THE GERMAN FEDERAL CARTEL OFFICE AND THE APPLICATION OF COMPETITION LAW IN REUNIFIED GERMANY

ANDRÉ R. FIEBIG

1. INTRODUCTION

The German Federal Cartel Office (Bundeskartellamt, hereinafter FCO) is the authority responsible for the enforcement of the German Law Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, hereinafter GWB). Although the formation of the GWB was strongly influenced by American antitrust laws, the application of the law by the FCO differs significantly from the enforcement of the antitrust laws in the United States. In contrast to the United States, where the application of the antitrust laws is influenced to a large degree by the public policy of the current administration, the application of the law in Germany proceeds in a strictly legalistic manner. The FCO is not generally perceived as a political entity.

Germany’s purely legalistic approach to competition law is

* Associate, Deringer Tessin Herrmann & Sedemund; Dr. jur. candidate, University of Tübingen (Germany); LL.M. 1991, University of Tübingen; J.D. 1989, IIT Chicago-Kent College of Law. Much of the information about the Bundeskartellamt used in this article was gained during an internship with the Bundeskartellamt in the Summer of 1992. I would like to thank those individuals of the Bundeskartellamt who took time to discuss with me the operation of the Office and the enforcement of competition law in Germany. I would also like to thank Professor David Gerber and Professor Spencer Weber Waller for their helpful comments.

limited, however, by the inherent vagueness of the laws that regulate competition. Because there is no accepted definition of what competition means, the laws designed to protect it are by necessity vaguely worded. This places a limitation on the legalistic application of competition law because it requires that certain policy decisions be made. As a result, there is a struggle between the entities responsible for the enforcement of the law and the political agencies who want to control the results of the application of the law. In the case of the FCO, this conflict is illustrated in its relationship with the federal government as well as the European Commission. Tension exists in both relationships primarily because of the struggle between what the FCO considers the objective legal application of the GWB on the one hand and its political instrumentalization by the federal government and the European Commission on the other. This article is written to give an overview of the FCO and its attempts to apply Germany's competition law in a purely legalistic manner.

2. THE GERMAN COMPETITION LAW AUTHORITIES

2.1. The Institutions

There are five bodies which play a role in competition law in Germany. According to the GWB, the three governmental bodies (Kartellbehörden) which share regulatory power over competition are the FCO, the Federal Minister for Economics (Bundesminister für Wirtschaft), and the various state cartel offices.\(^2\) The fourth authority mentioned in the GWB, the

\(^2\) § 44 GWB. The state cartel offices, unlike the FCO, are integrated into their respective state economic ministries so that the political independence that exists at the federal level does not exist at the state level. See WERNHARD MÖSCHEL, RECHT DER WETTBEWERBSBESCHRANKUNGEN 690 (1983). The relationship between the FCO and the state cartel offices differs from the relationship between the American federal and state antitrust authorities. First, Germany has only one competition law which is applied by the various state competition authorities as well as the FCO. Second, the state cartel offices view their task as being complimentary to that of the FCO rather than as following an independent policy directed by their respective state governments. For further discussion of the state cartel offices and their relationship to the FCO, see Gerhard Hitzler, Die Abgrenzung der Zuständigkeitsbereiche des Bundeskartellamtes und der Landeskartellbehörden nach § 44 Abs. 1 Nr.1d GWB, 29 WUW 733 (1979); Karl-Heinz von Köhler, Behördenkonkurrenz im Kartellrecht, 79 DEUTSCHES
Monopolies Commission, is not a government agency and has no decision-making authority. The courts also play a role in private civil cases, but are required to operate in close connection with the FCO.

2.1.1. Federal Cartel Office

The FCO is the most important actor on the German competition law scene. It has jurisdiction in cases where the effect of the particular restraint of trade extends beyond the territory of one of the federal states of Germany. Unlike in the United States, where the respective jurisdictions of the Department of Justice and Federal Trade Commission often overlap, the FCO does not share enforcement authority with any other federal agency. In certain cases, however, the decisions of the FCO may be made ineffective by the Federal Minister for Economics.

The decisions of the FCO may be appealed to the court in which the FCO has its offices—the Berlin Kammergericht. Within the Berlin Kammergericht, there is a special chamber (Senat) set up solely to handle competition law cases. This results in a great deal of expertise in the judicial review of administrative decisions which does not exist in the United States. The decisions of the Berlin Kammergericht may then be appealed to the German Supreme Court which also has a Senat responsible for competition law matters.

VERWALTUNGSBLATT 214 (1964).

See § 24(b) GWB.

See § 90(1) GWB. Another actor on the competition law scene in Germany is the European Commission which has jurisdiction over restraints of trade that affect trade between Member States.

See § 44(1)(1)(d) GWB. The so-called “effects test” is used to determine whether the restraint extends beyond the territory of a state. See § 98(2) GWB.

See infra notes 10-13 and accompanying text.

See § 62(1) GWB.

See § 92 GWB.
2.1.2. Federal Minister for Economics

The second most important government agency in the enforcement of German competition law is the Federal Minister for Economics (hereinafter FME). The legal authority of the FME in the application of the GWB is limited to three instances. First, if a cartel agreement which is prohibited by Section 1 of the GWB does not fall within one of the exceptions provided in Sections 2 through 7 of the GWB, the FME has the authority to permit the cartel if "the restraint of competition is necessary for predominating reasons concerning the general economy and the common welfare." Second, the FME may authorize an export cartel in the context of Section 6(1) of the GWB. No prior decision of the FCO is required, and the firms may apply directly to the FME for an exemption to form an export cartel. Third, and perhaps most important, is the so-called minister authorization (Ministererlaubnis). According to this provision of the GWB, the FME may approve a merger that has been prohibited by the FCO if the restraint of competition is outweighed by advantages to the economy as a whole or if the merger is justified by a predominate public interest.

2.1.3. State Cartel Offices

In addition to the FCO, most states (Länder) have their own competition law agencies. The state cartel offices have jurisdiction in those cases which do not fall within the jurisdiction of the FCO or FME. Because the FCO has jurisdiction over restraints of trade that extend beyond the territory of a state, and the size of the German states are on the average not much larger than a typical U.S. county, the state competition law offices have jurisdiction only in cases involving small companies with local influence. In cases where a state cartel office does have jurisdiction, the applicable law

---

10 See § 44(1)(2) GWB.
11 § 8(1) GWB. This is the so-called Ministerkartell.
12 § 44(1)(2) GWB.
13 See § 24(3) GWB.
14 See § 44(1)(3) GWB.
15 § 44(1)(1)(d) GWB. See Zuständige Kartellbehörde bei Mißbrauch eines ländereübergreifenden Demarkationsvertrages, 30 WUW 692, 693 (1980).
is the GWB since the states do not have their own competition laws as in the United States.

The relationship between the state cartel offices and the FCO is horizontal in that the FCO has no authority over the state cartel offices and their spheres of jurisdiction are exclusive. The FCO has jurisdiction only in those cases specifically listed in Section 44(1) of the GWB. In all other cases, the state cartel offices have jurisdiction. In addition, the FCO and the state cartel offices are required to notify one another if either undertakes an investigation or initiates a proceeding against a firm. If an investigation or proceeding is undertaken by a state cartel office as well as the FCO, the state cartel office must cede jurisdiction to the FCO if one of the bases of jurisdiction of the FCO listed in Section 44(1) of the GWB exists.

---

16 The duties and powers assigned to the Cartel Authority by this Act shall be exercised by:

1. the Federal Cartel Office (§ 48)
   a) in respect of cartels within the meaning of §§ 4, 6 and 7, insofar as these functions have not been conferred upon the Federal Minister of Economics;
   b) with regard to agreements as designated in § 16 and recommendations as designated in § 38a;
   c) in respect to mergers under §§ 23 to 24a, insofar as these functions and powers are not conferred upon the Federal Minister of Economics;
   d) if the effect to the market influence, of conduct in restraint of competition, of discriminatory conduct, or of a competition rule extends beyond the territory of a state;
   e) in respect to the Federal Postal Administration and the German Federal Railways;

2. the Federal Minister of Economics in the cases of § 8 and § 12(2) in connection with § 6(1) and in § 24(1) in conjunction with subsections (3) to (5);

3. in all other cases, by the highest state authority competent according to state law.

§ 44(1) GWB.

17 See § 44(1)(3) GWB.

18 § 45 GWB.

19 § 45(3) GWB. For further discussion of the jurisdiction of the FCO and the state cartel offices see Hitzler, supra note 2.
2.1.4. Monopolies Commission

The competition law body with the least formal authority in Germany is the Monopolies Commission which was established by the second reform of the GWB in 1973. The Monopolies Commission consists of five members who are usually the leading experts in the field of competition law and who are nominated by the federal government and confirmed by the federal president. It is a highly independent body whose members cannot be members of a state or federal government or legislature. The Monopolies Commission, which has no decision-making authority, is charged with the duty of assessing the current state of market concentration, evaluating the application of Sections 22-24a of the GWB, and suggesting amendments to the GWB when deemed necessary. The Commission's primary task is to draft reports in response to requests from the federal government concerning a particular sector of the economy or industry. Although reports drafted by the Monopolies Commission have no formal authority, they are extremely influential in Germany because of the stature of the Commission's members. In many instances, suggestions made by the Monopolies Commission become the focus of public debate and serve as stimuli for legislation.

2.2. The Structure of the Federal Cartel Office

2.2.1. The Internal Structure of the Federal Cartel Office

The FCO came into existence with the introduction of the GWB which became effective on January 1, 1958. The internal structure of the FCO as well as its jurisdiction and

---

20 § 24b GWB.
21 § 24b(1) GWB.
22 § 24b(6) GWB.
23 § 24b(2) GWB.
24 See § 24b(3) GWB. The biennial reports of the Monopolies Commission contain summaries in English attached as appendices. In 1987, the Commission issued a single volume collection of these summaries. See MONOPOLKOMMISSION, GERMAN MONOPOLIES COMMISSION 1973-1983 (1987).
authority are governed by the GWB. The FCO is comprised of a President, ten Decision-Divisions (Beschlußabteilungen) (each with its own jurisdiction over a particular branch of the economy), a Fundamental Policy Division subdivided into five departments, a European and International Division subdivided into three departments and an Appeals Division. The staff of the FCO has grown from 137 in its first year of operation to the current staff of approximately 250.

a. The Office of the President

The head of the FCO is the President who is appointed by the FME. The FCO has had only three Presidents in its thirty-five year history: Eberhard Günther, Wolfgang Karte and the current President Dieter Wolf. The unwritten policy is to appoint someone from outside the FCO. The current President, as well as his predecessors, was appointed from the staff of the FME.

The President of the FCO has little decision-making authority. In fact, he has no authority to decide individual cases. Indeed, the power of the President lies primarily in his administrative and operational authority. Perhaps the most important is the President's authority to determine the distribution of competencies among the Divisions of the FCO. Subject to the approval of the FME, the President of the FCO can determine the composition of the Divisions as well as the cases for which each Division is responsible.

In addition, the President determines the operational rules of the FCO. This means that the President is responsible

---

26 § 48 GWB.
27 See Appendix.
28 See Bericht des Bundeskartellamtes über seine Tätigkeit im Jahre 1973 sowie über Lage und Entwicklung auf seinem Aufgabengebiet, Drucksache 1000 (1959) at 12.
31 Kurt Markert, Die Rolle des Bundeskartellamtes bei der Durchsetzung des Wettbewerbsrechts in der Bundesrepublik Deutschland, in Institutionen und Grundfragen des Wettbewerbsrechts 9, 15 (Uwe Blaurock ed., 1988).
32 § 48(2) GWB.
for daily procedures within the FCO and can institute policies as he sees fit. For example, the weekly meeting of the Divisions (Abteilungsleiterkonferenz), at which the Divisions summarize their current developments was instituted by former FCO President Kartte. The meeting serves to inform the President of the current operations of the FCO and allows him a forum in which he can voice his opinion on specific cases.

Finally, the President has the responsibility for publicly representing the FCO. He is in contact with the other branches of the government and with the public through speeches and interviews. This often gives the false impression that he is the decision maker at the FCO.

b. The Decision-Divisions

The real decision-making authority of the FCO lies in the ten Decision-Divisions. The directors of the Decision-Divisions, like the President, are appointed by the FME for life and cannot be members of any company boards, trade or industry associations, or any other professional organizations. This ensures a degree of independence from politics and industry. Generally, the directors of the Decision-Divisions are life-long civil servants (Beamter) who have worked their way up through the ranks of the FCO.

The Decision-Divisions are divided according to industry, with each Division being responsible for cases in their assigned industries. For example, the Sixth Division handles cases involving the printing, copying, tobacco, cultural arts, film, and advertising industries. If it is unclear which Division is to handle a case, it is worked out informally between the Division directors themselves. Each Division has a director (Vorsitzender), four to six assistant directors (Beisitzer), and two to three assistants (Referenten). Within the Divisions themselves, the specific industries are divided between the assistant directors. In the case of the Sixth

---

33 *Id.* The number of Decision-Divisions was increased from nine to ten in 1991 as a result of the increased workload created by the reunification process. See Bundeskartellamt auf 10 Beschlüsseabteilungen erweitert, 1 WUW 4 (1991).

34 § 48(4) GWB.

36 § 48(5) GWB.

https://scholar.ship.edu/jil/vol14/iss3/3
Division, for example, cases in the tobacco industry are assigned to one particular assistant director. One intended result of this organizational structure is that a great deal of specialization occurs within the Divisions concerning a particular industry.\footnote{Klaus Weber, Geschichte und Aufbau des Bundeskartellamtes, in ZEHN JAHRE BUNDESKARTELLAMT: BEITRÄGE ZU FRAGEN UND ENTWICKLUNGEN AUF DEM GEBIET DES KARTELLRECHTS 263, 267 (1968).}

Once an assistant director has been assigned a case, she is referred to as the “reporter” (Berichterstatter) and is responsible for drafting a preliminary decision. Final decisions in individual cases are made by a majority vote of the Division head and two assistant directors.\footnote{\textcopyright{} 1993 Published by Penn Carey Law: Legal Scholarship Repository, 2014} The Division director and the responsible reporter are automatically included in the decision. The second assistant director is pre-determined in the sense that each reporter has a fixed secondary reporter and also serves as a secondary reporter for one of her colleagues. This avoids any politics that would be possible if the Division director were able to decide who casts the third vote. Theoretically, the primary reporter must only persuade one of her colleagues since the vote of the Division director is equal in weight to votes of the assistant directors. In practice, however, even when the primary reporter secures the vote of one of the other two, the third person may force an oral discussion if she decides against the other two. This seldom happens because the opinion of the individual responsible for the case is usually accepted by the other two.

The Decision-Divisions are entirely independent from one another. What influence there is comes in the form of informal discussion between the “reporter” and those in other Divisions. The weekly meetings mentioned above provide an important forum for the exchange of information and ideas not only between the President and the Decision-Divisions, but also among the Divisions themselves. During the meeting, each Division presents a summary of its activities to which the other Divisions may ask questions or, more commonly, add their comments.
c. The Fundamental Policy Division

The most important function of the Fundamental Policy Division is to insure legal uniformity (Rechtssicherheit) in the application of the GWB. The independence of the Decision Divisions both from the President and from one another carries with it the danger of inconsistent decisions. As discussed above, the Decision Divisions are separated by industries rather than according to the type of restraint of competition involved. Each Decision Division is responsible for the application of the entire GWB. As such, there are ten different sources of interpretation of the same provision of the GWB.

There are several ways in which this threat to legal uniformity is addressed. First, the authority to apply new laws or amendments to the GWB is usually concentrated into several Decision Divisions for the first years after its enactment. For example, in the first five years of the merger law, introduced in 1973, its application was concentrated in three Decision Divisions. Second, it is the responsibility of the Fundamental Policy Division to assist on questions of general policy. The Departments of the Fundamental Policy Division are separated not by industry, like the Decision Divisions, but according to the particular type of restraint of competition involved. They have no decision-making authority but make non-binding recommendations to the other Divisions. The final practice which increases legal uniformity is that there is a certain degree of stare decisis that exists within the FCO. Past decisions hold significant weight even if they were made by a different Decision Division.

d. The European and International Division

The primary function of the European and International Division of the FCO is to coordinate contacts with the European Community and other foreign competition law agencies such as the United States Department of Justice and the United States Federal Trade Commission. This Division is becoming increasingly important because of the
globalization of industries and the integration of Europe. The increasing amount of transnational business activity requires, in the absence of a supranational competition law authority, the coordination of enforcement practices of the national competition law agencies. In 1976, the United States and Germany signed a cooperation agreement concerning the application of competition law to international business. One of the functions of the European and International Division is to oversee and implement the cooperation provided for in this and other such agreements.

Another development which gives this Division added importance is the growing influence of European competition law. As the European competition law system matures, the number of cases which fall within the European Commission's jurisdiction is increasing. As the EEC Commission assumes more influence in competition law matters, the role of the European and International Division becomes more important because it is the channel through which the FCO can make its position known to the Commission.

The Commission is required to transmit copies of applications and notifications to the Member States relating to Articles 85 and 86 of the Treaty of Rome. In addition,

---


41 In addition to the agreement with the United States, Germany has also signed a bilateral agreement with France concerning the coordination of the enforcement of competition law. See Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Französischen Republik über die Zusammenarbeit in bezug auf wettbewerbsbeschränkende Praktiken, 1984 BGBl II 758 (F.R.G.-Fr.).

42 The jurisdiction of the Commission extends to those cases which may affect trade between Member States. See Case 247/86, Alsatel v. Novasam, 1988 E.C.R. 5987, 6008 para. 11. There is widespread agreement that this requirement is merely a formality and presents no significant hurdle when the Commission wants to prohibit certain business conduct. See Volker Emmerich, Kartellrecht 512-13 (6th ed. 1991); Martin Hirsch & Thomas Burkert, Kommentar zum EWG-Kartellrecht 119 (4th ed. 1998).


44 See Treaty Establishing the European Economic Community, Mar. 25,
the Commission must consult an Advisory Committee on Restrictive Practices and Monopolies prior to making a final decision. The Advisory Committee is comprised of officials from the Member States. The Commission must supply the Advisory Committee with a draft decision upon which the Advisory Committee has the authority to issue its opinion. The European and International Department is also responsible for representing Germany at the meetings of the Advisory Committee.

e. The Appeals Division

As indicated above, the decisions of the FCO may be appealed to the Berlin Kammergericht. The decisions of the Berlin Kammergericht are then appealed to the Senat of the German Supreme Court responsible for competition law matters. The Appeals Division is responsible for appeals to the German supreme court, while the individual Decision-Divisions or the Vice-President of the FCO are generally responsible for appeals in the first instance.

2.2.2. The Position of the Federal Cartel Office in the Government

Although the FCO is a branch of the FME, it enjoys a high degree of independence not only from the government, but also from the business community. The geographical separation of the FCO, which is located in Berlin in accordance with the GWB, from the FME, which has its offices in Bonn, symbolizes the independence of the FCO.


45 See Regulation 17, supra note 43, at art. 10(3).

46 Id. at art. 10(6).

47 See supra note 7 and accompanying text.

48 See supra note 9 and accompanying text.

49 § 48(1) GWB.

50 Several authors have suggested making the FCO an entirely independent agency. For a discussion of these proposals, see Wolfgang Karte, Wettbewerbspolitik im Spannungsfeld zwischen Bundeswirtschaftsministerium und Bundeskartellamt, in WETTBEWERB IM WANDEL 47, 56 (H. Gutzler et al. eds., 1976).

51 § 48(1) GWB.

52 This independence is further symbolized by the upcoming move of the
The President of the FCO and the division heads are nominated for life terms by the FME and cannot be a member of a board of directors, a cartel, or a business or trade association. Unlike in the U.S., the top officials at the FCO do not change when the government changes and are not perceived as policy-makers but rather as civil servants who objectively apply the law. In order to avoid the danger of a Division director using his life-term appointment to maintain a fiefdom within a Division, former President Kartte developed a system of rotation whereby the Division directors periodically change Divisions.

2.3. Administrative Proceedings

Formal administrative proceedings by the FCO to enforce the GWB are seldom necessary because most alleged violations are settled through discussions with the firms involved. Where an agreement cannot be worked out with the parties, however, the FCO may institute administrative proceedings. The FCO has ex ante authority to prohibit conduct that it deems would violate the GWB. The FCO may also act ex post to either break up a completed merger or impose fines (Bußgeld). In practice, however, the imposition of fines plays only a minor role.

Given the value of business secrets in German business, perhaps one of the most feared powers of the FCO concerns its investigatory authority. The FCO, as well as the state cartel

---

53 § 48(5) GWB.
54 Infra Section 3.
56 See Emmerich, supra note 42, at 500.
57 Administrative proceedings conducted by the FCO are governed by §§ 51-58 of the GWB.
58 § 24(2) GWB.
59 §§ 38-39 GWB. Private parties injured by conduct which violates one of the provisions of the GWB intended to protect another person may bring a cause of action for compensatory damages or an injunction. See § 35(1) GWB.
offices and the FME, can demand information from businesses concerning their business relations or can conduct an on-site investigation of documents with the permission of a judge. Unlike the broad investigatory powers enjoyed by the European Commission, there must be a “concrete initial suspicion” before the FCO can resort to its investigatory powers.

The FCO’s access to documents which contain business secrets is a sensitive issue in German competition law, because business secrets are closely guarded in Germany. Even in litigation, German businesses are not forced to open their files to the same extent as their U.S. counterparts. In addition, German civil procedure does not include the process of discovery as it is known in the United States.

Of particular importance to practitioners is the opportunity to get an informal opinion from the FCO concerning a planned merger. Parties intending to enter a merger contract may at a very early stage report their plan to the FCO and ask for an informal opinion. Usually the FCO will ask for documents and statistics and will issue a non-binding opinion to the firms. Many cases are dealt with this way and it partially explains why the percentage of reported mergers that are prohibited by the FCO is extremely low. The advantage to the firms is that the FCO does not charge fees for the opinion.

---

61 § 46(1)(1) GWB.
62 Id. at (2).
63 See id. at (4).
67 For a discussion of the pre-trial collection of information in Germany, see David J. Gerber, Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States, 34 AM. J. COMP. L. 745, 748-769 (1986).
68 This process is not provided for in the GWB but arises out of the administrative practice of the FCO.
(which differs from a formal notice), the position of the FCO can be ascertained at a relatively early stage in the negotiations (thus avoiding potentially wasted costs), and the decision of the FCO remains confidential.

3. **THE APPLICATION AND INTERPRETATION OF COMPETITION LAW IN GERMANY**

The application of competition law is inherently political for two reasons. First, the institution which the laws are intended to protect, competition, is largely undefinable. Second, as a form of market regulation, the enforcement of competition law creates incentives for politicians to influence its application. The fact that there are few clear lines in the application of competition law makes it difficult to identify correct results and as such to preclude the political instrumentalization of the law. The more indefinite the terms of the statute, the greater the potential for political influence in the application to specific cases. The open nature of competition law, that is, the inability or unwillingness of the legislature to codify precise definitions and standards, leads to a continuing degree of tension between policy goals on the one hand and the objective legal application of the law on the other. This tension is particularly accentuated in Germany because of (1) the methodological approach to the application of the GWB and (2) the order-policy approach to competition law in Germany.

3.1. **The Systematic Application of Law in Germany**

The application of civil law in Germany follows a specific methodology which is the fundamental tool of the German jurist. First, the facts are gathered and their relevancy determined. Second, the appropriate legal norm that is to serve as the basis for the claim (Anspruchsgrundlage) is

---


70 See Wernhard Mösche, The Goals of Antitrust Revisited, 147 J. INST'L & THEOR'L ECON. 7, 9 (1991) ("Excluding a core area of 'naked' restraints of competition, the demarcation between practices which promote competition and those which hinder it has remained a field in which reasoned analysis and mere speculation exist in equal measure.").
sought. Each claim has specific elements (Tatbestandsmerkmale) which must be fulfilled. The third step is the subordination of the facts under the legal norm. The legal consequences are methodologically drawn from the law. The process of arriving at a legal consequence from a set of facts is therefore seen as a purely legalistic method and is taught as such in the law schools. A German jurist learns that there is a particular legal solution for each situation and the process of arriving at this solution simply requires the application of the legal methodology. This deductive, dogmatic approach to the law ensures, or at least reduces the risk that the values of the entity applying the law will play a role.

The methodology employed in applying the GWB is the same as that of civil law in general. A particular business conduct is identified, a particular provision of the GWB is sought, the elements of that norm are tested against the facts, and the legal consequences are then automatically derived from the law. The FCO, which is entrusted with the application of the GWB, is thus perceived merely as the instrument by which the legal results are arrived at and not as a policy-making body.

3.2. The Order-policy Approach to Competition Law

Because of the complexity and undefinability of competition, laws regulating market activity need to be formulated flexibly. This troubles German jurists who

---

71 This step is referred to as the subsumtion and is defined as “[t]he subordination of a fact pattern under a legal norm.” CREIFELDS RECHTSWÖRTERBUCH 1129 (11th ed. 1992). For further discussion, see KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 155-65 (6th ed. 1991).

72 For further discussion of the German approach to law, see Max Rheinstein, The Approach to German Law, 34 IND. L.J. 546 (1958); Folke Schmidt, The German Abstract Approach to Law, 9 SCANDINAVIAN STUDIES IN LAW 131 (1965).

73 ULRICH IMMENGA & ERNST-JOACHIM MESTMÄCKER, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 41, 49 (Ulrich Immenga & Ernst-Joachim Mestmäcker eds., 2d ed. 1992); WERNHARD MÖSCHEL, RECHT DER WETTBEWERBSBESCHRÄNKUNGEN 79-80 (1983).

74 See CORWIN D. EDWARDS, MAINTAINING COMPETITION: REQUISITES OF A GOVERNMENTAL POLICY 42-49 (1949).

75 See, e.g., Eberhard Günther, Die Auslegung unbestimmter Rechtsbegriffe des GWB, in WETTBEWERBSORDNUNG IM SPANNUNGFELD VON WIRTSCHAFTS- UND RECHTSWISSENSCHAFT. Festschrift für Günther Hartmann
are used to having a precise legal solution ascertainable through the implementation of the methodology described above.\(^7\) When the wording of the GWB does not lead to a precise legal solution, the decision-maker looks to its context and purpose. The application of competition law in Germany has been influenced primarily by the Ordo-liberals\(^7\) who provided the conceptual basis for the GWB.\(^7\) According to this school of thought, the activity of the state concerning economic policy “should be directed at securing the order of the economy, not at the steering of the economic process.”\(^7\) Like classical liberalism, it considers the market as the most efficient allocator of scarce resources. However, as one of the leading Ordo-liberals, Walter Eucken, pointed out, it differs from “the classical tradition” in that it envisages a positive role for the state in securing the order.\(^8\)

Perhaps the most important positive role of the state was in maintaining the competitive order (Wettbewerbsordnung). The two types of norms required for this task were called

\(^{123, 123}\) (1976) (“The analysis of the GWB indicates that the legislator in this law failed to fulfill every expectation that is to be expected of a codification.”); Gerd Pfeiffer, Grundfragen der Rechtskontrolle im Kartellverfahren (Auslegungsmethodik - unbestimmte Rechtsbegriffe - Verfahrensrecht), in Schwerpunkt des Kartellechts 1978/79, 1, 4-5 (1980).

\(^{76}\) See supra notes 71-73 and accompanying text.


\(^{78}\) See supra note 28, at 11; Wolfgang Karte & Rainer Holtschneider, Konzeptionelle Ansätze und Anwendungsprinzipien im Gesetz gegen Wettbewerbsbeschränkungen - Zur Geschichte des GWB, in HANDBUCH DES WETTBEWERBS 193, 199-210 (Helmut Cox et al. eds., 1981); Wernhard Möschel, Competition Policy from an Ordo Point of View, in GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY 142, 149-50 (Alan Peacock & Hans Willgerodt eds., 1989); Möschel, supra note 29, at 52.

\(^{79}\) WALTER EUCKEN, GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK 336 (5th ed. 1975).

\(^{80}\) Walter Eucken, Das ordnungspolitische Problem, 1 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 56, 80 (1948).
constituting principles (konstituierende Prinzipien) and regulating principles (regulierende Prinzipien). The former are designed to establish the competitive order,\(^1\) while the latter are designed to maintain a functionally competitive order (funktionsfähige Wettbewerbsordnung).\(^2\) Once the market is established, the state acts passively in the sense that it ensures that competition exists but does not intervene to achieve particular results.

This conception of the function of competition law—the maintenance of a competitive order—contrasts, for example, with the French conception of competition law as an instrument for securing economic goals rather than merely maintaining the competitive order.\(^3\) The use of competition law to achieve specific public policy goals is strictly limited in Germany.\(^4\) The fundamental principle of German competition law is that “the GWB does not empower the entities which are charged with the application of the law to firms involved in restraints of competition to apply the law for economic policy purposes.”\(^5\)

3.3. Implications

The methodological application of the GWB when combined with the Ordo-liberal approach to the interpretation of competition law means that there is little room for what is referred to as “non-competitive” (außerwettbewerblichen) objectives.\(^6\) The approach to competition law in Germany

---

\(^1\) EUCKEN, supra note 79, at 254-55.

\(^2\) Id. at 291.


\(^4\) One prominent exception is the ability of the FME to allow a merger on public policy grounds. § 24(3) GWB.

\(^5\) IMMENGA & MESTMÄCKER, supra note 73, at 42.

\(^6\) Otto Schlecht, Entscheidungslinien der deutschen Wettbewerbspolitik, 43 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND
represents a refusal to recognize that its application is influenced by public policy. The politicians are responsible for the policy; the jurists are responsible for the application of the law. This approach to law is based on the assumption that legal terms and standards promulgated by the legislature are precise. The inherently open nature of competition law is ill-suited for closed legal systems such as that existing in Germany.

In addition, the Ordo-policy approach to law assumes that there is a difference between government interference in the market and the maintenance of competition by the government. According to the dominant view of the role of competition law, the GWB is directed at the promotion and maintenance of a market economy. "A different understanding would give the agencies responsible for the application of the GWB political decisions which they have no legitimacy to make." Therefore, the application of competition law should not include public policy. This approach is supported by German scholars who consistently reject the "instrumentalisation" of the GWB to achieve specific social or economic goals.

This approach to competition law inevitably gives rise to conflicts since the application of competition law is inherently political due to the indefinability of the concept of competition and the economic effects following from its regulation. The tension arising from the refusal to recognize the political content of competition law is illustrated in several relationships the FCO has with certain more politically responsive entities.


87 See IMMENGA & MESTMÄCKER, supra note 73, at 41.

88 Möschel, supra note 73, at 79-80; see also IMMENGA & MESTMÄCKER, supra note 73, at 49.

89 Möschel, supra note 29, at 52 ("The FCO] follows a strict rule of law and not a system of discretionary political decisions.").

90 See IMMENGA & MESTMÄCKER, supra note 73, at 52.

91 See Meinrad Dreher, Verrechtlichung und Entrechtlichung Gesetzgebung und Gesetzesanwendung im Kartellrecht, 2 ZEITSCHRIFT FÜR GESETZGEBUNG 312, 320 (1987) ("The dynamic and complex character of competition makes the general regulation of concrete competitive behavior more difficult.")
4. THE FEDERAL CARTEL OFFICE AND PUBLIC POLICY

A purely legalistic approach to competition law inevitably results in a certain degree of friction between the entity responsible for the implementation of the law and those governmental entities who are politically responsible for the results of the market. This type of friction is apparent in the relationships the FCO has with other entities involved in the regulation of business and the German economy in general.

4.1. The Relationship Between the Federal Cartel Office and the Federal Economics Ministry

The German competition law jurists often refer to a "natural relationship of tension" between the FCO and FME. This tension exists because the FCO is technically in a subordinate role (Unterordnungsverhältnis) in its relationship with the FME. Whereas the FME is a governmental cabinet, and as such is politically responsive, the FCO is perceived as being bound "only by the instruction of the law and not by instructions of the economic policy arm of the executive." Accordingly, conflict arises in those cases in which the FME attempts to manipulate the competition for political purposes.

The FME can exercise its administrative authority over the FCO in four ways. First, it has the authority to issue general instructions to the FCO. The precise meaning of this clause is an issue in German competition law. There is agreement among the German competition law scholars that it empowers the FME to issue general directives concerning the application of the GWB to certain categories of cases. However, whether the FME can issue directives in individual cases is a

---

82 KARTTE, supra note 50, at 50; Geberth, supra note 55, at 296.
83 Klaue, supra note 30, at 1782.
84 Fritz Rittner, Das Ermessen der Kartellbehörde, FESTSCHRIFT FÜR HEINZ KAUFMANN ZUM. Geburtstag 307, 320 (Bartholomeyczik et al. eds., 1972).
85 See § 49 GWB; see also, Directive of May 30, 1980, concerning the treatment of foreign mergers, Bundesanzeiger Nr. 103, June 7, 1980, translated in HEIDENHAIN & SCHNEIDER, supra note 1, at 375.
86 Klaue, supra note 30, at 1782-83.

https://scholarship.law.upenn.edu/jil/vol14/iss3/3
point of controversy. Although the GWB does not expressly indicate whether the FME can issue directives in individual cases, the prevailing opinion in Germany is that such directives are impermissible. Therefore, authority to issue directives has little practical significance since it is seldom relied on.

The second administrative power that is granted to the FME by the GWB is the authority to establish the Decision-Divisions of the FCO. Although the operational rules of the FCO are determined by its President, they require the approval of the FME.

The third authority is the ability to attach comments to the bi-annual reports of the FCO. Every two years the FCO is required to publish a report summarizing its activities as well as other developments within its sphere of authority. The FME can attach comments to this report stating its position on the issues discussed in the report to indicate how its position differs from that of the FCO. The practical effect of this is that it allows the FME to publically question the policy of the FCO.

The last authority concerns the ability of the FME to resolve conflicts between the FCO and other agencies. The FCO can impose a fine in the insurance, banking, or savings and loan industry only in agreement with the respective governmental agencies which are responsible for regulating these branches. If the FCO and the respective agency cannot come to an agreement, the FME has the authority to decide.

More important than the administrative authorities of the FME is its authority to intervene in the application of the
substantive law. As indicated above, the FME has direct authority in the application of the GWB in three instances: the authority to prohibit an export cartel;\(^\text{106}\) the authority to permit a merger if it concludes that the benefits of the merger outweigh the effect of the reduction in competition;\(^\text{107}\) and the authority to permit a cartel that falls within Section 1 of the GWB if the restraint of competition is necessary for overriding reasons connected with the economy as a whole and the public interest.\(^\text{108}\)

Tension is most likely to arise when the FME relies on its power over the FCO to pursue industrial policy objectives that conflict with the dogmatic application of the GWB by the FCO. The FME is politically responsible for the success of the economy. Its interests are therefore not necessarily in maintaining a competitive market, but rather in the short term success of the economy as defined by the electorate. The case of the appropriate level of market concentration provides a good example. In April 1989, the FCO refused to grant permission to a merger between Daimler-Benz and Messerschmitt-Bölkow-Blohm GmbH because of the market concentration the merger threatened to bring about.\(^\text{109}\) The FME, however, saw the merger as enhancing the international competitiveness of the two German companies and subsequently issued an authorization essentially overriding

---

\(^{106}\) See § 44(2) & (8) GWB. The authority to declare an export cartel void was granted because of the foreign relations implications of such agreements. See Klaue, supra note 30, at 1745.

\(^{107}\) See § 24(3) GWB. An additional authority of the FME over the FCO concerns mergers which fall under the European Merger Control. When a merger threatens to create a dominant position in the Member State, that state may ask the Commission to cede jurisdiction to it even though the merger technically falls under the exclusive jurisdiction of the Commission. See infra notes 136-41, and accompanying text. Since the FME is responsible for actually making the request to the Commission, it can essentially prevent the FCO, which typically takes a harder stand against mergers than the Commission, from ruling on the merger. This informal authority was exercised recently in the case of a merger between two of the leading German potash mine companies which the FME was concerned that the FCO would prohibit. See Die Kali-Fusionskontrolle bleibt bei der EG-Kommission in Brüssel, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 7, 1993, at 9, col. 3.

\(^{108}\) See § 8(1) GWB.

the FCO's decision.\textsuperscript{110}

Such political intervention in the application of the competition law, which in the United States would probably not raise an eyebrow, is the source of what is referred to as the "natural relationship of tension"\textsuperscript{111} between the FCO and FME because it conflicts with the conception of a purely legalistic approach to competition law.

4.2. The Relationship between the Federal Cartel Office and the Treuhandanstalt

The delicate balance between politics and the apolitical application of the GWB by the FCO was tested in the process of transforming the planned economy of East Germany into a market oriented economy. The first step in this process was the privatization of the state-owned industries. These industries were converted into joint-stock companies whose shares were turned over to a government agency called the Treuhandanstalt.\textsuperscript{112} According to the Treaty on the Establishment of German Unity,\textsuperscript{113} the task of the Treuhandanstalt was either to privatize the firms under its control, to rehabilitate the non-marketable firms so that they could be sold, or to liquidate those firms that could not be rehabilitated.\textsuperscript{114} Where a buyer could not be found, the

\textsuperscript{110} See Ministererlaubnis fur ZusammenschluB Daimler-MBB, 10 WUW 803 (1989). Since the merger provisions were introduced into the GWB in 1973, there have been two ministerial authorizations, three ministerial conditional authorizations, one partial authorization, four denials, and five applications were withdrawn before a decision was reached. For a discussion of each of these applications, see Erfahrungsbericht des Bundeswirtschaftsministeriums über Ministererlaubnis-Verfahren bei Firmen-Fusionen, 11 WUW 925 (1992).

\textsuperscript{111} See supra note 90.

\textsuperscript{112} See Gesetz zur Privatisierung und Reorganisation des volkseigenen Vermögens, 1990, § 1(4) at 300, GB1 (1990).


\textsuperscript{114} For a discussion of the activities of the Treuhandanstalt, see George Akerlof et al., East Germany In From the Cold: The Economic Aftermath of Currency Union, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 65-75 (1991); Michael Gruson & Georg Thoma, Investments in the Territory of the Former German Democratic Republic, 14 FORDHAM INT'L L.J. 540 (1990-1991); Herbert Hax, Privatization Agencies: The Treuhand Approach, in PRIVATIZATION SYMPOSIUM IN HONOR OF HERBERT GIERSCH 143 (Horst
decision whether to rehabilitate or close down a business had serious political repercussions because of the ensuing unemployment.\textsuperscript{115}

Since the economic integration of East Germany preceded the political integration by seven months, the FCO did not have immediate legal control over business practices in eastern Germany. Accordingly, the West German government included a clause in the Treaty Establishing a Monetary, Economic and Social Union requiring the East German government to enact legislation regulating competition.\textsuperscript{116} The subsequent legislation, which was virtually identical to the GWB,\textsuperscript{117} granted the East German Office for the Protection of Competition (OPC) jurisdiction to enforce the competition law.\textsuperscript{118} Upon political unification, however, the OPC was dissolved and its functions assumed by the FCO.\textsuperscript{119}

The FCO made it clear from the beginning that the transformation of the East Germany economy must take place in accordance with the GWB.\textsuperscript{120} The primary challenge to the FCO in the reunification process was to prevent private concentrations of power from replacing the former state-owned

\textsuperscript{115} See Hax, supra note 114, at 149-52.


\textsuperscript{117} See Gesetz über die Inkraftsetzung von Rechtsvorschriften der Bundesrepublik Deutschland in der Deutschen Demokratischen Republik, GB1. DDR Part I Nr.34 p.357 (1990). For a detailed discussion of the legislation, see Werner Kleinmann, Das neue Kartellrecht der DDR, Recht der Internationalen Wirtschaft, 45 Betriebs-Berater 1 (1990).


\textsuperscript{119} See Reinhold Wutzke, 155 Tage für Wettbewerbschutz, 41 WuW 14 (1991). The 7th Decision-Division of the FCO was initially given authority for cases involving eastern German firms. See Zuständigkeit im BKartA für DDR-Fälle, 49 WuW 368, 368 (1990).

monopolies. The collapse of these monopolies presented a danger that firms from the West would step into the vacuum created by the collapse of the state-owned monopolies. As such, the merger control laws of the GWB were the primary instrument by which such market dominance was to be avoided.

The dogmatic application of the GWB by the FCO conflicted at times with the political goals of the Treuhandanstalt. In many instances, the Treuhandanstalt held stock of market-dominating companies. The responsibility of the Treuhandanstalt was first and foremost privatization, which meant the sale of the companies. The condition of most of the businesses, however, was such that a significant financial investment was required to make them competitive. As such, many business were attractive only to large firms from the West who already had significant market power. The Treuhandanstalt's goal to privatize often meant having to sell a business to a large firm from the West because smaller investors were not interested, and this conflicted at times with the policy of the FCO. In certain cases, the FCO's policy meant that the the Treuhandanstalt could not sell a business in its possession to a market dominating investor from the West, but had to hold on to the business until another investor could be found.

This did not make the FCO popular, as the case of Interflug, the East German national airline, illustrates. Soon after unification, Lufthansa, the West German national airline, indicated its willingness to purchase Interflug complete with landing and takeoff rights. The FCO took


122 The provisions of the GWB concerning cartels and the abuse of market dominating positions were of secondary importance in the reintegration of the eastern German economy. See Kartte, supra note 121, at 270-72.

123 § 1(1) GESETZ ZUR PRIVATISIERUNG UND REORGANISATION DES VOLKSEIGENEN VERMOGENS, 1990 GB1. DDR 300.

124 See Erhard Kantzenbach et al., Die Rolle der Wettbewerbspolitik bei der Transformation des planwirtschaftlichen Systems in den neuen Bundesländern, in ORD. JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFFT
a negative position on the proposed sale to Lufthansa since it would mean the strengthening of Lufthansa's already dominant position in West Germany. The fact that Interflug was not immediately sold, led to its liquidation which, in turn, caused substantial unemployment. In this case, the FCO was seen as the cause of the liquidation and was forced to take much of the blame for the ensuing unemployment.125

Because of its strict application of the GWB, the FCO was also blamed for hindering investment in eastern Germany. In July 1992, the Treuhandanstalt had entered into an agreement to sell the former East German oil company Minol Mineralölhandel AG to the French oil company, Elf Aquitaine. In the agreement, Elf Aquitaine agreed to invest in the construction of a new refinery in eastern Germany and in return it would acquire from the Treuhandanstalt Minol's distribution network in eastern Germany.126 The political motives of the German government and the Treuhandanstalt were clear. They were getting one of the largest European companies to make a substantial investment in a dilapidated eastern German industry badly in need of an influx of capital. The FCO on the other hand was not so responsive to these political concerns. Its imposition of additional conditions on the sale caused Elf to protest to the German government who in turn complained to the FCO.127 Both cases illustrate the conflict between the strict legalistic application of the competition law adhered to by the FCO on the one hand and the policy objectives of the government on the other.
4.3. The Relationship Between the Federal Cartel Office and the European Commission

4.3.1. The Authority of the European Commission in Competition Law Matters in Germany

In many instances, the FCO must share jurisdiction with the Commission of the European Community over business practices. The jurisdiction of the Commission in competition law matters extends only to practices which may affect trade between Member States. This requirement has posed little impediment to the extension of jurisdiction by the Commission to practices of firms located in one Member State. The result is that a particular business practice in Germany is often subject to the jurisdiction of the FCO as well as the Commission. Although the relationship between the German and European competition law authorities is generally harmonious, the political influence in the Commission decision-making practice often causes a degree of frustration within the FCO.

4.3.2. The Influence of Politics in Competition Law Matters

There are certain policy differences which have led to “outright confrontation” between the FCO and the Commission. This confrontation arises from what the Germans perceive as the improper influence of politics in the application of competition law. Whereas in Germany, the application of competition law is perceived as a legalistic process, “the thinking in all the other countries of the EEC is

---


129 EMMERICH, supra note 42, at 512-13; HIRSCH & BURKERT, supra note 42, at 119.

128 In addition, there has been what is described as a “mutual convergence” of substantive provisions of the European and German competition law systems. See Hans-Peter Schwintowski, Konzept, Funktion und Entwicklung des deutschen und europäischen Wettbewerbsrechts, 92 ZEITSCHRIFT FÜR VERGLEICHE RECHTWISSENSCHAFT 40, 55-74 (1993).

131 Wolfgang Karte, Offene Märkte sind wichtiger als ein Kartellamt, FRANKFURTER ALLGEMEINE ZEITUNG, May 26, 1992, at 17, col.1.
entirely different.” \textsuperscript{132} For example, the Germans take the position that industrial policy goals should not influence the way in which competition law is applied, whereas the French view competition law as “an instrument of state economic control.” \textsuperscript{133} Two recent events which have received much attention in Germany illustrate the tension that exists because of the differing conceptions of the function of competition law.

a. Industrial Policy in the Merger Control Regulation

The first event was the enactment of the European Merger Control Regulation in 1989. \textsuperscript{134} The European merger law applies only to mergers between firms with a combined worldwide annual turnover of 500 billion ECU (European Currency Unit), where at least 250 million of the combined turnover was derived within the European Community and two-thirds of each of the firms’ annual turnover was derived from more than one Member State. \textsuperscript{135} If the merger falls

\textsuperscript{132} Kartte, supra note 122, at 270-72. See also Schlecht, supra note 86, at 323. (“Dangers also exist at the European level. Some Member States view competition law as an instrument to achieve concrete, pre-determined goals. They load this legal field with certain social, labor market or middle-class policy guidelines thereby changing the real function of the competition law and weakening its function as ensuring freedom. According to this approach, competition policy would become a policy instrument of the state to direct the market. This type of industrial policy objectives are incompatible with our order-policy approach.”). Interestingly enough, it was the French version of Articles 85 and 86 that was adopted into the EC Treaty. See ALFRED MÜLLER-ARMACK, AUF DEM WEG NACH EUROPA 114 (1971).

\textsuperscript{133} Wernhard Möschel, Schutzziele eines Wettbewerbsrechts, in BEITRÄGE ZUM HANDELS-UND WIRTSCHAFTSRECHT. FESTSCHRIFT FÜR FRITZ RITTNER ZUM 70. GEBURTSTAG 405, 408 (1991).


\textsuperscript{135} The German merger law, in contrast, applies to mergers involving firms with a combined worldwide turnover of 500 million Deutsche Marks in the last completed business year (§ 24(8)(1) GWB), mergers in which at least one of the firms had a turnover in the last business year of more than 50 million DM (except when one firm had a turnover of at least 4 million DM and the other at least of 1 billion) (§ 24(8)(2) GWB), or where the market is effected is one in which goods or services have been supplied for at least five years and which had a turnover of at least 10 million DM in the last calendar year (§ 24(8)(3) GWB). Thus, conflicts will arise in very large mergers over 500 million.
within the scope of the EEC law, the Commission has exclusive jurisdiction.\textsuperscript{136}

However, there are two exceptions to the exclusive jurisdiction of the Commission which are designed to reduce the Commission's impact on the competition law agencies of the Member States.\textsuperscript{137} First, Member States may have jurisdiction if certain public interests are at stake such as public security.\textsuperscript{138} The second exception is the so-called German clause,\textsuperscript{139} labelled as such because it was inserted at the insistence of the German government.\textsuperscript{140} According to this clause, the Commission may decide, upon request of a Member State, that the merger should be handled by the national competition law authorities because it creates or threatens to create a dominant position in a distinct market in that Member State. Its inclusion in the Merger Control Regulation illustrates the insistence of Germany to maintain some influence over market concentration in Europe.\textsuperscript{141}

The enactment of the Merger Control Regulation has led to "frustration" at the FCO.\textsuperscript{142} The reason for this is that the Merger Control Regulation, from the German perspective, represents a victory of industrial policy over competition policy.\textsuperscript{143} The Germans see an inherent conflict between

\textsuperscript{136} Merger Control Regulation, supra note 134, art. 21(2).
\textsuperscript{138} Merger Control Regulation, supra note 134, art. 21(3).
\textsuperscript{139} Id., art. 9.
\textsuperscript{141} Horst Satzky, The Merger Control Regulation of the European Economic Community, 38 AM. J. COMP. L. 923, 945 (1990). There have been only five requests by member states for referrals and only one has been granted by the Commission. See Kommission der Europäischen Gemeinschaften, XXII. Bericht über die Wettbewerbspolitik 1992, 93 KOM 162-70 (1993).
\textsuperscript{142} Möschel, supra note 29, at 56.
\textsuperscript{143} See MICHAEL TOLKSDORF, EUROPÄISCHER BINNENMARKT 1993: VOR- UND NACHTTEILE FÜR DEUTSCHLAND UND SEINE PARTNER 106-07 (1991); Entweder ein Europäisches Kartellamt oder keine Absenkung der Schwellenwerte, HANDELSBLATT, 27.10.1992, at 5, col.1.; CHRISTIAN SCHMIDT, DIE "ENTWICKLUNG DES TECHNISCHEN UND WIRTSCHAFTLICHEN FORSCHUNGEN", DER KONFLIKT WETTBEWERBSPOLITIK—INDUSTRIEPOLITIK
industrial policy as inserted in the so-called "French clause" and competition policy.\textsuperscript{144} According to the "French clause", the Commission is instructed to take into account, \textit{inter alia}, the competition from firms located outside the Community when determining whether or not a merger should be allowed.\textsuperscript{145} The opinion of the FCO President, and of the German legal community in general,\textsuperscript{146} is that this discretion invites "the risk of the politicization of the decision-making in the Commission."\textsuperscript{147} This politicization runs counter to the German conception of competition law discussed above.

b. The Treaty on European Union

The second event which has added to the frustration of the FCO was the signing of the Treaty on European Union on February 7, 1992.\textsuperscript{148} One of the problems with the Treaty from the perspective of the German "Ordo-policy" advocates is that it opens the door for industrial policy like the Merger Control Regulation.\textsuperscript{149} The Treaty extends the activities of

\begin{flushleft}
\textsuperscript{144} SACHVERSTÄNDIGENRAT ZUR BEGUTACHTUNG DER GESAMTWIRTSCHAFTLICHEN ENTWICKLUNG, DIE WIRTSCHAFTLICHE INTEGRATION IN DEUTSCHLAND. PERSPEKTIVEN - WEGE - RISIKEN, JAHRESGUTACHTEN 1991/92 (1992) at 211.
\textsuperscript{145} Merger Control Regulation, \textit{supra} note 134, art. 2 (1)(a).
\textsuperscript{149} See, e.g., SACHVERSTÄNDIGENRAT ZUR BEGUTACHTUNG DER GESAMTWIRTSCHAFTLICHEN ENTWICKLUNG, FÜR WACHSTUMSORIENTIERUNG GEGEN LÄHMENDEN VERTEILUNGSTREIB, JAHRESGUTACHTEN 1992/93 at 245-47 (1992); Henning Klodt, \textit{Europäische Industriepolitik nach Maastricht},
\end{flushleft}
the Community to include “the strengthening of the competitiveness of Community industry.”150 This clause, together with Article 130(1), which calls on the Commission to actively promote the competitiveness of the European industry, creates, in the eyes of the Germans, the unwise codification of industrial policy into the EC Treaty. In its most recent report, the German Monopolies Commission indicated its dissatisfaction with this development and called for the “deletion of this provision.”151

4.3.3. Efforts to Address the Conflicts

a. Cooperation between Agencies

To a large extent, conflicts between the FCO and the EC Commission are addressed through the channels of cooperation that exist between the two agencies. Regulation 17 requires the Commission to keep the Member States informed of their activities and gives the Member States the right to express their views to the Commission.152 For example, where a merger has been reported to the Commission, it will inform the FCO if the merger affects the German market.

b. Independent European Cartel Office

In addition to attempts at closer cooperation between the agencies, the conflicts mentioned above have given rise to calls for the creation of a European Cartel Office independent from

---


152 Regulation 17, supra note 43, art. 10.
the Commission. From the German position, the problem at the European Community level is that the responsibility for stimulating the economy is in the same hands as the responsibility for controlling the economy, i.e., the Commission. The creation of an independent office along the lines of the FCO would, according to the FME, ensure that non-competitive interests (wettbewerbsfremde Interessen) do not have influence in the decision-making process. “The problem . . . is that there is no European cartel office. If you don’t create such an organization, you’re mixing politics and antitrust issues.”


154 See Christoph Hauschka, Zielkonflikte zwischen Unternehmenskontrolle und Wirtschaftsförderung in den wettbewerbspolitischen Programmaussagen der EG-Kommission, 40 WUW 205, 216 (1990); Edling, supra note 143, at 251.

155 Stellungnahme der Bundesregierung zum BKartam Tätigkeitsbericht 1989/90 at V. The counterargument made by former EC competition commissioner, Sir Leon Brittan, is that such an agency would be exposed to the same political influences as the commission. See Lucy Kellaway, Skeptics Fear Damaging Effect of Conflicting Political Interest, The Financial Times, Sept. 21, 1990, p.8. In addition, Claus Dieter Ehlermann, Director of the Commission’s Directorate General IV, points out that a separate body comprised of officials appointed by the Member States would be inadequate to deal with the important competition law issue of state aids because of the national interests involved in such cases. See Ein Europakartellamt hätte auch Nachteile., Frankfurter Allgemeine Zeitung, May 21, 1993, at 17, col.1; Claus Dieter Ehlermann, Für ein Europäisches Kartellamt gibt es zur Zeit noch keinen Handlungsbedarf, Handelsblatt, Jun. 8, 1993, at 7, col.1 (“An independent European Cartel Office without political oversight is unthinkable.”).

156 See German Official Sees Need for Global Antitrust Work, WALL ST.
c. Power Sharing

In an attempt to curb what Germans perceive as the growing influence of politics in the application of competition law, they have proposed that the Commission allow the FCO to handle cases which technically fall within the jurisdiction of the Commission. Some authors, as well as the Federal Cartel Office itself, rely on the subsidiarity principle that was inserted into the EC Treaty through the European Union Treaty to support their argument. According to Article 3b of the European Union Treaty, the Community authorities will act in cases not within their exclusive authority "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community." Since the application of European competition law contained in Articles 85 and 86 of the Treaty of Rome does not fall exclusively in the competence of the Community, the Germans argue that


160 Treaty Establishing the European Economic Community, supra note 44.

161 Article 88 of the EC Treaty specifically indicates that the Member States may apply European competition law which is codified in Article 85
the Commission should defer more cases to the Member States. According to the German Federal Economics Minister:

In the interest of the division of labor between the Commission and the national agencies, one should think seriously about loosening the exemption monopoly of the Commission. In cases with clear national implication, in which the interests of the Community diminish, the national agencies must be granted the authority, not only to find violations as it currently does, but also to grant exceptions. It does not involve reducing the authorities of the Commission, but rather relieving the Commission from its constantly growing responsibilities through the national agencies.\textsuperscript{102}

The arguments of the Germans have not fallen on deaf ears. The Commission’s competition law commissar has called for a decentralization of the competition law and the referral of more cases to the Member States.\textsuperscript{103} In its most recent

and 86 of the EC Treaty. See also Regulation 17, supra note 43, art. 9(3). Since the 1990 reform of the GWB, the FCO has had the authority to apply the competition law provision of the EC Treaty. Until recently, however, the FCO has not applied European competition law to cases within its jurisdiction. See BKartA will gegen Strom-Monopol nach EG-Recht vorgehen, 43 WUW 180 (1993); Kartellamt will Exklusivklauseln kippen, \textit{HANDELSBLATT}, Feb. 12 & 13, 1993, at 25, col.5. This assumption of the responsibility for the application of European competition law was at least in part intended to show the Commission that the FCO is willing and able to handle cases which affect trade in Germany and which under current practices would be handled by the Commission.

\textsuperscript{102} Verabschiedung von Wolfgang Kartte als Präsident des Bundeskartellamtes--Einführung von Dieter Wolf, 42 WUW 567, 569 (1992). See also DIETER KRMPOHOVE, \textit{EUROPÄISCHE FUSIONKONTOLLE} 387 (1992) (arguing that the subsidiarity principle limits the authority of the Commission in merger cases to ensuring the existence and development of workable competition in Europe). A similar argument was made by the President of the FCO in the context of the Merger Control Regulation, “the Commission should not hesitate for their own benefit, to fill the subsidiarity principle with life in the future and leave merger cases to the Member States.” Wolf, supra note 147, at 1767. The subsidiarity principle has limited application to the Merger Control Regulation since it provides for exclusive jurisdiction for the the Commission in mergers involving companies of substantial size. See \textit{Mailänder}, supra note 128 and accompanying text. For a further discussion, see Panagiotis Kamburoglou, supra note 158, at 274-80.

\textsuperscript{103} Brüssel will Kartellverfahren Straffen und an nationale Behörden delegieren, 43 WUW 4 (1993); \textit{Vortrag von Sir Leon Brittan über, »Die
annual report on competition policy, the Commission expressly indicated that the subsidiarity principle is relevant in the application of the European competition laws. This policy was recently implemented in a notice which identifies how the Member States can take a more active role in the application of European competition law.

5. CONCLUSION

This article was aimed at providing the U.S. jurist with an overview of the FCO, its unique approach to competition law, and some of the most pressing issues it is facing. The purely legalistic approach to competition law adhered to by the FCO was used to explain some of the conflicts the FCO has with other political agencies. Each relationship exhibits an inherent tension which stems from the efforts of certain politically responsive government agencies to achieve results which would not otherwise follow from the dogmatic application of the GWB by the FCO. This tension is the inevitable result of the failure to recognize that the regulation of competition inherently involves political decisions. Although there may be general agreement that the regulation of competition is necessary, there are no universally accepted models of competition that would facilitate the "apolitical" enforcement of competition law. Deciding which business practices and structures should be allowed, and which should not, is inherently a political decision. This recognition, which is generally accepted in the United States, as illustrated by the use of the antitrust enforcement agencies to achieve policy goals, has not been accepted by the German FCO.

\[164\] XXII. Bericht über die Wettbewerbspolitik, supra note 141, at 74.
