University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 105

MARCH, 1957

No. 5

ANTITRUST LEGISLATION AND POLICY IN GERMANY—A COMPARATIVE STUDY*

Ivo E. Schwartz †

At present, the German antitrust field is still regulated by several decartelization and deconcentration laws enacted by the three occupation powers in Western Germany. On May 5, 1955, the Bonn Conventions terminated the occupation regime and transferred supreme authority from the occupation authorities back to the German government. Under the Conventions, Allied laws remain in force as long as they are not replaced or repealed by the German legislature.¹ Now, the German Draft Law Against Restraints of Competition² is to replace the Allied decartelization law as Germany's own antitrust statute in accordance with present circumstances and the economic policy of the Adenauer

* I am deeply indebted to Dean Edward S. Mason of the Graduate School of Public Administration, Harvard University, as well as to Professors Lon L. Fuller, Donald F. Turner and, particularly, Professor Kingman Brewster, Jr., of Harvard Law School. The paper has also benefited from many helpful suggestions of my friend Ernest Lampé, Member, New York Bar; LL.B., 1941, Harvard.

† *Referendar*, 1952, University of Freiburg; *Assessor*, 1955, Germany; LL.M., 1956, Harvard University.

1. See pp. 647-48 *infra*.

2. Entwurf eines Gesetzes gegen Wettbewerbsbechränkungen, DEUTSCHER BUNDESTAG DRUCKSACHE No. 3462, 1. Wahlperiode (1949); DEUTSCHER BUNDESTAG DRUCKSACHE No. 1158, 2. Wahlperiode app. 1 (1953) (hereinafter cited as Draft Law). The text of the draft law, with an unofficial English translation, is reprinted 1 & 2 WIRTSCHAFT UND WETTBEWERB [hereinafter W.W.] 432-59, 543 (Germany 1952). The English translation is reprinted in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 191-229 (University of Toronto Faculty of Law Symposium vol. 3, Friedmann ed. 1956).

administration. Moreover, the law will be the basic economic statute of the country.

THE GERMAN DRAFT LAW AGAINST RESTRAINTS OF COMPETITION

The bill was initiated by the federal administration and introduced in the legislative bodies in 1952. Since that time, the draft has been widely discussed in several committees of the Bundestag (the lower and dominant house of the legislature in the German Federal Republic), the Bundesrat (the upper house), in numerous industrial bodies and in the public generally. For lack of time, the bill did not pass the First Bundestag prior to September 1953, when national elections took place. But now it is probable that the legislative bodies will enact the bill before the next national elections in the fall of 1957.

The draft law is intended to cover the whole antitrust field by its eighty sections. In terms of American antitrust law, the bill deals with substantially all the problems arising under the Sherman Act, the Clayton Act, the Federal Trade Commission Act and their amendments. The proposed bill, however, does not encompass the law of unfair competition, which is already regulated in another statute,³ nor does it contain general provisions against price discrimination comparable to those of the Robinson-Patman Act.⁴

Basic Concepts

The public policy upon which the draft law is based is very similar to that underlying the antitrust laws of the United States as interpreted by the federal courts.⁵ In principle, the proposed law outlaws horizontal agreements in restraint of competition for the first time in German economic history.⁶ It is true that this newly introduced principle of cartel prohibition per se is subject to some exceptions.⁷ But in principle the draft abandons the pattern of previous German antitrust law, which was based upon the concept of cartel control exercised by an administrative agency. Under the latter concept, cartels were subject to governmental interference only if they abused their

3. Law Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) of June 7, 1909, [1909] REICHSGESETZBLATT (official law gazette of the Reich) [hereinafter R.G.B.] 499 (Germany). See also pp. 631-32 *infra*.

4. See comment by Fikentscher, *Germany: Proposed Antitrust Legislation and Price Discrimination*, 2 AM. J. COMP. L. 523 (1953).

5. See Friedmann, *Anti-Monopoly Law—Some Comparative Observations* in Festschrift für Ernst Rabel 453, 462-68 (Doelle, Rheinsteins & Zweigert eds. 1954); cf. Fikentscher, *Die neuere Entwicklung des amerikanischen Wettbewerbsrechts und der deutsche Kartellgesetzentwurf*, 17 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND KONKURSRECHT [hereinafter Z.G.H.K.] 1 (Germany 1955).

6. Draft Law pt. 1, § 1.

7. *Id.* arts. 2-5. See pp. 656-62 *infra*.

economic power—in other words, if they were “bad” or “unreasonable” or “unjustified.” Both in theory and practice there is a fundamental difference between these two concepts, which this paper will discuss in order to explain the new policy underlying the draft law.

At the outset, however, the meaning of “cartel” should be clarified. As the monopoly and the restraint of trade concepts have become a matter of great concern to American lawyers and economists, so has the cartel concept in Germany. Although there has been much discussion of the term “cartel,” there has been no legal definition. There is no complete agreement among German economists and lawyers, but a review of leading literature seems to me to justify the following definition:

A cartel is an agreement by or an association of independent enterprises engaged on the same level and in the same field of business formed for the common purpose of influencing collectively the market by regulating its competition.⁸

Thus, three factors are essential. First, a cartel is always a horizontal combination, *i.e.*, between enterprises on the same economic level. Second, the members of the cartel remain—at least legally—-independent entities, whereas in “trusts” and communities of interests (both called *Konzerne* in Germany) the constituent enterprises lose their legal or economic independence or both. Third, the cartel members have the common purpose of influencing the market through the regulation of competition.

Typical objectives and practices of cartels are: price-fixing (*Preiskartell*); restriction of production by allocating quotas to the individual members (*Kontingentierungskartell*); fixing of terms of payment and delivery (*Konditionenkartell*), standardization of products and rationalization of production (*Fertigungs und Rationalisierungskartell*); division of fields of operation and market areas (especially in the international field (*Gebietskartell*)); and control and limitation of the use of inventions by restrictive patent-licensing agreements.

Under the ordinary cartel agreement the execution of these objectives is left to the individual cartel members who continue to deal directly with their customers.⁹ Often, however, it is considered desir-

8. Cf. 1 CALLMANN, UNFAIR COMPETITION AND TRADE MARKS § 15.3, at 217 n.32 (2d ed. 1950); CALLMANN, DAS DEUTSCHE KARTELLRECHT 78-79, 87 (1934); 1 HUBER, WIRTSCHAFTSVERWALTUNGSRECHT 284 (2d ed. 1953) (hereinafter cited as HUBER); LIEFMANN, KARTELLE, KONZERNE UND TRUSTS 9 (8th ed. 1930).

9. Example: The steel manufacturers of a certain district form an association to maintain prices and to limit production. The members of the association agree not to produce more than a certain amount of steel per year and to charge agreed prices. Another example is the *Woodpulp* case, discussed at pp. 626-29 *infra*.

able by the contracting parties to provide for the centralization of all sales of products manufactured by the cartel members in one sales agency, which is usually a new corporation formed by the group. The cartel members retain their own legal personalities and, usually, subscribe pro rata to the stock of the incorporated sales agency.¹⁰

The legal form of the organization is not determinative of the question whether or not a cartel exists. A "gentlemen's agreement" is sufficient, as is the loose form of a civil law association (*Gesellschaft des bürgerlichen Rechts*)¹¹ and the forms of the corporation law. In the United States, cartels are better known under the term "loose combinations."

There can be no doubt that cartels in general restrict rather than promote trade and competition. They are a form of private regulation of business which seeks to divide and rule industry on the basis of economic privilege of their members as against outsiders and newcomers who do not want to join them. Big cartels generally have a tendency to dominate the market. On the other hand, very few cartels in Germany really acquired monopoly power; most could not even hope to become an important factor in their markets. Actually, the main purpose in most cases was protection against the risks of free (often called "ruinous") competition and the dangers of economic crisis.¹² It is significant that the German cartel movement began as a consequence of such a crisis.¹³ To these rather defensive aims later came other purposes and practices going far beyond the prevention of "ruinous" competition, often opposing any kind of free competition and trade.

At the same time, monopoly power can be acquired by means other than cartelization. A single enterprise can also acquire a monopolistic position and abuse its dominating power against its customers. The draft law, therefore, provides a control on single monopolistic or even oligopolistic enterprises.¹⁴ To the extent that an enterprise is not faced by any substantial competition in certain types of goods or

10. Example: The coal producers of northwestern Germany established an incorporated sales agency for centralization of all sales of their coal. The members of the association bound themselves to turn over their entire output at a fixed price to the sales agency which, in turn, sold to the public. The net profits were divided among the members of the association in proportion to output. This was the so-called Rhenanian-Westphalian Coal Syndicate. Cf. decision of the Reichsgericht (the former Supreme Imperial Court) (III. Zivilsenat), Feb. 19, 1901, 48 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter R.G.Z.] 305.

11. See 2 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 705 (9th ed. 1929).

12. See 1 HUBER 289-90.

13. See p. 625 *infra*.

14. Draft Law pt. 1, § 3, arts. 17-22.

commercial services, the Cartel Authority may prohibit such enterprise from demanding or offering prices and doing certain other acts in abuse of its dominant position.¹⁵

Monopoly power can also be acquired by merger of two or more enterprises. Therefore, the draft law requires permission for certain prospective mergers. The Cartel Authority must refuse permission if, as a consequence of the merger, the combined enterprises would acquire domination of the national market.¹⁶

Thus, the draft law is governed by two basic principles: (1) cartel agreements are prohibited per se by statutory provision; (2) single enterprises which dominate the market are not prohibited but are subjected to control by an administrative agency. With respect to mergers which would dominate the national market the draft law goes further: it directs the controlling agency to refuse the requisite permission.

The Main Controversy: Cartel Prohibition or Cartel Control?

The principle of cartel prohibition, introduced for the first time by a German statute, is of particular interest. While there is no longer doubt even in industrial circles that there is need for some degree of control against restraints of trade, in particular with respect to monopolistic enterprises abusing their dominating power, the prohibition of cartels per se is highly controversial. It provoked violent opposition, especially on the part of "heavy" industry.¹⁷ Some German trade unions and the German association of trade unions (*Deutscher Gewerkschaftsbund*) have also opposed a prohibition of cartels. Like the industry, they want the re-establishment of mere cartel control by the government.¹⁸ Thirty members of the Bundestag introduced their

15. *Id.* art. 17.

16. *Id.* art. 18(1), (2).

17. See the numerous amendments of the draft law as proposed by the representatives of the Federal Association of German Industries to the Federal Ministry of Economics, Oct. 18, 1954, partly reprinted in DRUCKSACHE No. 33 of the association (Germany 1955). See also the "Ten Theses" of the president of the association, Mr. Fritz Berg, in a letter to the Federal Minister of Economics, Mr. Erhard, Oct. 16, 1952, reprinted in *Deutsche Zeitung und Wirtschaftszeitung*, Oct. 29, 1952 and in 1 HUBER 395-96. However, the administration did not yield to the demands of the association and other interested parties. *Cf.* 2 *id.* at 768.

A modified position has been taken by the *Arbeitsgemeinschaft selbständiger Unternehmer* (Association of Independent Entrepreneurs) in its resolution of April 1955, reprinted in 5 W.W. 589-90 (Germany 1955). The resolution supports the per se concept of the administration's draft law in principle. However, it proposes more exceptions from the cartel prohibition. Moreover, the resolution demands a much more vigorous control of enterprises which dominate the market. Thus, it goes beyond the regulation as provided in the draft. However, the power and importance of this association seems to be little as contrasted with the *Bundesverband der deutschen Industrie* (Federal Association of German Industries).

18. Resolution of the *Deutsche Gewerkschaftsbund* of April 29, 1953, published in 3 W.W. 362 (Germany 1955). See also 1 HUBER 395; 2 *id.* at 767-68.

own bill which generally permits cartel agreements and provides only for control of abuses.¹⁹ Twenty liberal members countered by introducing a third version containing even more vigorous provisions against restraints of trade than does the administration's proposal.²⁰

However, many members of the present Adenauer party coalition, as well as—and to an even greater extent—the Social Democrat opposition party, generally support the administration's draft law outlawing cartels.²¹ The Bundesrat (upper house), by a tight majority, also accepted the basic concept of the draft law in a preliminary review. However, it objected that the law does not grant protection against "ruinous competition" and recommended amendments accordingly with regard to that and some other aspects.²²

The Arbeitsgemeinschaft der Verbraucherverbände (association of the associations of consumers) clearly supports the administration draft law.²³ However, what the public really thinks on the bill is not

19. Entwurf der Abgeordneten Höcherl und Genossen of March 11, 1955, DEUTSCHER BUNDESTAG DRUCKSACHE No. 1253, 2. Wahlperiode (1953).

20. Entwurf der Abgeordneten Bohm und Genossen of March 16, 1955, DEUTSCHER BUNDESTAG DRUCKSACHE No. 1269, 2. Wahlperiode (1953), reprinted in 5 W.W. 319-27 (Germany 1955); cf. Mestmacker, *Der Bohm Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen*, 5 W.W. 285 (Germany 1955).

21. The draft law was read for the first time by the Second Deutsche Bundestag (lower house) in its 76th and 77th sessions, on May 24 and 31, 1955. See Doerinkel, *Abriss der ersten Lesung des Kartellgesetzentwurfes im Bundestag*, 5 W.W. 573 (Germany 1955). The draft then was sent to several committees of the Lower House. From summer 1955 to summer 1956, the Economic Policy Committee of the Lower House discussed the draft and proposed numerous amendments, some of which would weaken the draft considerably. However, it approved the principle of cartel prohibition (Draft Law art. 1). It also approved the principle of control of individual monopoly and oligopoly enterprises which abuse their economic power (*id.* art. 17) and the prevention of certain mergers (*id.* art. 18), discussed at pp. 676-82 *infra*. For the wording of the proposed amendments and for other information on the discussion, see 5 W.W. 782 (Germany 1955); 6 W.W. 60-61, 148-49, 271-72, 351-52 (Germany 1956), and the current issues of the periodical. However, these proposals are not final and the Economic Policy Committee is discussing them anew since fall 1956. The draft law is also discussed in several other committees and it, as well as all amendments, is subject to the approval of the Lower House when the bill is read for the second and third time. Cf. Kuehne, *The West German Cartel Bill*, 6 CARTEL, REVIEW OF MONOPOLY DEVELOPMENTS AND CONSUMER PROTECTION [hereinafter CARTEL] 48 (1956). The amendments as proposed by the Traffic Committee of the Lower House are reprinted in 6 W.W. 224-25 (Germany 1956). As to the Committee for Agriculture, see 6 W.W. 668-70 (Germany 1956). See also the current German newspapers.

22. Resolution and proposals of the Deutscher Bundesrat of May 21, 1954, BUNDESRATS DRUCKSACHE Nos. 53, 54, Sess. No. 123. See also Doerinkel, *Der Bundesrat zum Entwurf des Kartellgesetzes*, 4 W.W. 433 (Germany 1954); Doerinkel, *Die Beratung des Kartellgesetzentwurfes im Bundesrat*, 4 W.W. 440 (Germany 1954). The opinion of the federal administration on the amendments proposed by the Bundesrat is printed in BUNDESTAG DRUCKSACHE No. 1158, 2. Wahlperiode app. 3, at 50 (1953). It is reprinted in 5 W.W. 313-18 (Germany 1955). See also the press release of the administration in Bulletin (a weekly survey of German affairs issued by the Press and Information Office of the German federal government) No. 26, Feb. 8, 1955, p. 21, reprinted in 5 W.W. 190 (Germany 1955).

23. Resolution of the Association of April & May 1955, reprinted in 5 W.W. 790-92 (Germany 1955). The Central Association of the German Handwerk also supports the basic concepts of the draft law. See Note, *Handwerk und Kartellgesetzgebung*, 6 W.W. 144 (Germany 1956).

known.^{23a} Public opinion will probably be divided. This is even more true as to the views of German economists and lawyers.²⁴

The German proponents of mere cartel control by an administrative agency argue, in brief, as follows: cartel agreements in restraint of competition should not be outlawed per se when trusts and single enterprises are only subject to case-to-case control. There is, it is said, no reason for such different treatment; it is not at all necessary to abandon the traditional European way to deal with cartels by merely controlling their activities. On the contrary, actually there are "good" or "reasonable" cartels which may even improve rationalization and automation, promote technical and social progress, and which may present or soften economic crisis by maintaining price levels and wages. Cartels also are said to be necessary for export purposes. The draft law itself, it is contended, in providing limited exceptions for rationalization, crisis and export cartels, recognizes that there are "good" cartels. To proponents of mere control, this seems a contradiction in principle. Moreover, they say, to outlaw cartels would unconstitutionally violate freedom of contract and association.²⁵ The conclusion is that, on the whole, it would be not only

23a. For an excellent description of the general public attitude toward the desirability and the possibility of preserving competition in Germany, see Boehm, *Monopoly and Competition in Western Germany*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 141, 152-67 (Chamberlin ed. 1954). Boehm takes a rather pessimistic view on German public opinion regarding a vigorous antitrust policy of which he is a leading proponent. See his own antitrust draft law, note 20 *supra*, which is also discussed at present by several committees of the Lower House. Most of the German newspapers clearly support the draft law. With respect to the general public attitude in the United States, see Clark, *Competition and the Objectives of Government Policy* in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 317 (Chamberlin ed. 1954). Clark says there is "a tendency to over-stress the differences between American and European views on competition and monopoly." *Id.* at 336. See also Scitovsky, *Monopoly and Competition in Europe and America*, 69 Q.J. ECON. 607 (1955).

24. See excellent survey by Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954, Eine kritische Übersicht*, 5 W.W. 205, with summary in English at 228-29 (Germany 1955); cf. FRICKE, *KOLLEKTIVMONOPOLE* (1956); WAGNER, *DIE DISKUSSION UEBER EIN GESETZ GEGEN WETTBEWERBSBESCHRAENKUNGEN* (1956). See particularly 3 GUTACHTEN DES WISSENSCHAFTLICHEN BEIRATS BEIM BUNDESMINISTER FÜR WIRTSCHAFT (Opinion of the Academic Advisory Council to the Federal Ministry of Economics) (1955). The Council clearly supports the draft law. A summary of its opinion and recommendations is reprinted in 5 W.W. 488 (1955). See also the articles of Benisch, von Brunn, Forsthooff, von Katzler, Metzner, Moehring, Ottel and Zweigert, in *BEITRÄGE ZUM WIRTSCHAFTSRECHT, FESTSCHRIFT FÜR RUDOLF ISAY* (Reimer ed. 1956).

25. For a survey, see Benisch, *Ist das Kartellverbot grundgesetzwidrig? Eine systematische Gegenüberstellung der wissenschaftlichen Standpunkte* (Is the Prohibition of Cartels Unconstitutional? A Systematic Confrontation of the Different Scientific Views), 9 DER BETRIEB 37 (Germany 1956). Of particular interest are the decision of the Federal Supreme Constitutional Court, July 20, 1954, 4 Entscheidungen des Bundesverfassungsgerichts 7; HUBER, *DIE VERFASSUNGS PROBLEMATIK EINES KARTELLVERBOTS* (The Constitutional Problematic of a Prohibition of Cartels) (1955); NIPPERDEY, *DIE SOZIALE MARKTWIRTSCHAFT IN DER VERFASSUNG DER BUNDESREPUBLIK* (The Social Market Economy Under the Constitution of the Federal Republic) (1954); Böhm, *Verstoßes ein gesetzliches Kartellverbot gegen das Grundgesetz?* (Does a Prohibition of Cartels Violate the Constitution?), 6 W.W. 173 (Germany

sufficient but also more reasonable and just merely to protect customers and the public against "bad" or "unjustified" cartels.

The whole controversy concentrates on the question: should cartels be prohibited outright, or should they be condemned only to the extent that they have harmful effects on the public interest and on different classes within the community, as it is provided for enterprises which dominate the market? The latter view has been generally taken by the other European industrial countries²⁶ and by the Havana Charter for an International Trade Organization²⁷ and the Ad Hoc Committee on Restrictive Business Practices' report to the Economic Council of the United Nations,²⁸ which contains proposals for the control of restrictive business practices affecting international trade.²⁹ However, the draft of the treaty constituting a common market of the six Schuman-plan countries provides in article 42 for a per se prohibition of cartels which is subject to certain exceptions.

The problem of mere cartel control or prohibition per se seems to be indeed the central question to be solved by any antitrust legislation. And the problem is not only to make a choice between two different legal techniques resulting in similar effects. The decision to be made, rather, is one between different economic, social and public policies.

1956); Huber, *Der Streit um das Wirtschaftsverfassungsrecht* (The Dispute on the Constitutional Law Concerning the Economy), 9 DIE ÖFFENTLICHE VERWALTUNG 97, 135, 172, 200 (Germany 1956).

26. For a brief review on previous development and present antitrust legislation in Europe, America and other regions of the world, see Timberg, *Restrictive Business Practices, Comparative Legislation and the Problems That Lie Ahead*, 2 AM. J. COMP. L. 445 (1953); Friedmann, *A Comparative Analysis*, in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 519 (University of Toronto Faculty of Law Symposium vol. 3, Friedmann ed. 1956). The Symposium also contains articles on the antitrust laws of Canada, France, Germany, Japan, Netherlands, Norway, South Africa, Sweden, United Kingdom and the United States. See also Deak, *Contracts and Combinations in Restraint of Trade in French Law—A Comparative Study*, 21 IOWA L. REV. 397, 430, 434-35, 441, 448-54 (1936); Kronstein & Leighton, *Cartel Control: A Record of Failure*, 55 YALE L.J. 297 (1946); Wolff, *Business Monopolies: Three European Systems in Their Bearing on American Law* [French, English and German], 9 TUL. L. REV. 325 (1935); Note, *The Antecedents of the Proposed German Law Against Restraints of Competition*, 3 INT'L & COMP. L.Q. 348 (1954). Much valuable material as to facts, laws, cases and writings on cartels and trusts in Europe will be found in FRIEDLANDER, *DIE RECHTSPRAXIS DER KARTELLE UND KONZERNE IN EUROPA* (1938); NEWMAN, *PUBLIC CONTROL OF BUSINESS, AN INTERNATIONAL APPROACH* (1956) (hereinafter cited as NEWMAN). The latter also collects non-European materials. See also the comparative historical study by ISAY, *DIE GESCHICHTE DER KARTELLGESETZGEBUNGEN* (The History of the Antitrust Legislations) (1955).

27. *Resolution of the U.N. Conference on Trade and Employment*, U.N. ECONOMIC AND SOCIAL COUNCIL OFF. REC., 6th Sess., Annex (Doc. No. E/717) (1948).

28. U.N. ECONOMIC AND SOCIAL COUNCIL OFF. REC., 16th Sess., Supp. Nos. 11-A & B (1953), the latter of which contains the texts of most antitrust laws existing in the world.

29. See Timberg, *supra* note 26, at 464; ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 561-78 (University of Toronto Faculty of Law Symposium vol. 3, Friedmann ed. 1956) (draft articles of the agreement). See also Kamberg, *Probleme Internationale Kartellkontrolle*, 6 W.W. 530 (Germany 1956).

It affects the structure of the whole economy and society of a country considerably. Germany's past seems to be a striking example of the correctness of this contention. The whole controversy, its solution and the importance of the draft law breaking with a long tradition can scarcely be fully understood without reviewing in brief the previous as well as the existing legal and economic situation in Germany.

THE HISTORY OF THE GERMAN CARTEL AND TRUST MOVEMENT AND THE PREVIOUS ANTITRUST LAW

1870 to 1923: The Concept of Limited Freedom of Cartels

Economic liberalism replaced the old guild system in Germany during the first third of the nineteenth century. Industrialization began and progressed rapidly; large-scale enterprise and mass-production developed during the second third of the century. An ever increasing number of producers and manufacturers established themselves in every line of business, and competition was steadily becoming more intense. When, in 1873, an economic crisis occurred, business reacted by beginning to organize itself in order to stabilize the markets and to prevent ruin of the individual firms. The first epoch of the cartel movement began. Protected against foreign imports by high tariffs, German industry developed into one of the most powerful in Europe.³⁰

In Germany, even after 1890, there was no statute like the Sherman Act prohibiting contracts, combinations or conspiracies in restraint of trade. Prior to 1923 the only general statutory provision relating to trade was section 1 of the Trade Regulation Act of 1869,³¹ which provides: "All trade is open to everyone, unless this statute provides exceptions from or limitations upon this rule." This pro-

30. Cf. CALLMANN, *DAS DEUTSCHE KARTELLRECHT* 58 (1934); Kronstein, *The Dynamics of German Cartels and Patents*, 9 U. CHI. L. REV. 643 (1942); Wolff, *supra* note 26, at 326-27.

31. Trade Regulation Act for the North German Confederation (*Gewerbeordnung für den Norddeutschen Bund*) of June 21, 1869, § 1, [1869] *BUNDESGESETZBLATT FÜR DEN NORDDEUTSCHEN BUND* 245. The first Prussian enactment with respect to freedom of trade will be found in a licensing and tax edict of Nov. 2, 1810, [1810-1813] *PREUSSISCHE GESETZSAMMLUNG* [hereinafter P.G.E.] pt. 1, at 79 and in the Trade Regulation Act of Sept. 7, 1811, [1810-1813] P.G.E. 264, supplementing the edict of Nov. 2, 1810. This principle of freedom of trade, newly introduced in Prussia, was embodied in said Trade Regulation Act of 1869 of the North German League. It was subsequently adopted as a Reich statute by Law of April 16, 1871, § 2, [1871] R.G.B. 63 (Germany). Many of its provisions—except § 1 were repeatedly amended. The act was finally adopted in modified form by the Federal Republic of Germany by Law of Sept. 29, 1953, [1953] *BUNDESGESETZBLATT* [hereinafter B.G.B.] pt. I, at 1459 (Germany). For a comprehensive presentation of history, scope and meaning of § 1 of the act and of the decisions thereunder, see 1 LANDMANN, ROHMER, EYERMANN & FROEHLER, *GEWERBEORDNUNG, KOMMENTAR* 1-113 (11th ed. 1956). The two volumes of the *Kommentar* also reproduce the full text of the act, as amended, and all related statutes.

vision enacts into law the leading economic postulate of freedom of trade. It was the result and the legal coronation of the era of economic liberalism; the act was to protect its achievements. Thus, the question soon arose whether the provision was applicable to restraints of trade caused by cartels, which grew more numerous and more powerful during the last twenty years of the nineteenth century.

The Woodpulp Case: "Good" Cartels

The basis of all later judicial decisions on this question is the famous and controversial³² case of *B. v. Saxon Woodpulp Manufacturers Ass'n*,³³ decided by the Reichsgericht (the former German Supreme Court) in 1897. The facts were as follows:

A substantial number of the Saxon woodpulp manufacturers formed an association for the purpose of ending ruinous competition and securing a reasonable price for their products. The members agreed under penalty to sell their products exclusively through a central sales agency. The defendant member, in violation of the agreement, sold directly to paper factories. When sued by the association, the defendant pleaded invalidity of the agreement as violative of the principle of freedom of trade.

The court considered the issue of freedom of trade in two distinct aspects: first, whether the cartel contract violated section 1 of the Trade Regulation Act insofar as that provision sought to promote the interests of *society in general*; and second, whether the personal *liberty of the individual* is impaired by such contracts in a manner contrary to the act.

The first question was answered in the negative. The court reasoned:

"When the prices of the products of an industry fall to an unreasonably low level and the profitable operation of the industry is thereby endangered or made impossible, the resulting crisis is detrimental not only to the individual affected but also to the national economy. It is, therefore, to the interest of society that prices should not fall to an unreasonably low level. The legislature has clearly recognized this by enacting protective tariff laws designed to raise the price of certain products. It follows that it cannot be generally considered contrary to the public welfare for producers or manufacturers to combine with a view to preventing

32. See EUCKEN, *GRUNDSATZE DER WIRTSCHAFTSPOLITIK* (Principles of Economic Policy) 170 (1952); 1 HUBER 316-19; Bohm, *Das Reichsgericht und die Kartelle*, 1 ORDO 197 (Germany 1948); Kronstein & Leighton, *supra* note 26, at 302-03; Roper, *Der Wirtschaftliche Hintergrund der Kartell-Legalisierung durch das Reichsgericht* (The Economic Background of the Legalization of Cartels by the Reichsgericht), 3 ORDO 238 (Germany 1950); Wolff, *supra* note 26, at 330-38.

33. *B. v. den Sächsischen Holzstoff-Fabrikanten-Verband*, Reichsgericht (VI. Zivilsenat), Feb. 4, 1897, 38 R.G.Z. 155.

the consequent slump in prices. On the contrary, when prices continue to be so low that business men are threatened with ruin, combination is not merely a legitimate means of self-preservation but also serves the public interest. The formation of syndicates and cartels, such as the one here involved, has been suggested in many quarters as a means especially well adapted, if reasonably applied to economy in general, to render a service in the prevention of uneconomic and wasteful overproduction, working at losses, and the catastrophies arising therefrom. . . . Therefore cartel contracts can be objected to only from the viewpoint of public interest protected by freedom of trade, where they raise objections under the *special circumstances of the individual case*, particularly where the *purpose* of the cartel is to *create monopoly* and to *exploit the consumers* or where monopoly and exploitation of consumers actually *result* from the operation of such cartels."³⁴

The second question, whether the law also protects individuals against private interference through cartel contracts, was also answered in the negative. The court held that section 1 of the Trade Regulation Act should not be interpreted so as to deprive the individual of the right to enter into contracts whereby he restricts himself with reference to where and how he will conduct his business, provided that his economic freedom is only *temporarily limited* and not permanently destroyed.³⁵

It would be beyond the scope of this paper to discuss in detail³⁶ the correctness of the Reichsgericht's economic analysis of the cartel problem. At the least, the analysis seems very brief and abstract. The court does not at all refer to the particular economic situation of the Saxon woodpulp manufacturers at that time. The facts stated in the case do not permit conclusions as to the economic power of the cartel in the market, the exercise of this power with regard to price fixing

34. *Id.* at 157-58. (Emphasis added.) See also M. v. M., Reichsgericht (I. Zivilsenat), June 25, 1890, 28 R.G.Z. 238, 243-48; decision of the Bayrisches Oberstes Landesgericht (highest court of the state of Bavaria), April 7, 1888, 12 Entscheidungen des Bayrischen Ob. L.G. im Civilrecht und Civilproceß [hereinafter B.L.G.] 67, reprinted in Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten No. 13 (hereinafter cited as Seuffert's Archiv); decision of the Oberlandesgericht Dresden (appellate court of the state of Saxony in Dresden) (III. Zivilsenat), Sept. 19, 1893, 4 Hoffmann & Wulfert, Sächsisches Archiv für Bürgerliches Recht und Proceß 303.

35. 38 R.G.Z. at 158-59. See also decision of the Reichsoberhandelsgericht (predecessor of the Reichsgericht in commercial matters), Dec. 22, 1875, 12 Entscheidungen des Reichsoberhandelsgericht 29, 32 Seuffert's Archiv No. 310, at 401; plenary decision of the Königlich Preussische Obertribunals (the former Prussian Supreme Court), July 9, 1877, 80 Entscheidungen des Preussischen Obertribunal 1; decision of same court (VI. Senat), Sept. 27, 1877, 34 Seuffert's Archiv No. 105, at 159; decision of the Reichsgericht (II. Zivilsenat), Dec. 5, 1879, 1 R.G.Z. 22; decision of the Reichsgericht (V. Zivilsenat), Feb. 7, 1880, 35 Seuffert's Archiv No. 196, at 283; decision of the Reichsgericht (III. Zivilsenat), May 19, 1893, 31 R.G.Z. 97.

36. Cf. authorities cited in note 32 *supra*.

and output regulation or the business conditions in general. But the Reichsgericht obviously had in mind the type of economic crisis which often leads to the establishment of a so-called "crisis-cartel," directed to avoid "ruinous" competition.

There appears, indeed, some justification for such an emergency cartel if it is necessary to prevent the closing down of plants and if the crisis is due to a temporary decline of sales or prices which is not based on a fundamental change in the demand. The best known example of such a situation in the United States is the *Appalachian Coals* case,³⁷ where the Supreme Court, too, applied the rule of reason to the established coal cartel, and thus made a rare exception from the general rule that price-fixing agreements are unlawful *per se*.³⁸ However, this decision was based on a detailed analysis of the extraordinary circumstances of the case and actually remained an exception from the rule. In the *Woodpulp* case, on the other hand, the stated facts do not establish such an extraordinary situation. Instead, it seems that the Reichsgericht saw in the case the usual situation. In any event, the *Woodpulp* decision has subsequently been interpreted not as an exception but rather as having admitted in principle *all* types of cartels, if reasonable.

Thus, the *Woodpulp* decision has become the cornerstone of the German cartel development. In recognizing in principle the reasonableness of cartels, the decision was supported by most economists of that time.³⁹

But the case has still another important aspect. Having once introduced the doctrine of "good" cartels and thus having eliminated considerations of economic policy, the Reichsgericht saw no reasons for interpreting freedom of trade in a manner inconsistent with the legislative history⁴⁰ and precedents.⁴¹

Accordingly, section 1 of the Trade Regulation Act merely proclaimed freedom of trade *vis-à-vis* the government, *i.e.*, freedom from *governmental* interference with business—the old liberal doctrine. Thus, freedom of trade did not also mean freedom from interference by *private individuals* or groups of individuals.⁴² It did not mean

37. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). For a further discussion of the case, see p. 657 *infra*.

38. The exception was made under the guise of a finding that "price-fixing" did not in fact result.

39. *Cf.* the economists cited in the *Woodpulp* case, Reichsgericht (VI. Zivilsenat), Feb. 4, 1897, 38 R.G.Z. 155, 158 and the authorities cited in note 32 *supra*.

40. See wording of §1 of the Trade Regulation Act of 1869, quoted at p. 625 *supra*. See also cases cited in note 35 *supra*.

41. See cases cited in note 35 *supra*.

42. 1 HUBER 316-18; *cf.* decision of the Staatsgerichtshof für das Deutsche Reich, June 29, 1925, 112 R.G.Z. app. 21, 25.

freedom of competition in the real sense, namely among competitors. The legislator of 1869 did not foresee the possible dangers for freedom of trade arising from cartels and other private combinations because they did not yet exist at that time.⁴³

The idea that individuals also are to be protected against interference by other individuals or combinations of individuals, in other words that freedom of trade and other basic rights apply to individuals in their relationships among each other, has been raised only in modern times. Even today this question is still very controversial, particularly with regard to constitutional rights.⁴⁴ The modern interpretation of freedom of trade has been considered by some as an attack upon the freedom of every individual to decide for himself whether he wants to be subjected to contractual restrictions. This has been also the view of the Reichsgericht. Freedom of contract and association have been regarded as including individual freedom to enter voluntarily into restrictions on the conduct of business—within the limits indicated by the court in the *Woodpulp* case.

The Balance of Conflicting Freedoms

Thus, the *Woodpulp* case gave the old principles of freedom of contract and association priority over the younger principles of freedom of trade and competition. The opinion shows clearly that this result is only partially due to the court's economic approach to the cartel problem. The result largely reflects a lack of balance between two *legal* principles—freedom of trade and competition on the one hand, and freedom of contract and association on the other. What the court actually omitted was to re-establish this balance, which had suddenly become endangered by cartels that abused freedom of contract to restrict the other freedom. The court was badly advised by economists and could only rely on section 1 of the Trade Regulation Act of 1869; but when that statute was enacted, the legislature could not, or in any event, did not, foresee the future development of cartels. Finally, the court was obviously not prepared to recognize fully the great importance of its decision.

We are dealing here with a basic question arising in any society. The two principles are always in fundamental and continuous conflict with each other for the ideological mastery of a "free" or "open" industrial society. Modern society cannot be economically cohesive and organized unless it permits people to bind themselves to do things for

43. See p. 625 *supra*.

44. 1 HUBER 316.

defined periods of time, and to enter into some kind of more or less permanent group organization for the pooling of their joint resources and efforts. This involves giving proper scope to the principle of free contract and free association. At the same time, modern society cannot be economically open and dynamic unless it preserves opportunities for newcomers to enter trade and industry and for independent thought and initiative by those already engaged therein. This is the principle of freedom of competition. Of the reconciliation of these principles Timberg has said:

"When the modern state gives substantial support to either of these two principles, it must be continually on the alert to see that the other is not backed off the map. In practice, this has never happened. Even as allegedly cartelized a country as Germany has not given its businessmen legal *carte blanche* to agree to fix unreasonable or exorbitant prices, to exclude new blood, or to adhere to unproductive practices. And as purportedly competitive a society as that of the United States has prohibited the fundamentally unobjectionable competitive practice of price-cutting when it is pushed to the limits of extinguishing competition, and has permitted farmers and export groups, within certain limits, to combine in self-protection. However, the truce boundaries that are drawn between the two warring freedoms are temporary, shifting and vague. The rules applicable to this important part of 'industrial geography' have not yet been agreed on."⁴⁵

In comparing the situations in the United States and Germany at the time of the *Woodpulp* case, it should be borne in mind that the Supreme Court was in a better position to fight cartels than was the Reichsgericht. It met in the Sherman Act a statute which had clearly introduced the principle of prohibition with reference to all restraints of trade. Thus, freedom of contract was already restricted in favor of freedom of trade, so that the starting-points were opposite for the two courts.

For the Supreme Court the question was how to interpret more restrictively the broad terms of the Sherman Act. To meet this difficulty, the Court first worked with the common-law doctrine of ancillary restraints.⁴⁶ In 1911, this doctrine was replaced by the rule of

45. Timberg, *supra* note 26, at 445-46. For a fundamental discussion and analysis of the meaning of freedom and the conditions under which freedom is meaningful, see Fuller, *Freedom—A Suggested Analysis*, in CONFERENCE ON JURISPRUDENCE 33-52 (University of Chicago Law School Conference Series No. 15, 1955).

46. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898); see *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898).

reason in *Standard Oil Co. v. United States*,⁴⁷ involving the big Rockefeller oil trust. The rule of reason, however, has not also been applied to cartels. Since 1927 price fixing—whether horizontal or vertical—has been held illegal per se.⁴⁸

For the Reichsgericht, on the contrary, the question was how and for what reasons to interpret freedom of contract restrictively for the benefit of individuals who, under the Trade Regulation Act, were not protected in their freedom of trade among each other but only against interference by government. For the Supreme Court of the United States, the latter problem did not exist. Freedom of trade under the Sherman Act meant the very opposite: protection against private interference and restriction of freedom of contract. Thus, it repeatedly occurred that the question was raised whether the act was constitutional in permitting government interference with business.⁴⁹

Considering these facts, the opposite results at which the two high courts arrived seem more comprehensible. It also appears that these facts justify the attitude taken by the Reichsgericht in 1897 to a greater extent than admitted by some of its critics,⁵⁰ who look upon the situation of 1897 too much in the light of the later development of German cartels. Nevertheless, a considerable remainder of dissatisfaction cannot be denied, strengthened by the later attitude of German courts toward cartels.

Aftermath of the Woodpulp Case

As already indicated, the German courts did not grant unlimited freedom to cartels. A cartel may become illegal if the underlying agreements and arrangements intend to create or actually result in a monopoly and the exploitation of consumers.⁵¹ What the courts wanted was to compensate for the shortcomings of unbridled competition. Instead of considering every combination as per se a conspiracy against freedom of trade, they inquired into the purpose and effect of each cartel on the parties involved.

However, it was difficult for the courts to find a yardstick by which the "reasonableness" of a cartel could be measured. There

47. 221 U.S. 1 (1911).

48. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944).

49. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 565-66 (1898); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

50. Cf. authorities cited in note 32 *supra*.

51. 38 R.G.Z. at 158. The wording is quoted at p. 627 *supra*.

was no common law and no statute expressly governing the legality of combinations in restraint of trade, and the Trade Regulation Act had been held inapplicable to cartels. Thus, the courts made an interesting shift and examined the lawfulness of the cartel activities in question under the standard of "good morals" (*boni mores*, good ethics).

This standard is laid down in sections 138 and 826 of the German Civil Code of January 1, 1900, and in section 1 of the Law Against Unfair Competition of 1909. Section 138 reads: "A jural act (*Rechtsgeschäft*) which is repugnant to good morals (*gute Sitten*) is void."⁵² Section 826 provides: "Whoever in a manner repugnant to good morals intentionally inflicts an injury upon another is bound to such other for compensation of the injury."⁵³ Section 1 of the Law against Unfair Competition⁵⁴ was enacted to supplement section 826 of the Civil Code. It reads: "Whoever in business affairs, for the purpose of competition, commits acts which are repugnant to good morals may be subject to an action to desist therefrom and to pay damages."

These broad formulations may astonish a common-law lawyer. The civil law is often conceived as being completely codified. It is believed that whatever issue may be brought before the courts, a rule precisely applicable to the solution of the case can be found in the statute books. Under this view, lawyers and courts have then merely to apply such rule to the facts in a more or less mechanical way. This is not the case.⁵⁵

A civil-law system cannot work satisfactorily without introducing so-called "general clauses" (*Generalklauseln*). Law is dynamic and not static. Social, economic and political conditions change constantly. New problems arise which the legislature did not foresee and therefore could not regulate even in a codification as comprehensive as the German Civil Code. There will always be considerable "gaps" in a codified law.

On the other hand, there are certain basic principles governing application of a law which may be formulated in advance as guideposts for the decision of unforeseen cases not covered by special provisions.

52. 1 STAUDINGER, *op. cit. supra* note 11, § 138.

53. 2 *id.* § 826.

54. Gesetz gegen den unlauteren Wettbewerb of June 9, 1909, [1909] R.G.B. 499 (Germany). For a comprehensive representation of the scope and meaning of § 1, see BAUMBACH & HEFERMEHL, WETTBEWERBS UND WARENZEICHENRECHT (the Law of Competition and Trademarks), KURZKOMMENTAR 161-270 (7th ed. 1956). With respect to the relationship and border between competition and unfair competition, see *id.* at 1-63.

55. See Deak, *The Place of the Case in the Common and the Civil Law*, 8 TUL. L. REV. 337, 347-54 (1934), who gives an illustration by an analysis of the French law against monopolies.

In brief, this is the essence and the purpose of such general clauses as we are dealing with here. They are to enable the courts to adjust all of their decisions along the basic principles governing a code or statute.

The quoted provisions as well as section 1 of the Trade Regulation Act⁵⁶ are outstanding examples of such general clauses. For the lack of any antitrust law, the courts had to go back to these provisions. Almost the whole law of trade regulation had to be developed under these general provisions which were not particularly intended to apply to antitrust cases and which actually have been primarily applied to many other types of cases.

This lengthy explanation is offered not only because we must herein deal with several of such general clauses, but also because it would seem to contain the greatest similarities and points of contact between the two legal systems, for law based upon general clauses necessarily is case law. General clauses delegate, to a certain extent, law making power to the courts. However, it will be shown that these three clauses could by no means fully compensate for the lack of special antitrust legislation, for they apply only to acts repugnant to good morals. Hence they do not cover usual cartel activities which may result in restraint of trade.

Under the decisions of the Reichsgericht, an act violates good morals "whenever it offends against the feelings of equitable and just thinking men on fairness."⁵⁷ That may be the case depending either upon the *methods* applied by a cartel to enforce its measures⁵⁸ or upon the *purpose* pursued by the cartel.⁵⁹ Generally, courts were reluctant to interfere with cartel activities on the ground that they were repugnant to good morals. Said the highest court of Bavaria:

"Although there may be, from the point of view of national economy, a difference of opinion as to the desirability of such [cartel] agreements, and even granting that their economic effect may be considered detrimental, this does in no way mean that they are against good morals, which is the only point at issue in this case."⁶⁰

56. See p. 625 *supra*.

57. *W. v. Seine Majestät den König von Preussen, Reichsgericht (VII. Zivilsenat)*, Oct. 15, 1912, 80 R.G.Z. 219, 221; *cf.* 1 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 138, at 695-722 (10th ed. 1936). As to cartels and monopolies, see in particular the many cases cited in *id.* at 707-13.

58. *Cf., e.g.,* decisions of the Reichsgericht (VI. Zivilsenat), Feb. 2, 1905, 60 R.G.Z. 94, 104; (VI. Zivilsenat), Dec. 14, 1902, 56 R.G.Z. 271, 274; (VI. Zivilsenat), May 29, 1902, 51 R.G.Z. 369, 381-85.

59. *Cf.* decisions of the Reichsgericht (VII. Zivilsenat), Dec. 18, 1931, 134 R.G.Z. 342; (I. Zivilsenat), Sept. 21, 1927, 118 R.G.Z. 84, 89; (VI. Zivilsenat), Oct. 4, 1906, 64 R.G.Z. 155, 158; cases cited in note 58 *supra*.

60. Decision of the Bayrisches Oberstes Landesgericht, Dec. 27, 1888, 12 B.L.G. 222, 223 (at that time, a rule similar to § 138 of the Civil Code of 1900 already governed the law).

The appellate court of Hamburg took the same view even as late as 1925:

"For business men to obtain a monopoly is not, under general principles of civil law, unlawful even if such monopoly should in effect be at variance with the interests of national economy."⁶¹

The public, too, felt in a similar way. To a greater or lesser degree, it believed in the theory of "good" cartels—at least, prior to World War I. The idea of cooperation superseded the concept of free competition, often regarded as a kind of economic anarchy leading easily to ruin.⁶²

Courts and the public declined to recognize a necessary interdependence between "good morals" and what one or another economic theory regarded as "the public interest in the economy." Instead, courts made the decisive factor whether or not the very existence of the competitor was threatened in the individual case. A cartel was held repugnant to good morals if the restraint was general and absolute (*e.g.*, neither limited in time⁶³ nor space) or if a plan adopted by the cartel threatened another's business to the extent of weakening or undermining it and of substantially injuring his credit or his standing in the business world (*e.g.*, by boycott or intimidation).⁶⁴

This attitude can be understood only if the prevailing German views on the judicial functions are considered. It is well known that there is no German common law. The law generally is based upon codes and statutes. The courts, in applying it, have, of course, developed many well approved methods and rules for interpreting general clauses and have generally adapted carefully and reasonably to current economic and social conditions. But the judges do not consider themselves as a judicial law-making power. To create the law is regarded as the exclusive right of the legislative bodies according to the principle of separation of powers guaranteed under the constitution.

61. Decision of the Hanseatisches Oberlandesgericht, Jan. 14, 1925, 23 Kartell-rundschau 256, *aff'd* by the Reichsgericht (IV. Zivilsenat), Dec. 12, 1925, 24 Kartell-rundschau 18. See also decision of the Reichsgericht (VI. Zivilsenat), Dec. 14, 1902, 56 R.G.Z. 271, 274.

62. This view found expression in the writings of many economists of that time, who were overwhelmingly in favor of cartels. See the literature cited in note 32 *supra* and in the *Woodpulp* case, Reichsgericht (VI. Zivilsenat), Feb. 4, 1897, 38 R.G.Z. 155.

63. Cf. *Woodpulp* case, *supra* note 62.

64. Decision of the Reichsgericht (VI. Zivilsenat), Dec. 14, 1902, 56 R.G.Z. 271, 278. See also decisions of the Reichsgericht (VI. Zivilsenat), April 6, 1922, 104 R.G.Z. 327, 331; (VI. Zivilsenat), June 18, 1914, 85 R.G.Z. 177; (VI. Zivilsenat), Feb. 2, 1905, 60 R.G.Z. 94; (VI. Zivilsenat), Feb. 4, 1897, 38 R.G.Z. 155, 159. As to the abuse of monopoly power, see decisions of the Reichsgericht (I. Zivilsenat), March 21, 1923, 106 R.G.Z. 386; (I. Zivilsenat), Oct. 26, 1921, 103 R.G.Z. 82; (I. Zivilsenat), Oct. 1, 1921, 102 R.G.Z. 396; (VI. Zivilsenat), April 13, 1912, 79 R.G.Z. 224.

Even in developing law, judges do not feel as free as American and English judges, although the latter also feel to a certain extent limited by precedents and—more recently—by an increasing number of statutes.⁶⁵

Thus, significant changes of law in Germany generally first require legislative steps. Since there was no statute against cartels and monopolies, the courts were reluctant to interfere with what they regarded as the duty of the legislature to regulate a highly important question of national economic policy.

On the whole, the limitations put on freedom of cartels were few and inappropriate to prevent the further cartelization and concentration of German industry. With few exceptions, cartel agreements have been enforced.⁶⁶ This was, however, much more due to the lack of any antitrust legislation⁶⁷ than to the attitude of the courts.

1923 to 1933: The Concept of Cartel and "Trust" Control

During and after World War I, cartels and a number of single enterprises continued to gain power and thereby to restrict free competition. In 1911 there were about 600 cartels. In 1925 there existed 3,000.⁶⁸ When, in the spring of 1920, prices dropped, cartels sought to soften the decline. Subsequently demand progressively exceeded supply and prices continuously increased. Cartels did or perhaps could not prevent this development, which culminated in the terrible inflation. Cartels and "trusts" shifted the risks of the state of business and currency on customers and the general public. In face of these powerful combinations there was little "economic freedom"⁶⁹ for smaller businessmen and

65. For a comparative analysis of the judicial process in the United States and Germany by considering the type of judicial thinking in each system and each system's attitude toward judicial law making, see Von Mehren, *The Judicial Process in the United States and Germany—A Comparative Analysis*, in Festschrift für Ernst Rabel 67 (Doelle, Rheinsteinst & Zweigert eds. 1954) and the literature cited therein.

66. See, e.g., decisions of the Reichsgericht (II. Zivilsenat), Nov. 7, 1912, [1913] *Warneyers Rechtsprechung des Reichsgerichts* 108; (II. Zivilsenat), Nov. 6, 1902, 53 R.G.Z. 19; (III. Zivilsenat), Feb. 19, 1901, 48 R.G.Z. 305 (the *Rhenanian-Westphalian Coal Syndicate* case, discussed at note 10 *supra*).

67. The Imperial Administration opposed such legislation for different reasons, one of which was the view that German industry, unless cartelized, would be too weak in the competitive struggle with cartelized foreign industries. See 9 *KARTELLRUND-SCHAU* 15 (Germany 1911). For a survey of the attempts made by several Reichstag (lower house of the former Reich) parties to introduce anti-cartel legislation, see MICHELS, *CARTELS, COMBINES AND TRUSTS IN POST-WAR GERMANY* 34 (1928). See also REICHSAMT DES INNEREN, *DENKSCHRIFT ÜBER DAS KARTELLWESEN* (4 vols. 1906-1908).

68. 1 HUBER 282. For a comparative description of the development of cartels and trusts in the United States and Germany until 1938, see HAUSSMANN, *KONZERNE UND KARTELE IM ZEICHEN DER "WIRTSCHAFTSLENKUNG"* 27-143 (1938).

69. As safeguarded by the VERFASSUNG DES DEUTSCHEN REICHES (Constitution of the German Reich) art. 151 (1919) (hereinafter cited as WEIMAR CONST.).

consumers. It is true, freedom of trade and industry was guaranteed by the Weimar Constitution of 1919 within the limits drawn by the federal law.⁷⁰ This freedom, however, did not include freedom of competition, for reasons already explained.⁷¹ On the other hand, freedom of contract and association had been still strengthened by the constitution.⁷²

The Ordinance of 1923

This development lead to increasing public criticism of cartels. Demands for government interference became very strong.⁷³ The government finally responded and enacted in 1923 the "Ordinance Against Abuse of Economic Power."⁷⁴

Under section 1 of the Ordinance, all:

"Agreements and understandings which contain obligations regarding the manipulation of production or of sales, regarding the conditions to be observed in business transactions, regarding the method of fixing prices or regarding the demand prices (syndicates, cartels, conventions, and similar agreements), have to be executed in writing."

The following regulations were contained in sections 1-9:⁷⁵ All agreements and understandings falling under section 1 (in other words all types of cartels):

- (i) must be in writing;
- (ii) are void when confirmed by word of honor or when solemnly ratified in any other way;

70. *Ibid.*

71. See p. 629 *supra*.

72. WEIMAR CONST. arts. 152, 159.

73. For this development, see CALLMANN, DAS DEUTSCHE KARTELLRECHT 61-62 (1934); MICHELS, *op. cit. supra* note 67; Kronstein, *supra* note 30, at 658-71 (development prior to Hitler); Wolff, *supra* note 26, at 345-46.

74. Verordnung gegen Missbrauch Wirtschaftlicher Machtstellungen of Nov. 2, 1923, [1923] R.G.B. pt. I, at 1067 (Germany) (hereinafter cited as Ordinance of 1923). The ordinance is based on legislative powers delegated to the administration by the Law of Oct. 13, 1923, [1923] R.G.B. pt. I, at 943 (Germany). For an English translation of most of the sections of the ordinance, see NEWMAN 265-69. This law was enacted to enable the administration to meet effectively an extraordinary emergency when the currency inflation threatened with collapse the economic and financial system of Germany. The ordinance, therefore, is a rule of law enacted by emergency executive power. See WEIMAR CONST. art. 48(2). The ordinance has been amended by the Emergency Ordinances of July 26, 1930, [1930] R.G.B. pt. I, at 311, 328 (Germany) and of June 14, 1932, [1932] R.G.B. pt. I, at 285, 289 (Germany); and by Law of July 15, 1933, [1933] R.G.B. pt. I, at 487 (Germany).

75. For a detailed discussion of the ordinance, see CALLMANN, DAS DEUTSCHE KARTELLRECHT 295-670 (1934); ISAY & TSCHIRSCHKY, KARTELLVERORDNUNG (2d ed. 1930); MICHELS, *op. cit. supra* note 67 at 43-59; Grossmann, *Cartel and Syndicate Legislation in Germany*, A.B.A. COMP. L. BUREAU BULL. 210-15 (1933); Kessler, *German Cartel Regulation Under the Decree of 1923*, 50 Q.J. ECON. 680 (1936); Kronstein & Leighton, *supra* note 26.

- (iii) are void when they exclude or hinder an appeal to the cartel court or when they destroy the effectiveness of the cartel law or when they attempt to evade it;
- (iv) when endangering the common welfare or business as a whole, they may be:
 - (a) voided by the cartel court upon application by the Minister of Economics or restricted in the ways of their execution by the court;
 - (b) cancelled by any one of the contracting parties without prior notice upon a decree authorizing such action, which the Minister of Economics may issue;
 - (c) investigated by the Minister of Economics in which case the agreements and understandings can come into force only after the Minister has received a copy of them;
- (v) can be cancelled by any one of the contracting parties without prior notice for reason of weight;
- (vi) cannot be secured by a bond without the approval of the presiding judge of the cartel court. The same approval is needed where the cartel desires to take drastic steps against one or several enterprises to force them to yield. The application of the sharpest means of pressure against cartel members, outsiders or third parties is made dependent upon the approval of the presiding judge of the cartel court.

All these regulations were based upon section 1. The other section outlining the scope of the Ordinance is section 10. It provides:

"Whenever the terms of delivery (standardized contracts) or the methods of price fixing adopted by enterprises or combinations of enterprises (trusts, communities of interest, syndicates, cartels, conventions, and similar combinations) are apt to endanger economy as a whole or the common welfare (section 4, paragraph 2) through misuse of a powerful economic position, the Cartel Court, upon application of the Minister of Economics, may authorize any party to withdraw from any contract giving rise to such domination."

Section 10, as interpreted by the courts, deals only with monopoly and includes, besides monopolistic cartels, other monopolistic organizations of whatever structure, such as trusts or combines (affiliated enterprises under a centralized administration, in Germany called *Konzerne*) and

single giant enterprises. In contrast, a powerful economic position is not required for cartels and similar combinations falling under section 1.

The ordinance is concerned with three kinds of legal relationships. First, it regulates the internal relations between the members of a cartel. Secondly, it contains provisions concerning the external relations of powerful economic combinations of any kind with third parties and—thirdly—with the public. The ordinance did not apply to compulsory cartels which would be established by law or government decree.^{75a} Thereunder fell, *e.g.*, the Potash Cartel, the Rhenanian-Westphalian Coal Cartel and the Match Cartel.

The significance of the Ordinance of 1923 lies in the fact that the hitherto prevailing principle of judicially-limited freedom of cartels was replaced by the entirely new principle of cartel control by administrative agencies. Previously, the courts had had no opportunity for passing upon cartel agreements unless the members of the cartel did not perform their contractual obligations. Now, administrative agencies were authorized to interfere with restrictive business practices on their own initiative in the interest of the economy as a whole and the common welfare. The ordinance, however, did not condemn cartels and other combinations *per se*; rather it was based upon the "harmful effects" approach in preventing only the abuse of economic power. Therefore, it implicitly confirmed for the first time the right to establish cartels and other combinations, subject to certain limitations discussed above.⁷⁶ "Good" cartels remained lawful as before.

The already enumerated control powers (nullification, prohibition of performance of cartel contracts, authorization for termination and membership withdrawal, investigation, approval to certain acts of cartels, *e.g.*, boycotts, and dissolution of certain combinations) were exercised partly by the Reich Minister of Economics and partly by the so-called Cartel Court.⁷⁷ The latter was not actually a court in the proper sense of the term. It was rather an independent administrative agency which merely was organized like a court and which formally used a court-like procedure. Most of its functions were not of judicial but administrative nature.⁷⁸

The decisions of the Cartel Court were rendered by the presiding judge and four associate judges. Two of the associate judges were

75a. Ordinance of 1923, § 19.

76. Decision of the Reichsgericht (II. Zivilsenat), Dec. 14, 1928, 122 R.G.Z. 260, 263.

77. Ordinance of 1923, § 11. The Cartel Court was later replaced by the Reichswirtschaftsgericht (Reich Industrial Court).

78. Huber, *Das Wesen des Kartellgerichts*, 1930 KARTELLRUNDSCHAU 636 (Germany).

appointed by the Reichspräsident (Reich President) and were required to have the qualifications of a judge in the regular courts. The other two had to be experts and were to be selected with proper regard to opposing economic interests and common welfare.⁷⁹ The main reason for establishing the court apparently was that it could act quicker and more competently than the ordinary courts. The latter probably would have been less able to reach decisions for the best protection of the public interest because of their more conservative attitude and their lack of economic qualification to understand and evaluate the complexity of modern business life.

The other agency, the Reich Minister of Economics, was authorized only to take action by instituting proceedings before the Cartel Court, which then decided the case. But the Minister's powers to interfere directly with cartels were broadened considerably by the Emergency Ordinance To Meet Financial, Economic and Social Emergencies of July 26, 1930.⁸⁰

The theory underlying the division of jurisdiction was that the Cartel Court decided cases where the position of an individual member of a cartel or of an individual outsider was controversial, whereas the Minister of Economics decided cases where the position and actions of the cartel as a whole were at stake.

Although the ordinance considerably reduced the scope of the courts' jurisdiction in favor of the powerful administrative control, from which there was no appeal, the civil courts remained free to continue their previous judicial control of cartels and other combinations insofar as the administrative agencies did not intervene under the ordinance. Thus civil courts adjudicated private suits between combinations and their members or outsiders. Apart from applying the ordinances, the courts continued to apply the "good morals" yardstick⁸¹ under sections 138 and 826 of the Civil Code and section 1 of the Law Against Unfair Competition.

The Failure of Cartel Control

To review the numerous cases which were decided under the new law both by the administrative agencies and the courts would be beyond the scope of this article.⁸² Nor can we attempt here a detailed

79. Ordinance of 1923, § 11. As to the proceedings of the court, see *id.* §§ 12-15, 20-22.

80. Law of July 26, 1930, [1930] R.G.B. pt. I, at 311, 328 (Germany); *cf.* note 74 *supra*. See also the other amendments cited in note 74 *supra*.

81. See pp. 632-34 *supra*.

82. See Kessler, *supra* note 75; Kronstein & Leighton, *Cartel Control: A Record of Failure*, 55 YALE L.J. 297, 305-25 (1946); Wolff, *Business Monopolies: Three European Systems in Their Bearing on American Law* [French, English and German], 9 TUL. L. REV. 325, 345-70 (1935).

evaluation of the effectiveness of the thus-exercised control over cartels⁸³ and monopolies, which would necessarily include an inquiry into the economic situation prevailing during the twenties in Germany, particularly the serious crisis which occurred around 1930.

It is clear, however, that agencies and courts faced at the least a very difficult problem in interpreting such general terms as "public economy," "common welfare" and "abuse of an economic powerful position", although the Ordinance of 1923 sought to give some definitions⁸⁴ and to describe the restrictive business practices to be fought (*e.g.*, sections 1, 9 and 10). Today, it is the opinion of the administration and many economists and lawyers that the agencies and courts generally failed to fulfill the declared legislative intent, namely to re-establish "freedom of the market" and to resist "artificial restriction of production."⁸⁵

This failure, however, seems not so much due to the attitude taken by agencies and courts *vis-à-vis* cartels. Rather, the reason for the failure would seem to be a lack of workability and practicability of cartel control, however elaborate the respective statute may be. "Good" and "bad" cartels, "reasonableness" and "public interest" cannot be really defined by statute. The consequence is a lack of *Rechtssicherheit*, the principle that people should know in advance as far as possible whether their planned actions are lawful. Under a system of administrative supervision, that is very difficult to accomplish.

Also, the agency charged with administering such a law is very heavily burdened. A case by case examination of the fairness of the varying business practices of hundreds or thousands of cartels requires so much time, staff, expert knowledge and investigatory powers as can scarcely—if ever—be provided for the agency. Actually, the ordinance, to a considerable extent, transferred law-making power to the executive branch of the government. However, it would seem less dangerous to thrust such law-making power upon the judicial

83. See BOHM, *WETTBEWERB UND MONOPOLKAMPF* (Competition and Monopoly Struggle) (1933) and authorities cited in note 82 *supra*.

84. Ordinance of 1923, § 4(2) is of particular importance and interest: "The public economy or general welfare shall be in particular considered to be endangered whenever production or marketing are restricted in an economically unjustified manner, whenever prices are increased or maintained at a high level, whenever premiums against devaluation risks are added to a price calculated on a stable currency basis, or whenever economic freedom is unreasonably impaired by refusals to buy or sell or by fixing varying prices or conditions of sale."

85. Official press release of Nov. 2, 1923, accompanying the ordinance. It is fully reprinted in CALLMANN, *DAS DEUTSCHE KARTELLRECHT* 673-74 (1934). As to the different positions taken by German economists and lawyers, see survey by Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954, Eine Kritische Übersicht*, 5 *W.W.* 205, 206-12 (Germany 1955). With respect to American scholars, see, *e.g.*, Kessler, *supra* note 75; Kronstein & Leighton, *supra* note 82; Wolff, *supra* note 82, at 345-70.

branch or, at least, to give the judiciary control over the lawfulness of the agency decisions by means of appeal.⁸⁶

A final disadvantage of mere cartel control is the danger that government interference with business may increase to an extent incompatible with private initiative, progress and individual freedom to act. Contrariwise, if government interference remains weak and does not really control all misuses of economic power, business will continue to combine and to restrict free competition. It would seem that this was the situation prevailing in Germany under the principle of cartel and trust control as introduced by the Ordinance of 1923.

The new draft law appears to avoid many of these difficulties by declaring cartel agreements null and void *per se*. Thereby it creates a clear legal situation, one comprehensible for everybody. And it prevents, at least in this important area, a good deal of government interference. By declaring cartel agreements null and void, the draft law makes the cartel simply powerless to enforce the agreement against outbreking individual members. Cartel experience proves that in most cases some members of a cartel eventually dissent on its policy, break the discipline agreed upon (*e.g.*, by price cutting) and thus make the cartel ineffective or even cause its disintegration.

1933 to 1945: The Concept of State-Directed Cartels in a Planned Economy

Under the totalitarian system, after 1933, the government no longer restricted itself to an administrative control of cartels and other combinations, although the Cartel Ordinance of 1923, as amended, was further applied. Rather, the principle of control against abuse of economic power was superseded by a system of positive government direction of cartels. No longer independent, they became a vehicle of an administration-planned economy.

Cartels proved themselves a very appropriate device to increase the power of the totalitarian system. By law⁸⁷ the Reich Minister of Economics was authorized to establish compulsory cartels in any branch of industry or, by executive decree, to compel outsiders to join cartels already existing.⁸⁸ Compulsory and free cartels were used to establish and maintain price, raw material and production

86. *But cf.* pp. 634-35 *supra*.

87. Law on Establishment of Compulsory Cartels (Gesetz über Errichtung von Zwangskartellen) of July 15, 1933, [1933] R.G.B. pt. 1, at 488 (Germany). For an English translation of the law, see NEWMAN 269-71.

88. *Cf.* Wolff, *supra* note 82, at 370-77. The administration of the Weimar Republic, too, was already authorized to institute compulsory cartels. See text at note 75a *supra*. However, by the Law on Establishment of Compulsory Cartels of July 15, 1933, [1933] R.G.B. pt. 1, at 488 (Germany), this power was considerably extended.

controls as introduced by the government. Finally, they were used to strengthen the government-planned war industry.⁸⁹

At the beginning of World War II, German industry was highly cartelized and concentrated, and completely in the hands of the Nazi administration.

THE PRESENT ANTITRUST LAW IN GERMANY: PROHIBITION AND ELIMINATION OF EXCESSIVE CONCENTRATIONS OF ECONOMIC POWER

The Legal Basis of Allied Antitrust Policy and Law

When Allied forces entered Western Germany, supreme legislative, executive and judicial authority in the occupied area was vested in the Allied Supreme Commander. Military government was introduced to exercise these powers.⁹⁰ By the Four Power Statement of June 5, 1945, the Control Council was established in Berlin as the supreme authority for Germany.⁹¹ The basic charter for the quadripartite government is the *Report on the Tripartite Conference of Berlin*, containing the so-called Potsdam Agreements of August 2, 1945, signed by Stalin, Truman and Attlee.⁹² The Control Council notified the German people by its Proclamation No. 1 of August 30, 1945 that supreme authority "in matters affecting Germany as a whole" was conferred upon the Council.⁹³

Section III of the *Report on the Tripartite Conference of Berlin* of August 2, 1945 contains the agreement on "The Political and Economic Principles to Govern the Treatment of Germany in the Initial Control Period," paragraph 12 of which reads:

"At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentrations of economic powers as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements." ⁹⁴

89. See 1 HUBER 329; Kronstein & Leighton, *supra* note 82, at 328-32. For the political background, see LOCHNER, TYCOONS AND TYRANT (1955).

90. Proclamation No. 1, art. II, MIL. GOV. GAZ. issue A, at 2 (U.S. Zone Germany June 1, 1946).

91. CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE [hereinafter OG/CC] Supp. No. 1, at 10 (April 30, 1946).

92. *Id.* at 13, 14-17.

93. OG/CC No. 1, at 4 (Oct. 29, 1945); see Loewenstein, *Law and the Legislative Process in Occupied Germany*, 57 YALE L.J. 724, 725, 994-96 (1948).

94. OG/CC Supp. No. 1, at 15 (April 30, 1946). Subsection B of the agreement, "Economic Principles," also contains numerous further provisions relating to German economy. *Id.* at 16. Section IV of the *Report* contains the "Agreement on Reparations." *Ibid.*

The Military Government Decartelization and Deconcentration Laws
The Laws Nos. 56/78/96

The four powers, however, failed to agree on a common decentralization program under paragraph 12 of the Potsdam Agreement. In 1947, therefore, the three western powers acted separately and enacted military government decartelization laws in their respective zones of occupation.⁹⁵ The American and British Zone Laws Nos. 56/78 were enacted in order:

“ . . . (i) to prevent Germany from endangering the safety of her neighbors and again constituting a threat to international peace, (ii) to destroy Germany's economic potential to wage war, (iii) to insure that measures taken for Germany's reconstruction are consistent with peaceful and democratic purposes, (iv) to lay the groundwork for building a healthy and democratic German economy.”⁹⁶

These laws have been said to be “the most incisive intervention in the internal affairs of the defeated people that military government has undertaken to date.”⁹⁷ Although based to a large extent upon American antitrust law,⁹⁸ they go much further in effect. They not only prohibit all future restrictive and monopolistic practices including German participation in international cartels,⁹⁹ but also

95. For the United States Zone and Land Bremen: Mil. Gov. Law No. 56, Prohibition of Excessive Concentration of German Economic Power, Jan. 28, 1947, MIL. GOV. GAZ. issue C, at 2 (U.S. Zone Germany April 1, 1947) (effective Feb. 12, 1947) (hereinafter cited as Mil. Gov. Law No. 56), reprinted in 16 DEP'T STATE BULL. 443 (1947); NEWMAN 278-85.

For the United Kingdom Zone: Mil. Gov. Ordinance No. 78, Feb. 12, 1947, MIL. GOV. GAZ. No. 16, at 412 (British Zone Germany 1947). The wording of the ordinance is similar to Law No. 56.

For the French Zone: Mil. Gov. Ordinance No. 96, June 9, 1947, 2 JOURNAL OFFICIEL DU COMMANDEMENT EN CHEF FRANCAIS EN ALLEMAGNE 784 (French Zone Germany 1947). The French ordinance does not contain a regulation as detailed as the two other laws. It merely prohibits excessive concentrations of German economic power by a general clause and provides an examination of cartels in accordance with principles applicable under French law, which is based on the principle of cartel control. However since 1950 the Ordinance No. 96 has been interpreted as prohibiting cartels unless expressly permitted by the Military Government. See also 1 HUBER 337-38. For an English translation of the ordinance, see NEWMAN 285-88.

96. 16 DEP'T STATE BULL. 443 (1947).

97. Loewenstein, *supra* note 93, at 1000. For a brief critical review of Allied antitrust policy in Germany, see Bock & Korsch, *Decartelization and Deconcentration in the West German Economy Since 1945*, in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 138 (University of Toronto Faculty of Law Symposium vol. 3, Friedmann ed. 1956). Under the same title, Sidney H. Willner, former Chief, Decartelization and Deconcentration Division, United States High Commission for Germany, states a different position. *Id.* at 176-88.

98. See Frank, *American Policy Concerning German Monopolies*, 16 DEP'T STATE BULL. 913 (1947); Just, *The Influence of the Anti-Trust Laws on the New German Decartelization Law*, 9 FED. B.J. 33 (1947).

99. Mil. Gov. Law No. 56, art. II, § 5.

provide for the complete decartelization and deconcentration of German industry. Therefore they "repeal, alter, amend or supersede all provisions of German law inconsistent therewith,"¹⁰⁰ in particular the Cartel Ordinance of 1923, as amended.¹⁰¹

Article I, section 1 of the Laws Nos. 56/78 prohibits "excessive concentrations of German economic power" and declares that their activities are "illegal and . . . shall be eliminated," except in cases where the implementing agency grants exemptions.¹⁰²

The laws declare to be excessive concentrations of economic power :

"[C]artels, combines, syndicates, trusts, associations or any other form of understanding or concerted undertaking between persons, which have the purpose or effect of restraining, or of fostering monopolistic control of domestic or international trade or other economic activity, or of restricting access to domestic or international markets."¹⁰³

In prohibiting cartels and similar combinations in restraint of trade *ipso iure*, the laws introduced for the first time in Germany the principle of cartel prohibition. The laws not only cover horizontal understandings but also vertical restraints of trade like resale price maintenance and exclusive arrangements.¹⁰⁴

With respect to single enterprises—in spite of their wording—the laws in effect do not provide a general prohibition, but rather a case-by-case examination by the implementing Allied agency. Unlike cartels, big single enterprises prove inappropriate to prohibition and elimination simply by statutory order. The complicated legal and factual relations which constitute such enterprises required individual deconcentration proceedings.

The laws therefore provide, in article I, section 3, that all economic enterprises employing more than 10,000 persons shall be examined as *prima facie* constituting excessive concentrations of economic power. If the agency designated by the military government finds that the enterprise in fact constitutes an excessive concentration of economic power, the enterprise is to be dissolved into independent competitive units.

100. *Id.* art. VI, § 10.

101. See note 74 *supra*. With respect to the deconcentration of certain specific industries, see pp. 646-47 *infra*.

102. Mil. Gov. Law No. 56, art. III, § 6. See also 1 HUBER 335-86, 436-41; Rasch, *Das Verbot ubermassiger Konzentration deutscher Wirtschaftskraft* (Prohibition of Excessive Concentration of German Economic Power), 1947 SUEDEDEUTSCHE JURISTENZEITUNG 151 (Germany).

103. Mil. Gov. Law No. 56, art. I, § 2.

104. *Id.* art. V, § 9(c).

To execute this decartelization and deconcentration program, a powerful Allied agency was established.¹⁰⁵ It was authorized to take such action as it found appropriate to accomplish the purpose of the laws, including the elimination of corporate entities, the redistribution and removal of property, investments and other assets, and the cancellation of obligations of cartels.¹⁰⁶

The proceedings were in brief as follows. In order first to have a general survey, all enterprises affected by the laws had to submit detailed information to the Allied agency.¹⁰⁷ The agency then had to scrutinize the reports received and notify each enterprise whether it was within the scope of the laws or was exempt from their operation.¹⁰⁸

With respect to cartels, the agency could then issue an order to show cause. Subsequently, the alleged combination had to prove that it did not come within the scope of the laws. Hearings might be granted, but in earlier years of the occupation they generally were not permitted. Finally, the agency could either grant an exemption from the operation of the law or issue a cease and desist order.¹⁰⁹ Actually, the Allied agency carried out several such decartelization proceedings.¹¹⁰ Also, a good many private actions for injunction and damages were brought by private persons before the German courts against injurious acts of cartels, particularly boycotts.¹¹¹

105. *Id.* art. IV, § 7. Prior to 1949, the "designated agency" was the Bipartite Decartelization Commission (BIDEC). Order No. 2 to Law No. 56, MIL. Gov. GAZ. issue L, at 6 (U.S. Zone Germany Dec. 16, 1948). It was followed by the (tripartite) Decartelization and Industrial Deconcentration Group (DIDEG) of the (West) Allied High Commission in Germany. MIL. Gov. Law No. 56, art. IV, § 8 provided that the Allied agency "may delegate to appropriate German governmental agencies such powers, and may issue such directions with respect thereto, as it may deem necessary for the enforcement and application of this law." But any power to make decisions was not transferred to the German administration, which had merely some advisory and preliminary functions in the execution of the decartelization and deconcentration program.

106. *Id.* art. IV, § 7.

107. Regulation No. 1 of Feb. 12, 1947, art. V (under and in amplification of Law No. 56), MIL. Gov. GAZ. issue C, at 4 (U.S. Zone Germany April 1, 1947) (hereinafter cited as Regulation No. 1), reprinted in 16 DEP'T STATE BULL. 446 (1947); NEWMAN 284. Regulation No. 1 has been amended by Amendment No. 1 of April 1, 1947, MIL. Gov. GAZ. issue E, at 5 (U.S. Zone Germany July 1, 1947); Amendment No. 2 of March 1, 1948, MIL. Gov. GAZ. issue J, at 17 (U.S. Zone Germany March 16, 1948); Amendment No. 3 of July 27, 1949, MIL. Gov. GAZ. issue N, at 28 (U.S. Zone Germany Sept. 21, 1949). Regulation No. 1, as amended, is reprinted in German translation in BAUMBACH & HEFERMEHL, *op. cit. supra* note 54, at 635-46.

108. Regulation No. 1, art. VI(A); MIL. Gov. Law No. 56, arts. III, IV.

109. See provisions cited in note 108 *supra*.

110. See, e.g., 1 HUBER 382-84; 2 *id.* at 767.

111. The legal basis for such private actions is the German Civil Code of Jan. 1, 1900, § 823(2), which provides: "Whoever injures a law which has the purpose to protect another person [in other words here the Laws 56/78/96] is bound to such other for compensation of the injury arising therefrom." 2 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 823 (9th ed. 1929). Sections 138 and 826 of the Civil Code and § 1 of the Law Against Unfair Competition also apply. See p. 632 *supra*. Examples of such private actions are cited in 1 HUBER 386; 2 *id.* at 767.

With regard to single enterprises, the agency could issue detailed orders to deconcentrate. This could be done by dissolution, selling of assets, division, creation of several new and independent firms, selling of participations in other firms or selling of parts of the plants belonging to a trust.¹¹² A combination of several of these devices was applied in the deconcentration proceedings against the Robert Bosch GmbH trust of Stuttgart, an important manufacturer of electrical equipment.¹¹³ Deconcentration of the German motion picture industry was introduced by Order No. 1, issued pursuant to Law No. 56, effective on March 8, 1948,¹¹⁴ but later continued under special laws.

Special Allied Deconcentration Laws

The following industries were deconcentrated under numerous special laws of the Control Council, the Military Governments, the (Western) Allied High Commission and the Federal Republic of Germany:

- (i) The coal and steel industry, namely the following trusts: Vereinigte Stahlwerke, Klöckner, Mannesmann, Reichswerke, Hoesch, Gutehoffnungshütte, Otto Wolff, Ilseder Hütte, Thyssen-Bornemisza, Flick, Krupp. The big coal selling syndicate (former Rhenanian-Westphalian Coal Syndicate)¹¹⁵ was also liquidated.
- (ii) The chemical industry: I. G. Farben trust.
- (iii) The motion picture industry: Cautio, UFI, UFA trust.
- (iv) The three big banks: Deutsche Bank, Dresdener Bank, Commerzbank.

The numerous and difficult deconcentration proceedings and plans—different for each industry and enterprise—cannot be described here.¹¹⁶ For instance, the steel trust Vereinigte Stahlwerke (formerly the biggest German steel trust) has been dissolved into nineteen independent enterprises; the chemical trust I. G. Farben into three large and some smaller enterprises.

112. 1 *id.* at 438-40.

113. 1 *id.* at 440.

114. MIL. Gov. GAZ. issue J, at 16 (U.S. Zone Germany March 16, 1948).

115. See note 10 *supra*.

116. A detailed description will be found in 1 HUBER 441-76; 2 *id.* at 770-87, 790-94. With respect to the deconcentration of the German iron and steel industry, see the comprehensive report. DIE NEUORDNUNG DER EISEN UND STAHLINDUSTRIE IM GEBIETE DER BUNDESREPUBLIK, EIN BERICHT DER STAHLTREUHAENDERVEREINIGUNG (1954). On the chemical trust, see REICHELT, DAS ERBE DER I. G. FARBEN (1956).

Under the Occupation Statute of May 12, 1949, the three western powers had reserved to themselves the power to deconcentrate German industries.¹¹⁷ However, on March 10, 1951 the Council of the Allied High Commission in Germany decided, in implementing the decisions taken by the 1950 New York meeting of the three foreign ministers, to exercise such reserved powers only to ensure completion of Allied deconcentration proceedings already initiated. "Upon completion of such programmes and actions these powers will be relinquished."¹¹⁸

Thus, action to deconcentrate any of the existing enterprises in *other* industries was not undertaken. For example, the preliminary proceedings against the giant Siemens Electrical Company were not formally instituted before the decision of the aforementioned conference, and therefore discontinued.

On May 5, 1955, the Occupation regime was terminated in the Federal Republic of Germany by the Bonn Conventions.¹¹⁹ Effective that date, legislative, executive and judicial authority was returned to the German government. Allied Laws Nos. 56/78/96 and the laws concerning the deconcentration of the coal, steel and the chemical industry became German law. The special laws remain in force only until the deconcentration of these industries is terminated.¹²⁰ The Laws Nos. 56/78/96 *remain in force* until repealed or replaced by the German legislative bodies.¹²¹ The powers of the former Allied agency

117. Occupation Statute of May 12, 1949, para. 2(b), [1949] ALLIED HIGH COMMISSION FOR GERMANY, OFFICIAL GAZETTE [hereinafter OG/AHC] 13. The First Instrument of Revision of the Occupation Statute of March 6, 1951, [1951] OG/AHC 792 did not change this power. *But see* text at note 118 *infra*.

118. Decision No. 10 of the Council of the AHC: Programme for the Revision of Occupation Controls para. 1, [1951] OG/AHC 794.

119. Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954 (effective May 5, 1955), amending by schedules I-V the Bonn Conventions between the three powers and the Federal Republic of Germany, May 26, 1952, [1955] B.G.B. pt. II, at 213 (Germany). See also Kutscher, *Die Beendigung des Besatzungsregimes nach dem Pariser Protokoll vom 23. 10. 1954*, 9 DER BETRIEBSBERATER [hereinafter D.B.] 941 (Germany 1954).

With respect to decartelization and deconcentration, see the regulation in the Convention on the Settlement of Matters Arising Out of the War and the Occupation (one of the Bonn conventions, as amended by the said protocol) pt. I, [1955] B.G.B. pt. II, at 234 (Germany) (hereinafter cited as Convention on the Settlement of Matters) and the comments thereto by Gleiss & Fikentscher, *Weitergeltung des alliierten Dekartellierungsrechts*, 5 W.W. 525 (Germany 1955) and Kutscher, *supra* at 943-44.

120. Convention on the Settlement of Matters pt. I, arts. 9-12. See also Kutscher, *supra* note 119. With respect to the deconcentration of the three big banks and the motion picture industry, German laws have replaced Allied laws already in 1952 and 1953: Gesetz ueber den Niederlassungsbereich von Kreditinstituten of March 29, 1952, [1952] B.G.B. pt. I, at 427 (Germany) and Gesetz zur Abwicklung und Entflechtung des ehemaligen reichseigenen Filmvermoegens of June 5, 1953, [1953] B.G.B. pt. I, at 276 (Germany).

121. Convention on the Settlement of Matters pt. I.

under these laws are exercised by the German Federal Minister of Economics.¹²²

The Present State of German Industrial Concentration

With respect to cartels, it can probably be said that German industry is to a large extent decartelized today, for cartels are prohibited per se and violations have been repeatedly enjoined or punished under Laws Nos. 56/78/96.¹²³ In numerous other cases, private actions were brought before German courts against alleged cartel and other activities in restraint of trade.¹²⁴

The Federal Minister of Economics continues to enforce the laws. For instance, on February 14, 1956, he issued a cease and desist order against three leading firms in the photo industry (Agfa, Perutz and Schleussner) which had raised the fixed resale prices of their films simultaneously in the same amount. Although it was not clear whether this price increase was due to agreement or merely parallel action, the Minister prohibited the firms from continuing their vertical systems of resale price maintenance under Laws Nos. 56/78.¹²⁵ Recently, he issued several other orders to cease and desist or to show cause.¹²⁶

122. Decision No. 36 of the Council of the AHC of May 4, 1955, [1955] OG/AHC 3248.

123. For cases, see 1 HUBER 384-85; Moehring, *Die Bedeutung der Rule of Reason im Kartellrecht* (The Meaning of the Rule of Reason in the [Allied and German] Antitrust Law), 5 W.W. 89 (Germany 1955); Peters, *Ein Jahr deutsche Kartellaufsicht*, 9 DER BETRIEB 541, 543-44 (Germany 1956); decision of Federal Supreme Court (I. Strafsenat), April 10, 1956, 9 Neue Juristische Wochenschrift 599.

124. See, e.g., cases discussed in 1 HUBER 386; 2 *id.* at 767; Lindenmaier, *Die Rechtsprechung des Bundesgerichtshofes zum Wettbewerb unter besonderer Beruecksichtigung der Dekartellierungsvorschriften* (Cases on Trade Regulation Decided by the Federal Supreme Court, in Particular Under the Decartelization Law), 3 W.W. 259 (Germany 1953); Moehring, *supra* note 123, at 12-19, 98-101.

125. The cease and desist order is reprinted in 11 D.B. 190 (Germany 1956) and 6 W.W. 226 (Germany 1956). See also Note, 11 D.B. 190 (Germany 1956). Subsequently, the three firms agreed to reduce their resale film prices somewhat and the Minister of Economics repealed his cease and desist order. 6 W.W. 273 (Germany 1956). See also Gleiss, *Der Fall Fotofilme*, 6 W.W. 354 (Germany 1956).

Whether or not individual resale-price maintenance schemes for branded and copyrighted articles are lawful under Laws Nos. 56/78/96 is highly controversial. See, e.g., survey and discussion by Steindorf, *Das Verbot der Preisbindung fuer Markenartikel nach geltendem Recht* (The Prohibition of Resale Price Maintenance for Branded Articles Under Present Law), 10 D.B. 1001 (Germany 1955). Some courts held resale price-maintenance agreements for branded articles lawful. E.g., Decision of the Kammergericht (state appellate court of Berlin), Nov. 17, 1953, 16 Der Markenartikel 64. More recently, other courts held vertical price fixing illegal. E.g., Decision of the Oberlandesgericht Stuttgart (state appellate court of Stuttgart), Nov. 17, 1955, partly reprinted in 10 D.B. 1070 (Germany 1955) and 11 D.B. 183 (Germany 1956).

126. On March 9, 1956, the Minister of Economics prohibited the application of rules of competition introduced by the Kaliko-Association for its members and he objected to certain price lists issued by the association. 6 W.W. 273 (Germany 1956). On April 4, 1956, he issued an order to show cause against the Milchfoederungsfond of German farmers and their associations, a milk cartel introduced to increase the prices of butter. 6 W.W. 352-53 (Germany 1956); see Buentig, *Kartellrechtliche*

Although there are numerous applications, exemptions from the cartel prohibition have been granted only in very few extraordinary cases.¹²⁷ The granted permissions would seem to correspond with the provisions of the German draft law regarding crisis, rationalization and export cartels, discussed later herein.¹²⁸

As to big individual enterprises, the situation is different. It is true, leading coal, steel, chemical and motion picture companies as well as the big banks have been split into a considerable number of independent enterprises.¹²⁹ However, with the completion of this program, the special Allied deconcentration laws expired under the Bonn conventions, as amended.¹³⁰ Moreover, general Laws Nos. 56/78/96 neither prohibit mergers nor do they require administrative approval of planned mergers. Because of this gap in the law, it is at present possible for almost all enterprises (except the motion picture

Wuerdigung des Milchfoerderungsfonds, 6 W.W. 352-53 (Germany 1956). On April 5, 1956, the Minister issued a cease and desist order against the Leuchtroehren Manufacturers Association which also had established certain rules of competition in restraint of trade. 6 W.W. 355-56 (Germany 1956). On June 7, 1956, he issued another cease and desist order against the Association of West German Building Material Dealers which had promoted among its members a "non-discrimination contract" calling for fixed prices, price lists, discounts and other restrictive practices. 6 W.W. 593-94 (Germany 1956). In a few other cases, the Federal Minister of Economics approved the introduction of such rules of competition but only after careful examination and sometimes under certain conditions. For a survey, see Peters, *supra* note 123, at 542. The state ministers of economics, too, enforce the laws in their respective jurisdictions. See, e.g., *id.* at 541.

127. In September 1953, the Allied agency DIDEG approved an export and rationalization cartel agreement between two German net manufacturers. 2 HUBER 769. On June 30, 1954, DIDEG approved a crisis cartel agreement of the German soap manufacturers. However, on June 9, 1955, the association of the soap manufacturers suspended the cartel agreement because the cartel had actually broken down. Harz, *Die Wettbewerbsordnung der Konsumseifenindustrie*, 5 W.W. 775 (Germany 1955).

On November 9, 1955, the successor of DIDEG, the Federal Minister of Economics, granted a preliminary permission for a crisis cartel agreement of German grain mills because of considerable excess capacity of the mills. 5 W.W. 785 (Germany 1955); see Note, *Muehlenkartell und Kapazitaetsabbau*, 6 W.W. 141 (Germany 1956). On April 23, 1956, the Minister granted the first final permission for a cartel agreement of twenty cheese producers concerning the export of Allgauer Emmentaler cheese. 6 W.W. 419-20 (Germany 1956); 11 D.B. 482 (Germany 1956). However, the permission expires on the date of the enactment of the German draft law or on March 31, 1959. Besides it is subject to other limitations. In other cases, the Minister has denied his approval. On numerous further applications, no decision has so far been made. For a survey, see Peters, *supra* note 123, at 542-43.

128. See pp. 656-62 *infra*.

129. For description and critical review, see authorities cited in notes 97 and 116 *supra*; Thiesing, *Die Neuordnung der Eisen und Stahlindustrie im Gebiet der Bundesrepublik Deutschland* (The Reorganization of the Iron and Steel Industry), 10 JURISTENZEITUNG 412 (Germany 1955). An interesting but somewhat doubtful analysis of the results of the deconcentration of the German coal and steel industry will be found in PRITZKOLEIT, MAENNER, MAECHTE, MONOPOLE—HINTER DEN TUEREN DER WEST-DEUTSCHEN WIRTSCHAFT (Men, Powers, Monopolies—Behind the Doors of the West German Industry) 162-98 (1953).

130. See note 119 *supra*.

industry, the big banks¹³¹ and Krupp)¹³²—whether deconcentrated or not—to build up new concentrations.

Detailed information on such a concentration movement is only in part available. But there are strong indications that concentration is generally starting anew or continuing.

Although with respect to the steel and coal industry the treaty constituting the European Coal and Steel Community¹³³ prohibits concentrations impairing the maintenance of effective competition, exemptions may be granted by the High Authority of the Community. Two factors seem to be decisive: the percentage of total community output of the product which is controlled by the concentration, and the percentage of control it holds in a special market. "Six per cent of total production and 12 per cent of special markets are considered dangerous by the High Authority."¹³⁴ Actually, "no enterprise within the common market accounts for more than six per cent of the total production."¹³⁵ Thus, the High Authority approved or tolerated the reconcentration of numerous German steel and coal companies.¹³⁶ Apart from that, it approved and regulated the estab-

131. See p. 651 and note 138 *infra*.

132. See note 136 *infra*.

133. Treaty of April 18, 1951, [1952] B.G.B. pt. II, at 445 (Germany) (hereinafter cited as Treaty). Further provisions of the treaty prohibit unfair competitive practices, discriminatory prices and practices, and cartels of all kind. See *id.* arts. 3-5, 60, 65. The English wording of articles 65 and 66 is reprinted in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 579-85 (University of Toronto Faculty of Law Symposium vol. 3, Friedmann ed. 1956); NEWMAN 478-85. For a comprehensive study of articles 65 and 66, see KERN, DAS RECHT DER UNTERNEHMENSZUSAMMENFASSUNGEN IN DER MONTANUNION (1955).

134. BOK, THE FIRST THREE YEARS OF THE SCHUMAN PLAN 42 n.60 (1955).

135. *Id.* at 42.

136. It approved the reconcentration of the three main successor companies of the Mannesmann A.G. steel and coal trust, namely the Mannesmann A.G., the Consolidation Bergbau A.G., and the Stahlindustrie und Maschinenbau A.G., as well as the purchase of the majority of the stocks of the Essener Steinkohlenbergwerke A.G. by said Consolidation Bergbau A.G. 9 Der Volkswirt, Wirtschafts und Finanzzeitung [hereinafter D.V.] No. 2, at 26 (1955); 9 D.V. No. 24, at 26 (1955); 10 D.V. No. 27, at 27 (1956). The High Authority did not object to the merger of two of the successor companies of the Vereinigte Stahlwerke A.G., namely the steel firms Huettenerwerke Phoenix A.G. and Rheinische Roehrenwerke A.G. which are now called Phoenix-Rheinrohr A.G., Vereinigte Huettener und Roehrenwerke. 9 D.V. No. 21, at 29 (1955); 10 D.V. No. 30, at 25 (July 28, 1956). Two other hitherto independent successor firms of the same trust have also been reconcentrated, namely the steel companies Niederrheinische Huette A.G. and the August Thyssen Huette A.G. 10 D.V. No. 27, at 29 (July 7, 1956); 10 D.V. No. 29, at 30 (July 21, 1956). Three other steel companies which succeeded the same trust are reconcentrating, too, namely the Rheinstahl-Union Maschinen- und Stahlbau A.G., the Ruhrstahl A.G., and the Rheinisch-Westfaelische Eisen- und Stahlwerke A.G. 9 D.V. No. 19, at 16 (1955); 9 D.V. No. 23, at 22 (1955). The same is true of two of the coal companies which succeeded the Vereinigte Stahlwerke trust, namely the Gelsenkirchener Bergwerks A.G. and the Zeche (mine) Erin. 9 D.V. No. 36, at 24 (1955); 10 D.V. No. 36, at 26, 29 (Sept. 8, 1956). The High Authority tolerated the reconcentration in part of the former steel and coal trust Kloeckner Werke A.G. 9 D.V. No. 14, at 25 (1955); 9 D.V. No. 47, at 26 (1955). The dissolved steel and coal trust Hoesch A.G. was reestablished too. 9 D.V. No. 20, at 25 (1955); 9 D.V. No. 23,

lishment of several German coal-selling cartels under article 65 of the treaty.¹³⁷

There are also indications of planned reconcentration of the former three big banks and in the motion picture industry.¹³⁸ Interestingly, there are no reports on reconcentration of the successor companies of the former chemical trust I. G. Farben.

Outside the coal, steel, chemical and motion picture industries and the three big banks, no new deconcentration proceedings have been initiated since 1950 either by Allied or German authorities. Thus, there continue to exist numerous powerful enterprises.¹³⁹ Moreover, as in the United States and elsewhere, the concentration

at 25 (1955). Besides, the High Authority approved the merger of the government-owned coal company Bergwerksgesellschaft Hibernia A.G. with the Mine Emscher Lippe. Thiesing, *supra* note 129, at 412. Furthermore, there is information on reconcentration tendencies of the former steel trust Gutehoffnungshütte A.G. 9 D.V. No. 3, at 24 (1955); 9 D.V. No. 25, at 25 (1955); 9 D.V. No. 31, at 29 (1955). The deconcentration of the Krupp trust by sale of important assets has not yet been carried out and further development cannot be foreseen. Hitherto, there was no reconcentration of Krupp companies. 9 D.V. No. 37, at 26 (1955); 9 D.V. No. 41, at 28 (1955); 9 D.V. No. 44, at 30 (1955); 10 D.V. No. 27, at 48 (July 7, 1956). For further information on the concentration movement, see *Hohe Behörde toleriert Zusammenschlüsse* (High Authority Tolerates Concentrations), 10 D.V. No. 21, at 10 (March 1956) and the issues of *Der Volkswirt* since August 1956; cf. Coenen, *Das Verhältnis des Entflechtungsrechts in Deutschland zum Montanunionvertrag* (The Relationship Between the Deconcentration Law in Germany and the Schuman Plan Treaty), 6 W.W. 89 (Germany 1956).

137. The big Ruhr coal selling cartel *Gemeinschaftsorganisation Ruhrkohle* (GEORG) and its six coal selling companies are no longer tolerated by the High Authority. In 1953 these companies became the successors of the German *Kohlenverkauf* (DKV) which was established in 1945 and had succeeded the German coal selling syndicates of 1919. See 1 HUBER 559-62; 2 *id.* at 790-92. Actually, all three organizations had a monopoly in selling the Ruhr coal. The new solution as approved by the High Authority under article 65 of the treaty provides for the dissolution of the GEORG organization into three independent coal selling cartels with a common bureau of limited powers. The detailed decisions of the High Authority are reprinted in 6 W.W. 368-84 (Germany 1956). See von Simson, *Zur Reorganisation des Kohlenhandels in der Montanunion*, 6 W.W. 133, 325 (Germany 1956). For a survey on other cartels and mergers approved by the High Authority, see von Simson, *Kartelle und Zusammenschlüsse in der Montanunion*, 5 W.W. 401 (Germany 1955).

138. On April 18, 1956, the federal administration approved a new "big bank" draft law which shall replace the present Law of March 29, 1952, [1952] B.G.B. pt. 1, at 427 (Germany). Under the draft law, a merger of the three legally independent successor institutions of each of the three big banks would be lawful. 6 W.W. 420-21 (Germany 1956). Among the three successor institutions of the former Dresdner Bank a profit and loss pooling agreement came into force on January 1, 1955. MOODY, *BANK AND FINANCIAL MANUAL* 1537 (1956). Some tendencies to reconcentration are discernible in the German movie industry: for example, the theater-owning U.F.A. Company, apparently, starts making movies again. See *German Screens*, *Barron's National and Financial Weekly*, Oct. 22, 1956, p. 19, col. 4. U.F.A. reconcentration plans after repeal of the present "movie" law (Law of June 5, 1953, [1953] B.G.B. pt. I, at 276 (Germany)) are also reported in 10 D.V. No. 28, at 8 (July 14, 1956).

139. For examples, see PRITZKOLEIT, *op. cit. supra* note 129, at 421-23. There also continues to exist the match monopoly of the German *Zuendwarenmonopolgesellschaft*, established by Law of Jan. 29, 1930, [1930] R.G.B. pt. I, at 11 (Germany). Initial attempts to dissolve it in the American Zone under military government were abandoned under the Allied High Commission. The match monopoly also has been called a compulsory cartel. Cf. Huber, *Der Streit um das Zuendwarenmonopol* (The Controversy on the Match Monopoly), 9 JURISTENZEITUNG 375 (Germany 1954).

process seems to have increased rather than decreased since World War II.¹⁴⁰ This is partly due to the recovery of German industry since 1948¹⁴¹ and partly due to the general tendencies toward large-scale enterprise. Considerable size is often considered essential for efficient operation in manufacture, distribution and research.

Under these circumstances, the early enactment of a German anti-trust law would seem desirable in order to prevent further concentrations through mergers that would create market-dominating enterprises.

THE GERMAN DRAFT LAW AGAINST RESTRAINTS OF COMPETITION IN THE LIGHT OF AMERICAN ANTITRUST LAW

In principle, the draft law is based upon the same public policy as Laws Nos. 56/78 and American antitrust law as interpreted in recent times by the American federal courts. In the opinion of the German administration, public interest is best safeguarded and promoted by a "free and social market economy" (*freie, soziale Marktwirtschaft*). This concept is not based upon the "laissez-faire" theory of the nineteenth century, nor does it recognize any justification for a more or less state-planned or directed economy. Instead, it recognizes the fact that, for the real functioning of the free and social market economy, there must be a legal framework in which free competition is promoted for the benefit of the public.

In other words, the concept of the free and social market economy is based upon the establishment of certain "rules of the game" which do not permit either unrestricted freedom of contract and association or direct government interference. The administration recognizes, however, that there are certain sections of the economy where, for various reasons, this new concept of free competition can no longer work satisfactorily under present economic and social conditions.¹⁴²

140. PRITZKOLEIT, *op. cit. supra* note 129, at 421-23. On a general tendency to concentration is reported in *Konzentration im Stillen*, 10 D.V. No. 35, at 6 (1956). With respect to the soap industry, see 9 D.V. No. 39, at 23 (1955). A recent concentration of the beer breweries of Berlin to two groups is reported in 5 W.W. 192 (Germany 1955). Regarding concentration tendencies in the tobacco industry, see 3 W.W. 227 (Germany 1953) and 6 W.W. 595 (Germany 1956).

141. For an English survey, see Tuchtfeldt, *The Development of the West German Economy Since 1945*, 1955 WEST GER. SOC. SCI. DIG. [hereinafter W.G.S.D.] 59 (Germany); cf. *Selected Bibliography on the Development of the German Economy Since 1945*, 1955 W.G.S.D. 89 (Germany).

142. See Official Explanation of the Federal Administration to the Draft Law (*Ämtliche Begründung zum Gesetzesentwurf*), DEUTSCHER BUNDESTAG DRUCKSACHE No. 3462, 1. Wahlperiode app. 1, at 16-17 (1949); DEUTSCHER BUNDESTAG DRUCKSACHE No. 1158, 2. Wahlperiode (1953) (hereinafter cited as Official Explanation), reprinted in part in 2 W.W. 460-62 (Germany 1952). A very condensed English version of the Official Explanation is published in ANTI-TRUST LAWS, A COMPARATIVE SYMPOSIUM 230-37 (University of Toronto Faculty of Law Symposium vol. 3, Friedmann ed. 1956).

Therefore, it has provided certain statutory exemptions where the proposed law is not to apply. This is true particularly:

- (i) for the federal post and railways, and certain other enterprises engaged in public traffic, insofar as their services and rates are regulated by statutes;¹⁴³
- (ii) for certain vertical and cartel agreements in the field of agriculture and forestry. However, the draft law sets up detailed limitations for the admissibility of such cartels;¹⁴⁴
- (iii) for certain governmental banks and for fiscal monopolies insofar as their services and rates are regulated by other statutes;¹⁴⁵
- (iv) in the field of public utilities, where the Federal Minister of Economics may issue statutory orders to the effect that the provisions on horizontal and vertical agreements in restraint of trade shall not apply to certain agreements enumerated in article 77.

Insofar as the treaty constituting the European Coal and Steel Community¹⁴⁶ contains special provisions, the draft law does not apply.¹⁴⁷

Horizontal Agreements (Cartels)

The Per Se Invalidity of Cartel Agreements

Section 1, articles 1-9 of the draft law deal in detail with cartels. Article 1 provides that:

"Agreements made by enterprises for a common purpose and understandings of associations of enterprises are null and void insofar as they are suited to influence, by restraints of competition, production or market conditions with respect to the trade in goods or commercial services. This does not apply if a permission has been granted."¹⁴⁸

The provision outlaws cartels in principle and therefore corresponds in substance with section 1 of the Sherman Act¹⁴⁹ and article I of the Laws Nos. 56/78.¹⁵⁰ It contains no rule of reason test. As the Sherman Act, the draft law prohibits a "contract" or "understanding."

143. Draft Law art. 74(1) 1.

144. *Id.* art. 75.

145. *Id.* art. 76, Nos. 1, 2.

146. See pp. 650-51 and notes 136, 137 *supra*.

147. Draft Law art. 76, No. 3. The special provisions are in Treaty arts. 3-5, 60, 65-66.

148. Pursuant to Draft Law arts. 2-5.

149. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952).

150. See p. 644 and note 95 *supra*.

Mere parallel action would not seem to be sufficient. The terms "conspiracy" and "combination" do not exist in German terminology. If there is no contract or understanding, there is no valid combination at all.

The principle of cartel prohibition is the cardinal point of the draft. It is based upon practical as well as theoretical considerations. The practical reasons for an incipient prevention of cartels have been explained already: the experiences made with a mere administrative control of cartels were not satisfactory.¹⁵¹

However, to prohibit cartels in principle means much more than merely replacing one legal technique with another and probably more effective one. The administration rather proceeds on a very different theoretical assumption. It does not recognize a distinction between "good" and "bad" cartels. They are all regarded as a danger per se for the re-established "free and social market economy."

The main arguments against cartels are: they restrict the best supply of the consumer with commodities by fixing artificial prices. They restrict production and prevent the inherent tendency of modern industry for intensified competition. Cartels destroy the selective function of free competition by actually subsidizing their economically weaker members in fixing prices on the basis of the high costs of the latter. Finally, cartels may acquire so much power that they are able to influence general policy in a manner detrimental to the public interest. They represent states within the state. Thereby, they destroy the balance of a social order which is based upon at least some degree of economic and social freedom (*herrschaftsfreie Sozialordnung*). That could help to make the country again ripe for a central planned economy (*Zentralverwaltungswirtschaft*).

For these reasons, mere control of cartels seems insufficient to the German administration, for such control would recognize cartels as a justified form of combination in a "free market economy." Therefore, a reasonable cartel policy cannot be restricted to the purely defensive protection against abuse of cartel power. Such policy must seek to prevent incipient cartels, and this is the basis of article 1.

However, even if one considers the principle of cartel prohibition the best solution, there remains the further question whether this solution should be applied without permitting exceptions. Are there no extraordinary cases where a cartel may be justified economically? Why should prohibition not be modified by the rule of reason? Since Germany lacks experience, it would seem to be of particular interest to

151. See pp. 639-41 *supra*.

consider what sixty-five years of administration of the Sherman Act show regarding this important question.

A review of the cases decided by the American federal courts reveals that the courts generally did not apply the rule of reason to cartel agreements. This development began in 1927 with *United States v. Trenton Potteries Co.*,¹⁵² wherein the Supreme Court held that the rule of reason test, as previously laid down for trusts,¹⁵³ was not also applicable to price-fixing agreements (cartels).¹⁵⁴ This view was subsequently reaffirmed in several cases, including *United States v. Socony Vacuum Oil Co.*,¹⁵⁵ the second *American Tobacco* case,¹⁵⁶ *United States v. Paramount Pictures, Inc.*¹⁵⁷ and *Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc.*¹⁵⁸ The only case in which the Supreme Court applied the rule of reason to a cartel is *Appalachian Coals, Inc. v. United States*,¹⁵⁹ involving a price cartel established under emergency circumstances in the coal industry.

However, American (and German) scholars by no means take the same unanimous view. On the contrary, the per se doctrine has been more and more criticized in recent years. It has been proposed to introduce the rule of reason in the statutes in order to prevent unjust per se decisions detrimental to the industry and public.¹⁶⁰ In the United States, the concept of "workable" or "effective" competition offered not only a new theoretical basis for these attacks, but also seeks

152. 273 U.S. 392 (1927).

153. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

154. "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, *whether reasonably exercised or not*, involves power to control the market and to fix arbitrary and unreasonable prices." 273 U.S. at 396-97. (Emphasis added.)

155. 310 U.S. 150 (1940).

156. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

157. 334 U.S. 131 (1948).

158. 340 U.S. 211 (1951).

159. 288 U.S. 344 (1933); see p. 628 *supra* and p. 657 *infra*.

160. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Anti-Trust Policy*, 50 MICH. L. REV. 1139, 1156-58 (1952). For the German draft law, the same proposal has been made, e.g., by Fikentscher, *Die neuere Entwicklung des amerikanischen Wettbewerbsrechts und der deutsche Kartellgesetzentwurf*, 17 Z.G.H.K. 1, 9 (Germany 1955). There are many cases and writings in Germany on the meaning and scope of the rule of reason as "imported" by the Allied antitrust law in Germany. See, e.g., Moehring, *Die Bedeutung der Rule of Reason im Kartellrecht*, 5 W.W. 89, with English summary at 98-101 (Germany 1955). Some courts and many writers interpret the rule of reason much broader than American courts and writers do, though they often cite American decisions. Thus, Allied Laws Nos. 56/78 are frequently interpreted more broadly than their much more general and less rigorous American counterparts. Accord, Kronstein, *Amerikanische Rechtsprechung zur Antitrustgesetzgebung* (American Cases Under the Antitrust Law), 4 W.W. 520, 525 (Germany 1954).

to provide certain yardsticks by which the individual case may be tested.¹⁶¹

The German administration does not neglect such ideas. However, it does not provide a general rule-of-reason clause in article 1, because, in the administration's view, such a clause could open the door to an interpretation which would possibly go far beyond the purpose of the law to maintain competition as far as possible. Thus, the administration selected another, narrower way to solve the problem: The law itself contains and determines in detail under which circumstances certain cartels may be permitted in individual cases for a limited time.

Exceptions for Crisis, Rationalization and Export Cartels

The draft law authorizes the Cartel Authority to approve, upon application, three kinds of cartel agreements in individual cases. Such permission may be granted for:

- (i) *crisis cartels*, i.e., with "regard to enterprises engaged in production, . . . if the applicant proves that, owing to a temporary decline of sales which is not due to a fundamental change in the demand, the arrangement is necessary to prevent the total closing down of plants of the participating enterprises or of considerable parts of such plants."¹⁶²
- (ii) *rationalization cartels*, i.e., "if the applicant proves that the arrangement serves to rationalize economic processes and is especially suited to raise considerably the efficiency or to foster considerably the economical operation of the participating enterprises from a technical, managerial or organiza-

161. See, e.g., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 315-42 (1955); Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); Clark, *The Orientation of Antitrust Policy*, 40 AM. ECON. REV. 93 (1950); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948); Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265 (1949); Carlston, *Antitrust Policy, A Problem in Statescraft*, 60 YALE L.J. 1073 (1951); Handler, *Antitrust—New Frontiers and New Perplexities*, 6 N.Y. CITY BAR ASS'N RECORD 59 (1951); Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N.Y.U.L. REV. 405 (1951); Oppenheim, *supra* note 160; MacDonald, *Product Competition in the Relevant Market Under the Sherman Act*, 53 MICH. L. REV. 69 (1954); Brewster, *Enforceable Competition: Unruly Reason or Reasonable Rules?*, 46 AM. ECON. REV. 482 (1956). See also Roper, *Wende in der U.S.-Antitrust Politik?*, 3 W.W. 22 (Germany 1953); Schwenck, *Der Wandel der Antitrust Rechtsprechung in den Vereinigten Staaten*, 3 W.W. 515 (Germany 1953); Fikentscher, *Die neuere Entwicklung des amerikanischen Wettbewerbsrechts und der deutsche Kartellgesetzentwurf*, 17 Z.G.H.K. 1 (Germany 1955). The per se approach has been attacked in Germany, e.g., by 1 HUBER 331-33. For a survey, see Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954, Eine kritische Übersicht*, 5 W.W. 205 (Germany 1955).

162. Draft Law art. 2.

tional point of view and to improve thereby the satisfaction of the demand." ¹⁶³

- (iii) *export cartels, i.e.*, "if the applicant proves that the proposed arrangement . . . is suited to protect or promote foreign trade, especially by equalizing on world markets the competitive position of participating enterprises in relation to that of competitors who are not subject to this law or corresponding legislation of another country. . . ." ¹⁶⁴

"No [such] permission . . . shall be granted for an arrangement which comprises the trade in goods or commercial services within the territory of the Federal Republic of Germany." ¹⁶⁵

By these provisions, the draft law introduces a rule of reason limited to three types of cartel agreements. Let us now see how the federal courts of the United States decided such special cases.

As to crisis cartels, the *Appalachian Coals* case shows that the Supreme Court, too, recognized—within narrow limits—crisis cartels. There an important group of coal producers had established a price cartel (in the form of a syndicate) in order to prevent complete ruin of their industry by a dangerous price war. Article 2 of the draft law would seem to have in mind such a factual emergency situation. It is the applicant who has to prove the emergency. Moreover, exemption, if any, cannot be granted for more than two years. However, upon application the permission may be renewed once, but only in exceptional cases. ¹⁶⁶

With respect to rationalization cartels, there appear to be no cases in the United States where the courts recognized this type of cartel purpose as reasonable. The reasons for this exception are stated in article 3 itself. Important restrictions are set up in article 4(1), which provides:

"No permission within the meaning of Article 3 shall be granted for agreements or for joint purchasing or marketing organizations (syndicates) by which prices are being established in a uniform manner, or, which result in uniform pricing methods, or, which limit the sales or production of the participating enterprises."

Thus, approved rationalization cartels may not result in price fixing or the establishment of sales or production quotas. It may be asked whether, in effect, such pure rationalization cartels can really work

163. *Id.* art. 3.

164. *Id.* art. 5(1).

165. *Id.* art. 5(2).

166. *Id.* art. 7(1), (2).

effectively. Besides, they may be permitted for three years only. Upon application, however, the permission may be repeatedly extended for another three years.¹⁶⁷ On the whole, this exception should not be overemphasized in its importance. Under the present narrow statutory limits it would probably not constitute a danger for effective competition.

Export cartels seem to be much more problematic. The main reason for permitting such cartels in individual cases is indicated by article 5 itself:¹⁶⁸ the existence of monopoly and organized competitors abroad which are not subject to German jurisdiction under the draft law¹⁶⁹ or corresponding foreign legislation. Thus, article 5 intends

167. *Ibid.*

168. See text at note 164 *supra*.

169. With respect to the applicability to foreign enterprises, the German draft law provides: "The Law shall apply to enterprises whose seat of management is abroad to the extent as the effects of their business activities extend into the Federal Territory, in particular, in so far as they maintain, within the Federal Territory, statutory representatives [*gesetzliche Vertreter*], attorneys [*Bevollmaechtigte*] or agents for the purpose of participating in the markets within the Federal Republic." Draft Law art. 73(2). The provision does not expressly mention foreign cartels. However, article 73(2) would seem to apply also to pure foreign combinations in restraint of competition, for the individual members of such combinations (cartels) are "enterprises" within the meaning of the law. Therefore, the proposed law will apply at least insofar as such members of foreign cartels carry on the activities agreed upon in the cartel agreement, and insofar as the effects of these activities extend into the federal territory. In other words, such activities of foreign cartels would be illegal per se under article 1.

Article 73(2) does not expressly answer the question whether such activities of foreign cartels must have direct effects upon the commerce within the federal territory or whether indirect effects, too, would be sufficient. However, the wording of article 73(2), in particular the examples enumerated therein as well as the difficulties which would arise from the enforcement of the proposed law abroad (conflict with the local rule of law) and political considerations (cooperation and friendship with foreign countries), would seem to indicate that the draft law will only apply as to direct consequences of foreign activities of enterprises and combinations upon commerce within the federal territory. For example, a foreign cartel which would directly limit imports into the Federal Republic would seem to fall within the scope of the proposed law. On the other hand, if the Argentine meat producers established a combination for the purpose of raising considerably the prices of meat exported to Germany, the draft law would seem not to be applicable. Such action would be carried on within the territorial limits of Argentina and scarcely have direct legal effects extending into the federal territory, although it is obvious that the economic effects are the same as if the action were carried on by an Argentine import cartel participating in the German meat market but also established abroad.

Such an interpretation would correspond with the legal treatment of purely foreign combinations in the United States. While foreign cartels directly limiting imports into the United States fall within the scope of the antitrust laws, *United States v. Aluminum Co.*, 148 F.2d 416, 442-48 (2d Cir. 1945); *United States v. General Electric Co.*, 82 F. Supp. 753, 890-91 (D.N.J. 1949), they are not applicable to indirect restraints upon the commerce of the United States, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951); *United States v. Aluminum Co.*, *supra* at 443, *General Milk Co.*, 44 F.T.C. 1355, 1416 (1947); *Hale & Hale, Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas*, 31 TEXAS L. REV. 493, 531-35 (1953) and writings cited therein. See Note, *Extraterritorial Application of the Antitrust Laws*, 69 HARV. L. REV. 1452 (1956).

However, one important difference may be stated: in the United States, the foreign actors must intend to affect the commerce of the United States, *United States v. Aluminum Co.*, *supra* at 424; *Hale & Hale*, *supra* at 533 and authorities cited therein, whereas article 73(2) of the German draft law does not require any intent.

to enable German manufacturers and producers to enter the world markets on more equal terms with their organized foreign competitors and customers.

The Official Explanation of the administration¹⁷⁰ indicates that article 5 has been introduced as a parallel to the Webb-Pomerene Act.¹⁷¹ Therefore, the interpretation given to this act by the American federal courts is of particular interest.

Section 2 of the Webb-Pomerene Act provides that the Sherman Act shall not apply to an association formed for the sole purpose of engaging in export trade, provided that no restraint of export trade results adversely to the interest of any domestic competitor and provided also that there is no effect upon prices within the United States. Similar theories underlie the act and article 5 of the German draft law, *i.e.*, "that the existence of monopsony abroad justifies an export monopoly because bargaining between those two units will come nearer to achievement of free-market equilibrium prices than will attempts by American producers to act singly."¹⁷² The Webb-Pomerene Act, furthermore, regulates how such export cartels shall be formed and subjects them to a general surveillance of the Federal Trade Commission. However, unlike the German draft law, the act does not prescribe prior approval of export cartels by the FTC.

A review of the cases decided by the federal courts of the United States shows that the act has been interpreted very restrictively. In *United States v. Minnesota Mining & Mfg. Co.*,¹⁷³ while the district court indicated that an agreement by the manufacturers of a particular industry to export exclusively through a jointly-organized export company on a basis of assigned quotas was authorized by the Webb-Pomerene Act, the court held that a combination of American manufacturers controlling four-fifths of the export trade in coated abrasives to establish jointly-owned factories abroad was *not* "an association entered into for the sole purpose of engaging in export trade" under section 1 of the act.¹⁷⁴ Furthermore, the court held that an export

170. See note 142 *supra*.

171. 40 STAT. 516 (1918), 15 U.S.C. §§ 61-65 (1952); see Hale & Hale, *supra* note 169, at 510-23 and authorities cited therein; Jones, *The Webb-Pomerene Act*, J. POL. ECON. 754 (1920).

172. Hale & Hale, *supra* note 169, at 514-15, citing *Hearings Before the Temporary National Economic Committee*, 76th Cong., 2d Sess. pt. 20, at 10935 (1939). Hale and Hale then proceed to criticize this theory of countervailing power in a balanced-force polity.

173. 92 F. Supp. 947 (D. Mass. 1950).

174. For other cases not involving the question of the applicability of the Webb-Pomerene Act, but concerning dispersion of American firms abroad, see *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (agreements dividing territories and fixing prices between American corporation and foreign subsidiaries created jointly with native competitors already established in the field held to violate Sherman Act);

cartel as first described was unlawful and not covered by the Webb-Pomerene Act when used in *conjunction* with a program whereby the export company chose not to export to areas where jointly-owned foreign factories could supply foreign-made abrasives at a greater profit.¹⁷⁵

Apart from that, a Webb-Pomerene cartel may undertake no activities which limit the opportunities of independent exporters. Thus, an agreement by the members of such an export cartel, if they are producers, to sell exclusively to the cartel is not legally binding. The agreement must leave the members free to sell to independent exporters.¹⁷⁶

These decisions would seem valuable in interpreting article 5 of the German draft law. Unfortunately, however, the wording of article 5 is not as clear and exact as that of section 2 of the Webb-Pomerene Act, although the latter also leaves many questions open. While section 2 of the act precisely defines the term "export trade," article 5 of the draft merely reads: "that the arrangement is suited to protect or promote foreign trade. . . ." It is thus quite ambiguous and might open the door for an interpretation much broader than the Webb-Pomerene Act would permit by its narrow wording.

It even would seem questionable whether article 5 prohibits or permits exemptions for *import* cartels, for the term "foreign trade" may well include export as well as import. In any event, paragraph (2) of article 5 prohibits exemptions for arrangements which comprise the trade within the territory of the republic. In the United States, it is now settled that a cartel among importers will be tested by the same standards as those applied by the courts to domestic combinations.¹⁷⁷

With respect to *international* cartels, further questions arise. It is true, article 1 of the German draft implicitly prohibits in principle the participation of German enterprises in international cartels. It corresponds, therefore, with recent American decisions which hold it illegal

United States v. Imperial Chemical Industries, Inc., 100 F. Supp. 504 (S.D.N.Y. 1951) (duPont's joint creation with non-native foreign investor of subsidiaries abroad held to constitute territorial division and illegal restraint of trade); Hale & Hale, *supra* note 169, at 526-28.

175. The Federal Trade Commission has reached a similar result in General Milk Co., 44 F.T.C. 1355, 1419 (1947).

176. United States v. United States Alkali Export Ass'n, 86 F. Supp. 59, 74-76 (S.D.N.Y. 1949); Phosphate Export Ass'n, 42 F.T.C. 555, 841-42, 843, 847 (1946); American Export Door Corp. v. John A. Gauger Co., 154 Wash. 514, 524, 283 Pac. 462, 465 (1929); Hale & Hale, *supra* note 169, at 521-22.

177. United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. General Dyestuff Corp., 57 F. Supp. 642, 649 (S.D.N.Y. 1944); Hale & Hale, *supra* note 169, at 504-10.

for producers in the United States to join with competitors abroad in dividing markets, fixing prices, and doing other restrictive activities.¹⁷⁸

However, article 5 of the draft law does not reveal whether an exemption granted under this provision would enable German export cartels or their members to join international cartels. It would seem that article 5 does not justify such exception to the general policy of the proposed law, in view of the limited purpose which article 5 pursues.¹⁷⁹ International trade should not be dominated by private industrial governments. Friendship and cooperation among the peoples of the world can scarcely be established as long as special interests determine the exchange of goods. International cartels to "promote or protect foreign trade" (if that purpose may ever be really performed by an international cartel which would seem to have different purposes) may easily have reactions on the domestic markets detrimental to the public interest. This is true when the producers of a country are allocated restricted quotas or are wholly prevented from participating in foreign markets. It is equally obvious that it should not be left to international cartels to determine the conditions upon which foreign goods may be imported in the domestic markets.

Several further reasons for this view are given in *United States v. United States Alkali Export Ass'n*.¹⁸⁰ There it was held that an agreement between a Webb-Pomerene organization and foreign competitors to share markets in fixed percentages and at established prices was illegal under section 1 of the Sherman Act, and that the Webb-Pomerene Act did not cover such joinder.¹⁸¹ Thus, in the United States the law today is that no export cartel permitted under the Webb-Pomerene Act may join an international cartel.¹⁸²

On the whole, it would seem that too much is left to the administration of article 5 by the Cartel Authority. Only a restrictive interpretation of this provision, considering carefully the basic policy and purpose underlying the proposed law, may prevent the inherent dangers arising from export cartels of whatever type and the repercussions on domestic trade if there are too many of them.

178. *United States v. General Electric Co.*, 80 F. Supp. 989, 1009-16 (S.D.N.Y. 1948); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); *United States v. General Dyestuff Corp.*, 57 F. Supp. 642, 647 (S.D.N.Y. 1944); Hale & Hale, *supra* note 169, at 538-41.

179. *Contra*, 1 HUBER 401 (without giving reasons).

180. 86 F. Supp. 59, 65-71 (S.D.N.Y. 1949).

181. *Id.* at 65-71, 74; see *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 964 (D. Mass. 1950).

182. Hale & Hale, *supra* note 169, at 542; see authorities cited in *id.* at 542 n. 180.

In addition to the specific limitations provided in the proposed statute for export, rationalization and crisis cartels subject to a possible exemption, the following *general provisions* apply to all of them. The agreement must be in writing.¹⁸³ Exemptions may be granted subject to limitations, conditions and requirements.¹⁸⁴ They may be revoked ex officio or be amended under certain circumstances.¹⁸⁵ With the approval of the Cartel Authority, any participant of the cartel agreement may terminate it for important reasons (reasons of weight), "especially if the terminating party's freedom of economic action is being unreasonably restricted or if its fundamental right to equal treatment with other parties is impaired."¹⁸⁶ Approved cartels are prohibited from impairing the freedom of economic action of a nonparticipating enterprise by restraining it unfairly from engaging in business activities which are usually open to similar enterprises or by treating it differently from similar enterprises.¹⁸⁷ Approved cartels or individual enterprises are also prohibited from coercing an enterprise to become a member of a cartel.¹⁸⁸

Finally, it is unlawful for an approved cartel to express or disseminate recommendations as to price fixing or price-fixing methods, limitations on production or sales, or discriminatory activities against other enterprises.¹⁸⁹ Thus, every approved crisis, rationalization and export cartel is subject to a considerable control exercised by the Cartel Authority.¹⁹⁰

Vertical Agreements

Section 2, articles 10-16 of the draft law regulates another kind of restrictive business practice: the so-called vertical agreement in restraint of competition, *i.e.*, all kinds of individual agreements between members of different trade levels (*e.g.*, manufacturer and wholesaler, wholesaler

183. Draft Law art. 27.

184. *Id.* art. 7(3).

185. *Id.* art. 7(4).

186. *Id.* art. 8.

187. *Id.* art. 23(1).

188. *Id.* art. 23(2).

189. *Id.* art. 24(1). For exceptions, see *id.* art. 24(2). With respect to the illegality of such practices in the United States, see *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *Tag Mfrs. Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949).

190. *Cf.* Official Explanation, reprinted in 2 W.W. 466-67 (Germany 1952). Recently, the Economic Committee of the German Bundestag (lower house) proposed some amendments to the provisions on crisis, rationalization and export cartels. See 5 W.W. 784 (Germany 1955); 6 W.W. 60-61 (Germany 1956); 6 W.W. 147-49 (Germany 1956). However, these provisions are being discussed anew by the Committee since January 1957. See note 21 *supra*.

and retailer) as contrasted with collective agreements between members of the same level of business (*e.g.*, producers) which are also called cartels and are not subject of section 2 of the proposed law.

The draft law distinguishes between two groups of vertical agreements. Resale price maintenance agreements and agreements concerning acquisition or use of patents or registered designs which impose restrictions upon the assignee or licensee beyond the scope of the grant are unlawful *per se*.¹⁹¹ Other vertical agreements (tying clauses, supply and requirements agreements, exclusive arrangements) may be invalidated by the Cartel Authority from case to case to the extent that they *unreasonably* restrict the freedom of economic action of one party to the agreement or of any other enterprise.¹⁹²

Resale Price Maintenance and Restrictive Patent Agreements

The regulation provided in article 10 includes particularly resale price-maintenance agreements. They are illegal *per se*. Article 10 is intended to prevent *ipso iure* any abuse of the economic power of one party over the other. Such restrictive practices are often defended under the principle of freedom of contract. But actually it is precisely this freedom which may be easily abused by a more powerful manufacturer or producer to restrict freedom of economic action and contract of the weaker party to the agreement. The latter's freedom to contract is no real freedom if he is under economic pressure.

The regulation of article 10 corresponds in substance to the attitude taken by the courts of the United States. They hold price-fixing agreements illegal *per se* whether horizontal or vertical.¹⁹³

The draft law, however, grants one important statutory exemption from the general prohibition of resale price-maintenance agreements: individual resale price-maintenance agreements on *branded articles* would be lawful if they are competing with similar goods of other producers or dealers.¹⁹⁴ Following an old tradition, the draft law also permits resale price-maintenance with respect to *copyrighted articles*, such as books.¹⁹⁵

191. Draft Law arts. 10, 15.

192. *Id.* art. 13.

193. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143-44 (1948); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 719-21 (1944); cases discussed at p. 655 *supra*. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) is the only case where the Supreme Court applied the rule of reason to vertical price-fixing agreements. The case was decided six weeks before *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), where the court introduced the rule of reason as to trusts.

194. Draft Law art. 11(1) 2. In *id.* art. 11(2) is given a definition of the term "branded article."

195. *Id.* art. 11(1) 2.

In effect, the exemption of resale price maintenance of branded articles again substantially corresponds to the present legal situation in the United States. Since 1931, forty-five of the states enacted so-called fair trade laws which permit resale price maintenance as to branded articles with few differentiations.¹⁹⁶ By the Miller-Tydings Act¹⁹⁷ and the McGuire Act,¹⁹⁸ the Sherman Act and the Federal Trade Commission Act¹⁹⁹ have been amended in order to legalize fair trade in interstate commerce to the extent that the state fair trade laws permit resale price maintenance in the respective states.

But there is one difference between the two systems: the draft law does not contain the famous non-signer clause. In Germany, individual resale price-maintenance contracts will be necessary.

Apart from that, resale price maintenance seems to be as controversial in Germany as it is in the United States. The arguments pro and con are the same. Fair trade, it is contended, prevents "ruinous" price competition. It protects the product's good will owned and introduced by the producer through product quality and advertising.²⁰⁰ Besides, and even more important under modern distribution methods, the small retailer must be protected against discount houses, department stores and others. On the other hand, prohibition of resale price maintenance is demanded in order to re-establish price competition on the dealers' level and thus to promote progress in distribution, to prevent excessive mark-ups and unreasonable expenses for advertising.²⁰¹

As to mark-ups, the German draft law introduces a provision not existing in the fair trade laws. Article 12 authorizes the Cartel Authority to invalidate ex officio resale price maintenance agreements if mark-ups are agreed upon "which are unjustified by market conditions, especially in relation to mark-ups on similar but not price-fixed goods." The provision is based upon experience in the United States where mark-ups of fair-traded articles have often been unreasonably high.²⁰² If mark-ups are found to be unreasonable, the Cartel Au-

196. Only Missouri, Vermont, Texas and the District of Columbia did not enact fair trade acts. However, in the last few years, the highest courts of nine states held their fair trade laws—wholly or partially—unconstitutional.

197. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

198. 66 STAT. 631 (1952), 15 U.S.C. § 45 (1952).

199. 38 STAT. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1952).

200. Cf. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

201. *E.g.*, FTC, REPORT ON RESELL PRICE MAINTENANCE (1945); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 149-55 (1955). As to the situation in Germany, see, *e.g.*, ROPER, VERTIKALE PREISBINDUNG BEI MARKENARTIKELN (Resale Price Maintenance of Branded Articles) (1955).

202. Official Explanation art. 12, No. 1.

thority, under article 12, does not fix the proper mark-up, but issues an order to cease and desist from the established resale price maintenance system.²⁰³

Agreements concerning the acquisition or use of patents or registered designs (*Gebrauchsmuster*) are void under article 15 of the draft law if they:

"impose upon the acquirer or licensee any restrictions in his business conduct which go beyond the legal substance of the protected privilege (*Schutzrecht*); restrictions pertaining to the type, scope, quantity, territory or period of exercise of the protected privilege shall not be deemed to exceed its legal substance."²⁰⁴

Article 15(1) would seem to prevent a patentee generally from extending his privilege beyond the scope of the grant in cases in which he could not do so in the United States.²⁰⁵ Since this prohibition is contained in the proposed antitrust law, it can be assumed that it is based primarily on antitrust grounds rather than on the broader ground of patent abuse.²⁰⁶ Nevertheless, it seems questionable whether it would be necessary to prove the anti-competitive effect of an agreement so long as it was shown to exceed the scope of the grant.

Corresponding to American law, article 15(1) permits territorial subdivisions²⁰⁷ but, in addition, includes some exceptions concerning the manner, scope and quantity of the licensee's use of his privilege which are not quite clear. Additional difficulties might be created by the fact that article 15 applies not only to licensees but also to assignees or "acquirers," as the law puts it. Does it mean, as the article seems to say, that the assignee of all rights under the patent for the entire territory could be limited, for example, concerning quantity or quality of the products he manufactures under the assigned patent? Could restrictions be imposed on him regarding his terms of sale?

Section 2 of article 15 makes section 1 expressly inapplicable to:

- 1) restrictions imposed on licensee or assignee to the extent and so long as they are justified by the patentee's interest in a technically unobjectionable use of the patent;

203. *Id.* No. 2.

204. Draft Law art. 15(1).

205. *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944).

206. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942); *B. B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942) and earlier cases such as *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

207. See *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121 (9th Cir. 1954).

- 2) fixing the prices of the licensee²⁰⁸ as well as the assignee;
- 3) agreements for the exchange of know-how and grant-backs of improvement and "parallel" (related) patents,²⁰⁹ provided that the obligation is not exclusive;
- 4) express agreements against challenging the patent's validity.²¹⁰

A licensor, of course, has a justified interest in supervising, to some extent, the technical quality of the licensee's product or services; but it cannot be foreseen to what extent section 2(1) may furnish arguments for certain tying arrangements.²¹¹ The article leaves in doubt, for example, the legality of package licensing²¹² and of cross-licensing and mutual price-fixing, particularly in the case of dominating companies or industry-wide pools.²¹³ Interestingly, article 16 makes article 15 applicable, *mutatis mutandis*, to unpatented secret processes.²¹⁴

Tying Clauses and Exclusive Dealing Agreements

These types of vertical agreements are not declared illegal *per se* by the draft law. Article 13 empowers the Cartel Authority to invalidate such agreements either on petition of a party to the agreement or *ex officio*, if the arrangement unreasonably (unduly) restricts the economic freedom of one of the parties or of any other enterprise.

In the United States, such agreements may fall within the scope of section 3 of the Clayton Act²¹⁵ and sections 1 and 2 of the Sherman Act.

208. This, presumably, would establish for Germany the rule of *United States v. General Electric Co.*, 272 U.S. 476 (1926) and eliminate doubts created in the United States by implications from *United States v. Line Material Co.*, 333 U.S. 287 (1948) and *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

209. *Cf. Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947).

210. *Query*, whether a licensee or assignee could nevertheless challenge the validity of the patent if his promise not to do so were part of an otherwise illegal license or assignment contract. *Cf. Mac Gregor v. Westinghouse Electric & Mfg. Co.*, 329 U.S. 402 (1947); *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947).

211. *Cf. International Business Machines Corp. v. United States*, 298 U.S. 131 (1936).

212. *Cf. Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950).

213. *Cf. Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

214. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *cf. Foundry Services, Inc. v. Beneflüt Corp.*, 110 F. Supp. 857 (S.D.N.Y.), *rev'd on other grounds*, 206 F.2d 214 (2d Cir. 1953).

For a detailed study of the whole field, see LIEBERKNECHT, *PATENTE, LIZENZVERTRÄGE UND VERBOT VON WETTBEWERBSBESCHRÄNKUNGEN, EINE VERGLEICHENDE DARSTELLUNG DER RECHTSLAGE IN DEUTSCHLAND, GROSSBRITANNIEN UND DEN VEREINIGTEN STAATEN* (Patents, License Agreements and Prohibition of Restraints of Competition, a Comparative Study on the Legal Situation in Germany, Great Britain and the United States) (1953). See also Lieberknecht, *Patentverträge im deutschen Kartellgesetzentwurf*, 3 W.W. 142 (Germany 1953) (with English summary).

215. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).

A typical example of a tying agreement is the case of *International Salt Co. v. United States*.²¹⁶ International owned two patents on two machines for utilization of salt products. Each of these machines was under leases requiring the lessees to purchase from International all unpatented salt and salt tablets consumed in the leased machines. The Supreme Court ruled that under both the Sherman Act and section 3 of the Clayton Act the arrangement was illegal, since ". . . it is unreasonable, *per se*, to foreclose competitors from any substantial market. . . ." ²¹⁷ Thus, the "decision, at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences. . . ." ²¹⁸

In *Times-Picayune Publishing Co. v. United States*,²¹⁹ however, the Supreme Court upheld a tying agreement for newspaper advertising as not violative of the Sherman Act.²²⁰ The defendant, publisher of the only morning daily newspaper in New Orleans and one of the two evening papers, had introduced a unit system requiring that classified and national display advertisements be placed in both papers. The Court interpreted *International Salt* and other earlier cases as holding that a tying agreement is a *per se* violation of section 1 of the Sherman Act whenever the seller enjoys a monopolistic position in the market for the "tying" product *and* if a substantial volume of commerce in the "tied" product is restrained.²²¹ The Court found that the morning and evening newspapers were not differentiated products and, therefore, operated in the same market. Thus, it held that the *Times-Picayune's* control of forty per cent of the advertising lineage was not sufficient to constitute the market control necessary for a violation of section 1.

The Court also stated that the system lacked the "common core of the adjudicated unlawful tying arrangements," the "forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the

216. 332 U.S. 392 (1947).

217. *Id.* at 396. Although the case involved the tying of unpatented articles to patented machines, it would seem not to fall within the scope of the *per se* prohibition of article 15 of the proposed law, discussed at pp. 665-66 *supra*. Article 15 covers only "agreements concerning the acquisition or use of patents" (in other words of the patent right), but not agreements concerning the acquisition or use of patented articles. However, it is doubtful that agreements concerning the acquisition or use of patents should be more objectionable (namely, null and void *per se*) than agreements concerning the acquisition of use of patented articles which are merely subject to the rule of reason test of article 13. *Accord*, LIEBERKNECHT, *PATENTE, LIZENZVERTRÄGE UND VERBOT VON WETTBEWERBSBESCHRÄNKUNGEN, EINE VERGLEICHENDE DARSTELLUNG DER RECHTSLAGE IN DEUTSCHLAND, GROSSBRITANNIEN UND DEN VEREINIGTEN STAATEN* 302 (1953).

218. *Standard Oil Co. v. United States*, 337 U.S. 293, 304 (1949).

219. 345 U.S. 594 (1953).

220. The case was not brought under § 3 of the Clayton Act because the Government elected to proceed not under the Clayton but the Sherman Act. *Id.* at 609.

221. *Id.* at 608-09.

'tied' market."²²² This view approaches the attitude taken by the German draft law, which stresses the economic freedom of both parties to the arrangement and of any other competitor or enterprise.

Dominant position in the market for the "tying" product, however, and restriction of a substantial volume of commerce in the "tied" product are the Court's dual standards for a Sherman Act violation. But, as to "the narrower standards expressed in section 3 of the Clayton Act," the Court observed by way of dicta that *either* of these tests is sufficient "because from either factor the requisite potential lessening of competition is inferred."²²³ Thus, as to section 3 of the Clayton Act, the Court corresponds with the holding in *International Salt* in substance and, in addition, emphasizes the importance of the question whether there was buyer coercion.

With regard to exclusive dealing agreements, Justice Frankfurter introduced in the *Standard Stations* case²²⁴ the so-called quantitative substantiality doctrine. In this case, Standard had entered into contracts with many independent gasoline dealers under which they had to purchase from Standard all their requirements of one or more products. The issue was whether the requirement of showing that the effect of the agreements "may be to substantially lessen competition" (section 3 of the Clayton Act) may be met simply by proof that a substantial portion of commerce was affected (quantitative analysis), or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish (qualitative analysis).

The Court recognized that requirements agreements, unlike tying clauses, may well be of economic advantage to buyers as well as to sellers and indirectly to the consuming public.²²⁵ However, for practical difficulties in the application of the qualitative test, the Court decided in favor of the quantitative substantiality doctrine.²²⁶ In result, this decision comes very close to the holdings in *International Salt* and *Times-Picayune* that tying agreements restricting a substantial volume of commerce in the "tied" product are illegal under section 3 of the Clayton Act.

On the whole, section 3 of the Clayton Act and the attitude taken by the Supreme Court as to tying clauses and exclusive dealing arrangements would seem not to correspond with the regulation provided

222. *Id.* at 614.

223. *Id.* at 608-09. Thus, unlike in the *International Salt* case, the Court drew a distinction between the scope of the two acts.

224. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

225. *Id.* at 305-08.

226. *Id.* at 308-14; *accord*, *Richfield Oil Corp. v. United States*, 343 U.S. 922 (1952).

in article 13 of the German draft law. The test in the latter is not whether a substantial volume of commerce has been or probably will be foreclosed by such agreements; the decisive factor is rather whether such arrangement unreasonably restricts the freedom of economic action of one party to the agreement or of a competitor. Thus, article 13 introduces the rule of reason and thereby looks only to the individual enterprise and its freedom from economic coercion as buyer or seller, while section 3 of the Clayton Act requires that the effect of the arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." No such effect is necessary under article 13.

The German regulation apparently is based upon the assumption that, if there is no unreasonable restriction of freedom of economic action by such arrangement, there will be no substantial lessening of competition. If this is correct, it is sufficient to prove the unreasonably coercive effect of the tying clause or exclusive dealing agreement. Then, it is not necessary to prove also that the effect of such arrangement may be to substantially lessen competition. Thus, the German draft law would avoid the difficulties arising from the interpretation and application of this rule which led to the questionable quantitative substantiality test, and yet arrive at similar results. Obviously it is easier to decide whether an individual arrangement unduly restricts the economic freedom of one of the parties or of a competitor than to determine whether it may substantially lessen competition. Apart from that, the rule of reason test as to freedom of economic action may secure an appropriate case by case examination, excluding all per se tendencies²²⁷ and also covering, perhaps, cases where there is economic coercion but no substantial lessening of competition. For these reasons, the German solution would seem preferable.

Enterprises Which Dominate the Market

Competition may be restricted not only by combination of several independent enterprises, but also by a single enterprise. While the draft law in principle outlaws horizontal combinations per se—whether or not they constitute monopolies—single enterprises already existing²²⁸ are only subject to administrative control if they

227. See dissenting opinion of Justice Jackson in *Standard Oil Co. v. United States*, 337 U.S. 293, 321-23 (1949) and the remarkable dissenting opinion of Justice Douglas, *id.* at 315.

228. As to the establishment of future monopoly enterprises by means of merger, another regulation is provided. See pp. 676-82 *infra*.

(i) are in a position to dominate the market, and (ii) abuse this power by certain restrictive activities.

An enterprise which dominates the market is defined by article 17 as one that:

"is not faced by any substantial competition for any type of goods or commercial services, especially if an enterprise is in a position, by reason of the share of the market held by it, to determine the production of a particular commodity or the prices and terms for a particular commodity or commercial service, without having to take competitors into serious consideration and to influence thereby the market tangibly."²²⁹

This definition of the term "enterprise which dominates the market" would seem to correspond in substance with the definitions of monopoly as laid down in recent decisions of the courts of the United States, particularly in the first and second *Alcoa* cases.²³⁰ "In considering the matter of monopoly power, two ingredients are of outstanding significance: *viz.*, the power to fix prices and the power to exclude competitors."²³¹ The first "ingredient" corresponds exactly to the German definition. The second is undoubtedly implicitly included.

In addition, the federal courts require that there be shown "a purpose or intent to exercise the power . . ." which "is present if the acquisition or retention²³² of the power comes about as a consequence of defendant's conduct or business arrangements."²³³ Such an intent, however, is not required by article 17 of the draft law. Article 17 does not introduce the term "monopolize, or attempt to monopolize," but only speaks of "enterprise which dominates the market," whether or not intentionally. Furthermore, the draft law contains no criminal provision and thus need not require an intent. The considerable difficulties which may arise from the proof of intent to monopolize, therefore, are avoided under the draft law.

It is not clear whether *oligopoly* enterprises, too, fall within the scope of article 17. Therefore, the federal administration proposed an additional clause which expressly includes oligopoly enterprises in the regulation of article 17. This amendment to article 17 reads:

229. Draft Law art. 17(1).

230. *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945) and *United States v. Aluminum Co.*, 91 F. Supp. 333 (S.D.N.Y. 1950).

231. *Id.* at 342; see *American Tobacco Co. v. United States*, 328 U.S. 781, 809-14 (1946).

232. Not the abuse. See Draft Law art. 17(1) 1-3.

233. *United States v. Aluminum Co.*, 91 F. Supp. 333, 342 (S.D.N.Y. 1950); see *American Tobacco Co. v. United States*, 328 U.S. 781, 809-14 (1946).

"Two or more enterprises which cooperate by parallel behavior so as to affect the market substantially shall also be deemed to dominate the market within the meaning of article 17."²³⁴

By this definition, the scope of article 17 would seem to be considerably broadened.²³⁵ Today, oligopolies do exist in many important branches of industry, while monopoly occurs rarely. Therefore, it seems very important to prevent oligopoly enterprises from abusing their power.

The difficult problem of the determination of the relevant market will be considered later in connection with the provisions on mergers.²³⁶

As to the legal consequences of market domination, article 17 provides that the Cartel Authority may prohibit such enterprise from:

- "1. . . . demanding or offering, in connection with agreements on such goods or commercial services, prices established under abuse of its dominating position;
- "2. . . . applying, in connection with agreements on such goods or commercial services, terms and conditions established under abuse of its dominating position;
- "3. . . . making the conclusion of agreements on such goods or commercial services dependent upon the purchase by the other participating party of goods or services which technically or according to trade customs do not belong together."

The essence of this provision is that certain abuses of monopolies and oligopolies can be prohibited, but that monopolies cannot be dissolved and can be prevented only if they are achieved through mergers.²³⁷

Again, a review of the position taken by the courts of the United States as to the monopoly problem may be useful in predicting how the German regulation may work and whether it will be sufficient to

234. For the German text of the clause, see DEUTSCHER BUNDESTAG DRUCKSACHE No. 1158, 2. Wahlperiode app. 3, at 81 (1953), reprinted in 5 W.W. 313-14 (Germany 1955).

235. The Bundesrat (upper house) proposed a different oligopoly clause. It reads: "(2) Two or more enterprises shall also be deemed to dominate the market, if, for factual reasons, substantial competition does not exist between them and if, as a whole, they are within the meaning of Para.(1)."

For the German text of this proposal, see DEUTSCHER BUNDESTAG DRUCKSACHE No. 1158, 2. Wahlperiode app. 2, at 66 (1953). For several reasons the oligopoly clause of the administration seems to be preferable. See Rasch, *Der Begriff des Oligopols im Kartellgesetzentwurf*, 6 W.W. 3 (Germany 1956); see Ohm, *Oligopolistische Preisführerschaft und Kartellgesetz*, 5 W.W. 20 (Germany 1955).

The Economic Policy Committee of the Bundestag (lower house) worked out the following oligopoly clause which represents a certain combination of the clauses of the administration and the Upper House: "(2) Two or more enterprises shall also be deemed to dominate the market (a) if, for factual reasons, substantial competition does not exist between them, or (b) if, by parallel behavior, they substantially influence the market." For the German wording, see 6 W.W. 271 (Germany 1956).

236. See pp. 679-81 *infra*.

237. See Draft Law art. 18, discussed at pp. 676-82 *infra*.

fight monopoly successfully. Such a review reveals considerable differences between the two systems.

The Supreme Court originally held that: "The law, however, does not make mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power."²³⁸ To this extent the German draft law fully corresponds with the interpretation given to the Sherman Act by the Supreme Court.

However, the situation has changed since 1932, when Justice Cardozo said in *United States v. Swift & Co.*:²³⁹ "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."²⁴⁰

In the first *Alcoa* case,²⁴¹ Judge Learned Hand for the Court of Appeals for the Second Circuit went still further in saying:

"[I]t is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit. The Act has wider purposes. . . . [Congress] did not condone 'good trusts' and condemn 'bad' ones; it forbade all. . . . Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the con-

238. *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927). See also *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920); cf. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), where the abuse of their dominating power by the oil and tobacco trusts and not their mere size led to dissolution. The activities of the two trusts about correspond to their acts prohibited in article 17(1) 1-3 of the German draft law.

239. 286 U.S. 106 (1932).

240. *Id.* at 116.

241. *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945), finally decided under a statute authorizing the circuit court of appeals to render a decision "in lieu of a decision" by the Supreme Court, because there was no quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on its merits. 58 STAT. 272 (1944) (later amended by 62 STAT. 989 (1948), 15 U.S.C. § 29 (1952)).

demnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.”²⁴²

This is exactly the argument which could be made against the different treatment of cartels and single monopoly enterprises by the German draft law. Is it not economically and legally unjustified to declare unlawful per se a monopoly achieved by agreement²⁴³ and at the same time to permit a monopoly established by a single enterprise by only preventing it from abusing its power?

It seems to me that the answer depends upon what one puts the stress. If one looks chiefly on the economic result in terms of market structure, we must certainly agree with Judge Hand, and a different treatment of monopoly cartels and single enterprises would hardly be justified. On the other hand, if one considers chiefly the origin and the actual behavior of a cartel as contrasted with a single enterprise, important factual differences may often be stated.

A cartel is established by its members with the clear intent and for the common purpose to influence the market by regulating competition exclusively to the common benefit of the cartel members. Accordingly, the cartel works for this purpose.

A single enterprise, however, need not necessarily acquire a monopoly by restrictive activities regulating competition. Judge Hand himself recognizes this in saying:

“It does not follow because ‘Alcoa’ had such a monopoly, that it ‘monopolized’ the ingot market; it may not have achieved monopoly; *monopoly may have been thrust upon it*. If it had been a combination of existing smelters which united the whole industry and controlled the production of all aluminum ingot, it would certainly have ‘monopolized’ the market. In several decisions the Supreme Court has decreed the dissolution of such combinations, although they engaged in no unlawful trade practices. . . .”²⁴⁴

But even where monopoly “involuntarily” arises from the combination of existing facilities, there is present the agreement to combine. Although the court obviously inclines to adopt the economic result approach, the decision is still based upon the Cardozo doctrine, in other words upon the actual behavior of Alcoa.²⁴⁵

242. *Id.* at 427-28.

243. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), and other cases discussed at p. 655 *supra*.

244. *United States v. Aluminum Co.*, 148 F.2d 416, 429 (2d Cir. 1945). (Emphasis added.)

245. “Alcoa’s size was ‘magnified’ to make it a ‘monopoly’; indeed, it has never been anything else; and its size, not only offered it an ‘opportunity for abuse’, but it ‘utilized’ its size for ‘abuse’, as can easily be shown. . . .”*Id.* at 430.

In the second *Alcoa* case,²⁴⁶ the district court continues to follow the new line. "[T]he mere existence of what is denominated 'monopoly power', irrespective of its exercise, may be the focal element that will resolve the outcome of a particular suit" and "is some indication of illegality."²⁴⁷ Thus, this court is even more inclined to adopt the "mere size" doctrine, considering the result rather than the behavior of the monopoly enterprise.

It would seem that the answer to the problem should be found by going back to the proper purpose of the Sherman Act as well as the German draft law: to maintain competition and private initiative to the utmost extent under modern conditions. This certainly includes the protection of the public as to the price advantages which ordinarily are the consequence of price competition between several manufacturers. It includes, furthermore, the protection of the public and the country against interference by powerful private enterprises. It finally includes the protection of smaller business and newcomers. Monopoly is obviously incompatible with that.

However, there is one situation where monopoly may lie in the interest of the consumer: if technical conditions of production are such as to offer substantial economies of scale throughout the whole region of possible industry outputs.²⁴⁸ Under such circumstances, the commodity in question can be produced in an economical way—namely in the cheapest way possible—only if production is concentrated in a few or in one firm.

It is obvious that there may occur very few cases where the relationship between the size of the market and the economies of scale are such as to allow the operation of one firm only. Therefore, the argument is much more important for oligopolies. The American automobile market is generally quoted as an example of gains in efficiency caused by large-scale production.

For these reasons, the decisive factor should not be so much the origin and market behavior of a monopoly or oligopoly enterprise, but rather the possible economic, social and sometimes even political results of monopoly and—to a lesser extent—oligopoly which are generally recognized to be detrimental to the public. Whatever view one may take, bigness of an enterprise, if resulting in monopoly, seems to be as much a danger as a monopoly cartel as long as no social economies of scale are involved.

246. *United States v. Aluminum Co.*, 91 F. Supp. 333 (S.D.N.Y. 1950).

247. *Id.* at 341, 342.

248. See, e.g., STIGLER, *THE THEORY OF PRICE* 223-24 (1952); Lutz, *Einwaende gegen die Wettbewerbsordnung*, 5 ORDO 245, 257-58 (Germany 1953).

Without that important qualification this has been expressly recognized by the Supreme Court itself in the *American Tobacco* case,²⁴⁹ where the Court cites with approval the significant wording of the first *Alcoa* case and applies it to the cigarette monopoly cartel. Apart from that situation, it probably would rarely happen that monopoly is "thrust upon" an enterprise.²⁵⁰ Therefore, such "involuntary" monopoly should not be overemphasized.

Summarizing: the German draft law seems to take a different view of "mere size" than have the courts of the United States since 1932. It seeks only to prevent the abuse of monopoly and oligopoly power and therefore treats differently cartels—which are prohibited per se—and monopoly and oligopoly enterprises.²⁵¹ To the extent that article 17 implicitly includes the toleration of "big business" based on substantial economies of scale, it would seem not to be objectionable.

A further remarkable difference lies in the remedies available. The draft law provides for the prohibition by the Cartel Authority of three enumerated restrictive practices. It contains no machinery for dissolution of monopoly enterprises into independent units or for divestiture. Here again, the attitude taken by the courts of the United States is different. Several important divestiture proceedings were ordered in the United States in recent years in order to deprive the defendant of the gains of its violations (so-called "fruits" theory). Injunctions were held several times an insufficient remedy. Courts sought more and more to reduce monopoly power to impotence.²⁵²

Altogether, article 17 of the draft law is the first German attempt to deal effectively with single monopoly and oligopoly enterprises. It goes much further than section 10 of the Cartel Ordinance of 1923 which, moreover, was seldom applied by the implementing agencies.²⁵³ It will become a matter of great interest to see how the administration of article 17 will work.²⁵⁴

249. *American Tobacco Co. v. United States*, 328 U.S. 781, 811-15 (1946).

250. *Cf. United States v. Aluminum Co.*, 148 F.2d 416, 430 (2d Cir. 1945).

251. Approved crisis, rationalization and export cartels (articles 2-5) which acquire monopoly power also are subject to the regulation of article 17. Draft Law art. 6. Thus, monopoly cartels, as far as they will be permitted by the Cartel Authority, have the same position as monopoly enterprises.

252. See survey on this development in the second *Alcoa* case, *United States v. Aluminum Co.*, 91 F. Supp. 333, 342-44 (S.D.N.Y. 1950). See also *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188-91 (1944).

253. See pp. 639-40 *supra*.

254. For a detailed discussion, see AXSTER, *DAS MARKETBEHERRSCHENDEUNTERNEHMEN* (The Market Dominating Enterprise) (1956).

Mergers

The regulation with respect to enterprises which dominate the market, however, is subject to one important modification under the draft law. It aims at preventing monopolies achieved through mergers.

There are, of course, different legal techniques available to arrive at this purpose. The law itself may declare unlawful such a merger and authorize the agency to enforce compliance after the merger. This is the solution provided in sections 7 and 11 of the Clayton Act.²⁵⁵

The German administration has chosen another technique. Article 18(1) makes every *planned* merger subject to *prior* approval by the Cartel Authority

"if as a consequence of it the combined enterprises would, with regard to a certain type of goods or commercial services, acquire the position of an enterprise which dominates the market within the meaning of Art. 17(1)²⁵⁶ and this situation would not be of a local nature only."²⁵⁷

In effect, however, a merger with such a result in the national territory may not be approved, for article 18 further provides:

"The Cartel Authority may approve a merger of the nature specified in Para. (1), only if it determines that the combined enterprises do not thereby acquire with regard to certain goods or commercial services within the territory of the Federal Republic the position of an enterprise which dominates the market within the meaning of Art. 17, Para. (1)."²⁵⁸

Although the German statute requires prior approval, the companies planning to merge, of course, may come to the conclusion that their merger would not result in domination of the market and may decide to merge without prior approval at the risk of subsequent dissolution.²⁵⁹ For the draft law contains no general obligation to inform the Cartel Authority of every planned merger.²⁶⁰ In doubtful cases, however, businessmen probably will not assume such considerable risks but will apply for prior approval of the planned merger.

255. 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1952).

256. See pp. 670-77 *supra*. Article 18(4) and (5) of the Draft Law contain further details as to the scope of article 17(1) and (2). Article 18(5) provides that the permission may be granted subject to limitations, conditions and requirements and may be revoked if obtained by unlawful means such as fraud or threats.

257. Draft Law art. 18(1).

258. *Id.* art. 18(2).

259. *Id.* art. 20.

260. With respect to the United States, see H.R. 6748, 84th Cong., 1st Sess. (1955) (the new Patman Bill of June 9, 1955, to amend §§ 7 and 11 of the Clayton Act to provide for prior notification and suspension of certain acquisitions, mergers and consolidations).

Advance clearance of American mergers by the Antitrust Division is now also possible,²⁶¹ but if denied by the Division creates a serious problem for the applicants. The great practical advantage of the German draft law lies in the fact that advance disapproval of the planned merger is an administrative ruling subject to review and final tests in the courts.

Once a merger has been approved by the Cartel Authority, the merged enterprises cannot ever be dissolved or deconcentrated later. Such approved combined enterprises are only subject to the control of the Cartel Authority against abuses of their power as provided in article 17.²⁶²

The present wording of article 18 applies to monopoly mergers only. However, it seems desirable and of consequence that planned mergers which would lead to an oligopolistic market or to the further concentration of an already existing oligopoly market, should also be made subject to prior approval by the Cartel Authority. Without such a provision, the number of competitors may be lessened to a point where parallel behavior and cooperation become practicable and likely, so that the quantitative change in the number of enterprises brings about a qualitative change in the structure of the market. Thus, mergers leading to concentration in oligopoly markets may lessen competition just as monopoly mergers necessarily do.

Although the administration has recognized the dangers arising from oligopoly enterprises and introduced an additional clause subjecting oligopolies to article 17,²⁶³ it did not amend the merger regulation of article 18 in a similar way. A difficulty lies in the fact that the oligopoly clause as introduced in article 17 could not be made applicable to mergers, for the Cartel Authority cannot predict whether the merged enterprises would "cooperate" with other enterprises "by parallel behavior so as to affect the market substantially."²⁶⁴ Perhaps for this reason, the Economic Policy Committee of the Lower House proposed that planned mergers shall be subject to prior approval by the Cartel Authority if, as a consequence of the merger, "for factual reasons, substantial competition" would be "excluded."²⁶⁵

However, the meaning of the phrase "for factual reasons" is not clear. Furthermore, in many cases, there is only a probability that

261. Barnes, *Theory and Practice of Anti-Trust Administration*, in *How To COMPLY WITH THE ANTI-TRUST LAWS* 37, 41 (Van Cise & Dunn eds. 1954).

262. See p. 671 *supra*.

263. See pp. 670-71 *supra*.

264. Draft Law art. 17(2).

265. For the German wording of this proposal to article 18, see 6 W.W. 27-28 (Germany 1956). For an English translation of the Committee's version of article 17(2) (oligopoly clause), see note 235 *supra*.

"substantial competition would be excluded." Therefore, the wording of section 7 of the Clayton Act, "*may* be substantially to lessen competition," seems to be a much more appropriate solution for this point.

With respect to planned mergers where one of the participating enterprises already holds a dominating position, article 18(3) provides:

"Paras. (1) and (2) shall apply *mutatis mutandis* if an enterprise which participates in a merger, with respect to a certain type of goods or commercial services, already holds a market dominating position within the meaning of article 17, Para. (1) and that position is strengthened by such merger."

Here, too, an amendment to include mergers that would lead to an oligopoly market or to the further concentration of an already existing oligopoly market seems desirable and of consequence.

A merger without permission of the Cartel Authority is not illegal *per se*, but the Cartel Authority may order rescission.²⁶⁶ This is the only instance of deconcentration provided in the German draft law.

The Cartel Authority, either *ex officio* or if an enterprise applies for a permission to merge under article 18, may request the necessary information²⁶⁷ and conduct any investigation and collect all evidence deemed necessary.²⁶⁸ Thus, there seems to be no problem of insufficient information or investigation powers under the German draft law.

But, what is to be regarded as a merger? The draft law contains a broad definition which might be of interest for the American lawyer:

"As a merger within the meaning of article 18 shall be considered:

1. the acquisition of ownership of operational facilities of other enterprises or of a real right to usufruct them;
2. the renting or leasing of operational facilities of other enterprises;
3. contracts providing for the assignment of the operational facilities of other enterprises or of their management;
4. acquisition of the capital of other enterprises and acquisition of the right to usufruct other enterprises;
5. merger with other enterprises;
6. contracts with other enterprises which provide for the pooling of profits;

266. Draft Law arts. 20, 21.

267. Draft Law art. 38.

268. *Id.* art. 45(1).

7. any legal transaction by which holders of managerial positions in one firm (members of the *Vorstand*, managers, members of the *Aufsichtsrat*, leading employees) become holders of managerial positions in other firms;
8. the acquisition of interests of any kind in other enterprises, insofar as such interests alone or in combination with already existing interests would give the acquiring enterprise a dominating influence on other enterprises or sufficient votes to block the alteration of the by-laws in other enterprises."²⁶⁹

Thus, the term "merger" includes in effect all kinds of horizontal and vertical as well as conglomerate integration. The draft law hence covers a much broader field than section 7 of the Clayton Act.

With respect to horizontal integration, the first question, then, is the determination of the relevant market in which the participants of the planned merger compete. If there is no pre-existing competition among the participants, the merged companies cannot "substantially lessen competition" (section 7 of the Clayton Act) or "acquire the position of an enterprise which dominates the market with regard to a certain type of goods or commercial services" (article 18 of the draft law).

In other words, integration, without more, does not violate the statute. This has been repeatedly recognized by the Supreme Court.²⁷⁰ It will also be true under the German draft law, according to the wording of article 18(1) and (2). Therefore, ". . . the extent of permissible integration must be governed . . . by . . . circumstances of individual cases."²⁷¹ Several factors must be considered in determining the "market." First, the relevant *geographical* area must be ascertained. The draft law, in this connection, provides that the Cartel Authority may not approve a merger if the resulting combination would dominate the market "*within the territory of the Federal Republic.*"²⁷² Furthermore, permission is required for every merger which results in market domination "not of a local nature only."²⁷³ In the United States, the situation seems at first somewhat different. Section 7 of the Clayton Act formulates: "in any section of the country." And referring to the Sherman Act, the Supreme Court said: "[W]e have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to

269. *Id.* art. 19.

270. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). As to the Sherman Act, see same view in *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948).

271. *Id.* at 526.

272. Draft Law art. 18(2). (Emphasis added.)

273. *Id.* art. 18(1).

prevent unreasonable restraints within that area.”²⁷⁴ In effect, however, there may be no real difference between these American provisions and article 18 of the German draft law. For, what may be considered a “small” area in the big United States, will be generally an area “not of a local nature only” in Germany.

Secondly, the relevant *time* must be determined.²⁷⁵

Thirdly, the market has to be determined with respect to the *products* in which the participants compete prior to the merger.²⁷⁶ In this connection, the draft law specifies: “with regard to a certain type of goods or commercial services.”²⁷⁷ This definition seems to cover not only particular goods or services, but also—within the limits of the term “type”—substitutes.

Again, it is interesting to look on recent American decisions. A review shows that the federal courts considered substitute competition depending on the varying circumstances of each case. In the first *Alcoa* case,²⁷⁸ the relevant market for measuring Alcoa’s power was held to be the market for “virgin” aluminum, and the court refused to consider the close competition offered by used aluminum.²⁷⁹ This narrow interpretation of substitute competition was apparently based on the fact that Alcoa, by its monopoly on virgin aluminum, was also able to control the supply of used aluminum.

In the *Columbia Steel* case,²⁸⁰ the Supreme Court found no unreasonable restraint of competition in the acquisition by United States Steel of a pipe steel fabricator because pipe and structural steel was not of the “same type,” and pipe produced by United States Steel were not used for the same purposes as pipe produced by the fabricator, and was cheaper to produce.²⁸¹ As to rolled steel products, the Court accepted “as the relevant competitive market the total demand for rolled steel products in the eleven state area.”²⁸² And, in the *International Shoe* case,²⁸³ in determining whether competition was substantially lessened by a merger, the Court inquired whether the competing products of

274. *United States v. Columbia Steel Co.*, 334 U.S. 495, 519 (1948).

275. *Cf. id.* at 533.

276. Since the same problem arises with respect to monopoly and oligopoly enterprises under article 17(1) and (2), the discussion on the relevant market is not confined to the merger problem only.

277. Draft Law arts. 17(1), 18(1), (2).

278. *United States v. Aluminum Co.*, 148 F.2d 416, 424-26 (2d Cir. 1945).

279. *Id.* at 424-26.

280. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

281. *Id.* at 515-18, 530.

282. *Id.* at 512.

283. *International Shoe Co. v. FTC*, 280 U.S. 291, 295-97 (1930).

the merged companies were distributed in the same markets, *i.e.*, by the same class of dealers and to the same class of consumers, and by the same trade policies.

In the *Cellophane* case,²⁸⁴ the Court found substitute competition between cellophane and other flexible wrapping materials. The Court looked to the cross-elasticity of demand between the products, which measures the responsiveness of the sales of one product to price changes of the other, stating that "no more definite rule can be declared than that the commodities reasonably interchangeable by consumers for the same purposes make up . . ." the relevant market.²⁸⁵

This modern economic test as applied by the Supreme Court would seem to be of particular interest for the future German practice under articles 17 and 18 of the draft law. Having determined the relevant market as to geographic area, time and products in which the participants of the planned merger compete, the Cartel Authority will proceed to determine the extent to which the participants actually compete in this area, time, and in these products. In other words, it must inquire whether the abolition of this competition by merger would enable the merged companies "to dominate the market."

Here again, the question arises what factors are to be considered decisive to determine the "loss" in competition. The draft law answers this question at least partly in articles 18 and 17(1): the share of the market dominated by the merged companies, their resultant power to determine production, prices or terms of sale for certain goods or services, and their consequent relative ability to disregard competitors, and the power thereby to influence the market tangibly. This enumeration, however, is not exclusive under the wording of article 17(1).²⁸⁶

This test seems to correspond in substance with the so-called foreclosure-volume test which the Supreme Court set up in the *Columbia Steel* case:

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements [economies of scale] or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures. . . ." ²⁸⁷

284. *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

285. *Id.* at 400.

286. See pp. 670-71 *supra*.

287. *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948). See also the remarkable dissenting opinion of Justice Douglas to the general problem of bigness and market definition. *Id.* at 534-40.

Intent or purpose to monopolize are irrelevant under the draft law because it does not contain criminal provisions. Furthermore, it should be emphasized that the German draft does not make the legality of mergers dependent on reasonableness. Permission is to be denied to any merger which would result in domination of the national market. Thus, under the draft law the Cartel Authority may not consider economies of scale which may make certain mergers desirable for efficiency reasons.²⁸⁸

*Violations Punishable by Administrative Fines*²⁸⁹

As already mentioned, the draft law does not regard violations as a criminal offense. Accordingly, it was not necessary to make a violation dependent on the proof of intent or purpose. In the United States, presumably the requirement of intent results from the realization that imposition of penalties upon conduct not designed to injure commerce would give rise to resentment. Today, most people in Germany do not really regard violations of economic laws in the same light as traditional criminal offenses, such as theft or fraud.²⁹⁰ In some cases it may be the economic result rather than a certain individual behavior which leads to antitrust suits.²⁹¹ And as explained,²⁹² there is hesitancy, even under a civil statute, to interfere vigorously with enterprises which owe their bigness to their efficiency or particular situations prevailing in a market.

The ultimate reason for such scruples is probably the dilemma of any free market economy and any system based on freedom: that it cannot desist from balancing the freedoms upon which it is based simply in order to maintain them. It is not really the problem of no freedom for the enemies of freedom, for one who wants "economic security" need not necessarily be an enemy of freedom. The problem rather is to find the proper balance between freedom to compete and to trade and freedom to contract and to combine; they are only different forms of freedom to act and both are justified.

288. See p. 674 *supra*.

289. See Rasch, *Zu den Strafbestimmungen des Kartellgesetzentwurfs*, 5 W.W. 132 (Germany 1955).

290. Official Explanation 21-22, reprinted in 2 W.W. 471 (Germany 1952). For the same reason, the government already enacted, *e.g.*, the Economic Penal Code (*Wirtschaftsstrafgesetz*) of July 9, 1954, [1954] B.G.B. pt. I, at 715 (Germany), which—like an earlier code replaced by this law—differentiates between "criminal" and "economic" offenses.

291. See the consideration of this question in *United States v. Aluminum Co.*, 148 F.2d 416, 429-30 (2d Cir. 1945), discussed at pp. 672-74 *supra*.

292. See p. 675 *supra*.

However, in spite of its civil character, the draft law cannot fail to provide measures against violators of its provisions. Part II (articles 31-35) of the proposed law, therefore, provides for so-called "administrative fines" (*Geldbussen*)—as distinguished from criminal fines (*Geldstrafen*)—of up to 1,000,000 Deutsche Mark for violations of the law. Such administrative fines may be imposed upon a person who wilfully or, in some cases, negligently violates provisions of the proposed law in a manner defined in detail in articles 31 to 35. Only to this extent must intent or negligence be proved.

ADMINISTRATION OF THE DRAFT LAW

Parts III and IV of the proposed law (articles 36-72) regulate in detail the establishment and jurisdiction of the Cartel Authorities and the administrative and court proceedings.²⁹³

Organization and Jurisdiction of the Cartel Authorities

All functions and powers assigned to the "Cartel Authority" pursuant to the law shall be exercised by two agencies, namely either by the Federal Cartel Office or by the Supreme Land (state) Authority to be established in each of the nine Länder. Both authorities are administrative agencies and are organized and proceed as such.

The Federal Cartel Office is to be established as an independent federal agency (*Bundesoberbehörde*)²⁹⁴ subject to the Federal Minister of Economics.²⁹⁵ Its members may not be owners, managers or directors of an enterprise, cartel or economic or professional association.²⁹⁶ The Office has its own budget as part of the budget of the Federal Ministry of Economics.²⁹⁷ The Office must publish an annual report concerning its activities and the situation and developments in its field. Also, it must currently publish its decisions and regulations.²⁹⁸

The establishment of the Supreme Land (state) Authorities is left to the individual Länder. They will probably appoint their respective Land ministers of economics to exercise the powers locally.²⁹⁹

293. See Official Explanation 41-49; Kreifels, *Verfahrensvorschriften im Entwurf des Gesetzes gegen Wettbewerbsbeschränkungen*, 9 NEUE JURISTISCHE WOCHENSCHRIFT 936 (Germany 1956); Thomae, *Die Verfahrensvorschriften des Kartellgesetzentwurfes*, 6 W.W. 393 (Germany 1956).

294. Cf. Basic Law (the German Constitution) for the Federal Republic of Germany of May 8, 1949, art. 87(3), [1949] B.G.B. pt. I, at 1 (Germany).

295. Draft Law art. 40(1).

296. *Id.* art. 40(2).

297. *Id.* art. 40(4).

298. *Id.* art. 41.

299. Official Explanation 22, reprinted in 2 W.W. 472 (Germany 1952).

The jurisdiction of the agencies is distributed as follows. The Federal Cartel Office decides:

- (i) petitions for permission of crisis, certain rationalization and export cartels;
- (ii) the annulment of resale price fixing agreements in accordance with article 12;
- (iii) the permission and dissolution of mergers pursuant to articles 18-21; and
- (iv) in all other "cases where the effect of the influence on the market or of the activities which are in restraint of competition or of a discriminatory nature extend beyond the territory of one Land."³⁰⁰

The Supreme Land Authority decides in all other cases, *i.e.*, where the Federal Cartel Office is not expressly given jurisdiction as enumerated.³⁰¹

Under article 38, the cartel agencies may, to the extent to which it is necessary and justified in order to accomplish the purposes of the draft law, request every enterprise and cartel to give information concerning its cost accounting methods, operating equipment, terms and conditions, prices, pricing methods, participations, license agreements, profits and productivity. The cartel agencies may also demand information from economic and professional associations concerning their by-laws and resolutions and the number and names of their members.³⁰² Finally, the cartel agencies may, in connection with crisis and certain rationalization cartels³⁰³ and with enterprises which dominate the market,³⁰⁴ examine any matters subject to compulsory information under the Ordinance on Auskunftspflicht (obligation to give information).³⁰⁵

Administrative Proceedings

Proceedings Before the Cartel Authorities

The Cartel Authority may institute proceedings *ex officio* or upon demand of any third party.³⁰⁶ Participants in the proceedings are those who are authorized to demand the institution of proceedings, the

300. Draft Law art. 36(1) 1.

301. *Id.* art. 36(1) 2; *cf. id.* arts. 36(2), (3), 37.

302. *Cf. id.* art. 26.

303. *Id.* arts. 2, 4.

304. *Id.* art. 17.

305. Verordnung über Auskunftspflicht of July 13, 1923, [1923] R.G.B. pt. I, at 723 (Germany).

306. Draft Law art. 42(1).

cartel, enterprise, professional or economic association against which the proceedings are directed, and persons who are invited by the Cartel Authority to participate in the proceedings on the grounds that their legal interests are affected by the decision.³⁰⁷

The cartel agency must give the participants the opportunity to state their views, and upon application of one of them, grant a hearing.³⁰⁸ It may conduct any investigations and collect all evidence deemed necessary.³⁰⁹ It may also seize material which might be of importance as evidence for the investigation.³¹⁰ Pending a final decision, the cartel agency may issue temporary injunctions.³¹¹ The cartel agency must publish final decisions in the *Bundesanzeiger* and state the reasons for its decision.³¹²

Appeals

Any decision of the cartel agency (*e.g.*, permission of a crisis cartel, its revocation, its amendment, permission of a merger, dissolution of a merger, imposition of an administrative fine) may be appealed to the Oberlandesgericht (state appellate court), which has exclusive jurisdiction. New evidence can be introduced on appeal.³¹³

An appeal may be filed by any party to the proceedings before the Cartel Authority and by any person directly affected by the decision.³¹⁴ The appeal must be filed with the Cartel Authority whose decision is being contested within a month from service of the decision. It must be substantiated within one month from the date of the appeal.³¹⁵

The appellate court decides after a hearing which can be waived with the consent of the parties.³¹⁶ It inquires into the facts *ex officio* and is not bound by the statement of the parties.³¹⁷ The court decides by way of order (*Beschluss*) and must write an opinion.³¹⁸

Appeals on Points of Law

From decisions of the Oberlandesgerichte a petition for review on points of law may be filed to the Bundesgerichtshof (Federal Supreme

307. *Id.* art. 42(2).

308. *Id.* art. 44.

309. *Id.* art. 45.

310. *Id.* art. 46.

311. *Id.* art. 47.

312. *Id.* art. 48.

313. *Id.* art. 49(1).

314. *Id.* art. 49.

315. *Id.* art. 52.

316. *Id.* art. 55.

317. *Id.* art. 56.

318. *Id.* art. 57.

Court) if the state appellate court grants permission. Such permission may be granted only if the case is of fundamental importance; it must be granted by the appellate court if its decision is not in accord with any decision of the Federal Supreme Court or any other state appellate court.³¹⁹ However, if the state appellate court does not grant permission to appeal, no petition for certiorari to the Federal Supreme Court appears possible, even if the state appellate court mistakenly believes that its decision is in accord with decisions of the Federal Supreme Court.³²⁰

The appeal may be filed by the Cartel Authority or any affected party to the appellate proceedings. This appeal may be based only on questions of the cartel law.³²¹

Civil Actions

Article 28 provides:

"Any person who intentionally or negligently violates any provisions of this law or any ruling of the Cartel Authority or of the appellate court issued pursuant to this law, shall, if such provision or decision has the purpose to protect any other person, be liable to such person for damages caused by such violation."³²²

For such private (civil) actions the Landgerichte (state district courts) have exclusive jurisdiction.³²³ The court must give notice to the Federal Cartel Office of all proceedings relating to the cartel law.³²⁴

Furthermore, the provisions of the German Civil Code—in particular sections 138, 823 and 826³²⁵—and of the Law Against Unfair Competition—in particular section 1³²⁶—and any other provision dealing with regulation of trade are applicable.

Summary

On the whole, the execution shows the following:

(i) appropriate distribution of the competences between the Federal Cartel Office and the Supreme Land Authorities;

319. *Id.* art. 59.

320. Cf. decision of the Bundesgerichtshof (IV. Zivilsenat), April 23, 1951, 2 B.G.H.Z. 16. This case was decided under the corresponding general provision of the German Civil Procedure Code. ZIVILPROZESSORDNUNG § 546(2).

321. Draft Law art. 60.

322. Cf. *id.* arts. 22, 30.

323. *Id.* art. 63.

324. *Id.* art. 65.

325. Quoted and discussed at pp. 632-34 and in note 111 *supra*.

326. *Ibid.*

(ii) concentration over all legal matters with the ordinary courts (state district, state appellate, Federal Supreme Court) rather than administrative courts;

(iii) jurisdiction of the ordinary appellate courts for all appeals;

(iv) concentration of this jurisdiction with a few appellate courts;³²⁷

(v) review on points of law of important decisions of the appellate courts by the Federal Supreme Court;

(vi) constitution of a special cartel senate at the appellate courts and at the Federal Supreme Court.³²⁸ The proposed law thereby hopes to meet the problem of judges trained well enough to handle anti-trust suits. The difficulties involved in antitrust suits require judges highly qualified both in law and economics. Such judges are rare. Therefore the draft law provides for the establishment of cartel senates (in Germany, every appellate court and the Federal Supreme is divided into several senates consisting of five judges each). The judges appointed to these cartel senates are to be men particularly experienced and really prepared to deal with antitrust suits.

It would be beyond the scope of this paper to discuss also in detail the differences existing between the administration and proceedings of the statutes in both of the countries. Some of these differences are quite obvious. Most of them have their origin in the different legal and administrative systems of the two countries.

However, one basic difference may be stated briefly: "In accordance with a long tradition of positive state control over economic affairs, the German bill places great emphasis on the preventive and permissive functions of public authority. It balances a far-reaching anti-monopoly and anti-cartel policy with an equally far-reaching discretion of the cartel authority (*Kartellbehorde*) to sanction certain agreements which are prohibited in principle, and other departures from the law where certain considerations of public policy require or justify such a departure."³²⁹ "[P]ublic authorities, both administrative and judicial, are given very considerable powers, far exceeding those of their American counterparts."³³⁰

As contrasted therewith, American law puts "all the emphasis on the prosecution of violations of the law, civil or criminal. This of

327. See Draft Law art. 68.

328. *Id.* arts. 67, 70.

329. Friedmann, *Anti-Monopoly Law—Some Comparative Observations*, in *FESTSCHRIFT FÜR ERNST RABEL* 453, 468 (Doelle, Rheinstein & Zweigert eds. 1954).

330. *Id.* at 463.

necessity means a discriminatory and selective administration of the law. Certain cases are selected according to considerations which are largely of a discretionary character. It is an open question how the German practice will develop. . . . No law has as yet attempted what the German Bill sets out to do.”³³¹ It is true, the German courts will have the last word. But it would seem to be doubtful whether their influence will be as great as that of the American courts.

Another important difference lies in the fact that the German Attorney General and the district attorneys have no power to file anti-trust proceedings under the draft law. That power rests exclusively with the cartel authorities. There is no other agency except the independent Federal Cartel Office and the Supreme Land Authorities, which have different functions in the execution of the law. The power of the Länder (states) are based upon articles 83 and 84 of the Basic Law (the German Constitution).³³² Thus, there is no concurrent jurisdiction over the proposed law.

As contrasted therewith, the Clayton Act provides in sections 2, 3, 7 and 8 that both the Federal Trade Commission and the Attorney General may take action. It will probably be an advantage that the German draft law does not grant such concurrent jurisdiction to two different agencies. Conflicts of jurisdiction and different interpretations of the same law will thereby be prevented.

CONCLUSION

The German Draft Law against Restraints of Competition is in substance based upon the economic theory and policy of Walter Eucken and his so-called “Freiburg School,”³³³ on the one hand, and upon the experience of the United States during the last sixty years, on the other. The American influence has been effective mainly through the Allied decartelization laws and their interpretation,³³⁴ but even more by direct theoretical and practical studies of American antitrust law by the “German Commission To Study Cartel and Monopoly Problems in

331. *Id.* at 475.

332. See note 294 *supra*.

333. Franz Böhm, Grossmann-Doerth, A. Lampe, Friedrich A. Lutz, K. F. Maier, Fritz W. Meyer, Leonhard Miksch and others. See the basic work, EUCKEN, GRUNDSATZE DER WIRTSCHAFTSPOLITIK (Principles of Economic Policy) (1952). For a recent example, see Lutz, *Bemerkungen zum Monopolproblem*, 8 ORDO 19 (Germany 1956).

334. See, e.g., KRONSTEIN, NEUE DEUTSCHE WIRTSCHAFTSRECHTLICHE ENTSCHEIDUNGEN IM LICHT DES AMERIKANISCHEN ANTITRUSTRECHTS (New German Court Decisions Reviewed Under American Antitrust Law) (1953) and sources cited in Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954, Eine kritische Übersicht*, 5 W.W. 205, 206 n.5, 208 (Germany 1955).

the United States"³³⁵ and otherwise.³³⁶ A third decisive factor has been Germany's own experience with the traditional European concept of "cartel control" between 1923 and 1945. Thus, the draft law is based to a considerable extent upon comparative studies.³³⁷

A comparison of the two laws shows indeed a considerable similarity of the underlying policy and the basic concepts. In this light, the existing differences would seem to be of minor importance. However, they should be by no means overlooked and they can be reduced only in part under the different legal systems of the two countries.

The draft law is a modern statute with all advantages deriving therefrom. Thus, it was possible to regulate numerous restrictive business practices in one statute. The basic construction and the systematic and relatively clear language of the proposed law would seem to be positive and helpful factors in its application. At the same time, the draft law seeks to be in most cases as detailed and exact as possible. It seeks to provide for the cartel authorities and courts real guideposts and, thus, to ease and to secure the execution of its clearly expressed purposes.

An even more detailed regulation and more exact definitions would hardly be possible and appropriate in the long run. Any regulation of trade will have to deal with developments, factual situations and their evaluation which cannot be determined, defined and exactly regulated in advance by statutory provisions.³³⁸

335. Cf. *Vorläufiger Bericht* (Preliminary Report) der deutschen Kommission zum Studium von Kartell und Monopolfragen in den Vereinigten Staaten, Bundesanzeiger No. 250 of Dec. 29, 1950, app.

336. From May 17 to July 17, 1954, a new three men study group was in the United States. See the reports of two of its members: Meyer-Cording, *Zur heutigen Situation im Antitrustrecht, Eindrücke von einer Studienreise nach den U.S.A.*, Bundesanzeiger No. 193 of Oct. 7, 1954, app.; Kamberg, *Wirtschaftliche Massnahmen und Erfahrungen, Die amerikanische Anti-Trust Gesetzgebung*, Bundesanzeiger No. 6 of Jan. 11, 1955, app.

337. Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954, Eine kritische Übersicht*, 5 W.W. 205, 207 (Germany 1955). A comprehensive study on the draft law itself as compared with the present American antitrust law has not yet been published. For more general and brief surveys, see Friedmann, *Anti-Monopoly Law—Some Comparative Observations*, in *Festschrift für Ernst Rabel* 453 (Doelle, Rheinsteint & Zweigert eds. 1954) and Fikentscher, *die neuere Entwicklung des amerikanischen Wettbewerbsrechts und der deutsche Kartellgesetzentwurf*, 17 Z.G.H.K. 1 (Germany 1955). Besides there already exists several articles on specific questions. Most of them (as far as published until 1954) are cited in Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954, Eine kritische Übersicht*, 5 W.W. 205, 208 n.18 (Germany 1955).

338. With respect to atomic industry, in contrast to the American statute of 1954, the new atomic draft law of the German federal administration (*Entwurf eines Gesetzes ueber die Erzeugung und Nutzung von Kernenergie und den Schutz gegen ihre Gefahren* (Atomgesetz)) does not provide for public property of atomic energy, but merely for an elaborate system of federal and state controls including government administered depots for certain atomic materials. Thus, the atomic draft law claims to be based on the principles of a "free and social market economy." See Kruse, *Zum Atomgesetz-Entwurf der Bundesregierung*, 11 D.B. 740 (Germany 1956). The anti-

Apart from that, the quality and reasonableness of the principles and regulations cannot be judged until cartel authorities and courts begin to work with the statute.

However, in the long run an appropriate application of the proposed law will depend less on its quality and the capability of its executors than on the belief of the German people in the necessity of free competition as the type of an economy which promotes best the individual and common welfare. Unfortunately, it cannot be said that such belief is already widespread. A look in the current German anti-trust literature reveals serious controversies on basic questions. Nevertheless, it cannot be overlooked that the great success of the free market economy from 1948 till today is strengthening the number and power of its partisans.

trust draft law does not provide for any exception of the future atomic industry from its regulations. Thus, atomic industry at present would seem to fall under the anti-trust draft law like any other industry not expressly exempted. See Gleiss, *Atomenergie und Kartellrecht in den Vereinigten Staaten und der Bundesrepublik Deutschland* (Atomic Energy Law and Antitrust Law in the United States and the Federal Republic), 9 NEUE JURISTISCHE WOCHENSCHRIFT 819 (Germany 1956). The supranational aspects of the problem will of course have considerable influence on the legal solution finally to be found in Germany.

University of Pennsylvania Law Review

Formerly
American Law Register
FOUNDED 1852

Member, National Conference of Law Reviews

BOARD OF EDITORS

RONALD P. WERTHEIM, *Editor-in-Chief*

MYLES H. TANENBAUM, *Note Editor* RICHARD G. SCHNEIDER, *Case Editor*

GONCER M. KRESTAL, *Managing Editor* JOHN O. KARNS, *Article Editor*
and *Research Editor* and *Book Review Editor*

DUFFIELD ASHMEAD, III

MAURICE AXELRAD

BENNETT I. BARDFELD

S. DAVID BRANDT

CAROLE A. BRODERICK

MICHAEL M. DEAN *

CHARLES M. FARBSTAIN

STANLEY FRANK

MELVIN D. GLASS

JOHN G. HARKINS, JR.

HERBERT J. JAFFE

HARRY A. KITEY

CHARLES F. KNAPP

SEYMOUR KURLAND *

HARVEY LEVIN

ROBERT J. LEVY *

JAMES F. McCLURE, JR.

JOHN P. McKENNA, JR.

RAMON R. OBOD

JAY G. OCHROCH

PHILIP H. OSBORNE

JOHN W. ROBERTS

RONALD ROSENBERG

JOHN J. RUNZER

RONALD N. RUTENBERG

ALLEN G. SCHWARTZ

WILLIAM J. SHARKEY

CHARLES SOVEL

RICHARD W. STEVENS

MICHAEL L. TEMIN *

E. NORMAN VEASEY *

IRWIN J. WEINER

HARVEY G. WOLFE

CECILIA SIMONOSKI, *Business Manager*

* Senior Editors.