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## METHODS OF REGULATING UNFAIR COMPETITION IN GERMANY, ENGLAND, AND THE UNITED STATES

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### INTRODUCTION

The expression "unfair competition", as it is used in this article, is restricted to a particular type of unfair competition; that is, the measures employed by individuals, firms, cartels,<sup>1</sup> and other combinations in the interest of their monopolistic aims, to combat open competition and to contravene the natural effects of the economic law of supply and demand. In the same way as the law of the various nations condemns certain kinds of open competition as unfair, it also forbids certain methods of eliminating free competition. The differences which exist between the laws of the various states in regard to this subject are considerable, and are a result of the different points of view which the statutes and the decisions take in regard to the problems arising out of cartels, trusts, and monopolies.

This article will discuss certain typical measures used by business concerns in their endeavor to restrain free competition, and will investigate and determine their legality or illegality from the

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<sup>1</sup> A cartel is a combination of commercial concerns in a particular industry, said combination being created by law.

German, the English, and the American legal viewpoints. It will first treat the law of each of these countries separately, and at the close of the article will draw comparisons between the attitudes taken on these questions by the courts and the legislative bodies of these three nations.

### I. GERMAN LAW

The provisions of the German law which are of importance are as follows:

#### THE CARTEL ORDER—THE ORDER AGAINST THE ABUSE OF ECONOMIC POWER.<sup>2</sup>

Section 1: Agreements and resolutions which contain obligations regarding the production of commodities or the distribution thereof, the application of business terms, the manner of fixing or demanding prices thereof (syndicates, cartels, conventions, combinations in restraint of trade, and similar agreements) must be made in writing.

Section 4: If an agreement or a resolution of the kind designated in Section 1,<sup>3</sup> or a certain manner of its enforcement, is dangerous to the general economic situation or public policy, the *Reichswirtschaftsminister*<sup>4</sup> may: (1) apply to the Cartel Court<sup>5</sup> to have the agreement or resolution declared null and void, or the manner of its enforcement prohibited (Section 7); (2) order that any party concerned in the agreement or resolution may give notice of termination or withdrawal at any time; (3) order that a copy of all arrangements and dispositions taken for the enforcement of the said agreement or resolution be filed with him and that these measures shall take effect only after the receipt of such copy thereof.

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<sup>2</sup> KARTELLVERORDNUNG, R. G. Bl. 1923, I, 1067 *et seq.*, 1090.

<sup>3</sup> References to sections of the Cartel Order (KARTELLVERORDNUNG) are, for the most part, to sections of which a translation is given in this article. Where the text of sections cited is not given herein, mention of this fact will be made.

<sup>4</sup> Minister of Economics, a member of the President's cabinet.

<sup>5</sup> A division of the National Economic Court (*Reichswirtschaftsgericht*), having as its function the prevention of the "misuse of situations of economic power", particularly by the cartels. The court was created by the KARTELLVERORDNUNG, *supra* note 2. More specific functions of the Cartel Court will be considered *infra*.

The general economic situation or public welfare is regarded as endangered when unjustifiable methods are pursued to limit production and distribution, when prices are forced up or kept at a high level, when excess is added to offset risk in the case of price-fixing arrangements, or when economic freedom is influenced unfairly by the hampering of buying and selling or by discrimination in prices or conditions of sale.

Section 7: In the case of Section 4 (1) the Cartel Court has to declare the agreement or resolution null and void in whole or in part, or has to prohibit the particular method of its enforcement which is in question, if it considers it harmful to the general economic situation or against public policy. If it considers the order provided for in Section 4 (1) reasonable, it may make such order instead of pronouncing the decree of nullity or injunction.

If the Cartel Court declares part of the agreement or resolution null and void, it simultaneously has to decide whether and to what extent nullity of such part carries with it nullity of other parts of the agreement or resolution.

The Cartel Court may revoke an order made in accordance with Section 1 (2)<sup>6</sup> if the conditions requiring the order subsequently cease to exist.

Section 9: Under agreements or resolutions of the kind designated in Section 1, securities given for the enforcement of the same may not be forfeited, and boycotts or disadvantages of a similar character may not be declared without the consent of the president of the Cartel Court.

Such consent is to be refused, if the measure would adversely affect the general economic situation or public policy, or would be in unreasonable restraint of the trade of the party concerned.

The consent is to be looked upon as given if the president, within three weeks after receipt of the application for his consent, has not rendered any decision thereon.

Against the decision of the president of the Cartel Court or the authorities provided for in Section 4, the parties may invoke the decision of the Cartel Court within one week after service of the decision in question.

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<sup>6</sup> Not quoted in this article.

Section 10: If terms of business or methods of fixing prices by firms or by combinations thereof (trusts, syndicates, cartels, conventions, and similar associations) tend through exploitation of economic power to endanger the general economic situation or public policy [Section 4 (2)], the Cartel Court may, upon application of the *Reichswirtschaftsminister*, permit the parties affected by the contract to withdraw from all agreements which have been concluded under the conditions objected to. If it be assumed that the agreement would also have been concluded without the conditions objected to, the decision of the Cartel Court only allows withdrawal from the said terms of business, or from the agreement in which unreasonable prices were fixed.

In the case of agreements which require several independent part-performances (agreements for successive delivery), withdrawal is excluded in so far as a part-performance has been completely executed by both contracting parties.

The decision of the Cartel Court is to be published in the manner provided in its order.

The right of withdrawal is forfeited, if it is not declared within two weeks after the publication of the decision.

Agreements which are concluded after publication of the decisions are null and void in so far as their conditions are objected to in the decision. Section 139 of the German Civil Code<sup>7</sup> is also applicable.

Disputes as to whether and to what extent withdrawal according to Section 4 (1) (2) is permissible, or whether agreements are null and void in full or in part according to Section 5,<sup>8</sup> are to be decided by the ordinary courts of law.

Upon application of the *Reichswirtschaftsminister*, or of its own accord, the Cartel Court may revoke or amend a decision under Section 1, if the conditions which caused the decision have subsequently ceased to exist. The decision is to be published and becomes operative from the date of its publication.

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<sup>7</sup> Section 139, *infra* note 9, provides: "If a part of a transaction is void, the entire transaction is void, unless it may be assumed that it would have been entered into without the part which is void."

<sup>8</sup> Not quoted in this article.

THE GERMAN CIVIL CODE.<sup>9</sup>

Section 138: A transaction in violation of good morals is void.

Section 823: One who wilfully or negligently injures life, body, health, property, or any right of another is bound to compensate the other for the injury arising therefrom.

The same obligation rests upon one who violates a law, the purpose of which is to offer protection to another. If a violation of the law without fault is possible, the obligation to render compensation is applicable only in the case of fault.

Section 826: One who wilfully injures another in a manner contrary to good morals is bound to compensate the other for the injury.

THE LAW AGAINST UNFAIR COMPETITION.<sup>10</sup>

We shall not investigate here how far unfair regulation of competition is subject to the provisions of the law against unfair competition. The *Reichsgericht*, in a decision handed down in 1902,<sup>11</sup> refused to apply the statute against unfair competition to a boycott which was declared because of nonconformity to the agreed resale prices, because, as it said, the boycott was not declared "for the purpose of unfair competition" but to "exclude unfair competition by undercutting of prices" by those against whom the boycott was directed.

An investigation of this question is of no great practical importance, as the fact that the law against unfair competition is not applied is practically compensated for by the application of Section 826 of the Civil Code.

<sup>9</sup> *BÜRGERLICHES GESETZBUCH FÜR DAS DEUTSCHE REICH* (1896), hereafter cited B. G. B. For English translation, see LOEWY, *GERMAN CIVIL CODE* (1909).

<sup>10</sup> *GESETZ ZUR BEKÄMPFUNG DES UNLAUTEREN WETTBEWERBS* (1896). This law remained in force after the introduction of the Civil Code, by virtue of *EINFÜHRUNGSGESETZ ZUM, B. G. B.*, art. 32, Loewy, *op. cit. supra* note 9, at 576, which provides: "The laws of the empire shall remain in force. They become, however, of no force so far as the revocation results from the Civil Code or from this act." This is the introductory act to the Civil Code.

<sup>11</sup> *Artist. Union E. K. M. & Co. v. d. Börsenverein d. Deut. Buchhändler*, 56 *Zivil.* 271, 277 (1902). (The decisions of the Supreme Court (*Reichsgericht*) in civil cases are published in the *Zivilsachen*. This reporter will be cited "Zivil." hereafter.)

### JURISDICTION OF THE COURTS.

The interpretation and application of the special order concerning cartels<sup>12</sup> devolves upon the Cartel Court, a section of the *Reichswirtschaftsgericht*. The duty of the former is to protect the individual and the general economic life from being endangered by the practices of cartels. This Cartel Court is competent to examine whether certain cartel measures, which without sanction of law would constitute a tort according to private law, are to be permitted.

In so far as measures regulating competition are not in violation of the Cartel Order, but do contravene the provisions of the Civil Code, they are subject to the jurisdiction of the ordinary courts. The latter are also competent to adjudicate actions based on claims for damages arising out of the fact that the measure in question, not having the permission of the Cartel Court as provided for in the Cartel Order, is illegal. In case the Cartel Court has rendered judgment in a certain matter, this decision is final and binding on the ordinary courts, even in a case where the Cartel Court has affirmed or denied its jurisdiction.

In order to understand the following discussion concerning the German legal viewpoint with regard to the specific problems arising under the codified provisions of the law already stated, it is of fundamental importance to bear in mind that as soon as a specific state of facts is given which comes under the Cartel Order, the Cartel Court alone has jurisdiction, to the exclusion of the ordinary courts, and that the Cartel Court renders its judgments from the viewpoint of general economic policy. Measures concerning the regulation of competition which do not come under the Cartel Order are judged by the ordinary courts according to the provisions laid down in the Civil Code, already quoted.

#### *A. Boycott and Similar Measures*

The term "boycott" refers to the measures taken by enterprises, or combinations or associations of enterprises, under which a firm or a group of firms is excluded from the usual business

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<sup>12</sup> *Supra* p. 694 *et seq.*

intercourse.<sup>13</sup> In accordance with the limitations we have imposed upon our subject, we are concerned here only with the boycott against third parties. This boycott has for its aim the control of competition, either by trying to force the parties injured thereby to submit themselves to the business terms imposed by those who have declared the boycott, or by trying to eliminate undesirable competitors. Boycotts of this sort may be based on so-called "exclusive contracts", which are agreements between the members of a cartel, or between the members of cartels of different industrial groups; or between them and customers or suppliers, whereby the parties obligate themselves to deal solely with one another and consequently to exclude outsiders from selling to or buying from the parties to the agreement.

While the purpose of the boycott is to effect complete exclusion of outsiders from buying or selling, the purpose of "injurious measures of similar meaning"<sup>14</sup> is to place non-members in an even more disadvantageous position in business intercourse by means of discrimination in prices or in terms of delivery, payment, etc.<sup>15</sup> We shall next consider the application respectively of the provisions of the Cartel Order, the Civil Code, and the Law Against Unfair Competition to the specific problem of the boycott.

*a. Boycotts Under the Cartel Order.*

In dealing with a boycott, the provisions of the Cartel Order are first to be applied. According to these provisions, agreements or resolutions concerning the production or sale of commodities, the influencing of business conditions, the fixing of prices, the establishment of boycotts, or the adoption of injurious measures of similar effect are forbidden unless existing with the express permission of the president of the Cartel Court. The permission is to be refused if the measure in question would endanger the general economic welfare or the public good, or would unreasonably

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<sup>13</sup> Cf. Luley, KARTELLRUNDSCHAU (1928) 206 *et seq.* (The KARTELLRUNDSCHAU is a periodical dealing with problems arising in connection with the cartels and the Cartel Court, and containing digests of the decisions of the latter. It will be cited hereafter as KARTELL.)

<sup>14</sup> KARTELLVERORDNUNG, *supra* note 2, § 9(1).

<sup>15</sup> Luley, *supra* note 13, at 207.

limit the economic freedom of the party or parties concerned thereby.

Boycotts or similar measures within the meaning of Sections 1 and 9 of the Cartel Order are, therefore, not permissible without the approval of the president of the Cartel Court or the Cartel Court itself. If such measures are undertaken without this approval, then under one section of the Civil Code<sup>16</sup> they are absolutely void, and constitute a tort under Section 823 of the Civil Code, which gives the injured person a right of action for damages.

The decisions of the Cartel Court, as well as those of the ordinary courts which have been called upon for protection under Section 823, prohibiting boycotts established without the required permission, have discussed the question in detail, without, however, having reached a thoroughly unequivocal answer as to what constitutes "a boycott or measures similar to a boycott" within the meaning of Section 9 of the Cartel Order.

"Exclusive contracts" do not in themselves constitute a boycott. The permission of neither the Cartel Court nor its president is necessary before they may be entered into. However, when they are put in operation against definite persons or firms, this is a specific measure which is equivalent to the declaration of a boycott and which is not permissible without the consent of the authorities.

On the other hand, not every case where business intercourse with a customer is refused because the terms of the transaction as recommended by the organization to its members have not been accepted, constitutes a boycott requiring official permission. If merely terms of business are concerned in a specific transaction or class of transactions, and there is no intention to restrain competition thereby, the question of boycotting does not arise. The tradesman is simply taking advantage of his unlimited right to refuse to enter into any contractual relation which he does not consider conducive to the furtherance of his commercial interests.

No fixed rule of law has as yet been laid down as to how far

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<sup>16</sup> B. G. B. § 134, *supra* note 9, LOEWY, *op. cit. supra* note 9, at 35: "A transaction which violates a prohibition is void, unless a different conclusion may be drawn from the prohibiting law."

the refusal of a preferred rebate (*treurabatt*) can be considered a disadvantage of sufficient importance to bring it within the forbidden class. A preferred rebate is a reduction of prices, granted to customers who deal exclusively with the members of the cartel, syndicate or monopolistic enterprise in question, and which is granted only so long as the exclusive-dealing clause is adhered to. Very often it is provided, under the terms of the contract, that as soon as a violation occurs the rebates granted in the past must be returned. The withdrawal of the rebate *for the future* constitutes a price discrimination in favor of a faithful customer and against the disloyal one, which, under some circumstances, may constitute a serious disadvantage to, or even the complete destruction of, the economic freedom of action or the business existence of the customer in question. In such cases, the rebate is deemed a "boycott or similar measure" and needs the approval of the Cartel Court.<sup>17</sup>

On the other hand, the *Reichsgericht* held in the same decision<sup>18</sup> that the claim for the return of the rebates *granted in the past* is to be considered as a claim for payment of a penalty agreed upon in the case of a breach of contract, as provided for in the Civil Code,<sup>19</sup> and that its nature, purpose, end, and effect have nothing to do with "an injurious measure of similar importance" materially increasing the difficulties of usual and general business intercourse. Such a contractual provision is not intended to prevent the other party from buying, selling, reselling, or obtaining credit, or to make it more difficult for him to do these things. It is solely the compensation required by the terms of the contract for intentional and premeditated breach of the agreement. In so far as the claim for the return of the customer's rebate constitutes a penalty for breach of the contract, another section of the Civil Code<sup>20</sup> is to be applied. According to that section, if the penalty

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<sup>17</sup> Verkaufstelle d. Drahtglasfabriken v. Bl. & Co., 122 Zivil. 260 (1928); Luley, *supra* note 13, at 261.

<sup>18</sup> *Ibid.*

<sup>19</sup> B. G. B. § 339, *supra* note 9, LOEWY, *op. cit. supra* note 9, at 85: "If the debtor promises, in the event that he does not fulfill his obligation, or does not fulfill it in the proper manner, the payment of a sum of money as penalty, the penalty is forfeited, if he is in default. If the performance consists in an omission, the forfeiture takes place upon the omission."

<sup>20</sup> *Ibid.* § 343, LOEWY, *ibid.* 86.

is excessive it may be reduced on application to the courts. Whether a preferred rebate connected with an exclusive-dealing clause constitutes a measure similar to a boycott against outsiders, is a question to be decided in each individual case according to its special circumstances.

The *Reichsgericht*, in a recent decision <sup>21</sup> handed down in a case where the customer entitled to the rebate was not *obligated* to purchase exclusively from the cartel, took the view that the measure in question did not constitute a boycott against the outsider. The court said:

“It is entirely within the discretion of the purchasers to decide whether they desire, in a specific case, to enter into a contract with the members of the cartel or with the plaintiff. If they choose the former, it cannot be said that the cartel had imposed upon the plaintiff an ‘injurious measure similar to a boycott.’”

The *Reichsgericht* does not consider, in this case, the question whether granting a preferred rebate constitutes a boycott if the purchasers at the same time subject themselves to an exclusive-dealing clause.

In the same way, the *Reichsgericht* in another recent decision <sup>22</sup> declared the so-called “deferred rebates” a legal method of combat.<sup>23</sup> The facts in that case were as follows: The shipping lines which were members of the La Plata conference had granted those firms which shipped their goods exclusively through the members of the conference a customer’s rebate on all net freightage. This rebate was not, however, payable immediately, but was deferred six months and was only due if the customer in question, during this period, had maintained his loyalty to the conference. The *Reichsgericht* denied a right of action to an association of freighters who attacked this system as an infringe-

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<sup>21</sup> Rh. Linoleum-Werke B. v. Deut. Linoleum-Werke *et al*, 119 Zivil. 366 (1928).

<sup>22</sup> JURISTICHE WOCHENSCHRIFT (1927) 302. (The JURISTICHE WOCHENSCHRIFT is a periodical containing juristic articles and digests of court decisions. It will hereafter be cited “J. W.” Where such decisions are by the *Reichsgericht*, they will hereafter be cited R. G. in J. W.)

<sup>23</sup> TSCHIRSCHKY, KARTELLORGANISATION, 140 *et seq.*

ment under Section 826 of the Civil Code.<sup>24</sup> It stated that it was true that the business field of action of the freighting company was materially infringed upon by these measures; but such infringement of the business field of action frequently accompanies the economic competitive struggle, and is not illegal so long as it does not exclusively aim to injure the parties in question, but is employed to expand and strengthen the enterprise in its economic combat, and, as in the present case, is effected by legal means that are not unreasonably excessive. A boycott, within the meaning of Section 9 of the Cartel Order, cannot be found in this system if third parties are able to compete with the freight rates, and the customers therefore do not have to rely on the rebates granted by the lines of the conference.

On the other hand, the Cartel Court (the decisions of which are final and binding on the ordinary courts and arbitration tribunals)<sup>25</sup> in two recent decisions<sup>26</sup> considered that there was a boycott when a preferred rebate was granted and an exclusive-dealing clause was also imposed. The engagement undertaken by the customer in his agreement binds him to exclusive business connection with the members of the association, and, according to the wording and meaning of it, forms the contractual basis which permits the association to employ the force of the organization against the customer and also against third parties, and, by threatening financial injury, cancellation, or return of the rebate, to restrain the customer from entering into such business relations with third parties.

Before the association can declare such a boycott measure and carry it out against third parties, it must have permission from the authorities as provided for in Section 9 of the Cartel Order. A general answer cannot be given to the question as to what measures of an association constitute carrying out such a boycott, but each case must be considered individually. Usually a boycott is effected by the declaration of the association indicating the parties with whom the customer must refuse to have business relations in

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<sup>24</sup> *Supra* p. 697.

<sup>25</sup> KARTELLVERORDNUNG, *supra* note 1, at 12.

<sup>26</sup> KARTELL. (1928) 735; *ibid.* (1929) 283.

regard to orders concerning the preferential rebate, in order to avoid breaking his obligation of loyalty. Such a declaration can be made to the customer obligated by his signature as well as directly to the third party in question.

The "turn-over premium"—that is,

" . . . the consideration paid for the purchase of a certain quantity of goods while the customer is free to buy where he likes to, is not to be considered, in its nature, an exclusive clause. It only becomes such an exclusive clause when it is dependent not only on the amount of the turn-over but also on the fact that the customer undertakes to purchase his whole supply of goods from the same supplier."<sup>27</sup>

*b. Boycotts Under the Civil Code*

The necessity for securing permission to declare a boycott or a similar measure, as set forth in Section 9 of the Cartel Order, relates only to measures undertaken by cartels; that is, it applies only to agreements to which at least one of the parties is a cartel. In other cases the Cartel Order does not apply, but the principles of freedom of economic action of the individual remain in force. The limits here set are determined by the ordinary courts, without the assistance of the Cartel Court. The decisions of the ordinary courts are not, as in the case of the Cartel Court, based on considerations of whether general economic life, the public welfare, or the economic freedom of the individual are endangered, but are concerned rather with considerations of whether, according to the opinion of just and fair thinking persons, the measure complained of would be regarded as permissible.

The attempt to form a monopoly is not, according to the decisions of the ordinary courts, *per se* illegal, so long as the methods employed thereby are permissible and the purpose of the monopoly is not *contra bonos mores*.<sup>28</sup> It is an illegal abuse of a monopoly if the methods employed are in themselves illegal; or if they serve solely to damage the other party; or if under the circumstances of the case they appear unfair or unjust because, in

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<sup>27</sup> Rh. Linoleum-Werke B. v. Deut. Linoleum-Werke *et al*, *supra* note 21, at 370.

<sup>28</sup> R. G. in J. W. (1929) 3004.

the first place, they are such as might totally end the economic existence of the party injured, or at least damage him to an extent not in fair proportion to the advantages to be gained thereby, and because, in the second place, they appear to be actuated by malice toward the party injured.<sup>29</sup>

Measures taken for self-protection may also be *contra bonos mores*. In considering the question, however, whether they are permissible, their purpose must especially be considered. Measures which, if taken for any other reason would not be permissible as methods of competition, may be allowed if undertaken for purposes of self-protection. However, the means employed must not be unfair. To this extent, the limits set for competition are the same as those set for self-protection.<sup>30</sup>

It must not be concluded from the fact that the use of certain measures in the economic struggle may not be employed up to the point of destroying, or injuring to an unfair extent, the business affected, that every act which endangers the economic existence of another competitor is *contra bonos mores*. It cannot be expected that the defendant must disregard his own interests and deliver merchandise to the plaintiff solely that the business of the latter may continue.<sup>31</sup> According to these principles, the declaration or the threat of a delivery or purchase boycott is, in itself, not *contra bonos mores*.<sup>32</sup> The threat of the defendant, made to the suppliers of the plaintiff, that he would discontinue relations with them if they continued to sell to the plaintiff was not deemed illegal, because the defendant was simply acting in his own business interest and such acts done even with the knowledge that one's competitors are being injured is not *contra bonos mores*.

The declaration of a boycott against a third party who is undercutting the reasonable sale prices of the boycotting association is declared to be justified; and a cutting-off of supplies, an act to which the defendant has subjected himself in case he does not maintain the resale prices agreed to by himself, is not looked upon

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<sup>29</sup> *Ibid* (1927) 3002.

<sup>30</sup> *Ibid*. 112.

<sup>31</sup> *Ibid*. (1928) 1206.

<sup>32</sup> Verb. Deut. Damen-u. Mädchen-Näntelfabrikanten v. H., 85 Zivil. 177, 181 (1914).

as a measure which is *contra bonos mores*.<sup>33</sup> The boycott, however, can assume the character of a measure *contra bonos mores* if it is used in an illegal manner to force the party injured thereby to perform a certain act. The *Reichsgericht* held a boycott *contra bonos mores* in a case where it was declared by a roofing association against a seller of roofing material because the latter did not agree to charge on sales to outsiders a premium amounting to twenty-five per cent more than the prices charged members of the association; the premium to be paid to the association. The court stated that the proposition made to the boycotted party and refused by him was *contra bonos mores*.<sup>34</sup> The plaintiff was not only unjustly forced to enter into a contract which he did not desire, but this contract would also have forced him to increase his prices for deliveries to firms not members of the association and to pay this excess to the defendant association. This association thus undertook an unjust and immoral action against the pocketbooks of third parties, and attempted to enrich itself at the cost of the latter. The plaintiff was absolutely in the right when he, as an honest merchant, rejected such a proposition.

The *Reichsgericht*<sup>35</sup> has also held a boycott against a customer immoral in a case where the boycotting association sought to force the customer to recognize a judgment of arbitration, the validity of which was not above suspicion, and to prevent him from attacking, in an action before the ordinary courts, the contract of arbitration and the procedure based on the same.

The *Reichsgericht* does not, however, stop after deciding that in certain cases the boycott is an immoral means of combat. It goes further and holds that under certain circumstances there is an actual obligation to enter into contractual relations. The fact that a firm which actually holds a monopoly refuses, when not justified by economic reasons, to enter into contractual relations on the general terms usually employed, can be a serious injury to the party affected thereby and an immoral measure. In such cases

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<sup>33</sup> *M. v. Reichsverb. d. Deut. Mediz.-Drogen-u. Spezialitäten-Grosshandels*, 120 *Zivil.* 47 (1928), *J. W.* (1928) 1592.

<sup>34</sup> *J. W.* (1924) 1155.

<sup>35</sup> *Verb. Deut. Damen-u. Mädchen-Näntelfabrikanten v. H.*, *supra* note 32.

the *Reichsgericht* gives him a right of action on the basis of the provision in the Civil Code already quoted.<sup>36</sup> The court, however, does not declare to what extent there exists in such cases a legal obligation to enter into a contract in order to prevent this damage.<sup>37</sup>

In the same way, business people engaged in carrying on an enterprise necessary to public intercourse, who create a monopoly by their combination, may not impose business terms by which they reserve to themselves unreasonable advantages and at the same time bind the public in an unreasonable way.<sup>38</sup>

A recent decision<sup>39</sup> shows how reluctant the *Reichsgericht* is to assume an abuse of a monopoly. The defendant, having a monopoly, refused to continue business relations with the plaintiff, who was seriously injured by the discontinuance of the contract. The *Reichsgericht* dismissed the claim. If the business relations with the defendant were as vital to the plaintiff as he alleges, he should have entered into a long term contract. In that case, the question would have arisen whether the plaintiff had given the defendant sufficient cause for the breach, and the burden of proof would have been on the defendant. The plaintiff cannot, however, demand that, on the basis of Section 826 of the Civil Code, a contract between the parties, actually non-existent, should be deemed to exist.<sup>40</sup>

The granting of preferred rebates (*treurabatt*) is not *contra bonos mores*.

### B. Tying Contracts

The so-called tying contracts are contracts in which the lessee of a machine or plant which is indispensable to his business, or which is patented or otherwise monopolized, in order to avoid a

<sup>36</sup> B. G. B. § 826, *supra* p. .

<sup>37</sup> NIPPERDEY, KONTRAHIERUNGSZWANG UND DIREKTER VERTAG; cf. R. G. in KARTELL. (1927) 193 and the decisions therein quoted; Luley, *ibid.* 211; Wimpfheimer, *ibid.* (1929) 1; and SPERRE, ZULASSUNGSZWANG UND MONOPOLMISSBRAUCH (1929).

<sup>38</sup> Cf. Südd. Transp. Vers. A-G v. W., 106 Zivil. 386, 388; J. W. (1926) 120b and decisions there cited.

<sup>39</sup> *Ibid.*

<sup>40</sup> R. G. in J. W. (1927) 1982.

revocation of the license to use said machine or plant, undertakes to purchase accessories and replacement parts and all other machines necessary to his business exclusively from the lessor of the machine, although he could procure them from the lessor's competitors at better terms. They may also be contracts by which the purchaser obligates himself to order all machines necessary to his business from the seller of a certain part of his machinery, who possesses a monopoly on that part, although the purchaser could buy the other machines at better terms from other sources. Such a contract is not, under ordinary circumstances, deemed a boycott against the customer within the meaning of Section 9 of the Cartel Order. It may, however, under certain conditions be so considered.

These contracts are therefore legal and binding according to German law so long as the *Reichswirtschaftsminister* does not interfere with them as being against public policy or the common welfare, within the meaning of Section 4 or Section 10 of the Cartel Order; and does not, directly or through the Cartel Court, have them declared void or give the customer the right to withdraw from the contract or give notice of his intent to terminate it.

### C. Price-cutting

Price-cutting according to a preconceived plan is not always a special means of regulating competition. It is also employed in free competition, and is permitted as a fair method by German law, so long as it does not injure competitors without advancing one's own business interests. The question as to how far price-cutting comes within Section 9 of the Cartel Order depends on its character as a means of regulating competition, as contrasted with its tendency merely to influence the price level.<sup>41</sup> The *Reichsgericht* has said, with regard to price-cutting:

"It is not permissible to consider price-cutting an injurious measure similar to a boycott, if the customer takes advantage of the low prices of the association, in order to be able to compete. The fact that the price-cutting makes its

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<sup>41</sup> KESTNER-LEHNICH, ORGANISATIONSWANG 297.

influence felt in the business of the plaintiff and causes him to reduce his prices is not material in determining whether an injury has been suffered by him. Otherwise a cartel would be deprived of its most important means of combat and its whole existence would be shaken. It was, however, not the intention of the Cartel Order to make the existence of cartels generally impossible. The ordinance is the result of a compromise between two points of view which considered a cartel from different economic standpoints and which intended simply to do away with the evils of the cartel system and to prevent the abuse of its economic power. Consequently, it cannot be admitted that price-cutting is allowed to a single industrial concern but not to a cartel. If this were true, the result would be that customers, in their own interests, would purchase at the reduced price and would not buy any goods from another producer."<sup>42</sup>

#### D. Rings (*Agreements Not to Tender*)

The ring is a secret combination for regulating competition against one who desires to receive offers from an open market. While many eminent authorities consider the ring unfair because the customer is intentionally deceived, the *Reichsgericht* considers it permissible in principle. The court has declared that the ring arises out of the economic necessity of self-preservation against price-cutting at public biddings, which is injurious to the public welfare. It has declared such cartels to be *contra bonos mores* only if their purpose is to deceive the offeree and thus obtain, at his expense, unjustifiable advantages or exorbitantly high prices. The *Reichsgericht* held that a case where the successful bidder had offered to pay a compensation to the other bidders fell within this class.<sup>43</sup> The adherents of the view taken by the *Reichsgericht*, upholding the fundamental fairness of a ring, defend their position by the statement that the offeree has no right to demand that the offers come from an open market. It is a recognized rule of law that every prospective buyer does not have such a right.

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<sup>42</sup>Rh. *Linoleum-Werke B. v. Deut. Linoleum-Werke et al*, *supra* note 21, at 369.

<sup>43</sup>J. W. (1913); 134; *ibid.* (1914) 976; *ibid.* (1920) 431; *ibid.* (1926) 1550.

“Otherwise no price cartel of industrial firms could exist. There is no reason to be seen why a prospective buyer asking for bids should have the right to the same on an open market, which others have not. Furthermore, one cannot make the general statement that bids made in combination with others will deceive the buyer. In the important case of bids asked for by public officials, such combinations are either well known or the officials must at least count on the existence of a ring among the bidders.”<sup>44</sup>

#### *E. Maintenance of Resale Prices*<sup>45</sup>

By this means “the sale price is regulated not only for the producers but also for the wholesale and retail dealers, in such a way that the determination of the price according to the state of the market is made very difficult, if not prevented entirely”.<sup>46</sup> Agreements of this sort are, according to German decisions, permissible and binding in so far as they do not endanger the turnover of, or create exorbitant prices for, the necessities of daily life; or they are to be looked upon as illegal or immoral, because they oppress the customer or exploit without limit the advantages of a monopoly against the dealer or the public.<sup>47</sup>

The German courts protect agreements as to the maintenance of resale prices of standard articles, by considering the violation of this system of fixed resale prices as unfair competition in the nature of dumping and therefore subject to damages. According to the decisions, dumping of this sort consists in the regular sale of such goods at the price set by the producer, although the seller knows that the latter desires the resale to be made at the set price, and for this purpose has built up a certain system of inspection. The courts find the unfair competition in the fact that the reseller has secured the articles in question at cheaper prices in intentional contravention of the contractual obligation, or by taking advantage of the breach of his seller’s contract with the producer, for the

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<sup>44</sup> Gehler, J. W. (1926) 2080.

<sup>45</sup> Cf. Fluhme, *Preisunterbeutung bei Markenartikeln nach deutschem und ausländischem Recht*, KARTELL. (1927) 451.

<sup>46</sup> Tschierschky, *ibid.* (1929) 88.

<sup>47</sup> M. v. Reichsverb. d. Deut. Mediz.-Drogen-u. Spezialitäten-Grosshandels, *supra* note 33.

purpose of damaging his competitor and the producer by selling at a cheaper price, to his own advantage. Only in case the agreement as to the minimum resale price is, in itself, *contra bonos mores* and invalid, is it considered fair to combat the same by dumping.

In this matter, also, the Cartel Court has acted in protecting the general public against the power of the organization, and has taken a different point of view. In one case<sup>48</sup> the Cartel Court gave its protection to a retail dealer against whom a boycott had been declared because he had refused to sign an obligation binding him to the maintenance of resale prices. The court said:

“The attempt of the plaintiff to force the retail iron dealer in question, who was still free, not having as yet signed the articles of the association, into the sale organization of the association of steel works was an unreasonable restraint of his economic freedom and contained the ‘danger’ mentioned in the first alternative of Section 9, subsection 2 of the Cartel Order.”

In the same way, the president of the Cartel Court, in a recent decision, prevented uniform price maintenance through a collective agreement between the cigarette factories and a part of their wholesale and retail trade, refusing to give the required permission for a boycott of outsiders.

While the ordinary courts base their decisions on the fact that the inducing of a breach of contract is unfair competition, the Cartel Court, in the interest of preserving freedom of trade and commerce, refuses to protect monopolies organized for the purpose of controlling competition.<sup>49</sup>

#### *F. Bogus Independents*

Concealing the interdependence of several firms having different names may, under certain circumstances, be unfair. In a

<sup>48</sup> KARTELL (1927) 268.

<sup>49</sup> Tschierschky, *supra* note 46, at 88, 136, and 200, denies that the prevailing view of the law finds its foundation in our ruling economic and legal principles, and that refusing to maintain dictated prices and selling at cheaper prices within the scope of sound commercial principles without “dumping”—that is, selling at any price—can constitute, in our economic system based fundamentally on freedom of price competition, an illegal act.

case decided by the *Reichsgericht*,<sup>50</sup> the defendant had concealed the fact that he was the owner of two firms, in order to use the second firm as a competitor when making his bid. The bids made by both firms were determined by him, but the offeree was led to believe that the prices were competitive. The first appellate court dismissed the complaint because, considering the fact that the product was a monopoly, the defendant had suffered no damage. The *Reichsgericht* reversed this decision and gave judgment for the plaintiff, saying:

“This deceit practiced on the public constitutes an immoral act which contravenes the principles of an honest merchant in his business dealings. Even if the defendant has a monopoly of the type in question, this fact does not justify him in employing such deceitful methods in fixing his prices.”

(*Editor's Note:* The second part of this article, dealing with unfair methods of regulating competition in England and in the United States, will be published in the May issue of the REVIEW.)

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<sup>50</sup> J. W. (1926) 1549.