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The Control of Abuses by Market-Dominating Enterprises under German Antitrust Law

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TABLE OF CONTENTS

INTRODUCTION

German antitrust law, like that of the European Economic Community (EEC),[1] contains special provisions designed to control the conduct of

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1. The basic provisions of the antitrust law of the European Economic Community are found in articles 85 and 86 of the Treaty of Rome, *done* Mar. 25, 1957, 298 U.N.T.S. 11. For a discussion of the provisions and a translation of the regulations promulgated under them, see

market-dominating enterprises. The approach of each of these bodies of law differs from the American antitrust approach, which is primarily concerned with the existence of power to dominate markets rather than with the manner in which market-dominating firms conduct their operations. This difference is reflected in the remedies available under each law to counteract monopoly power. Whereas suppression or correction of specific monopolistic practices is the only remedy available under German and EEC antitrust law, the primary remedy for violations of section 2 of the Sherman Act[2] is to dissolve the monopoly.[3]

Critics of both systems have questioned whether either approach is alone sufficient to control abuses by monopolists. Some Europeans view the absence of dissolution powers in European statutes as a serious weakness in the effectiveness of the statutes.[4] Similarly, some American commentators have suggested that a system of conduct control like that in EEC and German antitrust law could bolster enforcement efforts under section 2 of the Sherman Act, particularly in actions against oligopolists, where dissolution may not be either feasible or effective.[5] For this reason, the German effort to control the conduct of market-dominating enterprises is of particular interest to those who work with U.S. antitrust laws.

This Article first outlines the legislative development and current provisions of German competition law governing market-dominating enterprises. Various problems in applying the law are then analyzed in light of administrative and judicial practice. The Article concludes by evaluating the present operation of the German system.

I

LEGISLATIVE DEVELOPMENT

The German competition statute governing market-dominating enterprises, the Act Against Restraints of Competition (GWB),[6] is based largely

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D. Barounos, D. Hall, & J.R. James, EEC Anti-Trust Law (1975); Business International S.A., Europe's Rules of Competition (1976).

2. 15 U.S.C. § 2 (1976).

3. *See, e.g.,* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. United Shoe Mach. Corp., [1969] Trade Cas. ¶ 72,688 (D. Mass. 1969).

4. In its first biennial report, the German Monopolies Commission recommended, *inter alia,* the introduction of dissolution powers insofar as bank holdings of shares of industrial and commercial enterprises are concerned. *See* German Monopolies Commission, Hauptgutachten der Monopolkommission I (1976) [hereinafter cited as Mehr Wettbewerb ist Möglich].

5. *See* Edwards, *Control of the Single Firm: Its Place in Antitrust Policy,* 30 Law & Contemp. Prob. 465 (1965). For a comparative analysis of the antitrust laws of the member countries of the Organisation for Economic Co-operation and Development (OECD) relating to market-dominating enterprises, see Organisation for Economic Co-operation and Development, Market Power and the Law (1970).

6. Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen),

on the neoliberal concept of a competitive market economy in which the state's role is actively to promote competition.[7] The state is to do this by taking action against undue concentration and restraints on competition. Where effective competition is not possible, the state is to control the market conduct of business enterprises so as to achieve the same economic results as would obtain under competitive conditions.

This approach was reflected in the first draft of a post-World War II German law against restraints of competition,[8] which provided that "holders of economic power shall behave in business activities as if they were exposed to effective competition."[9] The Government Bill of 1955 substituted a narrower provision for that contained in the first draft. The newer approach treated only two specific abuses of a market-dominating position: the fixing of prices and business terms, and the use of tying clauses requiring customers to buy unrelated products or services. This 1955 draft provision is virtually identical to that enacted in 1957 as GWB section 22.

The 1957 statute, although modeled after the 1955 approach, also retained the broader first draft for its interpretive value. According to the explanatory memorandum that accompanied the 1955 Bill, the "as if competition" test expressed in the first draft was to be used to determine whether prices or business terms were abusive. Proof of an abuse, the memorandum said, required the German Federal Cartel Authority to demonstrate "that the prices or business terms differ considerably from what they would be in a situation of effective competition and that the difference is not justified by economic reasons."[10] But the memorandum did not suggest how to determine in a particular case whether, and to what extent, prices and business terms in a dominated market would differ if substantial competition existed in that market.

After the adoption in 1957 of section 22, many jurists felt that the statute's scope was too narrow in two respects. First, it failed to restrict the

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July 27, 1957, [1957] Bundesgesetzblatt [BGBl] I 1081, *as republished* Apr. 4, 1974, [1974] BGBl I 869, *amended,* Law of June 28, 1976, [1976] BGBl I 917 [hereinafter cited as GWB]. For an English translation and discussion of the Act as currently amended, see 2 GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (OECD), pt. D; MUELLER & SCHNEIDER, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (KARTELLGESETZ)—THE GERMAN LAW AGAINST RESTRAINTS OF COMPETITION (1973).

7. *See* 3 BUSINESS REGULATION IN THE COMMON MARKET NATIONS 83-97 (H. Blake ed. 1969); Markert, *Developments in International Antitrust Law,* 43 FORDHAM L. REV. 697, 703-04 (1975).

8. Josten Draft of 1949, *reprinted in* E. GÜNTHER, PROBLEME DER FUSIONSKONTROLLE 17-18 (1970).

9. *Id.* at 21. Translations of non-statutory German language materials quoted in this Article are the author's translations unless otherwise indicated.

10. Bundestagdrucksache 1158, Annex 1, § 17 (1957) [hereinafter cited as Bundestag Doc.], *reprinted in* H. MÜLLER-HENNEBERG & G. SCHWARTZ, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 1092 (1958).

practices of market-dominating firms outside contractual relationships with customers. Second, it applied only to practices in markets where the firm concerned had a dominant position. To correct these shortcomings, section 22 was amended in 1966 to give the Cartel Authority the power to prohibit any abusive practice of a market-dominating firm, whether or not the practice occurred in the dominated market. This amendment extended the scope of section 22 to protect both actual and potential competitors and to guarantee their freedom to compete.

A further amendment in 1973 added a new definition of market domination to make section 22 easier to apply. Under the newly added structural criterion of section 22(1)(2), a firm is considered to be market dominating if it has a paramount market position relative to its competitors. The 1973 amendment also established a series of rebuttable market share presumptions. The Parliament expected these new provisions to strengthen significantly the Cartel Authority's ability to control abuses by market-dominating enterprises.

II
THE CURRENT STATUTORY FRAMEWORK

The GWB as amended regulates market-dominating enterprises in several respects. First, section 22 empowers the Cartel Authority to prohibit by administrative action "abusive practices by market-dominating enterprises."[11] Second, section 26(2) bars market-dominating enterprises from "either unfairly hinder[ing] . . . another enterprise" or discriminating against it.[12] Third, section 24 empowers the Federal Cartel Office to prohibit mergers that create or strengthen a market-dominating position.[13]

Before any of these provisions apply, two conditions must be met. First, an enterprise must act "as a supplier or buyer of a certain type of goods or commercial services."[14] Market domination must, therefore, be determined separately as to each type of goods or commercial services. Second, a firm must be "market dominating." As defined by section 22, a firm dominates a market when "it has no competitor,"[15] is "not exposed to substantial competition,"[16] or "has a paramount market position in relation to its competitors."[17] Where two or more firms not in substantial competition jointly meet any one of these three tests, the prohibitions against market domination apply to them as well.

11. GWB § 22(5), [1973] BGBl I 918.
12. *Id.* § 26(2), [1957] BGBl I 1087.
13. *Id.* § 24, [1957] BGBl I 1087.
14. *Id.* § 22(1)(1), [1973] BGBl I 918.
15. *Id.*
16. *Id.*
17. *Id.* § 22(1)(2), [1973] BGBl I 918.

To define further these tests of market domination, the GWB establishes rebuttable presumptions of market domination based on a firm's market share. A single firm presumptively falls under the statutory definition of market domination if it "has a market share of at least one-third for a certain type of goods or commercial services" and "recorded [sales] of . . . DM 250 million [or more] in the last completed business year."[18] Three or fewer firms are presumed to be market-dominating if they have a combined market share of fifty or more percent.[19] Similarly, five or fewer firms are presumed to be market dominating if they have a combined market share of two-thirds or more.[20] The latter two presumptions do not apply to firms that individually have recorded sales of less than DM 100 million in the last completed business year.[21]

If a firm is both "a supplier or buyer of a certain type of goods or commercial services" and is market dominating within the meaning of section 22, then the Cartel Authority may administratively prohibit abusive practices in which the firm engages. The full scope of this authority is not clear, since section 22 does not define the term "abusive practices." The section's utility as an enforcement measure is limited by the inability of private parties to bring actions under it, by the discretionary character of government enforcement,[22] and by the merely prospective effect of successful government enforcement actions.

Under section 26(2), market-dominating firms may not unfairly hinder or discriminate against other enterprises without justification in business activities usually open to the other enterprises. Unlike section 22, private enforcement actions may be brought under section 26(2). Because practices prohibited by section 26(2) may also violate section 22, actions brought by the Government against exclusionary or discriminatory practices of market-dominating enterprises are frequently based on both statutory provisions.

Section 24 enables the Federal Cartel Office to prohibit the merger of enterprises that exceed certain size and market volume specifications, if the merger would be likely to create or strengthen a market-dominating position of the parties. But the statute provides an exception, permitting the merger to be effected if "the restraint of competition is outweighed by advantages to the whole economy resulting from the merger or if the merger is justified by a predominating public interest . . . ."[23] Power to authorize a merger under these conditions is vested in the Federal Minister for Eco-

18. *Id.* § 22(3)(1), [1973] BGBl I 918.
19. *Id.* § 22(3)(2)(a), [1973] BGBl I 918.
20. *Id.* § 22(3)(2)(b), [1973] BGBl I 918.
21. *Id.* § 22(3)(2), [1973] BGBl I 918.
22. Heil & Vorbrugg, *Antitrust Law in West Germany: Recent Developments in German and Common Market Regulation*, 8 INT'L LAW. 349, 366 (1974).
23. GWB § 24(3), [1957] BGBl I 1087.

nomic Affairs.[24] The importance of section 22 in merger activities of market-dominating enterprises is reduced substantially by the more comprehensive rules governing mergers in sections 23 and 24. These provisions go much further than to restrict mergers of market-dominating enterprises. Because of the complexity of the merger rules, this Article will treat mergers between market-dominating enterprises only in passing.[25]

III
ENFORCEMENT PRACTICE

Three broad enforcement questions emerge from the numerous cases that have been brought against anticompetitive practices of market-dominating firms. First, are the terms "a certain type of goods or commercial services" and "in specific markets" as used in section 22 synonymous with the relevant product and geographic market concepts, and how are these terms applied in practice? Second, how are the various criteria of market domination interpreted; how are they related to each other; and what is the function of the market share presumptions? Third, what constitutes an "abusive practice" by a market-dominating enterprise?

A. THE RELEVANT MARKET

It is now well established in judicial and administrative practice that the term "in regard to a certain type of goods or commercial services" in section 22 is synonymous with the relevant product market concept. This follows from the term "market-dominating enterprise," which implies the existence of a dominated product market. That the relevant market must also be determined geographically is evident from section 22(2), which speaks of substantial competition between firms "either in general, or in specific markets." Inserted during the Parliamentary debate in 1957, this clause was designed to ensure that section 22 also covered enterprises that dominate regional markets.[26]

The definitions of market domination in section 22 do not otherwise specify how the relevant product and geographic markets are to be determined in particular cases. The parliamentary report to the 1966 amendment expressly stated that it is impossible to define the relevant market in the statute.[27] Similarly, the parliamentary report to the 1973 amendment noted

24. *Id.; see generally* Markert, *The New German Antitrust Reform Law*, 19 ANTITRUST BULL. 135, 139-47 (1974).

25. For a critical review of the first two years of merger law enforcement, see MEHR WETTBEWERB IST MÖGLICH, *supra* note 4, at 463-543.

26. Bundestag Doc. 3644, § 17 (1955), *reprinted in* H. MÜLLER-HENNEBERG & G. SCHWARTZ, *supra* note 10, at 1190.

27. Bundestag Doc. IV/3533, § 22 (1964), *reprinted in* [1965] WIRTSCHAFT UND WETTBEWERB 836 [hereinafter cited as WuW].

that the relevant geographic market could be either all or part of the domestic market.[28] It added, however, that imports and potential competition by foreign firms must be taken into account when assessing competitive conditions in a domestic market.

1. Product Market

The test applied in judicial and administrative practice to determine the relevant product market is to include as part of the market all products or services that by their "characteristics, purpose, and price are so closely related that the reasonable consumer will view them as intended to satisfy a specific demand and consider them as interchangeable."[29] The test focuses on the judgment of the average consumer and has been applied to define relevant markets for such products as manual price labeling machines,[30] sporting goods fairs,[31] tampons,[32] aluminum ingots and various types of aluminum semifinishes,[33] electricity and natural gas,[34] high-dosed vitamin B-12,[35] benzodiazepam tranquilizers,[36] and factoring.[37]

Once the relevant product market has been determined, only rarely has it been further divided into submarkets. This did occur in the *Sachs* case,[38] where the Berlin Court of Appeals held that the market for automobile clutches had to be divided into separate markets for supplies to automobile manufacturers and to independent automotive parts dealers.[39] This was necessary, the court said, because of the almost total independence of the submarkets from one another, causing a wide differential in the prices that manufacturers charged the two groups of purchasers.

Despite its wide acceptance and frequent application, this test of the relevant product market remains a controversial issue in many cases. No practicable means has yet been found by which to determine whether a reasonable consumer would consider products interchangeable. Especially

28. Bundestag Doc. 7/765, § 22 (1973), *reprinted in* [1973] WuW 587.
29. Judgment of Feb. 18, 1969 ("Handpreisauszeichner"), OLG, Berlin, [1969] WuW/E 623, 624, OLG 995, 996.
30. *Id.*
31. Judgment of July 22, 1968 ("Sportartikelmesse"), OLG, Berlin, [1968] WuW/E 849, 851, OLG 907, 909.
32. Decision of Nov. 18, 1974 ("o.b."), BKartA, [1975] WuW/E 343, BKartA 1571.
33. Decision of Dec. 23, 1974 ("Kaiser-VAW"), BKartA, [1975] WuW/E 419, BKartA 1571.
34. Decision of Mar. 9, 1976 ("Erdgas Schwaben"), BKartA, [1977] WuW/E 59, BKartA 1647.
35. Judgment of July 3, 1976 ("Vitamin-B-12"), 67 BGHZ 105, 113-14, [1976] WuW/E 783, 788, BGH 1465, 1470.
36. Judgment of Dec. 16, 1976 ("Valium"), 68 BGHZ 23, 27-28, [1977] WuW/E 255, 257, BGH 1445, 1447.
37. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 43 (1975) (copy on file at the offices of the *Cornell International Law Journal*).
38. Judgment of Dec. 1, 1976 ("Sachs"), OLG, Berlin, [1977] WuW/E 265, OLG 1745.
39. *Id.*

where many people use a particular product but hold differing views as to its interchangeability, almost any decision about the relevant product market is open to dispute.

Absent precise and practicable means to measure the average consumer's market perceptions, the Cartel Authority or the court must often base its determination of the relevant product market on its best estimate of what the consumer regards as reasonably interchangeable.[40] So long as such judgments are consistent, free of arbitrariness, and subject to judicial review, this method is reasonably workable. As the number of decided cases grows, a foundation will be built upon which future relevant market decisions can be based.

2. Geographic Market

In most cases brought under the rules governing market-dominating firms, the relevant geographic market is the entire nation. Separate regional markets have, however, been held to exist in cases involving the supply of cement, electricity, and other commerical services.[41] As in relevant product market cases, product overlap is often the principal obstacle to accurate definition of the relevant geographic market. For instance, low demand for cement causes many producers to ship their cement to more distant markets in order to sell it, despite the higher transportation cost this entails. The resulting product overlap makes determination of the relevant regional market difficult, often requiring the same sort of pragmatic judgment as is necessary to define the relevant product market.

Although the relevant geographic market is not readily determinable where regional boundaries are at issue, it is well established that the relevant geographic market cannot extend beyond national boundaries. But under guidelines contained in the report of the Bundestag Economic Com-

40. This pragmatic approach is described by the following observation: "The interaction of suppliers fills the sales territory, not in well-defined and segregated markets, each like a fenced field, but in the way a fog fills a landscape—as a continuum, of varying density, here thicker, there thinner, without clear boundaries." Edwards, *The Changing Dimensions of Business Power,* in DAS UNTERNEHMEN IN DER RECHTSORDNUNG, FESTGABE FÜR H. KRONSTEIN 237, 241 (1967). *See also* OECD, MARKET POWER AND THE LAW, *supra* note 5, at 45-46:

> The cases have made it clear the relevant market in the sense of being the only possible result of an application of objective criteria does in reality not exist. The various 'tests' or formulae that are applied by the courts and administrative agencies such as 'functional interchangeability,' 'cross-elasticity of demand,' 'peculiar characteristics or uses,' are merely several aspects of a policy decision which has to take into account many other aspects and the essence of which is to determine which of several possible market definitions is most appropriate in the individual case in the light of the statutory purpose of the law to be applied.

41. *See, e.g.,* Judgment of Oct. 25, 1974 ("Zementmahlanlage"), OLG, Berlin, [1975] WuW/E OLG 1534, 1536; Decision of Dec. 22, 1976 ("Zementmahlanlage"), BKartA, [1977] WuW/E 585, BKartA 1667. A further example is the *Springer Newspapers* case. *See* notes 84-87 *infra* and accompanying text.

mittee on the 1973 GWB amendment, the Cartel Authority may consider the competitive situation in foreign markets if it affects competition domestically. The Authority may, in making its enforcement decisions, take into account the effects of imports and of potential competition from foreign firms able and willing to enter the German market.[42]

3. Relevant Market Definition and Mergers

An important unresolved issue in the regulation of market-dominating enterprises is whether the relevant market should be defined differently where merger rules apply. The different aims of conduct control and merger control might support such a distinction. The inclusion in section 22(2) of relative market power in relation to individual customers suggests that there is some basis in existing law for such an approach.[43] Even so, the courts are unlikely to be willing to define the relevant market in merger cases by criteria other than those applied in cases brought under section 22.[44]

B. The Market-Dominating Position

Of the three statutory criteria by which section 22 defines dominant market power,[45] the first—absence of any competition whatsoever—is the easiest to administer. But since true monopolies are rare, this criterion has little practical utility. By contrast, the second criterion—lack of exposure to substantial competition—has been and still is of great practical importance. It is particularly relevant to the enforcement of section 22 against oligopolists, since section 22(2) provides expressly that its prohibitions apply if there is no substantial competition among the oligopolists. Application of the new paramount market position criterion to oligopoly situations is therefore necessarily linked to the substantial competition question.

1. Substantial Competition

A central factor in controlling the conduct of market-dominating firms is the presence or absence of substantial competition. It is generally agreed that the question of whether a firm is exposed to substantial competition is determined by a market conduct test: is the firm's market conduct con-

42. Bundestag Doc. 7/765, *supra* note 28, at 587-88.

43. According to the second sentence of § 26(2), the prohibition against unfair hindrance and unjustified discrimination also applies to firms "insofar as suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist." GWB § 26(2), [1957] BGBl I 1087.

44. The question would become moot if the proposal of the Federal Cartel Office to separate merger law from the present market domination standard were adopted. *See* German Federal Cartel Office, Annual Report 20 (1976) (copy on file at the offices of the *Cornell International Law Journal*).

45. *See* notes 15-17 *supra* and accompanying text.

trolled by competitive forces, or can it act without having to consider the possible actions and reactions of competitors? It is unclear, however, whether and to what extent firms must actually use the competitive means at their disposal in order to satisfy the substantial competition requirement.[46] Another open question is whether a finding that a firm is not exposed to substantial competition requires consideration of the entire range of possible competitive activity, or whether it is sufficient that substantial competition does not exist with respect to the particular activity alleged to be abusive.

The Federal Cartel Office follows the "parameter" theory, requiring that firms compete actively with other enterprises in order to satisfy the substantial competition requirement. The Office thereby rejects the "mosaic" theory, which would permit an aggregation of marginally competitive activities to constitute substantial competition.

The Berlin Court of Appeals in its *Valium* judgment adopted, at least in part, the parameter theory of the Cartel Office.[47] Substantial competition, the court said, requires "a dynamic struggle of the suppliers acting and reacting with a view toward influencing the buyer."[48] The court noted the various means of competition, and emphasized that price was of "paramount importance."[49] Competition by means other than price could constitute substantial competition only if consumers were given benefits comparable to price reductions, according to the court. Applying this standard, it held that the company supplying Valium and Librium in Germany, German Hoffmann-La Roche AG, was not exposed to substantial competition, since no price competition for the products existed and consumers were not otherwise benefited.

The Federal Supreme Court has not yet taken a definite stand on what constitutes substantial competition. In its *Vitamin B-12* judgment,[50] the court held that substantial reductions in the market share of the allegedly

46. The Federal Supreme Court considered this question in a case presenting the issue of whether there was sufficient price competition to permit resale price maintenance for brand name articles. The court stated that, despite parallel market behavior, a situation of "competitive tension" nonetheless met the substantial competition standard. Judgment of Feb. 26, 1970 ("Tennisbälle"), 53 BGHZ 298, [1970] WuW/E 545, BGH 1093.

47. Judgment of Jan. 5, 1976 ("Valium"), OLG, Berlin, [1976] WuW/E 313, OLG 1645.

48. *Id* at 318, OLG 1650.

49. *Id*

50. Judgment of July 3, 1976 ("Vitamin-B-12"), 67 BGHZ 105, [1976] WuW/E 783, BGH 1435. In this case, the Federal Cartel Office attacked the prices charged by the German drug manufacturer Ernst Merck for its vitamin B-12 products. It was found that Merck's market share had declined from 32.8 percent in 1966 to 20.9 percent in 1974, while the share of Steigerwald had risen from 8.9 percent in 1966 to 33.8 percent in 1974 because of price reductions effected by that firm. But Merck's higher prices meant that its sales still exceeded Steigerwald's and that Merck remained the leading seller of vitamin B-12. *Id* at 790, BGH 1442.

dominant firm caused by competitors' price cuts not only barred a finding of paramount market position, but demonstrated that the firm was exposed to substantial competition. The court has not, however, further elaborated how the term "substantial competition" is to be interpreted and, in particular, whether the strong emphasis by the Berlin Court of Appeals on price competition is to be followed. In its *Valium* judgment, the supreme court applied only the paramount market position criterion, leaving open whether it agreed with the court of appeals position that German Hoffmann-La Roche was not exposed to substantial competition.[51]

2. Paramount Market Position

The paramount market position criterion, added to the statutory scheme by the 1973 amendment, reflects the Parliament's judgment that the substantial competition standard is often too difficult to apply effectively.[52] The Parliament therefore sought to reduce the burden of proof borne by the Cartel Office in enforcement cases by supplementing the negative standard—absence of substantial competition—with an affirmative standard: paramount market position. Section 22(1)(2) was also intended to enlarge the scope of the market domination concept in at least one respect. Four market structure variables were added as determinants of paramount market position,[53] extending the paramount market position term to encompass vertical and conglomerate market power. This formulation complements the new merger rules, which govern vertical and conglomerate as well as horizontal mergers.

The legislative documents do not clearly elucidate the relationship between the substantial competition and paramount market position criteria of section 22. The latter was at one point termed a "new, additional standard of market power."[54] Yet the same document also defined paramount market position as the "scope of [a firm's] behavior in applying its competitive means."[55] At least arguably, therefore, section 22(1)(2) was not intended by the Parliament to be a pure market structure test that excludes all elements of market conduct. Rather, a firm could occupy a paramount market position yet also be exposed to substantial competition.

The Federal Supreme Court adopted this interpretation of the statute in

51. Judgment of Dec. 16, 1976 ("Valium"), 68 BGHZ 23, [1977] WuW/E 255, BGH 1445.

52. The purpose of the paramount market position criterion is extensively discussed in the Report of the Committee on the Economy, Bundestag Doc. 7/765, *supra* note 28, at 586-89.

53. These variables are the firm's "share of the market, its financial strength, its access to the supply or sales markets for goods and services, its links with other enterprises, and the legal or actual barriers to the market entry of other enterprises." GWB § 22(1)(2), [1973] BGBl I 918.

54. Bundestag Doc. VI/2520 at 21 (1971).

55. *Id*

its *Vitamin B-12* judgment.[56] The court held that the question of whether a firm occupied a paramount market position could be resolved only upon consideration of competitive conditions in the relevant market. But in its *Valium* judgment six months later[57] the court elaborated upon its position, holding that a firm could be found to occupy a paramount market position, even though it was exposed to substantial competition in the same market "as long as it possesses a predominant scope of action in its competitive behavior."[58]

Exposure to substantial competition thus does not bar a finding of paramount market position and market domination. The court did not further define the "scope of action" condition to this rule's applicability. But by confirming the finding below that German Hoffmann-La Roche had a paramount market position solely because it was the leading seller of benzodiazepam tranquilizers in Germany, the court left little doubt that the paramount market position criterion is not merely another market conduct test like the substantial competition standard.

This approach is arguably not supported by competition theory; in a substantially competitive market, there is no dominant market power.[59] But this criticism overlooks the fact that the Parliament is free to ensure the practicability of the law by adopting less complex criteria, such as market share, which may establish market domination irrespective of whether substantial competition can be shown in the individual case.

In two recent cases, the Berlin Court of Appeals followed the approach of the supreme court. In the merger case *Erdgas Schwaben*,[60] the court of appeals found that an electricity supplier, Lechwerke Augsburg, had a monopoly in the supply of electricity for light and power[61] and therefore occupied a paramount market position in the heating energy market. In the *Springer Newspapers* case,[62] the court merely considered whether substantial reductions of Axel Springer Verlag AG's share of the relevant market indicated that the firm did not have a predominant scope of action, in spite of its large market share. The paramount market position test of section 22(1)(2) may thus be applied in several circumstances: merger cases such as

56. Judgment of July 3, 1976 ("Vitamin-B-12"), 67 BGHZ 104, 115, [1976] WuW/E 783, 787, BGH 1435, 1469.

57. Judgment of Dec. 16, 1976 ("Valium"), 68 BGHZ 23, 28, [1977] WuW/E 255, 259, BGH 1445, 1449.

58. *Id.*

59. *See, e.g.,* Lubbert, *Der Begriff der überragenden Marktstellung, in § 22 Abs. 1 Nr. 2 GWB unter besonderer Berücksichtigung der Entscheidungspraxis,* [1977] WuW 559, 568.

60. Judgment of Mar. 23, 1977 ("Erdgas Schwaben"), OLG, Berlin, [1978] WuW/E 157, OLG 1895.

61. Lechwerke Augsburg produced 80 percent of the electricity in the relevant market.

62. Judgment of Jan. 26, 1977 ("Kombinationstarif"), OLG, Berlin, [1977] WuW/E 343, OLG 1767.

Erdgas Schwaben, anticompetitive practice cases such as *Springer Newspapers,* and monopolistic pricing policy cases such as *Valium.*

3. Market-Dominating Oligopolies

The applicability of section 22(2), defining market domination by oligopolists, has only recently become an issue in the cases. In an interlocutory ruling in the *Valium* case, the Berlin Court of Appeals indicated that the question of whether German Hoffmann-La Roche held a market-dominating position would also be considered in light of section 22(2).[63] The court elaborated upon this position in several respects. First, a firm could not be found to have dominated a market both individually under section 22(1) *and* as part of an oligopoly under section 22(2). Such findings, the court said, are mutually exclusive. Second, where the Cartel Office alleges that abusive prices have been charged, it need only show that there is no substantial price competition between the oligopolists in order to meet the test of section 22(2).[64] Third, if a market-dominating oligopoly is alleged to exist, all alleged oligopolists must be made parties to the proceedings. This last rule conflicts with past practice of the Federal Cartel Office, which in several cases proceeded against individual oil companies although it regarded all major oil companies to be a market-dominating oligopoly.[65] The new rule will undoubtedly cause great practical difficulties, particularly in merger cases.

4. Market Share Presumptions

Section 22(3) establishes rebuttable presumptions of market domination where monopolists or oligopolists exceed specified market share percentages and annual sales amounts. According to the report of the Bundestag Economic Committee, when the facts of a case cause a presumption to be raised, it is highly likely that a market-dominating position exists.[66] But the committee qualified its conclusion, stating that where the presumptions arise, the Cartel Office must consider any firm's substantiated argument that it is exposed to substantial competition and does not occupy a paramount market position. This caveat eases somewhat the burden of proof that the presumptions place on the respondent firms.

In practice, the market share presumptions of section 22(3) enable the Cartel Office to investigate, pursuant to section 46, possible abuses by an

63. [1978] WuW 28-29.

64. The court simultaneously rejected this parameter approach in the single firm situation where, in the court's opinion, all relevant competitive activities in the market must be considered.

65. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 41 (1967) (copy on file at the offices of the *Cornell International Law Journal*).

66. Bundestag Doc. 7/765, *supra* note 28, at 588.

alleged market-dominating enterprise if the Authority has some reason to believe that an abuse has been committed.[67] A number of investigations of pricing policy and other aspects of business conduct have been made on this basis.[68] But the presumptions have not been given any more than presumptive weight by the courts. For example, in the *Valium* case, the Berlin Court of Appeals noted that German Hoffmann-La Roche controlled approximately fifty percent of the tranquilizer market and was, therefore, presumed to be a market-dominating enterprise.[69] Instead the court went on to draw its conclusion not from this, but from the fact that the firm was not exposed to substantial competition. The same analysis was adopted by the court in the *Springer Newspapers* case.[70]

Like the paramount market position standard, the market share presumptions are also a key element in many merger cases.[71] The Federal Cartel Office noted this fact in its decision in the *Haindl-Holtzmann* merger case.[72] The importance of the presumptions rests on the fact that, by shifting the burden of proof from the Cartel Office, they require the merging firms to show that there has been competitive conduct in the past and that competition in that market will continue after the merger is effected.

C. The Abuse Concept

Under section 22, the Cartel Office brings enforcement actions against two principal abuses of a market-dominating position: exploitation of customers, such as by charging unduly high prices, and the use of exclusionary practices against actual or potential competitors.[73] The relative importance of each of these two main aspects of abuse control under section 22 is an unsettled question. The German Federal Government and the Monopolies

67. Judgment of Apr. 30, 1974, OLG, Berlin, [1974] WuW/E 545, OLG 1463.

68. A typical example is the 1974 investigation of Volkswagenwerk AG, Opel AG, and Ford AG. *See* German Federal Cartel Office, Annual Report 54 (1974) (copy on file at the offices of the *Cornell International Law Journal*).

69. Judgment of Jan. 5, 1976 ("Valium Librium"), OLG, Berlin, [1976] WuW/E 313, OLG 1645.

70. Judgment of Jan. 26, 1977 ("Kombinationstarif"), OLG, Berlin, [1977] WuW/E 343, OLG 1767.

71. *See, e.g.,* Judgment of Dec. 1, 1976 ("Sachs"), OLG, Berlin, [1977] WuW/E 265, OLG 1745.

72. Decision of Feb. 4, 1974 ("Haindl-Holtzmann"), BKartA, [1974] WuW/E 553, BKartA 1475.

73. A third type of abuse—the use of legal proceedings by a market-dominating enterprise in order to achieve an anticompetitive effect—has had little practical effect. The only major case involving this type of abuse was the proceeding against the automobile manufacturer Volkswagenwerk AG for allegedly abusing its market-dominating position by introducing a consignment system to evade the statutory prohibition of resale price maintenance. The case was terminated after VW dropped its consignment plan. *See* German Federal Cartel Office, Annual Report 84 (1973) (copy on file at the offices of the *Cornell International Law Journal*).

Commission frequently argue that measures to combat exclusionary practices against competitors should be given higher priority; but there is no legal requirement that this be done.

1. Exclusionary Practices

Whereas the 1957 version of section 22 covered exclusionary practices only indirectly,[74] the 1965 version has evolved into a primary means to control these practices. This evolution resulted from the difficulties the Government encountered in attempting to enforce section 26(2). Although that section prohibited exclusionary practices generally, until the 1973 amendment it could only be enforced by administrative fines, and the Cartel Authority wished to avoid the uncertainties of such quasi-criminal proceedings.

Reflecting this melding of enforcement practice under the two sections, the term "abuse" in section 22 has been interpreted in much the same manner as have the terms "unfair" and "unjustified" in section 26(2). Each requires a balancing of the interests of all affected parties in light of the statute's purpose to protect the freedom to compete.[75] As a result, section 22 as applied to exclusionary practices has become almost completely interchangeable with section 26(2), abusive practices usually being controlled to the same extent by both provisions.

The *Meto* case[76] was the first to illustrate this development clearly. The Federal Cartel Office there challenged Meto's use of a tying clause as an abuse of a market-dominating position. The clause required purchasers of invoicing machines manufactured by Meto to use Meto's labeling materials exclusively for a period of five years after purchase. The Berlin Court of Appeals stated generally that the criteria used to define an abuse must be drawn from the principles underlying a competitive economic system. The court then held that "economic power has to be eliminated where it impairs the effectiveness of competition and competition's inherent tendencies to promote efficiency and optimal satisfaction of consumers' demands."[77] The control of abuses practiced by market-dominating enterprises "has as its prime purpose to keep access to the market open to other enterprises."[78] Tying agreements are "typical cases of abuse of power within the meaning of section 22(3) because they fortify market-dominating positions by means

74. Tying clauses, regulated by the section, were both an exploitation of customers and an exclusionary practice against competitors.

75. *See, e.g.*, Judgment of Sept. 27, 1962 ("Treuhandbüro"), 38 BGHZ 90, 102, [1963] WuW/E 240, 246, BGH 502, 508.

76. Judgment of Feb. 18, 1969 ("Handpreisauszeichner"), OLG, Berlin, [1969] WuW/E 623, OLG 995.

77. *Id* at 627, OLG 999.

78. *Id*

other than greater efficiency and strangle competition of tomorrow."[79] The court found that buyers of the Meto products were not the only persons damaged by the tying scheme. Also injured were other sellers of labeling materials, whose share of the market was reduced by the discriminatory practice.

The court rejected Meto's defense that the exclusive use of its labeling material was necessary for a successful sales effort. The court said that such an argument might be sustained under certain circumstances, but that several factors prevented Meto from raising the defense successfully: Meto did not render free services to the extent alleged; the additional income from the buyers' obligation to use only Meto's expensive labels far exceeded the cost of services actually rendered; free maintenance service was not necessary to satisfy the buyers' needs or to promote the machines; and labels produced by other firms did not impair the proper functioning of Meto's machines. The court therefore enjoined Meto from including in its sales contract tying clauses of more than six months duration.

The Federal Cartel Office reopened the case in 1975 in order to investigate the five-year machine warranty service introduced by Meto after the 1969 judgment had become final.[80] Meto purported to offer this service free of extra charge, but solely on the condition that only Meto labeling materials would be used during the warranty period. The Federal Cartel Office found that this plan largely frustrated the aim of the 1969 judgment—that the labeling materials market be opened up to other suppliers. The failure of these suppliers to capture a substantial part of that market despite their lower prices resulted at least in part from the misleading impression created by Meto's sales agents that use of other suppliers' materials could cause difficulties when repair or replacement was necessary. Meto changed its practice before a decision was made.

The Berlin Court of Appeals has reached conflicting results in two cases in which the defendants sought to limit the public exposure of another firm's products. The court held that an organizer of sporting goods fairs engaged in an abusive exclusionary practice when it barred a manufacturer from participating in fairs because the manufacturer did not restrict distribution of its products to specialty shops.[81] But the court upheld a contract between the German Football Association (DFB) and the leading manufacturer of sports shoes (Adidas), under which DFB was to supply its national teams with Adidas shoes exclusively and display the Adidas brand and im-

79. *Id*

80. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 52-53 (1975) (copy on file at the offices of the *Cornell International Law Journal*).

81. Judgment of July 22, 1968 ("Sportartikelmesse"), OLG, Berlin, [1968] WuW/E 849, 850, OLG 907, 908.

age during games.[82] The court rejected the assertion of the Federal Cartel Office that this contract was abusive because it precluded Adidas's competitors from using what was probably the most effective means available to advertise football shoes. In the court's view, this exclusionary effect did not threaten either the existence of competitors or the effectiveness of competition. It was therefore outweighed by DFB's interest in receiving the agreed payments from Adidas to finance youth training programs.

Predatory pricing may also constitute an abusive exclusionary practice when employed by a market-dominating enterprise. In its case against Tourist Union International (TUI), the largest domestic package travel tour operator,[83] the Federal Cartel Office found that TUI had cut prices substantially for tours to Ischia, Italy. In order to counteract strong competition from a small, specialized package tour operator, TUI had discounted these tours below their actual cost and had allocated the difference to the expenses of its other operations. After the Federal Cartel Office advised TUI that the Office considered the discounted prices to be an abuse designed to drive competitors out of the market, TUI conformed the prices to its general pricing policy and the case was closed without a formal decision by the Cartel Authority.

The present scope of control over exclusionary practices under sections 22 and 26(2) can best be seen from the development of the *Springer Newspapers* case.[84] The leading German newspaper publisher, Axel Springer Verlag AG, offered a combination price plan to advertisers in its local newspaper, *Berliner Morgenpost*, and the Berlin editions of its national newspapers, *Die Welt* and *Die Welt am Sonntag*. Those who agreed to place the same advertisement in several of the Springer newspapers were offered a reduced price compared to that which they would have been charged had the advertisements been placed individually.[85] The Berlin State Antitrust Authority issued a preliminary restraining order, prohibiting the scheme under sections 22 and 26(2) on the ground that it adversely affected the smaller, independent newspaper *Der Tagesspiegel*. But on appeal, the Berlin Court of Appeals held that the Springer scheme did not violate

82. Judgment of Nov. 20, 1973 ("Deutsches Fußball Bund"), OLG, Berlin, [1974] WuW/E 189, OLG 1429.

83. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 76-77 (1975)(copy on file at the offices of the *Cornell International Law Journal*). In 1976, the Cartel Office opened proceedings against restrictions imposed by TUI on the entry of travel agencies into the group permitted to sell tours and on the freedom of those in the group to sell tours offered by TUI competitors. Both restrictions were reduced to the satisfaction of the Federal Cartel Office. *See id.* at 81.

84. Judgment of Jan. 26, 1977 ("Kombinationstarif"), OLG, Berlin, [1977] WuW/E 343, OLG 1767.

85. Under the plan, the combined price for an advertisement appearing simultaneously in *Berliner Morgenpost* and *Die Welt* was DM 4.40 per millimeter, instead of DM 4.00 and .70 for separate advertising in a single newspaper.

the statute and reversed the state authority's order.[86]

The court of appeals agreed with the state antitrust authority's finding that Springer held a paramount market position in the Berlin newspaper advertisement market. The court also pointed out that a finding of an abuse was not barred by the fact that other enterprises not occupying a market-dominating position employed the same practice. Exclusionary practices, the court said, must be judged by their impact on the market. Market-dominating enterprises have, therefore, a special duty of care toward actual and potential competitors.

At this point in its analysis of the case, the court's approach diverged from that of the state authority and led the court to an opposite result. Not every restraint imposed upon competitors by the market conduct of a market-dominating enterprise is an abuse, the court said. Anticompetitive practices are abusive only if by such practices, "competition in the market is threatened to be extinguished or to be adversely affected in a very serious manner," and if the practice in question is contrary to the principles of competition by performance.[87] The Springer combination price scheme, according to the court, met only the latter condition. Thus, even though it was a form of tying, albeit on a voluntary basis, it did not constitute an abuse of the newspapers' dominant market position.

In reaching this conclusion, the court refused to accept that the evidence showed a sufficiently strong adverse effect of the Springer plan on *Der Tagesspiegel*'s advertising business. Instead, the court focused on the fact that *Der Tagesspiegel*'s advertising receipts had not declined during the first two months that the Springer scheme was in effect. The court also expressed doubts that advertisers who wished to reach readers of *Der Tagesspiegel* could afford to stop advertising in that newspaper in order to take advantage of the discount offered by the Springer newspapers. Because *Der Tagesspiegel* had not shown the irreparable injury necessary to obtain a preliminary restraining order, the court reversed the state authority's order.

These cases illustrate that sections 22 and 26(2) have been forged into a strong weapon against exclusionary practices of market-dominating enterprises that intend to defend or strengthen their market position against actual or potential competitors. These provisions clearly extend beyond classical monopolization practices, such as exclusive dealing agreements

86. Judgment of Jan. 26, 1977 ("Kombinationstarif"), OLG, Berlin, [1977] WuW/E 343, OLG 1767.

87. This concept, *Leistungswettbewerb,* is not found in U.S. antitrust law. The courts have developed it by applying § 1 of the Unfair Trade Practices Act. Gesetz gegen den Unlauteren Wettbewerb, June 7, 1909, [1909] Reichsgesetzblatt [RGBl] I 499, *as amended* June 26, 1969, [1969] BGBl I 633 [hereinafter cited as UWG]. The concept was later included in the procedure for trade practices rules (GWB § 28). For a recent analysis of the whole concept, see Ulmer, *Der Begriff "Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB und UWG-Tatbeständen,* [1977] GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 565.

and contractual tying clauses, to include so-called voluntary tying as in the second *Meto* and the *Springer Newspapers* cases as well as predatory pricing as in the *Tourist Union International* case. But in light of the Berlin Court of Appeals *Springer Newspapers* decision, the requirements for showing the necessary adverse effects of the challenged practices on competitors are too strict to make the concept sufficiently workable.[88]

To preserve remaining competition in dominated markets as well as access to those markets by outsiders, the statutory sanctions must be applied at a much earlier stage. The incipiency doctrine in U.S. antitrust law[89] provides a useful model. Yet overregulation by protecting competitors at the expense of market competition must be avoided. Just as a general prohibition of price discrimination can restrict or even extinguish price competition in the market,[90] a rigidly enforced general ban of all practices adversely affecting competitors is likely to paralyze the vigor of competition in the market.[91] Further, although a market-dominating firm's unusually low prices may damage its competitors' market position, consumer interests may be served by the price reductions.[92] This calls for a middle course in the application of sections 22 and 26(2) to exclusionary practices—a course that requires a great deal more refinement than is now possible on the basis of the few decided cases.

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88. For a critical review of the court of appeals decision, see Ulmer, [1977] DER BETRIEBS-BERATER 561 (copy on file at the offices of the *Cornell International Law Journal*). *See also* P. ULMER, SCHRANKEN ZULÄSSIGEN WETTBEWERBS MARTBEHERRSCHENDER UNTERNEHMEN (1977). The latter work treats a similar case involving a compulsory combination price scheme that was stayed by the Northrhine-Westphalian state antitrust authority for reasons similar to those advanced in the *Springer Newspapers* case.

89. The "incipiency doctrine" arises out of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), which prohibits any merger tending to lessen competition or create a monopoly. The legislative history of the section reveals that the drafters intended to grant authority to stop monopolistic tendencies in their incipiency. *See, e.g.*, S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949). The courts have supported this congressional purpose with enthusiasm. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957). *See generally* P. AREEDA, ANTITRUST ANALYSIS 697-702 (2d ed. 1974).

90. This appears to be a generally accepted view in relation to the price discrimination provisions of the U.S. Robinson-Patman Act. *See* U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977). In Germany, there is still discussion whether a similar enterprise discrimination law should be adopted. The German Federal Government, the Monopolies Commission, and the Federal Cartel Office have persistently opposed such proposals.

91. This danger arises in particular if the concept of violating *Leistungswettbewerb*, UWG § 1, would be overextended. *See* note 87 *supra*.

92. This does not apply of course to cases of clear predatory intent such as the *Tourist Union International* case. *See* note 83 *supra* and accompanying text. The dilemma arises in two situations. First, prices on some products may be set at unusually low levels in order to promote the sale of other products, such as when a supermarket sells gasoline below cost. Second, abnormally low prices may be made possible by special circumstances, such as the high advertising receipts received by leading newspaper publishers that make it possible to sell newspapers at a very low price without selling below cost. *See* Ulmer, *supra* note 88.

2. *Abusively High Prices*

In the last decade, section 22 has also evolved into a potent means to control abusive pricing practices of market-dominating firms. The most recent case reflecting this development is the Federal Supreme Court's judgment in the *Valium* case. This trend began with the Cartel Office's 1967 challenge of the pricing practices of the German subsidiaries of several large international oil companies.[93] After the Suez Canal was closed in June 1967, the subsidiaries raised their retail gasoline prices several times by increments of DM 0.05 per liter. The higher prices were maintained until the fall of 1967, although the supply situation had improved considerably in the interim and transportation costs, claimed as a justification for the higher prices, had dropped substantially. The Federal Cartel Office initiated proceedings, alleging that the firms had long followed a policy of parallel market conduct and were, therefore, a market-dominating oligopoly under section 22(2). The Cartel Office further alleged that the failure of the firms to reduce prices after the justifications for the higher prices had ceased to exist constituted an abusive practice within the meaning of section 22. After public hearings at which Esso, Shell, British Petroleum, and DEA (a Texaco subsidiary) appeared, the Federal Cartel Office indicated that it would issue an order to reduce prices. Esso then started to lower its price by an average of about DM .02 per liter, other firms followed suit, and the proceedings were terminated.

In defining the abuse in such cases, the Federal Cartel Office relied on the "as if competition" concept as stated in the Explanatory Memorandum to the 1955 Government Bill.[94] The "as if competition" standard has provided the basis for a number of cases brought by the Federal Cartel Office, especially since the 1973 amendment added new criteria for finding market domination. Some of the cases, notably the *Braun Electric Shavers* case[95]

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93. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 41 (1967) (copy on file at the offices of the *Cornell International Law Journal*). *See also* Barnikel, *Abuse of Power by Dominant Firms: Application of the German Law*, 14 ANTITRUST BULL. 221, 231-40 (1969).

94. *See* note 28 *supra* and accompanying text. The general position of the German Federal Cartel Office on price abuses was first stated in its 1967 Annual Report:

> Insofar as section 22 covers the situation that market power is abused in the dominated market in relation to customers on the other side of the market (Gasoline case), its aim is to protect customers from disadvantages that the market-dominating enterprises can impose on them because they are not exposed to effective competition. Any practice of a market-dominating firm is abusive if it leads to market results that, with reasonable certainty, could not be achieved if substantial competition had existed in the market.

GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 11 (1967) (copy on file at the offices of the *Cornell International Law Journal*).

95. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 85 (1973); *id.* at 57 (1974) (copies on file at the offices of the *Cornell International Law Journal*).

and the *Sugar* case,[96] resulted in price reductions similar to those obtained in the *Gasoline* case. But in others, such as the 1974 and 1976 *Automobile* cases,[97] the proceedings were terminated because no abuse was found.

Of all the cases brought, only three resulted in formal decisions against abusively high prices. In the first, the Berlin Court of Appeals suspended the immediate effect of an order by the Federal Cartel Office against the German subsidiary of British Petroleum. The court did so on the ground that the evidence presented failed to prove that the firm's increased prices were abusively high.[98] In the second case, the court of appeals affirmed in substance an order of the Federal Cartel Office[99] against the German pharmaceutical firm Ernst Merck for charging excessive prices for vitamin B-12.[100] On appeal, however, the Federal Supreme Court held that Merck did not occupy a market-dominating position.[101] The third case to result in a formal decision against abusively high prices arose out of the Federal Cartel Office's 1974 order to German Hoffmann-La Roche to reduce its prices for Valium by 40 percent and its prices for Librium by 35 percent.[102]

German Hoffmann-La Roche bought the patented ingredient necessary to manufacture the tranquilizers from its Swiss parent company at a price that was ninety times the market price in Italy, where no patent protection existed. As a licensee of its Swiss parent, German Hoffmann-La Roche also paid substantial license fees. These made the total transfer price paid for the ingredient 130 times the manufacturing cost.

To measure precisely how excessive the retail prices were, the Cartel Office used the Italian market price for the ingredient as a standard of measurement, rather than the price that German Hoffmann-La Roche paid its Swiss parent company. Against the percentage difference it found, the Office allowed offsets of 14.23 percent for research and development costs and 17.6 percent for advertising costs. The Office also calculated that German

96. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 71 (1975) (copy on file at the offices of the *Cornell International Law Journal*).

97. GERMAN FEDERAL CARTEL OFFICE, ANNUAL REPORT 54 (1974); *id.* at 53 (1976) (copies on file at the offices of the *Cornell International Law Journal*). In 1977, the Federal Cartel Office issued a warning to the three leading car manufacturers, Volkswagen, Opel, and Ford, that anticipated price increases would be suspected as an abuse. The Cartel Office did not intervene when prices were raised by 3.9 percent a few weeks later.

98. Judgment of May 14, 1974 ("BP"), OLG, Berlin, [1974] WuW/E 549, OLG 1467.

99. Decision of Mar. 21, 1974 ("Vitamin B-12"), BKartA, [1974] WuW/E 560, BKartA 1482.

100. Judgment of Mar. 19, 1975 ("Vitamin B-12"), OLG, Berlin, [1975] WuW/E 649, OLG 1599.

101. Judgment of July 3, 1976 ("Vitamin B-12"), 67 BGHZ 104, [1976] WuW/E 783, BGH 1435.

102. Decision of Oct. 16, 1974 ("Valium-Librium"), BKartA, [1975] WuW/E 84, BKartA 1526. The Federal Cartel Office also decided that the order should have immediate effect, but this decision was reversed by an intermediate ruling of the Berlin Court of Appeals. *See* Judgment of Nov. 15, 1974 ("Valium-Librium I"), OLG, Berlin, [1975] WuW/E 281, OLG 1547.

Hoffmann-La Roche was entitled to the same 22.4 percent profit margin that it received on its combined domestic sales of pharmaceuticals. Both the excessiveness of the price and the need for a reduction were confirmed by the 36 percent drop in Valium and Librium prices in the United Kingdom after United Kingdom Hoffmann-La Roche was required to grant licenses to two other competing manufacturers.[103]

The Berlin Court of Appeals sustained the Cartel Office's finding that the Valium and Librium prices of German Hoffmann-La Roche were abusively high, but the court reduced the price roll-back to 28 percent.[104] It agreed with the Cartel Office that the extent of an abuse must be measured by the "as if competition" concept, but emphasized that only "significant" departures from the "as if competition" price were abusive.[105] The "as if competition" price, the court said, should be determined by comparing the price charged by the market-dominating firm with the same product's prices in other, more competitive markets, rather than by comparing profit margins as was the principal approach of the Cartel Office.[106]

The court also rejected the Federal Cartel Office's use of the Italian ingredient price and the reduced prices for Valium and Librium in the Netherlands and the United Kingdom as bases for finding that German Hoffmann-La Roche's price was excessive. According to the court, international price differences for the same product, even if maintained for a long period of time, do not necessarily indicate an abuse.[107] Instead, the court compared German Hoffman-La Roche's prices with those of Centrafarm, an importer in the Netherlands. The court adjusted the Dutch firm's prices upward to compensate for three special costs born by German Hoffmann-La Roche as a result of structural differences between the Dutch and German markets. Relying on a disputed private research report submitted by German Hoffmann-La Roche, the court first made a 25 percent markup to

103. UNITED KINGDOM MONOPOLIES COMMISSION, CHLORDIAZEPOXIDE AND DIAZEPAM: A REPORT ON THE SUPPLY OF CHLORDIAZEPOXIDE AND DIAZEPAM, H.C. 197, at 1 (1973).

104. Judgment of Jan. 5, 1976 ("Valium Librium"), OLG, Berlin, [1976] WUW/E 313, OLG 1645.

105. *Id.* at 321, OLG 1653.

106. *Id.*

107. As to the Italian price, the court reasoned that its view was justified by the fact that there is no patent protection in Italy.

> Although [German Hoffmann-La] Roche like other enterprises must include general research and management costs in its calculation, the situation in Italy is substantially different, because imitating competitors in their price calculation can ignore a substantial part of the research costs. The competitive situation of [German Hoffmann-La] Roche in attempting to maintain its position in the Italian market is therefore not comparable with its position in Germany.

Id.

As to state-controlled prices, the court said that such prices cannot be used for the purposes of the market comparison concept. "Otherwise dirigistic measures of other states would be indirectly transferred into our market economy." *Id.*

reflect higher general costs of the pharmaceutical industry in Germany. The court then added a second 25 percent adjustment to compensate for the fact that both Valium and Librium are still under patent protection in Germany. Finally, another 10 percent markup was made to reflect special costs attributable to German Hoffmann-La Roche's performance of ancillary services and the firm's high reputation in the market. Since Centrafarm did not sell Librium, the court had to infer from its findings about Valium that Librium prices were equally excessive. The court therefore applied the same 28 percent price reduction to Librium and left German Hoffmann-La Roche with a 21 percent of sales profit margin on both compounds.

The Federal Supreme Court reversed the Berlin Court of Appeals and remanded the case to that court for clarification of the facts.[108] The supreme court agreed with the Cartel Office and the court of appeals that German Hoffmann-La Roche held a dominant position in the relevant market and that prices of a dominant firm that are significantly higher than prices under competitive conditions are an abuse under section 22.

The supreme court endorsed in principle the lower court's comparison of the Dutch firm's prices with German Hoffmann-La Roche's, but differed with the court of appeals on two of the three calculations derived from the comparison. Although the adjustment for general costs was correct, the research cost adjustment may have been too low. The lower court did not give sufficient weight to the fact that Centrafarm, a possible patent infringer, could offer a lower price than a licensee. The third adjustment for ancillary services and market reputation was unfounded, the court said, because it did not reflect differences in the structure of both markets. Finally, the supreme court criticized the court of appeals calculation of these adjustments to Centrafarm's prices, because the lower court did not clearly distinguish between determination of the relevant hypothetical market price and determination of the additional margin by which that price may be increased before it is significantly higher.

The Federal Supreme Court's *Valium* decision is an important judicial clarification of the application of section 22 to market-dominating firms.[109] The case establishes that excessive prices may be an abuse under section 22, that the extent of such an abuse is to be measured according to the hypothetical competitive price, and that antitrust authorities have the power to prohibit prices that are significantly higher than the hypothetical competitive price. But the impetus these developments give to vigorous enforcement of the competition law is diminished by the method's stringent proof re-

108. Judgment of Dec. 16, 1976 ("Valium"), 68 BGHZ 23, [1977] WuW/E 255, BGH 1445.

109. The very controversial views on this question in the legal and economic literature are best summarized in D. MUNZINGER, MIßBRÄUCHLICHE PREISE, PREISBILDUNGSSYSTEME UND PREISSTRUKTUREN NACH § 22 GWB (1977).

quirements. These constitute strong impediments to effective enforcement. Proof of abusive pricing of nationally sold products under this new test apparently requires the identification of a more competitive foreign market for the same type of product against which price comparisons can be made. Even where a foreign market is available for comparative purposes, upward adjustments of the foreign market prices to compensate for market structure differences may reduce the effectiveness of monetary penalties for abuses under section 22.

Two further flaws mar the supreme court's approach. Ordinary research and development costs of a market-dominating enterprise do not generally justify increasing the hypothetical market price. An upward adjustment is warranted only if the firm holds patents or valuable know-how that a competitor would need in order to compete. The court's requirement that adjustments to the hypothetical market price and a further "significance" margin be separately determined and presented also hinders enforcement. According to the court, the former calculations must be made "with all necessary care" so as to take account of the uncertainties of the comparison data. If at this stage the dominant firm is given full benefit of any doubt as to the weight of the evidence, there is no justification for a further "significance" margin that the court would apply. The supreme court's approach seems even more questionable if individual attributes of the market-dominating firm, such as its special image or reputation in the market, may form the basis for further favorable adjustments in the hypothetical market price.

The geographic market comparison approach employed by the Federal Supreme Court in the *Valium* case cannot be regarded as an effective means to determine the abuse involved in the pricing policy of market-dominating firms. In view of the even greater difficulties inherent in other methods of determining the "as if competition" price in dominated markets, it is doubtful whether the "as if competition" concept is a practicable method to control exploitation of dominant market power. The concept may be theoretically satisfactory. But because of the great uncertainties involved in its application, the strict proof requirements, and the availability of judicial review—even giving the market-dominating firm any possible benefit of the doubt—it is simply not effective.

To remedy this enforcement dilemma, the courts might reduce this heavy burden of proof on the Government.[110] But in light of the Parliament's clear preference for the "as if competition" standard, it is highly unlikely that the courts will adopt a different standard to define the abuse, such as

110. This is essentially the conclusion of a recent analysis of the present situation by Engelbrecht-Nagel, *Probleme der Preiskontrolle nach dem GWB*, [1977] DER BETRIEB 1237, 1243 (copy on file at the offices of the *Cornell International Law Journal*).

the profit comparisons test applied by the British Monopolies Commission[111] or the "unfairness" standard contained in article 86 of the Treaty of Rome.[112] Thus, without amending the present law, no substantial progress can be expected in the application of section 22 to exploitative practices by market-dominating firms.

In its memorandum on the first biennial report of the Monopolies Commission, the German Federal Government acknowledged the need to consider whether a statutory revision of the abuse concept would be possible and useful. But the Government's Bill of May 17, 1978 to amend the GWB does not provide for new definitions.[113] Rather, the Bill would illustrate the term "abuse" in section 113 (which deals with practices of public utilities) by citing a number of specific practices that the term would include.[114] The same should be done with section 22. For example, section 22 should be amended to provide that where a market-dominating enterprise engages in territorial price discrimination, the higher price is presumed to be an abuse, unless the enterprise proves that the price difference is justified.

In markets where competitive pricing cannot be expected, more direct methods of price control could be adopted, such as a system of prior notification of price increases coupled with a short waiting period during which the Cartel Authority could object to the increase.[115] Admittedly, the experience of West Germany and other countries with price controls has not been

111. *See, e.g.,* the British *Valium* case, *supra* note 103 and accompanying text. *See also* Rhinelander, *The Roche Case: One Giant Step for British Antitrust,* 15 VA. J. INT'L L. 1 (1974). On British practice regarding prices of market-dominating enterprises, see generally P. GUENAULT & J. JACKSON, THE CONTROL OF MONOPOLY IN THE UNITED KINGDOM (2d ed. 1974).

112. Treaty of Rome, *done* Mar. 25, 1957, 298 U.N.T.S. 11. Article 86 defines the term "abuse" by giving examples of several types of abusive practices, including "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." The European Community Commission first invoked this clause against the United Brands Co. *See* Decision of Dec. 17, 1975, 19 O.J. EUR. COMM. (No. L 95) 1 (1975), *reprinted in* 2 COMM. MKT. REP. (CCH) ¶ 9800. The unfairness of United Brands banana prices in several EEC member countries was inferred by the Commission from lower prices of competing brands in the same countries and from lower United Brands prices quoted to buyers in Ireland. The Court of Justice in its judgment of Feb. 14, 1978, case 27/76, reversed this part of the Commission's order, but affirmed the principle that unfair prices of a market-dominating firm are an abuse within the meaning of article 86.

113. *See* Bundesratdrucksache 231/78 (1978) (copy on file at the offices of the *Cornell International Law Journal*). The Bill, in § 1(19), merely proposes that all orders rendered under GWB § 22 be effective immediately, subject to the respondent's right to ask the appropriate appellate court to stay execution of the order. Once an order became final, the Bill would permit damages to be claimed from the date the order was issued, *id.* § 1(19), and would allow the Government to "skim off" profits resulting from the abuse, *id.* § 1(11).

114. *Id.* § 1(27).

115. *See* Markert, *Kostenkontrolle bei der Missbrauchsaufsicht über marktbeherrschende Unternehmen,* [1974] DER BETRIEBS-BERATER 580, 583 (copy on file at the offices of the *Cornell International Law Journal*).

particularly encouraging.[116] But controls could and should be used as a last resort—when all other means of competition policy, including restructuring the industry in question, cannot reasonably be expected to restore competition.[117]

CONCLUSION

The German law governing market-dominating enterprises is a typical example of the conduct approach to existing market power that forms the basis of most antitrust laws outside the United States. Because it focuses on reduced competition in specific markets, this approach encounters the same market definition problems that arise in many American merger cases. German attempts to develop workable definitions of actionable market power for both monopolists and oligopolists also parallel American antitrust experience.

The practical problems in German antitrust practice of defining the relevant market and determining actionable market power remain substantial, but are not insoluble. The critical issue of the German approach is to identify abusive practices by market-dominating enterprises and counteract them, yet simultaneously to avoid endangering the competitive forces of the market. Although German antitrust enforcement practice is not yet fully developed, jurists already recognize that overextending protection of competitors against exclusionary practices of market-dominating enterprises may substantially reduce market competition. Observers have also recognized the inherent limitations of any system of conduct control based on antitrust standards that seek to protect customers from exploitation by market-dominating firms. This remains the least developed aspect of the German approach and, despite enormous practical difficulties, requires further experimentation by the Parliament and the Cartel Authority.

Analysis of the German experience cannot alone resolve whether American antitrust law should place greater emphasis on controlling the conduct of market-dominating enterprises. But the application of section 22 to oligopolies may assist current American attempts to deal with oligopoly power.[118] Similarly, German efforts to define market domination may provide a useful contrast to American attempts to do the same.[119] By pro-

116. Rate regulation requiring prior authorization of price increases is applied to several regulated German industries, such as transportation, electricity, and automobile liability insurance. For a study of the American experience, see A. PHILLIPS, PROMOTING COMPETITION IN REGULATED MARKETS (1975).

117. A market for which such price controls might be necessary is the pharmaceutical industry. In most other countries of Western Europe where such controls are applied, prices are substantially lower than in Germany.

118. Kellogg Co., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898.

119. An example of the increasing importance of market domination as a test of monopoly or oligopoly power in American antitrust law enforcement is the Railroad Revitalization and

viding a comparative perspective, examination of the German experience may contribute to the refinement of American antitrust law enforcement practice.

Regulatory Reform Act of 1976, Pub. L. No. 94-110, 90 Stat. 31 (1976) (codified in scattered sections of 29, 45, 49 U.S.C.). The Act gives railroads subject to its provisions almost unlimited freedom to set non-discriminatory rates for traffic over which they do not have "market dominance." 49 U.S.C. § 1(5)(a)-(b) (1976). "Market dominance" is defined to be "an absence of effective competition from other carriers or modes of transportation." *Id.* § 5(c)(i). Since passage of the Act, attention has focused on how to define more specifically this test of market dominance. The Department of Justice opposed a rule proposed by the Interstate Commerce Commission that a railroad be deemed to be market-dominating when it handles 70 percent or more of the traffic in question. U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL 57 (1976). The proposed rule was subsequently modified. *Id.*

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