (1935).
84. SCHLEGELBERGER, *op. cit. supra* note 81, at § 346 n. 32.
85. The Federal Court decided that these conditions are unobjectionable. GHBZ 9, 1; 12, 136. Leading experts disagree.

form conditions of sale, entire fields of industry and trade have practically a sales law of their own, usually interpreted by arbitration tribunals organized by or in co-operation with the trade associations. These arbitration tribunals remain fully permissible under the act. Section 91, which grants parties to arbitration the right to call on the ordinary courts, refers only to litigation between cartel members but not to litigation between cartel members and their customers.

The Cartel Office may intervene here, by filing objections within the three-month period[86] or by decree of prohibition[87] only, if "the agreements and resolutions or the method of their performance amount to an abuse of the market position resulting from the pertinent license in disregard of the general rule of section 1." Years ago I suggested that the concept of "abuse" as a test of cartel control imposes an unbearable burden on agencies of supervision.[88] How far may the participants cover different market levels? How much risk is the minimum risk to be assumed? Will the requirement of section 2 that the draftsmen of uniform conditions give a proper hearing to parties in interest help the public or all parties involved or operate as an invitation to inclusion of all possible levels into the agreement? Today, we can do no more than raise these questions. It remains to be seen, whether, in the case of uniform conditions, the courts will maintain the power of control which they assumed before, or whether as a result of the statute it will be considered the exclusive right of the Cartel Office to intervene in cases of abuse.[89] The argument that courts must now withdraw from this field is to be expected.

Discount Cartels

While horizontal agreements on uniform conditions of sale shall not influence the fixing of prices or of any element of prices,[90] the so-called discount cartel (Rabattkartell)[91] does have such effect, at least as far as the supply to wholesalers is concerned. Discount cartels will continue to be a source of litigation since section 3 declares them lawful if the Cartel Office does not file objections within three months after the filing of the implementing report. The eventual legalization of the discount cartel requires that the agreed discounts amount to a "genuine consideration and do not lead to an unjustified discrimination of certain economic levels or consumers belonging to such levels, who

86. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 2 III (1957).
87. *Id.* § 12 I.
88. Kronstein & Leighton, *Cartel Control: A Record of Failure,* 55 YALE L.J. 297 (1946).
89. See "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 12 (1957).
90. *Id.* § 2.
91. *Id.* § 3.

give the same consideration to the suppliers."[92] Originally it was the express intention to avoid any statutory solution; thus following similar provisions of the Robinson-Patman Act. Opposition to following the Robinson-Patman Act was based on the opinion that any prohibition of selling to various customers at different prices would lead to uniform prices. Will the discount cartel have an opposite effect? Under section 3 is the express statement that these horizontal agreements may only regulate "discounts given for special performances or services excludes agreements calling for no discounts at all or discounts irrespective of consideration." However, the argument has already been presented that the alleged purpose of section 3 (to exclude competition between manufacturers regarding the temptations offered to wholesalers by fixing discounts to be offered) cannot be realized unless the prohibition of discounts not covered by the concept of "discount for consideration" can also be agreed on and that, therefore, section 3 gives implied consent to this type of arrangement.

The concept "discount for consideration" is bound to raise difficulties of interpretation. At this point, it is sufficient to refer to quantity and functional discounts. In spite of the entirely different approach of the Robinson-Patman Act which obliges the merchant, as a matter of law, to give the same prices and the same discounts to every buyer, the American material on quantity discounts may be helpful. In both systems, the decisive point is whether a quantity discount is actually justified by cost-savings. Functional discounts, especially those in favor of the wholesaler, are brought under the concept "discount for consideration" by referring to the cost-savings which allegedly result from the fact that, for example, the selling manufacturer is not required to build up an expensive system of distribution. The problem presented by merchants who are at the same time wholesalers and retailers will have to be solved in the cartel rules without coming into conflict with the prohibition of discrimination. The Cartel Office is bound to raise objections against the cartel if participants in the pertinent market prove, within a month after the filing of the agreement, that the agreement subjects them to unjustified discrimination.[93] Even later, the Cartel Office, on its own motion, may declare the agreement ineffective by reason of discrimination.[94] The powerful consumers' co-operative is expected to present difficulties in this area. For years this organization complained that industry discriminated against it by giving functional discounts to large wholesale organizations which are linked up with retailers while the co-operative did not receive similar discounts. Under section 3 the discount cartel agreement has to establish clear

92. *Id.* § 3 I.
93. *Id.* §§ 3. 3 III.
94. *Id.* § 3 IV.

definitions applicable to everyone. Futhermore, the report filed in the making of such agreement has to give proof, "that persons on the economic levels, to be affected by the discount regulation, have been given a proper hearing." The co-operatives feel assured that they will be among the organizations to be invited,[95] and the cartel expert expects them to be among the cartel members so as to avoid serious clashes of interests.

Soelter suggests that discount cartels—as we have considered in regard to "Konditionenkartelle"—may be established on different levels.[96] If Soelter is right, even without a license, the entire trade from producer to retailer may be bound to maintain a uniform discount level. In that case the entire problem of resale price maintenance would change its character, since, even in non-trade-mark articles, the retailers would be bound to each other and to the wholesalers and their organization to keep their discounts within the same level. Whenever entire fields of trade are at the same time subject to both discount and "Konditionen" cartels not much flexibility would be left. The argument is made that this system would lead to real competition by better service and performance (Leistungswettbewerb). Indeed, the typical Robinson-Patman Act problems— "discrimination" and "meeting competition"—are successfully avoided, provided the entire trade follows the cartel policy, but at the expense of abolition of price competition in these fields. The modern industrial experience in which many industries have, from time to time, quantities of products which must be brought to the customers quickly if overcrowded storages are to be avoided, will foster the finding of loopholes in the law as before. Small business complains, with some justification, that many large enterprises and governmental offices buy cheaper as a result of quantity discounts and distribute it among their employees, who, in turn, supply their friends and relations.[97] The Rabattgesetz of 1933, which continues to affect discounts given by wholesalers and producers in their direct sale to the last consumer, does not help the retailer. Furthermore in certain fields, such as gasoline, an extensive outsider-business appeared on the market (Georg von Opel). It is not expected that discount cartels will attack these two problems.

Licenses of Industrial Property Rights

The cartel history shows that from the beginning of cartels industrial property regulations, especially with regard to patents, have

95. PAULS, ZUM NEUEN KARTELLGESETZ, BLATTER FUR GENOSSENSCHAFTSWESEN (1957).
96. SOELTER, DAS RABATTKARTELL IM GESETZ GEGEN WETTBEWERBBESCHRANKUNGEN "DER BETRIEB" 887, 913 (1956).
97. A practice called, in the vernacular, "beziehungskartell."

been used to strengthen the discipline among cartel members as well as to furnish protection against outsiders. All types of cartels, lawful under sections 2 to 14, may be strengthened by a combination of patent licenses and cartel obligations. In section 20 IV it is expressly stated that sections 1 to 14 "remain unaffected" by the special patent rules of sections 20 and 21 of the cartel statute.[98] On the other hand, patent license agreements may not exceed the exceptions from the cartel prohibition under sections 2 to 14, unless expressly authorized by section 20 II. While the formulation of this section seems to apply more to vertical restraints (not discussed here in detail) than to horizontal agreements, its practical importance for cartels is bound to be felt. A purely hypothetical example, constructed on the basis of the well-known former General Electric and Westinghouse license agreements may help. Fixing of prices by the licensee for "the protected product," or by the licensee and cross-licensee for the product resulting from the use of the pertinent patent is valid.[99] By this method the entire horizontal line of producers may be bound to obey fixed prices. This line may be strengthened by limitation in the sale to wholesalers or retailers to the extent that they have to obey the prices fixed. Very much depends on the definition of "protected article" in section 20 II (2). Does it require the existence of a product patent? Or does the use of a process-patent justify such action?

Patent licenses, even if granted to horizontal competitors, may contain restraints as to quantity and method of production or sale as well as limit production or sale to certain territories.[100] Pfanner even believes that in the interest of maintaining the reputation of the quality of products manufactured under the particular patent the patent owner may require the licensee to buy all raw materials exclusively from the patent owner or a firm connected with him.[101]

The patentee and his licensee—in the cartel cases one has to deal often with cross-license situations—may bind each other to establish exclusive exchange of information and the obligation to grant each other licenses in regard to "improvement patents and patents by virtue of which the field of application of the patent may be enlarged."[102] All these obligations have to be mutual. This mutuality is important where the firms operating on the same level are of equal importance. However, smaller firms will find that an obligation to hand over the

98. Section 20 is applicable to patents and design patents. Trademarks and copyrights are not affected.

99. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 20 II (2) (1957).

100. *Id.* § 20 I.

101. *Id.* § 20 II (1). For a different opinion of this matter, see LANGEN, DAS KARTELLGESETZ 104, 129 (1950).

102. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 20 II (3) (1957) (Anwendungspatent).

results of their progress to the big competitor may be of great nuisance value. Furthermore licensees may be bound not to attack the licensed patent.[103]

If these rules were to have unlimited application many industries or even entire trades could be "cartelized" for long periods merely with the help of a few more or less important patents. However, these rules have been included as an exception to the general statement of section 20 I:

> Agreements regulating acquisition or licensing of patents, design-patents ... are ineffective, as far as they impose limitations in business behavior on the acquiring person or the licensee which exceed the scope of the industrial property right.

Langen suggests that the restraints permissible under section 20 do not cover cases of substantial cross licensing. Maybe a similar interpretation will develop as in the United States, in the cases following *United States v. United States Gypsum Co.*[104] preventing the "organization of an industry" by patent structures. Section 20 III authorizes, however, the Cartel Office to license agreements which exceed the broad statutory permissions, "provided the economic freedom of action of the person acquiring the patent or the license is not unreasonably restrained and the competition not substantially restrained as a result of these special limitations." Even without such a license of the Cartel Office, the most restraining license provisions may be included in license agreements concerning the export of patented goods. Special reference is made here to the discussion on the extraterritorial effect and the rules on the European market which appears above.

Section 21 of the German statute has an especially important innovation: agreements on patent licenses are equalized with agreements on "industrial secrets," whether patentable or not. Since "industrial secrets" are not subject to any statutory period, the agreements as to them are unlimited. A number of questions are presented. Who determines what is "secret" enough to justify restraint of this type? What should be the duration and extent of "secret"? And how secret can it remain after publication to a large number of licensees? Is this step not a serious danger to the patent system since one may achieve better and more lasting protection without a patent than with a patent? Consideration of the international implications alone may prevent a movement to do business without patents.

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103. *Id.* § 20 II (4).
104. 340 U.S. 76 (1950).

Cartel Discipline and Organization

Past experience shows that the broad field in which cartels function in a lawful way requires rules on the internal organization and behavior of cartels as well as on their activities affecting outsiders or customers. Cartels shall not, by threat or otherwise, induce members to agree to measures not permissible under the act.[105] The practice seems to be developing that the prohibition of discrimination is expressly formulated in conditions made a part of licenses granted by the Cartel Office.[106]

Cartel discipline may revive the previous system of organizational fines imposed on members by organizations, committees or tribunals. The Bundesgericht has limited judicial review over this practice to the question whether the bylaws authorized such fines and the principal rules of procedure have been obeyed.[107]

The statute prohibits the sale of securities given by the members of a cartel as a guarantee for loyal performance of the contract, unless such sale is permitted by the Cartel Office.[108] In these instances the Office must protect the members against discrimination or unreasonable treatment. Only in very special cases may a "defendant" before a cartel tribunal, confronted with a threatened fine, ask for the protection of section 91, which authorizes parties called before an arbitration tribunal to request a decision by the ordinary courts, since section 91 is only applicable to "legal litigation resulting from agreements or resolutions" covered by the cartel statute. In most cases, however, disciplinary action for violation of cartel rules is not "legal litigation" within the meaning of section 91.

In many ways, directly or indirectly, cartel organizations try to impose their organizational power on outside competition as well as on customers. Under the rule of section 25 II "associations of enterprises" shall not "compel" horizontal competitors to join in a cartel or to behave in the market in conformance with cartel policy.[109] They shall not boycott customers or unjustifically discriminate among them.[110]

The statutory provisions on vertical restraints,[111] not discussed in this paper, may prove to have their principal importance when exercised by enterprises belonging to cartels or by enterprises operating in conformity with them. Section 15 is a general condemmnation of

105. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 25 I (1957).
106. *Id.* §§ 25 II. 25 III.
107. BGH X/4/1956, reported in WuW/E—BGH p. 159; see also MEYER-CORDING. DIE VEREINSSTRAFE (1956).
108. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 14 (1957).
109. *Id.* §§ 25 II (1), 25 II (3).
110. *Id.* §§ 25 I, 26 I, 26 II.
111. *Id.* § 15.

"contracts between enterprises with regard to goods or commercial services dealing with markets subject to the cartel statute which restrain a party to the agreement in his freedom to set prices or conditions of business in agreements which he enters into with third persons concerning merchandise delivered to him or other merchandise or commercial services." It is apparent that the restraint as to the use of merchandise which is subject to a cartel rule is much more effective than restraints in regard to other products, since the customer has no alternative other than to accept the restraint, whether in contractual relation with one or the other cartel members. Vertical restraints become unavoidable if a product is cartelized under one or the other "exceptions" under sections 2 to 14, on the producer as well as on the wholesaler level. The special case of exclusive dealing clauses, a typical vertical restraint, dealt with in section 18, declares such clauses lawful until prohibited by decree of the Cartel Office. This decree may be issued if such clause unreasonably restrains the economic freedom of action of a party to the contract or of other enterprises and if by the scope of such "restraints" the competition on the Market for these or other goods or commerical services has been substantially affected."[112]

The observer of cartels knows how often these exclusive dealing clauses have been instruments of cartel organizations. The use of "loyalty discounts" if merchandise has been purchased only from member firms during a certain period of time has been a traditional device of a combination of cartel and exclusive dealing. Whether one may justify those discounts under section 3, requiring "consideration for discount" is more than doubtful, but other combining devices may be used.

Biedenkopf, in his thesis on the exclusive dealing clauses[113] exemplifies through these clauses the "rule-setting" character, *i.e.*, private rule making as against statute or administrative, of cartel agreements. He would find even more justification for his important thesis if he would consider an eventual "Konditionenkartell," covering all economic levels of the market, combined with a similar system of discount cartels, combined furthermore with a uniform use of the exclusive dealing clause whether or not included in the uniform conditions of business. As a matter of fact a potential buyer of the pertinent product could not buy under other conditions any more than he can buy under another Civil Code. Therefore, such rules should be interpreted by the courts not as contracts but as norms. That means

112. *Id.* § 18 I.
113. The thesis will soon be published under the title *Zur Rechtsnatur wettbewerbsbeschrankender Vertrage.*

that, not the private interest, but the public interest would decide in the last result.

The Cartel Office may intervene in case of the use of another vertical restraint, partially declared lawful, *i.e.*, the "fair trade" rules, if adopted in "combination with other restraints of competition and resulting in an increase of the prices of the merchandise affected, not justified by the general economic conditions or to prevent a decrease of the prices or to limit their production or turnover."[114] The independence of the discount cartels and the "fair trade" question should become a substantial problem for the Cartel Office and the courts.

Procedure

The statute establishes the Cartel Office in Berlin within the jurisdiction of the Minister of Economics.[115] The committee report on the statute points out:

> Since the Federal Cartel Office is no Federal Court, but an administrative bureau, both committees (judicial and economic) believed that the right of the Minister to give instructions should not be limited, since only by this method will the Minister be able to bear the political responsibility for the decisions of the Cartel Office.

The only special rule as to those instructions is the rule that general instructions, for example, on general principles of interpretation of the statute, are to be published in the Federal Register (Bundesanzeiger).[116] The very broad use of such concepts as "general welfare," "prevailing interest of competition over regulation," etc., may invite the issuance of many general instructions under section 49.

The Cartel Office, under such instructions and under the organizational command of the President of the Office[117] is being organized on a quasi-judicial level. The principal decrees will be issued by "decree divisions" consisting of a chairman and two associates. Objections against these decrees may be filed before "objection divisions" again composed of a chairman and two associates.[118] For the preparation of decrees or decisions of any kind the office may collect all necessary evidence.[119] It has subpoena power.[120] However, in case of lack of cooperation this office is required to call on the court having local jurisdiction for the issue of a warrant.[121] The Cartel Office may call experts

114. "CARTEL STATUTE" OF THE FEDERAL REPUBLIC OF GERMANY § 17 I (3) (1957).
115. *Id.* § 48 I.
116. *Id.* § 49.
117. *Id.* § 48 II.
118. *Id.* §§ 48 II, 48 III, 59.
119. *Id.* § 54 I.
120. *Id.* § 55 I.
121. *Id.* § 55 II.

and witnesses; however, if an oath is requested by the Office, the local court shall decide whether the request of the Office is justified. By this procedure the "decree division" of the Cartel Office reaches a decision which is either accepted or made the subject of future litigation.[122]

Of special importance is the power of the Office to issue "temporary decrees in order to establish a temporary regulation."[123] This power exists in regard to applications for licenses,[124] motions for revocation or amendment of a license and many other instances. After exhaustion of the administrative remedies, the party considering itself unjustly burdened by a decree may ask for judicial review by a special division of the Court of Appeals in Berlin (Kartellsenat).[125] From the decision of this Court the objecting party or the Cartel Office may call on the Federal Supreme Court, provided the Court of Appeals, or on petition of review the Federal Supreme Court itself, permits such petition for judicial review by the "Kartellsenat of the Highest Court."[126] While the review of the Appeals Court includes the factual and legal aspect of the case (Beschwerde),[127] the review of the highest court goes only to the law ("Rechtsbeschwerde").[128] The review courts may affirm, overrule or partly overrule the decree, but they cannot substitute another decree.[129]

During the period of petition for judicial review the enforcement of the decree is suspended,[130] but the Cartel Office may maintain its temporary ruling issued under section 56.[131] Judicial review may also be asked for by persons burdened by the refusal of the Minister of Economics to grant licenses for the establishment of an emergency cartel. This particular provision exemplifies most clearly the problem with which the courts are going to be confronted in these review proceedings. We have seen that the Minister of Economics may issue special or emergency instructions in all cases. We have futhermore seen how often the Cartel Office is called on to determine whether "public welfare or national economy" require certain actions or when the national interest of one economic institution prevails over another institution. The language of section 70 IV deprives the reviewing courts of the excuse that determinations of all these points is up to the executive side of government:

122. *Id.* §§ 57, 59.
123. *Id.* § 56.
124. *Id.* §§ 4, 5 II, 6 II, 7, 20 III, 21.
125. *Id.* §§ 2, 62 IV.
126. *Id.* §§ 73-75.
127. *Id.* § 69 I.
128. *Id.* § 75 IV.
129. *Id.* § 70 II.
130. *Id.* §§ 63, 75.
131. *Ibid.*

> The decree is also without legal or factual basis, if the Cartel Office made a mistaken use of its discretion, especially if it exceeded the legally established borderlines of discretion or violated, by its use of discretion, the meaning and purpose of the statute. The evaluation, however, of the condition or future development of the national economy shall not be reviewable by the courts.

It will be a very hard question to decide which of the many different determinations of economic policy made by the Cartel Office in administering the law, such as those called for under sections 2 to 7, deal with this type of evaluation and which do not. At this point the German practice will find not only a most difficult problem of interpretation, but a constitutional question: the conflict between the political side of the Government, the Minister of Economics and the courts. It is argued that this procedure violates the separation of powers provided for by the basic law.

For the future development of the law it is most important to know who is to be considered a party at interest and thus entitled to be a petitioner for judicial review. The act states that those persons who could file objections against the issuance of a decree or the refusal of a decree in the first instance are parties at interest,[132] namely:

(1) The person who submitted an application to the office;

(2) cartels, enterprises or commercial or professional organizations, against which the proceedings are directed;

(3) persons or associations of persons, whose interests are being substantially affected by the decree and who, on their own motion, have been called by the Cartel Office into the proceeding.[133] The admission of a person, by the Office, into the case, before the end of the "first instance" proceedings determines whether later judicial review may be granted. The problem has already been presented whether the decision of the Office as to admission into the case is a "decree" from which judicial review may be taken. In addition to this list of persons permitted to ask for judicial review, section 62 III permits the filing of petition for judicial review for the "omission of the Cartel Office to issue a certain decree applied for, whose issuance, according to the allegation of petitioner, can be asked for as a right of such petitioner." Unless satisfactory reason is shown, an omission of this kind exists whenever the Cartel Office did not—within a reasonable period of time—make a decision on the petition for issuance of such decree. In discussing the various types of cartel licenses we distinguished between statutory rules where the Cartel Office "has to grant a license"

132. *Id.* § 62.
133. *Id.* §§ 51 II, 51 III.

(export cartel with domestic effects)[134] and other rules which leave the determination as to granting a license to the discretion of the Cartel Office. Only in the first line of cases does a person whose petition for a license was rejected have a right under section 62 III. In other cases persons opposing the licensing of cartels or persons who try to induce the Cartel Office to intervene in exclusive dealing clauses under section 18 have no right to appeal, unless admitted into the proceedings by the Cartel Office.

The cartel problem remains a judicial problem, apart from the field of judicial review. Cases between private litigants may directly affect the cartel statute since no court may help in the enforcement of any restrictive horizontal agreement not declared "effective" directly by the statute, or made "effective" on statutory authorization by the Cartel Office. No one can allege the legality of a cartel before a court of law, about which the Cartel Office is not informed or which the Cartel Office has not licensed. The automatic effectiveness of cartels requires, as we have seen, the filing of a report to the Cartel Office. Therefore no one can rely on "unreported cartels" before any court. The cartel register, to be established under section 9 I has only evidentiary importance. While all reported or licensed cartels (with the exception of export cartels) should be registered, the act of registration has no constitutive effect.[135] Each court, before which litigation dealing with cartel agreements or the cartel statute is in question, has to inform the Cartel Office and permit this office to appear as amicus curiae.[136]

The statute establishes a cause of action for any person, protected by any provision of the cartel statute or any decree issued under it, against an intentional or negligent violation of such provision or decree. A complaint may be brought for damages resulting from such violation.[137] Under general principles of the law of torts a plaintiff may ask for a court injunction restraining a defendant from further violations. The limitation of this cause of action to cases in which the defendant has violated a provision or decree issued in the interest of the plaintiff's protection is going to raise most difficult problems of interpretation. It is certain that the general prohibition of section 1 is not a provision having the purpose of protecting persons outside the cartel. On the other hand it is certain that the rules prohibiting certain acts of discrimination or boycott[138] are provisions protecting

134. *Id.* § 6 II.
135. *Id.* § 9 II.
136. *Id.* § 90 II.
137. *Id.* § 35.
138. *Id.* §§ 25, 26.

definite persons. It is uncertain whether the rule on exclusive dealing clauses[139] falls in the same category.

Conclusion

The cartel problem is a political, economic and legal problem. The draftsmen of the statute, on the one hand, were apparently impressed by the legal character of the American solution, enforced by courts and an independent executive agency (FTC) subject to judicial review. On the other hand, neither parliament nor the cabinet nor the Minister for Economics intended to withdraw from their respective fields. Any questions of cartel control, whether absolute prohibition or selective licensing, involves serious political considerations. While in the United States both political parties support, basically, a policy of free enterprise, in Germany the present opposition party gives at least lip service to some system of a planned economy. Even in the party in power, which is generally in favor of a liberal economic policy, strong elements believe in a cartelized form of "free enterprise." Under these conditions, it is not surprising that the statute tried to reach a compromise between a political, a quasi-judicial and a judicial system.

The German courts, following a long tradition in tort law, will be very reluctant to admit lawsuits in cases in which the executive side of the government has the responsibility and remedies available to give aid. The courts will also find it difficult—as the American courts did—to determine "damages" resulting from violations of provisions of the statute and decrees issued by the Cartel Office.

A most difficult task awaits the Court of Appeals in Berlin in deciding motions of the Cartel Office asking imposition of an administrative fine on persons who have committed a "violation of order" and in whose prosecution a "public interest" appears to exist.[140] The Office may file a motion at its discretion. The legislative committees insisted most emphatically that this proceeding is not of a criminal nature and the fine not a criminal penalty. The legislature did not intend to attack the civil reputation of the offenders but to induce them to comply. Therefore the threatened fines for intentional violation are very high, up to 100,000DM (approximately $25,000) or treble the amount of profits made as a result of violation of the act.[141]

The statute of 1957 does not bring to an end the German dispute over cartels. For the time being the place of the discussion will be transferred from the parliamentary place to the Cartel Office and

139. *Id.* § 18.
140. *Id.* § 81.
141. *Id.* § 38.

the courts. Perhaps because of contemplated integration into the European market—generally highly cartelized—with a consideration of the importance of East-West trade and the end of the post-war boom the law had to be written in a flexible way. The road is left open for liberal tendencies to lead Germany and Europe finally to a relatively free form of trade. The first president of the Cartel Office, Dr. Günther, is familiar with American experiences in this field and is well equipped for the position. In the future much will depend upon American practices and developments in this field. Likewise, American developments will certainly be influenced by the next phases in Europe. The Institutes for International Trade Law at Frankfurt University and Georgetown University will attempt to keep Americans aware of the European trend and the Europeans cognizant of the American trend. Problems peculiar to the economy of each, taking into consideration pertinent historical, social and political questions, require that continuous attempts at re-assessment and interpretation be made.