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12/12/2006 11:57

To: edb@edlb.gov.hk
cc:
Subject: On Competition Policy

Der the correspondence,

The basic marketing competition is based on the 4P of marketing matrix: Price, Products (including services), Place and Promotion. Competition Policy should be protecting innocent and reducing immoral activities according to social moral.

Attached is the German view on this issue, which is much thorough in this topic.
(This document was found in http://www.antitrust.de/articlesandreports )

Regards,
Horace

# The 1999 Amendments to the German Act Against Restraints of Competition

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## I. Introduction

The sixth major revision of the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen or „GWB"1) was enacted in May 1998 and entered into force iSn January 19992 . One of the main objectives of the revision is the harmonization with EU competition law 3. Over the last years, the influence of EU law on Member States' laws has grown steadily, especially in the area of competition law. It has been argued that equal opportunities for all competitors in the EU single market could not be provided as long as structural and substantive differences between German and EU antitrust law remain. German industry criticized perceived competitive disadvantages vis-à-vis foreign companies. To bring GWB into line with EU law standards, (a) prohibitions on cartels, the abuse of a market-dominating position, and recommendations were explicitly introduced; (b) a supplementing general exemption was added in § 7 GWB; (c) all covered mergers are now subject to pre-merger-notification; and (d) the definition of mergers was harmonized through the introduction of the „acquisition of control" in § 37 (1) No. 2 GWB. In the main investigation procedure, not only prohibitions, but also clearances of mergers, are subject to publication and explanation.

However, unlike Article 85 (1) of the EEC Treaty, German competition law will continue to distinguish between horizontal and vertical restraints. While horizontal restraints are generally prohibited by § 1 GWB and can be exempted according to §§ 2 through 8 GWB, vertical restraints in the form of exclusive dealing agreements are in general subject to supervision of the cartel authorities (§ 16), and „only" contractual restrictions on a party's freedom to determine prices or contractual terms concluded with third parties are directly prohibited by law.

## II. Horizontal Restraints

The prohibition of concerted practices, found in § 25 of the old version of the GWB (o.v.), has been incorporated in § 1 in order to follow the wording of Art. 85 (1) EEC Treaty. Like Art. 85 (1) EEC Treaty, § 1 GWB is now a „real" prohibition. Therefore, already the conclusion of a cartel agreement, and not only the performance of the cartel agreement, is now prohibited. Until these amendments, only the disregard of the ineffectiveness of the agreement or resolution was prohibited under § 38 (1) No. 1 GWB o.v. The amended § 1 GWB prohibits „agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their

object or effect the prevention, restriction or distortion of competition."

Substantive as well as procedural requirements continue to differ in the exemption systems of German and EU law. While EU law has a general provision in Art. 85 (3) EEC Treaty, German law relied on precise exclusive exemptions in §§ 2 through 8 GWB. The GWB as amended combines both models by keeping the revised exemptions in §§ 2 through 6 GWB and § 8 GWB and enacting a general exemption in § 7 GWB similar to Art. 85 (3) EEC Treaty. The amendments strengthen the tendency to require the Federal Cartel Office (FCO)4 to review every single exemption from § 1 GWB individually. In contrast, Art. 85 (3) EEC Treaty exempts special agreements from the application of Art. 85 (1) EEC Treaty by law through block exemptions5.

Different categories of cartel exemptions remain largely unaltered in substance, with minor procedural changes: (a) agreements for uniform application of standards or types (Normen- und Typenkartelle, § 2 (1) GWB); (b) agreements for uniform application of general terms of business, delivery and payment (Konditionenkartelle, § 2 (2) GWB); (c) specialization cartels (Spezialisierungskartelle, § 3 GWB); (d) efficiency-promoting agreements between small and medium enterprises (Mittelstandskartelle, § 4 GWB); (e) purchasing cartels (Einkaufsgemeinschaften, § 4 (2) GWB); (f) rationalization cartels (Rationalisierungskartelle, § 5 GWB); and (g) structural crisis or recession cartels (Strukturkrisenkartelle, § 6 GWB) .

The exemptions for rebate cartels (§ 3 GWB o.v.), export cartels (§ 6 GWB o.v.) and import cartels (§ 7 GWB o.v.) have been repealed. In practice, neither rebate cartels (§ 3 GWB) nor import cartels (§ 7 GWB) were important in the last years. According to the legislative comments, the exemption for export cartels (§ 6 GWB o.v.) has been abolished due to worldwide efforts to combat cross-border restraints on competition. However, at the same time, the „long-arm-statute" of § 98 (2) sentence 2 GWB (o.v.) that had widened the scope of the GWB to apply to „pure" German export cartels, thereby enabling monitoring of German pure export cartels through a notification requirement, has been abolished as well. Thus, the control of German-based export cartels, as well as the opportunity to pursue pure German export cartels, has been abandoned. With regard to exports to EU Member States, which account for more than half of German exports, the exemption was meaningless due to the prevailing prohibition in Art. 85 (1) EC Teaty.

In 1999, a general cartel exemption was enacted in § 7 GWB after the model of Art. 85 (3) EEC Treaty. Agreements or decisions which contribute to improving the development, production, distribution, procurement, recycling or waste disposal of goods, while allowing consumers a fair share of the resulting benefit, can be exempted from § 1 GWB. The exemption requires that the improvement cannot be achieved by other means, the improvement is adequate in relation to the restraint of competition connected with it, and the restraint of competition does not lead to the creation or strengthening of a market-dominating position. However, according to § 2 GWB, agreements and decisions whose object is the rationalization of economic activities by specialization or by other means, or whose object is the joint purchase of goods or commercial services or which deal with the uniform application of terms of business, do not fall under § 7 GWB. They can only be exempted from § 1 GWB by application of § 2 (2) GWB and §§ 3 through 5 GWB. The requirement of „promoting technical or economic progress", which is subject to Art. 85 (3) EEC Treaty, has not been incorporated in § 7 GWB; thereby the legislature expressly wanted to exclude any attempt to override competition considerations by industrial policy goals or public interest considerations. Nevertheless, § 7 GWB allows the cartel authorities as well as enterprises more flexibility to adapt to different market conditions and developments. In addition, this provision provides exemptions for areas such as banking or insurance which were formerly subject to industry exemptions.

Procedurally, German cartel exemptions can be divided into three categories. First, the cartel

exemptions in §§ 2 through 4 (1) GWB are governed by § 9 GWB (Widerspruchskartelle). They require notification and become effective if the cartel authority does not object within three months, § 9 (3) GWB. Second, agreements mentioned in §§ 5 through 8 GWB require express approval from the cartel authority according to § 10 GWB (Erlaubniskartelle). The third exemption category is purchasing cartels intended to increase the competitiveness of small or medium-sized enterprises, § 4 (2) GWB. They require notification and become effective without approval of the cartel authority if a complete notification is filed, § 9 (4) GWB. Purchasing cartels are no longer automatically defined to be outside the scope of § 1 GWB without notification.

III. Vertical Restraints

Resale price maintenance and agreements restricting a party's freedom to set the trade terms were declared null and void under the old § 15 GWB. The new § 14 GWB, like Art. 85 (1) EEC Treaty, prohibits such agreements. The nullity of those agreements now follows from general civil law rules, § 134 of the German Civil Code.

The exemption for books and other publications remained for reasons of cultural policy mainly unaltered and is now found in § 15 GWB.

Restrictive licenses concerning intellectual property rights (§ 17 GWB) or know-how (§ 18 GWB) are increasingly subject only to prevailing EU competition law with its detailed block exemptions, and therefore had few importance for the FCO practice in recent years. These provisions have been partly adapted to EU law.

Concerning vertical restraints other than resale price maintenance, the supervisory powers of the cartel authorities in § 18 GWB o.v. have been simplified and incorporated in § 16 GWB. The cartel authority may declare agreements between enterprises for the sale of goods or commercial services to be void and forbid the implementation of new, similar agreements, insofar as the agreements impose on one of the parties (1) restrictions as to its freedom to use the supplied goods, other goods or commercial services, (2) restrictions as to the purchase of other goods or commercial services from, or their sale to, third parties, (3) restrictions as to the sale of the supplied goods to third parties, or (4) an obligation to accept goods or commercial services not related to the subject-matter of the agreements by their nature or trade customs. Furthermore, a decision of the cartel authority requires that such restrictions substantially impair competition in the market for these or other goods or commercial services. Section16 GWB is not directly enforceable by private parties but lies within the discretion of the cartel authorities. Therefore, tying arrangements and other vertical restraints are not prohibited per se. However, they may fall under § 19 or § 20 GWB if exercised by market-dominating enterprises. Also, if they have an effect on trade between Member States, they may fall under Articles 85, 86 EEC Treaty.

Section 22 (1) GWB prohibits recommendations, e.g. suggested retail prices, which, through uniform conduct, circumvent prohibitions laid down in the GWB or decisions taken by cartel authorities pursuant to the GWB. Section 22 (2) and (3) GWB exempt several types of recommendations. Section 23 GWB exempts non-binding price recommendations issued by an enterprise for the resale of its branded goods, if the goods are in price competition with similar goods of other manufacturers. Those recommendations have to be expressly designated as non-binding, and economic, social or other pressure may not be exerted to enforce them.

The prohibition on boycotts and refusals to deal, and other prohibitions of unilateral acts irrespective of market power, were integrated into § 21 GWB. Section 21 (2) and (3) GWB prohibit different kinds of coercion of other enterprises, especially to threaten or cause harm, or to promise

or grant advantages, to other enterprises for the purpose of inducing them to adopt conduct which the GWB prohibits from being the subject-matter of a contractual commitment.

## IV. Market Dominating Enterprises

The GWB does not contain a provision applying to monopolization. However, the merger control rules govern the creation or strengthening of a market-dominating position, and § 19 GWB prohibits the abuse of an existing market-dominating position.

In contrast to § 22 GWB of the old version, which enabled the cartel authorities to take appropriate remedial measures, an abuse of a market-dominating position is now directly prohibited under § 19 (1) GWB, as is the case in Art. 86 EEC Treaty. Private parties can enforce this prohibition directly through damage claims and injunctive relief according to § 33 GWB. Under the old version of the GWB, they had to wait for a decision from the cartel authorities. Also, under the former law, administrative fines (Bußgelder) could only be levied after an enterprise had disregarded a decision of the cartel authority.

In contrast to European competition law, German law provides an explicit definition of market domination. An enterprise is market-dominating if it has no competitor or is not exposed to any substantial competition (§ 19 (2) No. 1 GWB), or if it has a paramount market position in relation to its competitors (§ 19 (2) No. 2 GWB). For this purpose, its share of the market, its financial strength, its access to the supply or sales markets, its links with other enterprises, the existence of legal or actual barriers to the market entry of other enterprises, its ability to switch its supply or its demand to other goods or commercial services, as well as the ability of the opposite side of the market to deal with other enterprises shall in particular be taken into account. In addition, the 1999 amendment requires consideration of „the actual or potential competition by undertakings located inside or outside the area in which the GWB applies". Thus, the legislature intends to make clear that for the purpose of defining market domination, the market conditions within the relevant international market shall be considered irrespective of the question of the applicability of the GWB to markets outside its scope6.

Any enterprise with a market share of at least one-third for a particular type of good or commercial service is presumed to be market-dominating. Also, if two or three enterprises have a combined market share of 50 percent or over, or five or less enterprises have a combined market share of two-thirds or over, they are presumed to be market-dominating, § 19 (3) GWB. Under the presumption for market-dominating enterprises, the turnover requirements subject to § 22 GWB o.v. were deleted.

Section 19 (4) GWB provides examples of abuses of a market-dominating position. An abuse occurs, for instance, if the enterprise demands consideration or other business terms that deviate from those which would result in all probability if effective competition existed, or if it demands less favorable consideration or other business terms than are demanded from similar buyers on comparable markets by the market-dominating enterprise, unless there is a factual justification for such differentiation (§ 19 (4) No. 2 and No. 3 GWB).

With the sixth revision the essential facilities doctrine was implemented in the GWB. After developing the doctrine in US in United States v. Terminal Railroad Association7, the essential facilities doctrine was used in EC competition law8. Since there are specific competition law provisions in, specially in the field of Telecommunications, § 19 (4) No. 4 GWB is only a subsidiary norm. How the relationship between the general competition law of the GWB and the specific competition law will show the practice of the FCO and the courts. According to § 19 (4)

No.4 GWB an abuse is present in particular, if a dominating the market enterprise as providers or supplier of a certain type of goods or commercial performances refuses to grant another enterprise against appropriate payment access to the own networks or other infrastructure facilities if it is not possible for the other enterprise for legal or actual reasons without the sharing, on pre or stored market than competitors of the dominating the market enterprise to become active; this does not apply, if the dominating the market enterprise prove that the sharing for conditioned or other reasons is not possible or not reasonable. The FCO and the courts will have to balance competition v. property (it should be mentioned that the essential facilities doctrine as applied in Europe is broader than the one in the US. In this respect it is somehow misleading to speak of the essential facilities doctrine; Germany will develop an own form of the essential facilities doctrine).

The problematic relationship between specific competition law and general competition law becomes specially obvious in the case of GWB and TKG 9. Section 2 (3) TKG states that the TKG shall not affect provisions of the GWB. On the other hand the legislative materials of the TKG show that the TKG is meant to be the more specific law when it comes to competition questions compared with GWB. The question of subsidiary has sever consequences for institutional questions: the GWB institutional authority is the FCO, the institutional authority of the TKG is the Regulatory Authority for Telecommunications and Posts (RATP) which operates in the jurisdictional area of the Ministry of Economy10.

The prohibitions of discrimination and hindrance (§ 26 GWB o.v.) remained mainly unaltered and are now in § 20 GWB. According to § 20 (1) through (3) GWB, market-dominating enterprises, cartels exempted under §§ 2 through 8 GWB, and enterprises binding their resale prices according to the exemptions in §§ 15, 28 (2), 29 (2) and 30 (1) GWB, shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation, treat such enterprise directly or indirectly in a manner different from the manner of treatment accorded to similar enterprises.

Section 20 (1) GWB also applies to enterprises and associations of enterprises, insofar as small or medium-sized enterprises acting as suppliers or purchasers of certain types of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist (§ 20 (2) sentence 1 GWB). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser, if, in addition to the price reductions or other considerations customary in the trade, the purchaser regularly receives special benefits not granted to similar purchasers (§ 20 (2) sentence 2 GWB).

Those enterprises and associations are also prohibited from using their market position to cause other enterprises in business activities to accord them preferential terms in the absence of facts justifying such terms, § 20 (3) GWB.

According to § 20 (4) sentence 1 GWB, enterprises having superior market power in relation to small and medium-sized competitors must not use their market power to unfairly hinder those competitors either directly or indirectly. In particular, the 1999 amendments added a provision (sentence 2) naming the sale of goods or services below original cost price or purchase price (Verkauf unter Einstandspreis), if it does not occur only occasionally, and in the absence of justifying facts. This amendment constitutes a further legislative attempt to protect small and medium-sized retailers against their large competitors in what is deemed to be a highly concentrated market. It remains to be seen if the difficulties in defining „original cost price or purchase price" can be overcome; also, criticisms have been raised concerning a „price control" effect created by this provision.

V. Exempted Areas

Following the privatization of a number of key industries such as energy, telecommunications and transport in recent years, the broad general exemptions for special industries in §§ 99 et seq. of the old GWB have been mainly repealed. For purposes of harmonization with EU law, they have been replaced by rules which in principle require single decisions of the cartel authority. For instance, § 29 (1) GWB requires from agreements in the bank and insurance sector an express application for a single exemption from the prohibition of cartels (§ 1 GWB) in accordance with §§ 2 through 8 GWB. Also, exemptions from resale price maintenance prohibitions (§ 14 GWB) and the prohibition of certain recommendations (§ 22 GWB) are, in general, subject to single decisions of the cartel authority, § 29 (1) GWB.

Also, the former broad exemptions for agreements for the supply of electricity or gas (§ 103 GWB o.v.) have been abolished, in connection with the new Energy Act of 1998 11.

Following a FCO decision, several judgments, and political discussions concerning the joint marketing of television rights by German professional soccer teams, another exemption from § 1 GWB was added in § 31 GWB exempting joint marketing of broadcasting rights through sports associations, provided that these sports associations, in accordance with their sociopolitical responsibility, are also obliged to promote youth and amateur sports, which has to be shown by an adequate participation in the proceeds. However, the EC Commission also initiated an investigation into the joint marketing of broadcasting rights within the German Soccer League (Bundesliga) under Art. 85 EEC Treaty. The results of this exemption might be restricted since an EC Commission decision, a German court decision in a private case or even a FCO decision12 finding a violation of Art. 85 (1) EEC Treaty prevails over the exemption provided in § 31 GWB.

## VI. Merger Control

Merger control is the area where the revisions mainly took place13. An amendment introduced a compulsory pre-merger notification for all mergers subject to the GWB. Until 1998, with several exceptions and modifications, mergers with more than DM 500 million required notification only after completion. Pre-merger notification was compulsory if one concerned enterprise had turnover of at least DM 2 billion, or two concerned enterprises recorded individual turnovers of DM 1 billion or more (§ 24a (1) GWB o.v.).

Under current law, both groups of mergers are treated equally. A proposed merger requires advance notification, if, during the completed business year preceding the merger, the participating enterprises together recorded a turnover of at least DM 1 billion (§ 35 (1) No. 1 GWB), and if at least one enterprise concerned recorded domestic turnover of at least DM 50 million (§ 35 (1) No. 2 GWB). Merger control does not apply if an enterprise that is not a controlled enterprise and in the last completed business year recorded a turnover of less than DM 20 million, affiliates itself to another enterprise (§ 35 (2) No.1 GWB). This prerequisite has been lowered from DM 50 million to DM 20 million. The application of the merger rules is also excluded insofar as a market is affected in which goods or commercial services have been supplied for at least five years, and the market in the last calendar year had a turnover of less than DM 30 million (§ 35 (2) No.2 GWB, „Bagatellmarktklausel"). This prerequisite has been increased from DM 10 million, thereby eliminating more cases deemed to be a „trifle" for merger control. It is expected that approximately two thirds of merger cases will no longer be subject to the notification requirement due to the increases in turnover thresholds triggering German merger control.

Also, in many cases, the European Merger Control Regulation 14 prevails, if the combined aggregate world-wide turnover of all enterprises concerned is more than ECU 5 billion and, in

addition, the aggregate Community-wide turnover of each of at least two of the enterprises concerned is more than ECU 250 million, unless each of the enterprises concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. In 1997, Art. 1 (3) of the European Merger Control Regulation was amended to extend the scope of Community merger control to concentrations with a significant impact in several Member States and to extend the „one-stop shop" system to particular mergers where the aggregate world-wide turnover of the enterprises concerned is more than ECU 2.5 billion 15. Mergers which fall under the EU Merger Control Regulation are not subject to German merger control, § 35 (3) GWB.

Section 36 (2) GWB includes a now common „connection provision" (Verbundklausel) for the purpose of turnover calculation as well as for the determination of a market-dominating position in terms of market shares. If one of the participating enterprises is a controlled or controlling enterprise or an affiliated company, the enterprises linked in this manner are regarded as a single enterprise for the calculation of turnovers as well as market shares. If several enterprises, as a result of an agreement or otherwise, act together in such a way that they jointly are able to exercise a controlling influence on a participating enterprise, each of them is regarded as a controlling enterprise. Therefore, the market shares as well as the turnovers of the controlling enterprises have to be taken into account. The terms „controlled enterprise", „controlling enterprise" and „affiliated enterprise" (Konzernunternehmen) are defined in Sections 17 and 18 of the Joint Stock Companies Act. The special rules for the calculation of turnovers and market shares remain mainly unaltered and are now subject to § 38 GWB.

Section 37 GWB governs the definition of mergers. The system of different explicit definitions has been shortened and partly adapted to EU Merger Control. § 37 (1) No. 1 GWB concerns the acquisition of all or a substantial part of the assets of another enterprise and remains almost unaltered.

In No. 2, the term „acquisition of control" has been introduced. In accordance with Art. 3 EU Merger Control Regulation, control requires that one or more undertakings acquire direct or indirect control of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking (§ 37 (1) GWB) a), or by rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking (b). According to the Commission decisions involving EU law, „acquisition of control" shall include not only majority holdings, but also minority interests if the owner of the shares holds a secure majority in shareholders' meetings. „Acquisition of control" shall also cover cases which were formerly subject to § 23 (2) No. 3, 4 and 5 GWB o.v. This amendment combines the flexible approach of EU merger control with the fixed merger definitions of German law.

No. 3 continues to cover the acquisition of shares in another enterprise, provided the shares alone or together with other shares already held by the acquiring enterprise amount to 50 percent (a) or 25 percent (b) of the capital or voting rights of the other enterprise. The shares held by the acquiring enterprise shall also include the shares held by another enterprise on behalf of these enterprises, and, if the owner of the enterprise is a sole proprietor, any other shares belonging to the owner. If several enterprises simultaneously or successively acquire shares in another enterprise to the extent mentioned above, this is also deemed a merger of the participating enterprises (joint venture) with regard to the markets in which the other enterprise operates.

The controversial provision of „competitively significant influence", which was enacted in 1989 in order to cover attempts to circumvent merger control, e.g. acquisition of 24.9 percent of the shares,

was transferred to § 37 (1) sentence 4 GWB. It concerns „any other combination of enterprises insofar as the combination enables one or several enterprises to exercise directly or indirectly a competitively significant influence on another enterprise."

Note that the fulfillment of each single merger provision is regarded as a separate merger and therefore subject to the notification requirement and the cooresponding administrative fines for failing to notify (§ 81 (1) No.7 GWB). Therefore, if an enterprise acquires at first 25 percent, gains a stable actual majority of voting rights in the shareholders' meeting one year later (acquisition of control), and another year later acquires shares amounting to 51 percent, the FCO must be notified of each of these acquisitions.

If it is likely that a market-dominating position will be created or strengthened as a result of a merger, the FCO has to prohibit the merger, unless the participating enterprises prove that the merger will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of market domination (§ 36 GWB). A market-dominating position is defined in § 19 GWB. Therefore, the market share-related presumptions in § 19 (3) GWB are important.

Major changes took place in the merger control procedure, which is divided into a preliminary examination within one month, and a main examination within four months (Hauptprüfverfahren). According to § 40 (1) sentence 1 GWB, the FCO may prohibit a notified merger only if it informs the notifying enterprises within a period of one month from receipt of a complete notification that it has begun an examination of the proposed merger. The main examination procedure shall be instituted if a further examination is necessary (§ 40 (1) sentence 2 GWB). In the first examination period, a preliminary examination is undertaken in order to detect harmless cases. Complex cases shall be subject to the second stage: the main examination procedure. Clearances in the first stage are not subject to formal decisions; they are handled by informal administrative notice, or by the expiration of the four month period. In the main examination procedure, decisions of the FCO have to be formal decisions (Verfügungen). Therefore, the FCO must publish and give reasons for its decision. Until 1998, only prohibitions of mergers were subject to publication and explanation. Clearance decisions were mainly only published in the biennial report of the FCO or the general report (Hauptgutachten) of the Monopoly Commission 16. The European Merger Control has shown that clearance decisions, even more than prohibitions, require discussion in public. It is expected that these formal requirements for clearance decisions will enhance transparency and the public control of merger control decisions by the cartel authorities. In addition, the amendments clarify that third parties are allowed to challenge clearance decisions. However, the amended GWB does not preclude clearance of mergers by letting the 4 months period lapse. According to § 40 (2) sentence 2 GWB, a merger is deemed to be cleared if the FCO does not issue a decision within four months. Therefore, although it might seem unlikely, merger cases could be cleared without a formal decision even in the main procedure through expiration of the four month period, thereby preventing third parties from their right to bring an action. Also, clearance of critical cases during the preliminary procedure through informal notice could hinder transparency and third party legal remedies.

Section 39 GWB defines the content of the notification and the persons obliged to notify, as well as the FCO's right to demand information. A new provision was introduced in § 39 (6) GWB to require an authorized recipient in Germany to file the notification if a concerned enterprise is located outside of Germany.

## VII. Enforcement

The procedural rules remain mainly unaltered. German competition law is enforced by the Federal Cartel Office, which is located in Berlin and moves to Bonn in 1999, and the cartel authorities of the sixteen German States (Länder).

The GWB provides for administrative sanctions in the form of cease and desist orders (the general rule for cease and desist orders is found in § 32 GWB) and administrative fines for administrative offenses (Ordnungswidrigkeiten) which are named in § 81 GWB. In addition, § 34 GWB provides for excess proceeds surcharge orders of the cartel authority if an enterprise willfully or negligently, as a result of conduct prohibited by a cartel authority decision pursuant to § 32 GWB, has obtained additional proceeds following service of a decision. In addition to the single excess proceeds surcharge subject to „ordinary" administrative proceedings (§§ 54 through 80 GWB), a treble surcharge of illegal proceeds is possible as an administrative fine if an administrative offense (Ordnungswidrigkeit) is found under § 81(2) GWB.

The GWB does not provide for criminal sanctions. However, the 1997 amendments to the Criminal Code introduced an express provision for bid-rigging 17.

Private damage actions and injunctive relief are now covered by § 33 GWB. Although this provision seems very similar to the former § 35 in the old version of the GWB, its importance might change substantially given the amendments to other provisions. The abuse of a market-dominating position is now prohibited in § 19 GWB and can therefore be enforced by private parties without a cease and desist order from the FCO. It is unclear whether or not the newly introduced explicit prohibition of cartels (§ 1 GWB) and agreements restricting one party's freedom to determine prices or business terms in contracts which it concludes with third parties (§ 14 GWB) will also impact the interpretation of the persons protected by those provisions and therefore authorized to claim for damages under §§ 1, 33 GWB or §§ 14, 33 GWB. A major impediment to the enforcement of the rules against abusive conduct of market-dominating enterprises and enterprises having superior market power has been the reluctance of adversely affected small firms to complain with the cartel authorities for fear of retaliatory measures taken by accused business partners. Therefore, § 54 GWB was complemented to allow the cartel authority to institute a proceeding ex officio upon the request of a complainant in order to protect the claimant's anonymity. The cartel authorities are now allowed to redact parts of a document, especially the address of the complainant, when they submit evidence to a court concerning a judicial review of an inquiry order issued by the cartel authority (§§ 59, 70 (4) GWB).

The requirement that cartel agreements and other agreements containing restrictions must be in writing (§ 34 GWB o.v.) has been abolished.

## VIII. Public Procurement

German procurement law has traditionally been part of administrative law and not competition law, and therefore focused on budgetary issues, without guaranteeing individual rights and legal remedies for applicants and bidders. Not until 1993 was a unified review of public procurement procedures and decisions for cases above the thresholds in the EU directives introduced ("budgetary solution"). The respective rules explicitly excluded bidders' individual, enforceable rights. This has been criticized by the Commission and by the EC Court of Justice as well as by the U.S. government in trade negotiations, and led to the introduction of several actions brought by the Commission against Germany on grounds of infringement of the EEC Treaty. In order to fulfill the requirements set by several European Directives18 aimed at the opening of public procurement for

Community-wide competition, the rules on government procurement have been amended and incorporated into the GWB, §§ 97 through 129. The GWB provides for definitions of public procurement and contracting authorities, and general principles governing public procurement. The procurement rules in the GWB do not only apply to governmental authorities. Contracting authorities within the meaning of § 98 GWB are also private enterprises involved in certain governmental-supported activities, e.g. the construction of hospitals and schools.

During the legislative process, strong disagreement occurred between the federal government and the States (Länder) concerning the permitted criteria for procurement. According to § 97 (4) GWB, procurement decisions have to be based on the expert knowledge, experience, efficiency and reliability of the enterprises. Other criteria may only be considered if provided for in federal or state laws. Several States insisted on their ability to set additional criteria. Thereby, they want to be able to use government procurement to promote certain groups of employees and to exclude those firms found guilty of work on the side through black lists.

The new GWB introduced a subjective right for tenderers to guarantee compliance of government procurement proceedings with the respective rules, § 97 (6) GWB. Any enterprise having an interest in the procurement order and claiming to be injured in his or her rights has standing to bring an action, § 107 (2) GWB.

Judicial review is guaranteed by administrative authorities in the first instance (§ 104 GWB). The Vergabekammern (procurement review bodies) are independent, § 105 (1) GWB. Federal procurement orders are handled by federal Vergabekammern which are constituted within the Federal Cartel Office, and the 16 German States (Länder) have their own Vergabekammern. The final decision of a Vergabekammer constitutes an administrative act, § 114 (3) GWB. The Vergabekammer as well as the High Court on appeal have to decide within 5 weeks after receiving the complaint, § 113 (1) and § 121 (3) GWB. A review application will automatically halt the award procedure (§ 115 GWB), thus keeping open for the bidder the possibility of winning the contract. In its decision, the Vergabekammer declares whether the tenderer is affected in his or her rights, and may order necessary measures, without being bound by the application, § 114 (1) GWB. For example, the Vergabekammer can issue an order against a contracting authority to eliminate discriminatory elements from tender documents. It cannot remand the award, § 114 (2) GWB. Vergabekammer decisions can be appealed to the High Court (Oberlandesgericht), § 116 GWB. The appeal, complete with a statement of the grounds for appeal, must be filed within two weeks of the announcement of the first instance decision, § 117 GWB. The Court of Appeals can either render its own decision or remand the case to the review board to decide again with attention to the court's arguments, § 123 GWB.

In case of an infringement of procurement rules, bidders can seek an award of damages under § 123 GWB, notwithstanding further damage claims, e.g., claims under the German Civil Code. In contrast, § 125 GWB provides a damage claim for cases involving abuse of rights; if the available remedies are abused by a bidding entity, it may be liable for damages to the other parties to the proceeding.

## IX. International Application of German Antitrust Law and Relation to European Antitrust Law

The GWB provides an explicit provision for the effects-principle in § 130 (2) GWB, stating that „this Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area." Therefore, all prohibitions and notification requirements apply to activities which have a direct, reasonably foreseeable and significant (not necessarily substantial) effect. The FCO has regularly applied the GWB provisions

to foreign enterprises.

A strong influence of EU law derives from the fact that EU law generally overrules German competition law. Therefore, if Art. 85 EEC Treaty is applicable, i.e., if an effect on trade between Member States is present, an express exemption granted under Art. 85 (3) EEC Treaty under a decision made by the Commission prevails over the prohibitions found in §§ 1 and 14 GWB. On the other hand, the prohibitions in Articles 85 and 86 EEC Treaty prevail over every kind of exemption in German law.

Many questions concerning the relationship, differences and conflicts of EU and German competition law remain open due to the fact that in many areas the EC Commission did not enforce prevailing prohibitions in EU law. Also, applications for exemptions under Art. 85 (3) EEC Treaty filed with the Commission may remain untreated for years. Due not only to the lack of resources in the EC Commission, recently, the FCO applied in several cases EU law directly, even if explicit provisions in the GWB exempted the conduct in question from the GWB prohibitions.

Therefore, for international transactions likely to have an „effect on trade between Member States" within the meaning of Articles 85 and 86 EEC Treaty, EU competition law rules always have to be considered in German competition law cases.

Footnotes

(1) The GWB was initially enacted in 1957 (BGBl. 1957 I, 1081). Since then, it has undergone six major revisions, the most important occurring in 1973 when the Merger Control was amended.

(2) Revision of August 26, 1998 (entry into force 1 January 1999), BGBl. 1998 I, 2521. For an overview of literature on German competition law in English, see <http://www.antitrust.de>.

(3) For the legislative history, see: BT-Drucks. 13/9720.

(4) In §§ 48 - 53 GWB.

(5) Block exemptions (Article 85 (3) EEC Treaty) under Council Regulations or Commission Regulations exist for exclusive dealing agreements, licensing agreements for the transfer of technology, specialization and research and development agreements, franchising agreements and insurance-sector agreements.

(6) See Federal Civil Supreme Court (Bundesgerichtshof), October 24, 1995 - BGHZ 131, 107-121 - „Backofenmarkt".

(7) 224 U.S. 383 (1912).

(8) 5 Common Market Law Report 255 - Sealink I.

(9) German Telecommunicatons Act of 1996 (TKG), BGBl. 1996 I, 1120; An English version of the Telecommunications Act is available through the German Regulatory Authority for Telecommunications and Posts at <http://www.regtp.de/English.htm>.

(10) Generally about the TKG: Carl. B. Kress, The 1996 Telekommunikationsgesetz and the Telecommunications Act of 1996, 49 Fed. Com. L.J. 551.

(11) BGBl. 1998 I, 730 - Gesetz zur Neuregelung des Energiewirtschaftsrechts.

(12) In addition to the EC Commission, the FCO and other Member States' Cartel Authorities are allowed and encouraged to apply EC competition rules; see § 50 GWB explicitly empowering the FCO to apply EC Competition Rules. See also Commission Notice on Cooperation Between National Competition Authorities and the EC Commission in Handling Cases Falling within the Scope of Articles 85 or 86 EEC Treaty, published in the Official Journal: OJ C 313, 15/10/97, p. 3.

(13) The FCO has published an information leaflet relating to the German control of concentrations, available at <http://www.bundeskartellamt.de>.

(14) Council Regulation (EC) No. 4064/89 on the control of concentrations between undertakings.

(15) Art. 1 (3) of the regulation now requires that

- the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2.5 billion

- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million

- in each of at least three Member States included for the above mentioned purpose, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million

- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

(16) §§ 44 - 47 GWB.

(17) § 298 of the Criminal Code (Strafgesetzbuch), "Wettbewerbsbeschränkende Absprachen bei Ausschreibungen", introduced through the Act against Corruptive Practices of August 13, 1997, BGBl. 1997 I, 2038-2043.

(18) For the respective EU directives, see the legislative history, Bundestags-Drucksache 13/9340 of December 3, 1997

# Competition Law in the European Union: A Dual Enforcement System (by Jason Hoerner)

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1) Introduction

Both the United States (US) and European Union (EU) utilize a model of dual enforcement to assure compliance with their antitrust or "competition" laws.2 This article examines the manner in which the EU utilizes a dual enforcement model to protect competition.

In the US, federal antitrust authorities do not have the power to direct or prevent state antitrust enforcement efforts. Federal and state governments are essentially coequals in antitrust enforcement, primarily because Congress has not reserved exclusive antitrust jurisdiction to the federal government4 and courts have (on federalism grounds) held that federal antitrust laws generally do not preempt state antitrust laws.5 Federal antitrust law applies in federal courts while state antitrust law applies in state courts. Although states can bring suits under federal antirust laws in federal courts, federal antirust law does not apply in state courts.

In general, EU authorities enforce European Community competition law ("Community competition law") while national authorities enforce national competition laws. EU competition authorities enforce Community competition law, but national competition authorities may enforce Community competition law and national competition laws. Community competition laws can apply in national courts and in administrative proceedings initiated by national enforcement authorities. The one area in which European competition authorities have exclusive jurisdiction to enforce Community competition law is in the merger area (depending on the sales figures of the merging entities). Where Community competition law and national competition law apply to an individual restraint of trade or anti-competitive act simultaneously, Community competition law generally preempts national competition law. However, to the extent national competition laws and Community competition laws do not conflict with one another, parallel proceedings before European competition authorities and national courts or authorities can occur and result in multiple liability.

2) Enforcement of EU Competition Law

The core of Community competition law originates form the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY (EC Treaty), which came into force on January 1, 1958.6 At the time the EC Treaty came into force, only a limited amount of competition legislation was in place in Member States.7 Germany had a sophisticated but untried competition law framework while that of other Member States such as Italy were non-existent.8 Today, all Member States have competition laws in place dealing with restrictive agreements and the abuse of monopoly power.9 However, competition law enforcement varies from the advanced to the

rudimentary among Member States.10 The United Kingdom, Germany, and France have been the most active in enforcement.11

a) EU

Community competition law must be understood in terms of the overall goals of the EC Treaty and the way in which competition policy is intended to achieve those goals.12 Article 2 and 3(f) of the EC Treaty are two provisions that identify the policies most important to understanding Community competition law. Article 2 states the importance of the promotion "throughout the Community [of] an harmonious development of economic activities, a continuous and balanced expansion ... an accelerated raising of the standard of living and closer relations between the States belonging to it." Article 3(f) acknowledges the need for "the institution of a system ensuring that competition in the Common Market is not distorted."

The two primary goals of Community competition law are therefore: a) the prevention of restrictive practices that interfere with the integration of the separate Member State economies into a unified common market;13 and b) the protection and promotion of competition within the EU.14

Community competition law is applied in three different scenarios. The first scenario in which Community competition law may apply is in administrative proceedings where cartel authorities (1) supervise the competitive behavior of undertakings, (2) prohibit cartels and abuses of dominant market positions, and (3) grant permissions or exemptions for certain types of cartels or for mergers.15 The second scenario in which Community competition law is applied in administrative fines procedures, where the cartel authorities may impose fines on enterprises in cases where law specifically provides for such fines.16 Finally, Community competition law is applied in civil actions where a court has to decide on the validity of an agreement or on the legality of a practice in a dispute between private parties.17

3) Substantive Law

The principal substantive rules of Community competition law are found in Article 81 and Article 82 of the EC Treaty.18 Article 81 applies to agreements and concerted practices in restraint of trade, and Article 82 applies to abuses of market dominating positions. Both Article 81 and 82 address restrictive practices by "undertakings," or all natural or legal persons and all combinations of legal persons engaged in an independent commercial activity, either as suppliers of goods or commercial services.19 Articles 81 and 82 apply both to private and public undertakings.

Article 81(1) prohibits restrictive agreements20 and concerted practices21 and makes them void if (1) they have as their object or effect the prevention, restriction, or distortion of competition within the Common Market, and (2) they affect trade between Member States.22 For Article 81(1) to be infringed, the following elements must be present:

(a) an agreement or concerted practice;

(b) a restriction on competition within the common market; and

(c) a potential appreciable effect on trade between Member States.23

Article 81(1) expressly applies to agreements or concerted practices to fix prices or trading conditions, limit production or markets, share markets or sources of supply, discriminate against other trading parties, or impose tying arrangements in respect of unrelated products.24

Article 82 prohibits abusive exploitation of a dominant position by one or more undertakings. The prohibition in Article 82 applies to "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it." For Article 82 to apply, the following elements must be present:

(d) a dominant position in a relevant product and geographic market within the common market;

(e) an abusive act; and

(f) a potential appreciable effect on trade between Member States.25

Dominant positions are measured on the basis of relevant product26 and geographic markets.27 An undertaking with a market share of 50 percent or more will be presumed to be dominant, although a market dominant position may exist with market shares between 40 and 50 percent.

Article 82 expressly applies to abuses such as imposing unfair prices or trading conditions, limiting production or markets, discriminating against trading partners, and tying.28 In addition, the following practices have been found to also infringe Article 82: unilateral refusals to supply customers,29 use of a nontransparent discount system,30 requiring a customer to purchase all or a significant part of its requirements of certain goods,31 predatory pricing or selective price cutting intended to damage a competitor,32 and charging excessive or discriminatory prices.33 A merger may fall within the Article 82 prohibition if a dominant undertaking permanently reduces competition through a merger. A potential appreciable effect is found relatively readily in practice.34

Unlike Article 81, Article 82 contains no exemption provision.

Competition rules applying to Member States mainly include provisions relating to the control of public aid.35 Article 87 provides that aid granted by a Member State or through Member State resources in any form whatsoever that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the Common Market.36 However, aid granted for specific purposes may be either automatically compatible with the Common Market or may be declared to be compatible with it.37

Article 86 governs the relationship between Member States and the public sectors of the economy. It prohibits the Member States from enacting or maintaining any measure contrary to the competition rules of the EC Treaty relating to public undertakings and undertakings to which Member States grant special or exclusive rights.38

ii) Enforcement Authorities

The principal procedural rules governing the enforcement of Community competition law are contained in EC REGULATION 17/62 (Regulation 17).39 It assigns the European Commission ("the Commission") the task of enforcing Articles 81(1) and Article 82.40 The Commission is the administrative arm of the EU. 41 Regulation 17 confers upon the Commission the power to request information using written interrogatories,42 to make inspections on company premises,43 and to require Member States to make such inspections on the Commission's behalf.44 If the Commission determines that there exists sufficient evidence of a competition law violation, it may adopt a decision enjoining45 the prohibited activity and impose fines.46 Regulation 17 does not apply to certain coal and steel products, the transport sector, or agricultural products.47

Each member of the Commission supervises one or more Directorate Generals, or departments of the Commission. The Commission exercises its powers through a number of Directorate Generals. The Directorate General for Competition is known as the "DG IV." The DG IV works on behalf of the Commission in the application and enforcement of Article 85 and 86.48

Concerning restraints of trade in violation of Article 81(1), an undertaking can avoid an enforcement proceeding by notifying the Commission of a proposed or existing agreement, decision, or concerted practice in order to attain an individual exemption,49 negative clearance,50 or both an individual exemption and negative clearance.51

The Commission must be formally notified of the terms of any existing or proposed agreement, decision, or concerted practice to which Article 81 applies.52

Only the Commission has the power to grant individual exemptions or negative clearances.53

Upon request, the Commission may exempt an individual agreement, decision or concerted practice from the prohibition in Article 81(1) under Article 81(3).54 The exemption applies where the Commission concludes that an otherwise prohibited agreement:

4) improves the production or distribution of goods, or promotes technical or economic progress;

5) allows consumers a fair share of the resulting benefit;

6) requires restrictions of competition "indispensable" to the achievement of the permissible beneficial results; and

7) does not permit the parties to eliminate competition in a "substantial part" of the market.55

Only the Commission can grant an exemption, subject to review by the European Court of Justice.56

Individual exemptions are granted for a limited period of time,57 and do not bar the Commission from taking enforcement actions to remedy abuses of market dominating positions prohibited by Article 82.58 Furthermore, the Commission reviews individual exemptions periodically, and it can revoke or alter an individual exemption in a subsequent decision.59 The Commission may grant an individual exemption with conditions attached.60

If an undertaking is unsure whether Article 81(1) or Article 82 apply to an agreement, decision or practice, the undertaking can notify the Commission and ask it to grant a negative clearance.61 A negative clearance is a certification from the Commission that, on the basis of the facts in its possession, there are no grounds under Article 81(1) or Article 82 for the Commission to initiate an enforcement action.62 A negative clearance would be warranted in a case involving a potential Article 81(1) violation where the Commission decides that the activities of the undertaking do not perceptibly restrain competition between the member States or within the Common Market.

In practical terms, the Commission lacks the resources to rely on the notification system exclusively.63 As early as 1967, the Commission was faced with a docket of 37,450 cases that had accumulated four years after the notification system began with the entry into force of Regulation 17.64 By 1997, the Commission could issue only 27 formal decisions while over 1,200 remained undecided.65

To avoid delays in the individual exemption and negative clearance process, the Commission has

utilized comfort letters since the early 1970s.66 Comfort letters now total some 150-200 a year (90 percent of all notifications).67 In a comfort letter, the Commission, through the DG IV, assures an undertaking that despite the fact that no negative clearance or individual exemption has been issued, the Commission will not initiate an enforcement action.68 Comfort letters help to speed the processing of cases in part because they do not have to be published, unlike formal decisions, individual exemptions and negative clearances.69 The comfort letter bars future enforcement action by the Commission absent a change in circumstances.70 However, the national courts and authorities are not bound by a comfort letter when they determine whether a restrictive practice violates Article 81, although they may take them into account as one fact to be considered.71

The Commission has also attempted to avoid delays by adopting "block exemption" regulations applying to categories of agreements.72 Block exemption regulations are now so numerous that the basic prohibition of cartels in Article 81(1) has less force than it had.73

a) Member States

Nothing in the EC Treaty preempts national competition laws expressly so long as the competition provisions of the EC Treaty apply only to anti-competitive acts that "affect trade between Member States."74

i) Germany

Historically, Germany has had perhaps the most developed competition law framework of all the Member States dating back to when the allied occupying powers imposed a rule prohibiting cartels and monopolization in 1947.75 Germany's competition law began when the Ten years later, West Germany enacted the Law Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB).76 The purpose of the GWB is to protect "freedom of competition."77

Despite its American origins, there are fundamental differences between the US and German legal methods of antitrust enforcement.78 German antitrust law is applied primarily through administrative bodies.79 US antitrust law is applied primarily through the courts in determining rights and duties of individual parties. German statutes set forth more detailed substantive rules than US statutes, which rely more on judicial interpretation. German antirust law is applied by an active decision maker through the application of a rule to a particular set of facts; US antitrust law is applied ordinarily to resolve a particular dispute by a passive decision maker with the formulation of issues controlled by the adversaries and their lawyers. Finally, the enforcement of German antirust law is centralized in specialized decision-makers. US antitrust enforcement relies on autonomous and non-specialized decision-makers.80

(1) Substantive Law

§1 of the GWB prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition."81.

In addition to restraints of trade, the GWB prohibits abuses of market dominating positions. §19 prohibits the abuse of a market dominating position, similar to Article 82 of the EC Treaty. Unlike the EC Treaty, the GWB contains an explicit definition of "market dominating." An enterprise is market dominating if it has no competitors or is not exposed to any substantial competition, or if it has a paramount market position in relation to its competitors.82 An abuse of a market dominating

position occurs when an enterprise a) demands consideration or other business terms that deviate from those which would result assuming effective competition existed; or b) demands less favorable consideration or other business terms than the enterprise demands from similar buyers in comparable markets.83 A refusal to grant access to essential facilities for reasonable consideration is also an abuse of a market dominating position if the other undertaking would be prevented for legal or practical reasons from entering upstream or downstream markets.84

Resale price maintenance agreements are prohibited by §14.

Germany recently enacted the sixth major amendment to the GWB.85 Harmonization with EU law was one of the main objectives of the amendments.86 The discussion about the sixth amendment centered on the question whether and to what extent German competition law ought to be adjusted to the competition rules of the EC Treaty.87 Members of the business community in Germany had argued that the parallel existence of national law and European law impeded corporate planning, caused an unnecessary administrative burden and violated the principle of the level playing field.88 German industry considered itself at a comparative disadvantage relative to foreign companies.89

To harmonize German competition law with European competition law, the following changes were made to the GWB:

(a) cartel agreements are now no longer void, but prohibited in harmony with Article 81(1);90

(b) abuses of market dominating positions are no longer void, but prohibited in harmony with Article 82;91

(c) resale price maintenance agreements are no longer void,
• • • • • but prohibited in harmony with Article 81(1);92

(d) a general exemption was added in §7 that is modeled after the Article 81(3) exemption;93

(e) broad general exemptions for special industries have been replaced by system requiring individual exemptions decided by the Bundeskartellamt;94

Despite the above-mentioned changes, the German Parliament did not decide to harmonize the GWB with Community competition law entirely. An important difference between the GWB and the EC Treaty is that the German system has distinguished between horizontal and vertical restraints while the European system treated both equally. After the 1999 amendment, German competition law will continue to distinguish between horizontal and vertical restraints. The GWB prohibits horizontal agreements under §1 with exemptions where §§2 through 8 apply. Vertical agreements, however, are not directly prohibited. In general, they are subject to the supervision of the Bundeskartellamt.95 However, vertical agreements are prohibited to the extent they restrict a party's freedom to determine prices or contractual terms concluded with third parties.96 Article 81(1) applies to both horizontal and vertical agreements.

Unlike the Sherman Act, the GWB does not provide for criminal sanctions.97 Instead, competition law violations are treated as administrative offenses (Ordnungswidrigkeiten) and subject to sanctions in the form of cease and desist orders98 and administrative fines.99

(2) Enforcement Authorities

German competition law is enforced by four entities; three of the four entities are governmental bodies (Kartellbehörden). The three governmental bodies are the Bundeskartellamt (Federal Cartel

Office), the Bundesminister für Wirtschaft (Federal Minister of the Economy), and the Landeskartellbehörden (Regional Cartel Offices)100 of the German states (Länder). The fourth entity is the Monopolkommission (Monopolies Commission).101

The Bundeskartellamt is an independent federal office (Bundesbehörde).102 It exercises exclusive jurisdiction over most cartels, price maintenance agreements and those mergers over which the Commission has not reserved sole jurisdiction. It is also responsible for all other violations of the GWB if the effect of those violations extends beyond a single state. The Bundeskartellamt may grant permissions or exemptions,103 prohibit anti-competitive agreements and practices,104 or impose fines.105 In addition to sanctions in the form of cease and desist orders106 and administrative fines,107 the Bundeskartellamt may impose an excess proceeds surcharge on an undertaking that willfully or negligently acquires additional proceeds after the Bundeskartellamt issues a decision prohibiting a restraint.108 Unlike the Federal Trade Commission, the Bundeskartellamt does not share enforcement authority with another federal agency.109

Although the Bundeskartellamt is considered an independent agency,110 it is still subject to the authority of the Federal Minister of the Economy (Bundesminister für Wirtschaft), who can issue general and particular directions to the agency, and formulates policy regarding authorizations for certain cartels and mergers.111. General directions express the enforcement intent of the Minister of the Economy, but only five general directions have ever been issued.112 Particular directions are more common and deal with issues concerning particular cases. For example, in 1965 the Federal Minister directed the Bundeskartellamt not to prosecute a self-restraint agreement of oil companies which was brought about by the federal government to protect coal mines.113

The Federal Minister has jurisdiction to make two types of authorizations regarding competition law enforcement. First, the Federal Minister has the power to authorize cartel agreements otherwise prohibited by §1 GWB if the restraint of competition is necessary for predominating reasons concerning the general economy and the common welfare.114 Second, the Federal Minister may approve a merger that has been prohibited by the Bundeskartellamt if the restraint on competition is outweighed by the benefits to the economy as a whole or if the merger is justified by an overriding public interest.115

An important aspect of the German system is its emphasis on insulating competition enforcement from policy considerations. The role of the Bundeskartellamt is to decide competition issues on a purely legal basis; it should only consider the effect of a restraint on competition.116 The GWB does not authorize the enforcement authorities responsible for applying competition law to apply competition law for economic purposes.117 In contrast, the decisions of the Federal Minister can be based on political considerations, including industrial policy. For example, the Federal Minister can authorize an otherwise illegal merger if the restraint of competition is outweighed by the advantages to the whole economy resulting from the merger, or if the merger is justified by a predominating public interest.118 In this way, responsibility for political decisions falls on a body other than the enforcing authority: the government, which is politically accountable to parliament.119

The result is a two-tiered system. In the first stage, the Bundeskartellamt examines the merger according to competitive criteria exclusively. In the second stage, the Federal Minister may authorize the same merger for political reasons, provided it is justified by a predominant public interest or the competitive disadvantages of the merger are outweighed by advantages to the economy.120 However, the Federal Minister cannot reverse the reasoning of the Bundeskartellamt.121

The basic assumption upon which this two tiered system is premised is that the interests of individual legal entities or groups constantly threaten competition.122 For example, companies may

find reasons to avoid competition in times of economic crisis, and politicians concerned about preserving jobs may attempt to put pressure on a competition authority to base its decisions on factors other than competition.123 Indeed, proposals have originated from Germany that the EU create an independent cartel authority similar to the Bundeskartellamt. The Commission is responsible currently for both stimulating the economy and protecting competition.124 The philosophy behind the proposal is that the creation of an independent office would lessen the risk that non-competitive interests could influence decision-making processes.125

8) Relationship Between EU and Member State Competition Laws

The Commission did not assume sole responsibility for competition policy within the Common Market once Articles 81 and 82 entered into force. Practically speaking, to do so at that time would have been impossible given the Commission's limited resources.126 Instead, the competition policy contained in Article 3(f) called for joint implementation with Member States by making Community competition law directly applicable in national courts and in administrative proceedings conducted by national competition authorities.127

In theory, Community competition law controls when trade between Member States is affected. If anti-competitive practices affect trade in one Member State, Community competition law is not applicable. However, because the reach of Community competition law and Member State competition law has been so broadly interpreted, the boundary between the application of EU and national competition law is no longer clear. In practical terms, the applicability of Community competition law overlaps with the applicability of national competition law.128 In the event of a conflict, Community competition law should apply, but no conflict of law rule specifically directs such a result. Parallel proceedings are possible where the European Commission applies Community competition law and the courts of the Member States apply national competition law concurrently, provided that the proceedings in the national courts do not interfere with the uniform application of EU law and fines are not duplicative. The only area where Community competition law absolutely preempts national competition law is in the merger area, assuming that the merger is one with a "Community dimension."129

a) Overlap in EU and Member State Laws

The dividing line separating the application of national competition law and Community competition law is unclear. In theory, if an anti-competitive practice occurs within the Common market that is not contained within a single Member State, Community competition law applies. Likewise, if an anti-competitive practice transpires in a single Member State, then national competition law generally applies. However, Community competition law can also apply where an anti-competitive practice takes place outside of the EU or within a single Member State, provided the practice affects trade between Member States. Furthermore, Member State competition law can apply where an anti-competitive practice takes place outside of a Member State, provided the practice affects trade within the Member State. As the EU and Member States broaden the application of their respective competition laws more and more, the overlap between Community competition law increases.130

Community competition law applies to anti-competitive business practices affecting trade between Member States.131 Article 81 applies to restraints "which may affect trade between Member States" and "which have as their object or effect the prevention, restriction or distortion of competition within the common market." Article 82 applies to the abuse by one or more undertakings of a dominant position within the common market "in so far as it may affect trade between Member States." Therefore, Articles 81 and 82, according to their express language, should only apply to anti-competitive acts affecting trade between Member States, and not to anti-

competitive acts with effects in only a single Member State.

It is generally accepted that Community competition law subscribes to an "effects doctrine" for determining the reach of Articles 81 and 82.132 Under this effects doctrine, judicial jurisdiction exists to apply Community competition law to restraints or abuses of dominant positions occurring outside the EU, provided that there are effects within the EU between Member States.133 For example, if an undertaking is registered or maintains its center of operations outside the EU, Community competition law would apply if its anti-competitive acts had an effect on trade between Member States.134 It is a doctrine not at all unlike the effects test used in the US to measure the applicability of the Sherman Act.

The Commission has used the effects doctrine as a basis for asserting jurisdiction in a number of cases,135 and the European Court of Justice has implicitly approved the manner in which the Commission applies the doctrine.136 According to the Commission's usage of the effects doctrine, Article 81 applies where the restraint has as its object137 or its effect138 the prevention, restriction or distortion of competition within the EU.139 The Commission takes the position that restrictive agreements between undertakings from different Member States are always likely to impair trade between Member States.140 The Commission does not consider the following to be determinative:

(a) the place of contracting for the restraint;141

(b) whether an undertaking is incorporated outside the EU;142

(c) whether the anti-competitive acts were committed in the
•••••EU;143 or

(d) whether the agreement, decision or concerted practice targets a national market only.144

Some Commission decisions have gone so far as to require only a "perceptible" effect.145 Other decisions require that a restraint have a "noticeable" effect upon the supply and demand within the Common Market.146 The more recent practice of the Commission is to require that a restraint or the abuse of a dominant position have "direct, substantial and intentional" effects within the Common Market for Articles 81 and 82 to attach.147

The European Court of Justice has held that Articles 81 and 82 can apply where an agreement, decision, or concerted practice affects a market within a single Member State, provided there is the possibility that trade between Member States will be affected. In Suiker Unie v. Commission,148 Article 81(1) applied to a price fixing agreement that was limited to the sugar market in the South of Germany. Although the agreement only affected the German sugar market, it had the possibility of affecting trade between member States. The Court looked at the structure and dimension of the sugar market, and found that the market for sugar in Germany was important to the development of European markets. The existence of similar contracts in other member States created a possibility that trade between Member States could be affected.149

Even if a restrictive practice relates to a market which is limited to a single Member State, Articles 81 and 82 can apply once there is the possibility that trade between the Member States could be affected.150 Restrictive practices between undertakings established in one and the same Member State relating solely to the production or distribution of their products on the national market which produce effects on the sale of foreign products within the country in question, or on entry into the market by non-resident undertakings, fall within the scope of Community law.151 Furthermore, a cartel of undertakings that accounts for a significant overall share of the market and covers the entire sovereign territory of a Member State is by its very nature likely to impair trade between

Member States insofar as it contributes to the partitioning of national markets within the Community.152

Therefore, there is no requirement that the market affected by an agreement, decision, or concerted practice cross national boundaries before Community competition law may apply. However, not every case involving an agreement, decision or concerted practice affecting a national market only will warrant the application of Articles 81 and 82. There must first be the possibility that the agreement can restrain trade between the Member States.153

Some Member States take such a broad approach to the enforcement of their national competition law that the jurisdiction of the national competition laws overlap with Articles 81 and 82 of the EC Treaty.154 For example, the reach of the GWB's application is premised on an effects doctrine (Auswirkungsprinzip). The GWB applies to all restraints of competition "having effects within the area of operation of the [GWB], even if [such restraints] are caused outside the area of operation of this law."155 "Effects" is interpreted as an injury to the freedom of competition and the freedom of third parties to exercise economic activity.156 There is disagreement about whether an effect must be substantial or whether a mere potential effect is enough.157 No court has ruled on this issue.158 However, a potential effect is normally enough for the Bundeskartellamt and the Bundesgerichtshof given the difficulties of proving a substantial effect.159

Unlike German competition law, Italian competition law contains a unique provision designed to eliminate overlaps in jurisdiction between Community competition law and Italian competition law. Italy was the last Member State in the EU to enact its own competition law, Law no. 287/1990,160 which is modeled after Community competition law. Article 2 of the Italian competition law prohibits agreements, concerted practices and decisions by undertakings and associations of undertakings which restrict competition.161 Article 3 prohibits abuses of dominant positions.162 Article 1 of Law no. 287/1900 provides that its provisions apply only to agreements, abuses of dominant positions, and to mergers "which do not fall within the cope of application of ... [EC Treaty] Articles 81 and 82 or Community acts having an equivalent legal force." Furthermore, paragraph 4 of Article 1 of provides that the interpretation of substantive provisions of Italian competition law shall be based on the Community competition laws. The provision was thus designed to bring national and Community law into harmony.163

Some scholars suggest that the provision causes the enforcement of competition laws to become more problematic. If the European Commission fails to investigate a restrictive practice to which Community competition law applies, could a situation arises in which no competition law, Italian or European, is enforced?164 Some scholars believe that the provision could lead to just such a "gap" in enforcement.165 However, Italian law grants the Italian Competition Authority (Autorità garante della concorrenza) the power to apply Community competition law.166 In the event Italian competition law does not apply, the national competition authority should apply Community competition law and no gap in enforcement should result.

No conflicts of law rule applies to the overlap directly, except in the merger area where Community competition law applies exclusively depending on the nature of the transaction and the turnovers of the undertakings involved.167 The EC Treaty grants the EC Commission the power to enact one, but the Commission has not seen fit to as yet.168

One source for guidance is the primacy doctrine. According to the primacy doctrine, EU law controls in the event of a conflict between EU and national law.169 If EU law and national law conflict, national law does not apply.170 The primacy of Community law prevents the application of national law from undermining the full and uniform application of Community law and the effectiveness of measures implementing it.171 Some Member States have entered this principle into

their own legislation.172 For example, Belgian competition law provides that exemptions issued under Article 81(3) bar proceedings by Belgian authorities.173

Another source for guidance to resolve conflicts is the subsidiarity principle. The subsidiarity principle is found in Article 3(b) of the EC Treaty.174 According to this principle, the Commission may act in cases not within its exclusive authority only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the effects of the proposed action, be better achieved by the Commission.175 German competition authorities have argued that the Commission should defer more cases to the Member States assuming that the Commission does not have exclusive competence to apply Articles 81 and 82,176 and the Commission appears to agree that the subsidiarity principle does have application in competition law matters.177

However, the primacy doctrine and the subsidiarity principle do not help to determine the issue whether there is a conflict. Clearly, a conflict occurs when Community competition law forbids a restraint and national competition law permits it. The issue is much more difficult to resolve when national law is more restrictive than EU law, which is often the case where EU and German competition laws conflict. For example, competition authorities use market definitions to gauge whether certain business practices are or would be anti-competitive. The Bundeskartellamt and the Commission defined markets differently before the most recent amendment to the GWB took effect in 1999. The Bundeskartellamt defined them strictly, and the Commission defined them according to Community principles, including economic integration. For example, the Commission considered the competition from outside the Community when determining whether or not a merger should be approved, but the German authorities could not consider this.178 Thus, the Commission was in general more likely to approve a practice than the Bundeskartellamt in those cases calling for market definitions.

In general, national law is considered displaced by Community competition law where the two conflict:179

(e) if an effect on trade between Member States is present, Article 81 applies and an individual exemption granted
• • • • • under Article 81(3) has priority over the prohibitions in national competition law;180

(f) the prohibitions in Article 81 and 82 have priority over
• • • • • every kind of exemption in national competition law;

(g) courts have considered the effect of block exemptions,
• • • • • but there has not been an express finding that these
• • • • • take precedence over national law.181

(h) Exemptions under national laws do not bar the application of Community competition law regardless of whether EU
• • • • • law would prohibit an agreement or practice exempted
• • • • • under national law or provide for the same exemptions
• • • • as national law.182

b) Decentralized Application of Community Competition Law

Community competition law is applicable in national courts and in administrative proceedings conducted by national competition authorities.183 However, there must be a uniform application of

Community competition law.184

i) Application by National Courts

National courts are responsible for safeguarding the subjective rights of private individuals in their relations with one another.185 Community rules affect relations between private persons and therefore create individual rights.186 Because those rights must be safeguarded, it follows that the national courts have jurisdiction to apply Articles 81(1) and 82.187 Thus, national courts have been granted the power to apply Article 81(1) and Article 82 of the EC Treaty. However, the Commission retains sole power to grant exemptions under Article 81(3) for certain types of agreements, decisions, and concerted practices.188

The European Court of Justice has held that the application of Articles 81(1) and 82 in the national courts does not create any new remedies to ensure compliance with Community law other than those already provided by national law.189 Likewise, Community law must be applied under the same conditions of procedure and admissibility as any national cause of action.190 The purpose of this rule is to ensure that if there is a violation of Community competition law, litigants will have access to all the procedural remedies provided for by national law on the same conditions as would apply assuming a breach of national law were at issue.191

The application of Community competition law in national courts has considerable advantages for private plaintiffs.192 First, claims for damage awards may be brought before national courts. However, the Commission cannot award damages for losses suffered as a result of Article 81(1) or 82 violations.193 Second, national courts can usually adopt interim measures and enjoin conduct more quickly than the Commission.194 Third, national courts are authorized to join a claim under EU law with a claim under national law, something the Commission is not authorized to do.195 Finally, the courts of some Member States have the power to award costs to successful plaintiffs, which is impossible in the administrative procedure before the Commission.196

In 1993, the Commission issued the NOTICE ON COOPERATION BETWEEN NATIONAL COURTS AND THE COMMISSION IN APPLYING ARTICLES 81 AND 82 OF THE EEC TREATY197 ("Notice"). It spells out the how the Commission intends to assist national courts using closer cooperation in the application of Articles 81 and 82 in individual cases.198 The purpose of this notice was to achieve effective cooperation between the national courts and the Commission199 and thereby protect competition.200

The Commission announces in the Notice that it intends to concentrate its decision-making function to those notifications, complaints and investigations that have particular political, economic or legal significance for the Community.201 The administrative resources at the Commission's disposal are necessarily limited and cannot be used to deal with all the cases brought to its attention.202 In cases involving notifications, the Commission will issue a comfort letter assuming there is no significance for the Community. In cases involving complaints, the Commission believes that a sufficient Community interest in examining such cases is lacking so long as plaintiffs are able to secure adequate protection of their rights before the national courts.203

National courts can apply EU and national competition laws simultaneously, provided Community competition law takes precedence over national law where the two conflict. In the Notice, the Commission has announced that "the simultaneous application of national competition law is compatible with the application of EU law, provided that it does not impair the effectiveness and uniformity of Community competition rules and the measures taken to enforce them."204 To eliminate the risk that a national measure could jeopardize the full effectiveness of EU law, any conflict between EU and national law must be resolved in accordance with the supremacy

principle.205

In the national courts, actions under Article 81(1) and Articles 82 may relate to contracts or damages. In actions relating to contracts, the defendant relies on Article 81(2) to dispute the contractual obligations invoked by a plaintiff.206 Defendants in these cases argue that contractual terms are unenforceable by virtue of some Article 81(1) or Article 82 violation.207 In actions for damages, plaintiffs argue that they have suffered injury caused by conduct that violates Articles 81(1) or 82.208

The Notice takes the position that national courts should ascertain whether an agreement has been the subject of a decision, opinion or other official statement issued by the Commission or other administrative authority.209 If the Commission has not ruled on the agreement, decision, or concerted practice, the Notice asserts that the national courts can be guided by the case law of the European Court of Justice and the decisions of the Commission.210 If the Commission initiates a proceeding relating to the same agreement, decision, or concerted practice, the national court can stay the proceedings while awaiting the outcome of the Commission's decision.211 National courts may also stay proceedings to seek the Commission's views.212

Comfort letters are never binding on the national courts,213 but the Notice provides that the national courts should consider them persuasive authority when deciding cases.214

Once the national court decides that an agreement, decision or concerted practice is prohibited by Article 81(1), it must check to see whether it is or will be the subject an individual exemption by the Commission under Article 81(3).215 The national courts must abide by the exemption decisions of the Commission. Furthermore, agreements, decisions and concerted practices which fall within the scope of the application of the block exemption regulation are automatically exempt and supersede national court proceedings.216 If it appears likely to the national court that the agreement, decision or concerted practice may be the target of an individual exemption, the national court may bring the case before the Court of Justice for a preliminary ruling217

To ensure the consistent application of the rules, and the preservation of the unity of competition policy, there are two main instruments in Community law: Article 169 and Article 177 of the EC Treaty.218 Article 169 empowers the Commission to refer to the Court of Justice cases of infringement of Community law by Member States.219 Article 177 requires courts of last instance to refer questions of interpretation of Community law to the Court of Justice for a preliminary ruling.220

If private parties raise provisions of both Community competition law and national competition law, the national courts can apply the two sets of rules, provided they both apply.221

German courts apply Articles 81 and 82 of the EC Treaty and the associated case law extensively.222

ii) Application By National Competition Authorities

Pursuant to Article 84 of the EC Treaty, Regulation 17 authorizes the national competition authorities to apply Articles 81(1) and 82.223 If, for whatever reason, the Commission never initiates proceedings, the national competition authorities are authorized to apply Articles 81(1) and 82 of the EC Treaty in administrative proceedings, either exclusively or in conjunction with national competition law.224 However, only the Commission is competent to grant exemptions under Article 81(3),225 and national competition authorities loose the power to apply Articles 81(1)

and 82 the moment the Commission initiates its own proceedings.226 As a general rule, the national authorities should handle cases whose main effects are felt inside their jurisdiction and which do not appear prima facie to qualify for exemption under 81(3).227

To apply Articles 81(1) and 82, a national competition authority must also have a grant of power from the Member State government.228 EU authorization to apply Articles 81(1) and 82 is for all practical purposes ineffective without a corresponding grant of power from the Member State.229 For example, Germany's Bundeskartellamt has the power under the GWB to apply Articles 81(1) and 82 in administrative proceedings;230 but Sweden's competition authority has no such ability under Swedish competition law.231

If a national competition authority is capable of only applying the law of its Member State, the application of that law should not prejudice the uniform application throughout the common market of the Community competition rules.232 This rule is based on the primacy of Community law over national law233 and the obligation to cooperate found in the EC Treaty.234

In 1997, the Commission issued the NOTICE ON COOPERATION BETWEEN NATIONAL COMPETITION AUTHORITIES AND THE COMMISSION (Second Notice).235 The Second Notice describes the cooperation considered appropriate between the Commission and the national authorities.236 It does not affect the extent of the powers conferred by Community law on either the Commission or national authorities for the purposes of dealing with individual cases.237

The Second Notice asserts that national competition authorities are in a better position to detect restrictive practices or abuses of dominant positions whose effects are essentially confined to a Member State because they have a more precise knowledge of the relevant markets and businesses concerned.238 By enhancing the role of the national competition authorities, the Commission hopes to "boost the effectiveness of Articles 81 and 82" and "bolster the application of Community competition rules throughout the Community."239

According to the Second Notice, where a Member State competition authority applies Community law, it is required to comply with any decisions taken by the Commission in the same proceedings.240 If the Commission rules that an agreement, decision, or concerted practice violates Article 81(1) or 82, the ruling precludes the application of a domestic legal provision authorizing what the Commission has prohibited.241

Can a national authority apply its more stringent national competition law to an agreement, decision, or concerted practice if it is covered by a block exemption or the Commission already granted an individual exemption? According to the Second Notice, there is no clear answer to this question.242

The Commission concedes that comfort letters from the DG IV do not bind the national competition authorities, but it hopes that the national authorities will consider the opinions expressed in them when deciding whether to initiate a proceeding.243 Because the European Court of Justice ruled that comfort letters were not binding on the national courts, they should not be binding on national authorities either.244

The Second Notice distinguishes between three types of comfort letters. In the first category, the DG IV sends a letter expressing the view that an agreement or practice is incompatible with Article 81, but also states that no proposal to the Commission will be made for a formal decision for logistical reasons.245 The Commission believes in that case that the national authorities in whose territory the effects of the agreement or practice are felt may take action.246 In the second category, the DG IV expresses the opinion in a comfort letter that an agreement does restrict competition

within the meaning of Article 81(1), but qualifies for an individual exemption under Article 81(3).247 In that case, the Commission intends to call upon the national authorities to consult it before they decide whether to adopt a contrary decision under Community or national law.248 In the final category, the DG IV expresses the opinion that there is no need to take any action because neither Article 81 or Article 82 apply.249 According to the European Court of Justice, such a comfort letter does not prevent the national authorities from applying national competition law, which may be more stringent than Community law.250

It is not uncommon for a national authority to have a choice whether to apply its national competition law or Community competition law in a case, provided both are applicable to the same agreement, decision or concerted practice. In such cases, the decision to apply Community competition law instead of national law is a pragmatic one.

For each international transaction likely to have an effect on trade between Member States, Community competition laws must be contemplated in administrative proceedings before German enforcement authorities.251 The Bundeskartellamt has held several proceedings in which both the GWB and Articles 81(1) and 82 applied simultaneously.252 In one proceeding, two competing travel agencies, Toursitik Union International (TUI) and NUR Touristik (NUR), formed contracts with Spanish hoteliers containing exclusive dealing clauses according to which the hoteliers were forbidden to rent rooms to TUI and NUR competitors.253 Article 81(1) was applicable because the agreement had an anti-competitive effect on the German travel market and on the hotel market in Spain.254 §18 of the former GWB applying to vertical restraints of trade was also applicable.255

The Bundeskartellamt elected to to challenge the practice under Article 81(1) of the EC Treaty instead of under §18 GWB.256 The reason for its decision was based on a pragmatic consideration: Article 81(1) required fewer elements for its application than §18 GWB.257 Therefore, the Bundeskartellamt found it more convenient to apply EU law.258

TUI tried to have the proceedings stayed by submitting an application for a negative clearance or individual exemption under 81(3) at the appeal stage.259 However, the Bundesgerichtshof (Federal Supreme Court) expressly upheld the lawfulness of the Bundeskartellamt's decentralized application of Community competition law and ruled that the exclusive dealing clauses seriously harmed competition in the German travel market.260 Furthermore, it refused to stay the proceedings.261

The Bundeskartellamt has also found it convenient to apply Community competition law when exemptions under German competition law would prevent the application of the GWB. The former GWB contained exemptions applying to the utility industries that no longer apply.262 In a case involving a challenge to a licensing agreement between a utility and a municipality, the Bundeskartellamt applied Article 85(1) because the exemption under the GWB would have prevented the application of German competition law.263 The former GWB also had exemptions for transport industries.264 In a case involving a resale price maintenance agreement, Article 85(1) applied where the GWB did not apply because of the exemption.265 The Bundeskartellamt had planned to apply Article 81(1) in order to challenge the practice and avoid the GWB exemption, but this was no longer necessary after the recent amendment to the GWB became effective January 1, 1999 and eliminated the exemption for transport industries.266

Three factors could discourage the national authorities from applying Community competition law. First, the Commission can stop proceedings in Member States at any time by initiating its own proceedings.267 Second, the Commission has the exclusive power to grant individual exemptions under Article 81(3) and in effect stop proceedings by Member States.268 Third, Member States may not impose fines under EU law for violations of competition rules.269 Therefore, the application of Community competition law by a national authority may be interrupted or terminated

if at any time the Commission initiates proceedings, and Member States cannot bring as much pressure to bear when applying European Competition law since they cannot impose fines.270 Furthermore, the situation is worse in Member States that cannot apply European competition rules in the first place absent national laws allowing their competition authorities to apply EU law.

An issue arises whether a national authority like the Bundeskartellamt can apply Community competition law consistent with the policies of the Commission and yet operate independently of industrial policy considerations. The Bundeskartellamt is not permitted to consider industrial policies in its decisions. However, one policy goal of Community competition law is the prevention of restrictive practices that interfere with the integration of the separate Member State economies into a unified common market.271 Germany is of the opinion that industrial policy goals should not influence the way in which German competition law is applied.272 Can the Bundeskartellamt therefore apply Community competition law to reach results consistent with the Commission if it does not take economic integration into consideration?

c) Parallel Proceedings

Walt Wilhelm and Others v. Bundeskartellamt273 is the leading case dealing with conflicts in dual enforcement of competition laws involving parallel proceedings. In it, the European Court was called upon to review Article 83(2)(e) of the Treaty of Rome. Article 83(2)(e) grants the European Council the power to define the relationship between national competition laws and Community competition laws either by regulation or directive. The case arose after the Bundeskartellamt fined four German producers of dyes for price fixing in violation of the GWB. While the dye producers appealed to the Kartellsenat of the Berlin Court of Appeals (Kammergericht) in Berlin, the Commission initiated parallel proceedings under Article 81 to challenge the very same price fixing activities. The Berlin Court of Appeals stayed its own proceedings once the dye producers protested that the Court could not proceed in view of the possible conflict between EU and German competition law. It then requested a preliminary ruling on that issue from the European Court of Justice.

The European Court of Justice noted that the EU and German outlook upon cartels and restrictive agreements differed. The overriding policy interest in Article 81 is the economic integration and preservation of trade between the Member States. Member States apply national competition laws based more on each state's own priorities and policy considerations. Therefore, the Court concluded that certain agreements could be the target of parallel proceedings.

However, to ensure that the general aims of the EC Treaty were protected, the Court held that parallel proceedings on the national level are tolerable only if certain conditions were met. First, application of national laws must not prejudice the full and uniform application of EU law, or the full effect of measures adopted to implement that law. Second, Member States must not introduce or retain any laws that do not resolve conflicts between EU and national law in the EU's favor. Third, Member States have a duty to take appropriate measures to avoid the risk that a national decision on an issue of competition law might conflict with parallel, Commission proceedings.274

The Wilhelm decision stands for two important principles. First, Community competition laws are supreme where they conflict with national competition law, i.e., the "supremacy principle." Second, to the extent national competition laws and Community competition laws are in harmony, parallel proceedings can take place and may result in multiple liability. Two conditions are that the national proceedings must not interfere with the uniform and unrestricted application of EU law, and any earlier fines must be taken into account when imposing subsequent fines.275

d) Mergers: Exclusive EU Jurisdiction

The Commission has jurisdiction over all concentrations, i.e., mergers, acquisitions, and joint ventures, with a "community dimension."276 The determination of whether a concentration has a community dimension is measured by the turnover277 of the parties to the merger. If those thresholds are not met, Member States may apply their own competition laws to the transaction in question.278

The basis for merger enforcement by the Commission is Council Regulation (EU) No. 4064/89 (Merger Regulation).279 All transactions to which the Merger Regulation applies must be notified to the Commission before they can be concluded.280 The Merger Regulation applies if:

(a) the total worldwide combined turnover281 of all the enterprises is more than ECU 5 billion; and

(b) the total Community-wide turnover of each of at least two
•••••of the enterprises concerned is more than ECU 250 million;

(c) unless each of the parties achieves more than two-thirds
•••••of its aggregate Community-wide turnover within one and the same Member State.282

In 1997, an additional set of thresholds was amended to the Merger Regulation. Commission jurisdiction is now triggered when the total, combined Community turnover of all the undertakings concerned is more than ECU 100 million in each of three Member States.283 This has extended the scope of Community merger control to concentrations with significant impacts in several Member States. Furthermore, a new threshold was introduced where the total combined worldwide turnover of the enterprises concerned is more than ECU 250 billion.284 The purpose of these new thresholds was to further a "one-stop shop" system for mergers.285

The Commission investigates all notified mergers to assess whether or not they will create or strengthen a dominant position that significantly impedes competition in the market or a substantial part of it.286 Concentrations that do not meet the criteria are declared incompatible and must not be implemented.287 The Commission may grant clearance to a merger if binding agreements can be made with the parties to modify the merger so as to make it compatible.288

In order to reduce the impact of the Commission's partial monopoly on national authorities, there are two exceptions to the exclusive jurisdiction of the Commission.289 The first exception is that Member States may have jurisdiction where certain public interests are at stake, such as public security.290 The second exception is where the Commission, upon the request of a Member State, determines that a merger should be handled by a national competition authority because it creates or threatens to create a dominant position in a distinct market within the corresponding Member State.291

Member States can apply their competition laws to mergers that do not meet the thresholds of the Merger Regulation and trigger European merger control. For example, the GWB provides that those mergers falling under the Merger Regulation are not subject to German merger control.292 A proposed merger requires advance notification if the following conditions are met:

9) the undertakings achieved a combined turnover of at least DM 1 billion during the completed business year preceding the merger;293 and

10) at least one undertaking achieved a domestic turnover of a minimum DM 50 million.294

German merger control does not apply if an undertaking records a turnover of less than DM 20 million in the last business year, provided the undertaking is not a subsidiary of some other controlling undertaking.295 Furthermore, German merger control does not apply in so far as a market is affected in which goods or commercial services have been supplied for at least five years and the market in the last calendar year had a turnover of less than DM 30 million.296

It is expected that approximately two-thirds of German merger cases will no longer be subject to the notification requirement since the last amendment to the GWB increased the turnover thresholds triggering German merger control.297

4) Dual Enforcement Problems

Dual enforcement of Community competition law has been hindered by the degree to which the Commission has retained control over the application of Article 81(3). Regulation 17 is the basis for the current system of centralized authorization for all restrictive practices requiring an exemption. Under Regulation 17, the national courts and national competition authorities may apply Article 81(1). However, the power to grant exemptions under Article 81(3) from the prohibition in 81(1) belongs to the Commission exclusively.

The centralized authorization system based on prior notification and the Commission's exemption monopoly has led undertakings to notify large number of restrictive practices to the Commission.298 Since national competition authorities and courts have no power to apply Article 81(3), undertakings have used this decentralized authorization system to block private actions before national courts and national competition authorities.299 Undertakings systematically notified their restrictive practices to the Commission, which was soon faced with impossibility of dealing by formal decision with the thousands of cases submitted given its limited resources.300 This undermined efforts to promote a decentralized application of EU competition rules.301

Due to the deluge of notifications that continue to ensue, the Commission has not been able to focus on the most serious cases involving restrictions on competition, or to close all the cases it has to handle by formal decision.302 Between 1988 and 1998, proceedings initiated by the Commission to investigate and take action against unlawful restraints accounted for 13 percent of new cases while notifications accounted for 58 percent.303 Of cases closed, only an average of 6 percent closed by formal decision.304

Furthermore, the national courts and national authorities have had less incentive to apply Community competition law while undertakings may thwart national proceedings by notifying restrictive practices to the Commission.

Currently, the Commission believes that the NOTICE ON COOPERATION BETWEEN NATIONAL COURTS AND THE COMMISSION has "reached [its] limit within the existing legal framework."305 Private parties remain reluctant to petition the national courts when they have suffered harm as a result of an infringement of competition law.306 The Commission also believes that the Second Notice has "reached [its] limit within the existing legal framework."307 As soon as the Commission initiates a procedure, the competition authorities loose their jurisdiction.308 Undertakings involved in national proceedings can therefore thwart the enforcement efforts of a national authority by notifying their restrictive practices to the Commission.309 The Commission addressed the problem of dilatory notifications in the COMMISSION NOTICE ON COOPERATION BETWEEN NATIONAL COMPETITION AUTHORITIES AND THE COMMISSION, stating that where a notification was primarily intended to suspend national proceedings, the Commission considers itself justified to not examine the notification as a matter of

priority.310 However, the Commission concedes that this mechanism for cooperation with the national authorities has not led to the success it had expected.311 It cites its monopoly on the power to grant exemptions under Article 81(3) as the cause.312

On April 28, 1999 the Commission issued a WHITE PAPER ON MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY (WHITE PAPER).313 This working paper outlines a proposed reform to the current system of Commission Article 81(3) monopoly. In the WHITE PAPER, the Commission expresses its intent to reform the current system so that the Commission can refocus on initiating its own proceedings to investigate and take action against the most serious infringements of Community competition law, which are almost never notified.314

The proposed reform involves the abolition of the notification and exemption system and its replacement by a Council Regulation which would render the exemption rule of Article 81(3) directly applicable without prior decision by the Commission.315 Such regulation would have as its basis Article 83 of the EC Treaty, and would stipulate that all national authorities or courts before which the applicability of Article 81(1) was invoked would also consider the applicability of Article 85(3).316

As is already the case for Articles 81(1) and 82, Article 81(3) would be applied by the Commission, national competition authorities, and national courts.317 Undertakings would be able to invoke Article 81(3) as a defense in court cases and obtain immediate civil enforcement of restrictive practices that satisfy the exemption requirements.318

This new rule would also mean that restrictive practices could no longer be notified in order to be validated.319 Under the new proposed system, undertakings would have to make their own assessment of the compatibility of their restrictive practices with Community competition law, in light of the legislation in force and the case law.320

According to the WHITE PAPER, the Commission will not entirely relinquish its control over the exemption process. It plans to reserve ex post control to "ensure the coherent application of the rules throughout the Community."321 First and foremost, the Commission will have the power to transfer a case from a national competition authority's jurisdiction to its own if the risk arises that the national competition authority will diverge from Commission competition policy.322 Furthermore, national competition authorities and courts would be required in the new regulation to inform the Commission of any proceedings in which Articles 81 or 82 are applied, or in which an application of national law might have implications for Community proceedings.323 The Commission could then intervene in judicial or administrative proceedings as amicus curiae to help maintain consistency in the application of the law.324

In the future, therefore, a directly applicable exception system in the EU will be in place and should have the following three main elements:

(a) the end of the system of notification and authorization;

(b) decentralized application of the competition rules; and

(c) intensified ex post control by the Commission.325

5) Coordination

The Commission has a duty to cooperate with the Member States: Article 5 of the EC Treaty

establishes the principle of cooperation between the Community and the Member States in order to obtain the objectives of the Treaty. Article 5 provides that Member States shall:

(a) take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising
• • • • • • out of [the] Treaty or resulting from action taken by the institutions of the Community;

(b) facilitate the achievement of the Community's tasks; and

(c) abstain from matters which could jeopardize the attainment of the objectives of the Treaty.

This includes the implementation of Article 3(f), which refers to the establishment of a system ensuring that competition in the market is not distorted.326 The European Court of Justice has ruled that the Commission has a duty to cooperate with the judicial authorities of the Member States.327

The Commission has a duty to transmit copies of applications and notifications to the Member States relating to Articles 81 and 82.328 The Commission must also consult an Advisory Committee on Restrictive Practices and Monopolies consisting of officials from the Member States prior to making a final decision.329 The Commission supplies the Committee with a draft decision and the Committee has the authority to issue an opinion on.330

The Commission has attempted to coordinate dual enforcement in other ways. It has issued the two notices on the application of Community competition law by national courts and national authorities.331 It has also coordinated efforts by erecting a preemptive legal framework in those areas where Member States find it acceptable. As mentioned in this section, the EU Merger Regulation gives sole jurisdiction to the Commission once the necessary thresholds are met. Exceptions to this rule are possible if an adverse effect on a local market or the implication of national interest arise.332

The Bundeskartellamt and the Commission do cooperate. The European and International Division of the Bundeskartellamt represents Germany at the Advisory Committee meeting (another of its functions is to coordinate contacts with the EU and other foreign competition authorities). It has become the conduit through which the Bundeskartellamt communicates its position to the European Commission. The role of the Division becomes more important to Germany as the European Commission assumes more influence on competition law matters.333

There are legal barriers to coordination between the national authorities and the Commission. Regulation 17 currently prohibits national competition authorities from using information supplied by the Commission as evidence.334 In the White Paper, the Commission recommends that its proposed regulation permit this.335 Under the proposed regulation, if the effects of a disputed practice are felt primarily in one Member State, the Commission would be able to send the whole of a file, including any confidential information, to the competent authority in that Member State.336 The national authority could then continue the Commission's investigation making direct use of the information provided to it.337 Likewise, a national authority could forward its file to the Commission if it comes to the conclusion that a case has a Community dimension and requires action by the Commission.338 Such information could be used only for the purpose for which it was originally collected and for the application of Articles 85 and 86, or of national competition law as the case may be.339

6) Conclusion

In the US, federal antitrust authorities do not have the power to direct or prevent state antitrust

enforcement efforts. Federal and state governments are essentially coequals in antitrust enforcement, primarily because Congress has not reserved exclusive antitrust jurisdiction to the federal government340 and courts have (on federalism grounds) held that federal antitrust laws generally do not preempt state antitrust laws.341 In the US, federal antitrust law applies in federal courts while state antitrust law applies in state courts. Although states can bring suits under federal antirust laws in federal courts, federal antirust law is never applicable in state courts.

In general, EU authorities enforce European competition law while national authorities enforce national competition laws. EU competition authorities enforce European competition law, but national competition authorities may enforce European competition law and national competition laws. Community competition laws can apply in national courts and in administrative proceedings initiated by national enforcement authorities. The one area in which European competition authorities have exclusive jurisdiction to enforce European competition law is in the merger area (depending on the sales figures of the merging entities). Where European competition law and national competition law apply to an individual restraint of trade or anti-competitive act simultaneously, European competition law generally preempts national competition law. However, to the extent national competition laws and Community competition laws do not conflict with one another, parallel proceedings before European competition authorities and national courts or authorities can occur and result in multiple liability.

The EU has reserved exclusive jurisdiction to the Commission in the merger area while at the same time facilitating a decentralized enforcement of Community competition law with the express intention of ensuring adequate enforcement.342 Community competition law is directly applicable in national courts and administrative proceedings. Although the Commission has tried to facilitate decentralized enforcement of Community competition law, it has at the same time maintained a centralized authorization system for all restrictive practices requiring an exemption.

The primary reason for decentralized dual enforcement is that the administrative resources at the Commission's disposal are necessarily limited and cannot be used to deal with all the cases brought to its attention.343 Although the EU dual enforcement system is decentralized, it is not premised on the notion that there are multiple approaches to certain problems even if this value comes at the cost of inefficiency or inconsistent results. Instead, the EU has made European competition law directly applicable while at the same time reserving control in the Commission to ensure that the national courts and authorities apply Community competition law in a uniform fashion. Where reserving too much control has hindered adequate enforcement, the Commission has resorted to increased coordination and even increased decentralization to avoid inefficiencies or inconsistent results, but the Commission has never relinquished ultimate control over the manner in which Community competition law is applied.344 However, the Commission plans to share power to grant exemptions with the Member States while reserving the power to remove competition cases from the national courts and administrative proceedings at its discretion.

Dual enforcement has also created a need for substantial coordination.345 Coordination has been accomplished using Commission notices on the application of Community competition law in national courts and by national authorities, a preemptive legal framework in the merger area, and cooperative investigations. The overall adequacy of enforcement in relation to dual enforcement is a more vital issue in the EU insofar as the Commission values the uniform application of Community competition law.346

Some have suggested that the EU should adopt American coordination techniques.347 However, the need for coordination in the EU is substantially different than the US need for coordination. Coordination of enforcement efforts is a higher priority in the EU because Member States implement EU law, EU law is directly applicable in the national courts, and it is very important to

allocate resources at the community level proportionate to increases in enforcement responsibilities.348 Moreover, the Commission and the Member States have a legal duty to cooperate. There is no equivalent duty to cooperate in the US.349

Historically, most Member States lacked well-developed competition law systems and developed their competition laws with the goal of uniformity with Community competition law.350 For those Member States such as Germany with more developed enforcement traditions, they have been willing to harmonize national law, albeit not entirely. An issue arises whether a national authority like the Bundeskartellamt can apply Community competition law consistent with the policies of the Commission and yet operate independently of industrial policy considerations. The Bundeskartellamt is not permitted to consider industrial policies in its decisions. However, one policy goal of Community competition law is the prevention of restrictive practices that interfere with the integration of the separate Member State economies into a unified common market.351 Germany is of the opinion that industrial policy goals should not influence the way in which German competition law is applied.352 Can the Bundeskartellamt therefore apply Community competition law to reach results consistent with the Commission if it does not take economic integration into consideration?

Notes

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2 The field of law that Americans refer to as "antitrust" is generally referred to as "competition law" in Europe. RALPH E. FOLSOM, MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 876 (1995). The term "dual enforcement" is defined in this article to mean a system of antitrust law enforcement that recognizes separate sovereigns. See Thomas M. Wilson III, The Specter of Double Recovery in Antitrust Federalism in 58 ANTITRUST LAW JOURNAL 1 (1989).

3 It is important to differentiate the terms "European Community", "European Union", "Common Market" and "European Economic Community." Modern European integration started with the European Coal and Steel Community (ECSC) in 1951. The ECSC was expanded by treaty in 1957 with the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY (EC Treaty). After the 1986 SINGLE EUROPEAN ACT, the term EU was used to signify the collection of states which had dedicated themselves to achieving economic integration. In 1992, the MAASTRICHT TREATY ON EUROPEAN UNION (Maastricht Treaty) was ratified. It amended the EC Treaty and changed the title of the European Economic Community to the European Union (EU) in order to emphasize the heightened commitment to unification embodied in the Maastricht Treaty. Therefore, the term "EU" applies to the pre-Maastricht political entity and the term "EU" should apply to the post-Maastricht political entity. Alissa A. Meade, Modeling a European Competition Authority, 46 DUKE L.J. 153, (1996) at footnote 4.

4 ABA ANTITRUST SECTION: MONOGRAPH NO. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW (1988) at 13. See generally, Herbert Hovenkamp, State Antitrust in the Federal Scheme, 58 INDIANA L. J. 3 (1983).

5 See Hillsborough Co. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985).

6 TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY (1957) [hereinafter EC Treaty].

7 D. G. GOYDER, COMMUNITY COMPETITION LAW 427(1993).

8 Id.

9 For an overview of each Member State's competition laws, see EUROPEAN COMMISSION, THE APPLICATION OF ARTICLES 85 & 86 OF THE EC TREATY BY NATIONAL COURTS IN THE MEMBER STATES (August J. Braakman, Nauta Dutilh, eds. 1997).

10 GOYDER, supra note 7 at 427.

11 Randolph W. Tritell, Mark F. Friedman, Fundamentals of EEC Competition Law: The Framework of EEC Competition Law in 40TH, ANNUAL ABA ANTITRUST SPRING MEETING (1992) at 13.

12 Spencer Weber Waller, Fundamentals of EEC Competition Law: An Overview of Articles 81 and 82 of the Treaty of Rome in 40TH ANNUAL ABA ANTITRUST SPRING MEETING (1992).

13 Even though the substantive rules of Community competition law and US antitrust law are, generally speaking, similar, their application often differs because this goal above is alien to the US system.

14 These principles are also reflected in EC Treaty, arts. 30-36 (free movement of goods) and arts. 67-73 (free movement of services). Tritell, Friedman, supra note 11 at 6; EUROPEAN COMMISSION, supra note 9 at 3.

15 EUROPEAN COMMISSION, supra note 9 at 178.

16Id.

17Id.

18 Article 12 of the Treaty of Amsterdam came into force on May 1, 1999. It provides for the renumbering of the articles of the EC Treaty. For example, former Articles 85 and 86 are now numbered Articles 81 and 82 respectively. See the following chart for other changes.

Old Number

New Number

85

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91 (repealed)

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19 EUROPEAN COMMISSION, supra note 15 at 16.

20 EC Treaty, art. 81(1).

21 Id. A concerted practice between undertakings is a form of cooperation based on an understanding of an exchange of information. Case T-7/89, Hercules v. Commission, [1991] II E.C.R. 171.

22 EC Treaty, art. 81(1) prohibits "all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."

23 James S. Venit, Community competition law - Enforcement and Compliance: An Overview, 65 ANTITRUST L.J. 81 (Fall 1996).

24 EC Treaty, art. 81(1), (a)-(e).

25 Venit, supra note 23.

26 The relevant product market includes all products that are interchangeable with the product in question. Case 85/76, Hoffman-LaRoche v. Commission [1979] E.C.R. 461.

27 The relevant geographic market comprises an area where the objective conditions of competition must be the same for all traders. Case 27/76, United Brands v. Commission, [1978] E.C.R. 207, par. 44.

28 EC Treaty, art. 82(a)-(d).

29 Case 27/76, United Brands v. Commission, [1978] E.C.R. 207.

30 Case 85/76, Hoffman-LaRoche v. Commission, [1979] E.C.R. 461.

31 Case 322/81, Michelin v. Commission, [1983] E.C.R. 3461.

32 Id.

33 Case 27/76, United Brands v. Commission, [1978] E.C.R. 207.

34 Venit, supra note 23.

35 EC Treaty, art. 86(1). EUROPEAN COMMISSION, supra note 9 at 11.

36 EC Treaty, art. 87. The distinction between rules applying to undertakings and those applying to Member States are understood by examining the provisions relating to State monopolies of a commercial character in Article 37 of the EC Treaty. State monopolies of a commercial character are bodies through which a Member State in law or in fact, either directly or indirectly supervises, determines or appreciably influence imports or exports between Member States. EC Treaty, art. 37. The term also includes monopolies delegated by a Member State to others. Id. The EC Treaty does not require that state monopolies of a commercial character be abolished, but they must be progressively adjusted so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States. EUROPEAN COMMISSION, supra note 9 at 12.

37 EC Treaty, art. 87(2), (3).

38 EC Treaty, art. 86.

39 Commission Regulation 17/62, 13/204, [1962] O.J. 1959-62 [hereinafter Regulation 17/62], adopted in March 1962 by the Council of Ministers. For a full discussion of Community competition law, see Venit, supra note 23.

40 Regulation 17/62, art. 9.

41 The Commission is located in Brussels and consists of twenty commissioners appointed by the Member States. Commissioners are expected to serve the interests of the Union rather than their national States. The Commission may also initiate policies to further the objectives of the Treaty of Rome, propose legislation, and negotiate certain agreements on behalf of the Union. The Commission also has the task of assuring that Member States comply with the Treaty of Rome and Community legislation.