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Law and the Abuse of Economic Power in Europe

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INTRODUCTION

Most industrialized countries treat the possession of significant economic power by individual firms as a potential societal harm and, therefore, apply legal controls to the conduct of firms having such power.[1] United States law utilizes the concept of monopolization to define the limits of permissible conduct for powerful enterprises,[2] but virtually all other competition law systems, including all significant European legal systems, utilize the concept of abuse of power to fulfill this function.

These two approaches to the problem of single-firm economic power share a common objective: each attempts to protect society against harms which may result from the use of economic power without unduly restricting the conduct of powerful enterprises. The two legal mechanisms are, however, fundamentally different. They have evolved from different conceptual and theoretical starting points; they are embedded in different legal traditions, especially in relation to the role of government in economic activity; they are shaped by different social and political pressures; and their enforcement is based on different assumptions about law as well as about economics.

Because of these differences, the concept of abuse of economic power is alien to American lawyers. It has been little studied in English, and what little attention has been paid to it has focused on its use in the competition law of the European

1. For a dated, but still useful, review of the various national statutes, see ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MARKET POWER AND THE LAW (1970) [hereinafter O.E.C.D.].

2. For a leading discussion of the monopolization concept in United States antitrust law, see 3 P. AREEDA & D. TURNER, ANTITRUST LAW chs. 6-8 (1985).

Economic Community.[3] Consequently, American lawyers frequently misunderstand the concept, its legal context, and the factors influencing its use and interpretation.[4]

This lack of understanding has several harmful effects. It impairs the ability of American lawyers to render advice relating to business operations in most of the industrialized countries of the world. An understanding of the legal regime relating to the conduct of economically powerful enterprises is critical not only to those enterprises themselves, but also to all who would either deal or compete with such enterprises. In addition, this lack of understanding of the abuse concept tends to prevent meaningful evaluation in the United States of the European experience in controlling economically powerful enterprises. This is particularly important in light of long-standing dissatisfaction in the United States with the treatment of single-firm economic power under United States antitrust law.[5] Proper evaluation of the European experience can thus provide needed perspective on United States law.

The problems involved in understanding the abuse concept are exacerbated by the fact that in recent years the role and content of the concept of abuse have undergone significant and rapid change. In Germany, for example, the abuse concept primarily targets a substantially different type of conduct than was its principle aim only ten years ago.[6] Moreover, the nature and extent of these changes in the role of the abuse concept have been seldom recognized and little understood.

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3. *See generally* R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION: A COMPARATIVE STUDY OF THE AMERICAN AND EUROPEAN APPROACHES TO THE CONTROL OF ECONOMIC POWER (1970). *See also generally* C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 177-95 (1967); Edwards, *American and German Policy Toward Conduct by Powerful Enterprises: A Comparison*, 23 ANTITRUST BULL. 83 (1978). For a German comparison of U.S. and German antitrust law regarding powerful enterprises, see I. SCHMIDT, US-AMERIKANISCHE UND DEUTSCHE WETTBEWERBSPOLITIK GEGENÜBER MARKTMACHT (1973).

4. In 1956, Professor Wolfgang Friedmann wrote that "[h]ardly any topic requires more urgently a comparative survey and critical analysis than that commonly described as "anti-trust law." ANTITRUST LAWS: A COMPARATIVE SYMPOSIUM iii (W. Friedmann ed. 1956). Yet in the ensuing years there has been very little comparative work done in English. *See generally* Gerber, *Antitrust Law and Economic Analysis: The Swedish Approach*, 8 HASTINGS INT'L & COMP. L. REV. 1 (1984). *See also* Rittner, *Konvergenz oder Divergenz der Europäischen Wettbewerbsrechte*, in INTEGRATION ODER DESINTEGRATION DER EUROPÄISCHEN WETTBEWERBSORDNUNG (1983).

5. *See, e.g.*, 1 NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 141-74 (1979).

6. *See infra* pt. III *D*, p.74.

This article, therefore, responds to this lack of understanding by analyzing the legal concept of abuse of a market-dominating position.[7] Section I of the article presents some historical background for the development of the abuse concept. Section II describes the function of the abuse concept in competition law systems based on administrative control.[8] Sections III and IV examine, respectively, the concept's role in the competition law systems of the Federal Republic of Germany and the European Economic Community, analyzing in detail the factors which affect its interpretation and application. Section V then compares and assesses the role and development of the abuse concept in German and European Community law. The focus of this article is on understanding how meaning is ascribed to the vague notion of abuse.[9] In analyzing this process, however, the article also reveals characteristics of the general process of law creation in the legal systems involved.

I. HISTORICAL BACKGROUND ON THE ABUSE CONCEPT

A. Pre-Modern Conceptions of Abuse

The concept of abuse of a market-dominating position has developed during the twentieth century in the context of modern antitrust law systems. The idea of imposing sanctions on certain forms of conduct by economically powerful enterprises can be traced back, however, at least as far as the Roman Empire,[10]

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7. There has been little attempt to study the interrelations between antitrust law developments in the various European countries. For notable exceptions, see U. BERNITZ, MARKNADSRÄTT (1969); R. JOLIET, *supra* note 3; and Rittner, *supra* note 4.

8. The term "competition law" is used here to refer to legal processes designed to protect against restraints of competition. In the United States the term "antitrust law" is used to refer to these issues, but that term has the disadvantage of being associated with the American system of competition law.

The term "competition law" is, however, also less then optimal, because its direct analogues in European languages (for example, *Wettbewerbsrecht* and *Droit de Concurrence*) also refer to the law of unfair competition.

9. The concept of abuse of a market-dominating position has two components—the concept of abuse and the concept of dominant position. The abuse concept provides conduct standards; the concept of dominant position identifies those enterprises whose conduct is subject to those standards. The central idea is that an enterprise is market-dominating where it is not subject to substantial competition in a particular market. For a review of approaches to defining market-dominance, see O.E.C.D., *supra* note 1. Market-dominance is roughly the equivalent of having a high degree of market power for purposes of applying § 2 of the Sherman Act. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 19-40 (1977). Due to space limitations, only the concept of abuse will be studied here.

10. *See generally* R. PIOTROWSKI, CARTELS AND TRUSTS ch. 2 (1933); *see also* R.

where several separate laws established penalties for individuals or groups of individuals who "cornered" a market and used the power achieved by that monopoly position to drive up prices to consumers.[11]

Roman laws on this subject would be of limited interest, however, if it were not for the fact that provisions of these laws were included in the Corpus Juris Civilis, the repository of Roman legal learning which served as the basis for law and legal education throughout much of Europe from the eleventh century until well into the last century.[12] At least partially as a result of this fact, laws following the Roman pattern were frequently in effect from the early middle ages until the nineteenth century.[13]

During the medieval period the concepts of "usury"[14] and of "just price"[15] added an important dimension to the way Europeans viewed economic activity. First, they established the proposition that any given price was either "just" or "unjust" and that legal processes not only could, but should, make that determination. Second, they labeled the charging of "unjust" prices as morally wrong and abhorrent to the basic religious tenets of society.[16] These ideas have had a powerful effect on legal and popular thought relating to economic activity, and this effect can still be detected.[17]

Since the last century, the concept of fairness implicit in the notions of just price and usury has been developed within the

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ISAY, DIE GESCHICHTE DER KARTELLGESETZGEBUNGEN 2-3 (1955); von Brunn, *Vom Kartellrecht der Roemer*, in RECHT UND WIRTSCHAFT: FESTSCHRIFT FÜR J.W. HEDEMANN 47 (1958).

11. *See generally* Trinkner, *Die Kartellgesetzgebung des Corpus Juris Justiniani im Vergleich zum modernen Recht*, 1973 BETRIEBS-BERATER 860.

12. For a discussion of the importance of the Corpus Juris Civilis in continental European legal education, see H. BERMAN, LAW AND REVOLUTION 120-65 (1983).

13. *See* R. PIOTROWSKI, *supra* note 10, at 118.

14. *See* BERMAN, *supra* note 12, at 248-50; *see also generally* B. NELSON, THE IDEA OF USURY (2d ed. 1969); J. NOONAN, THE SCHOLASTIC ANALYSIS OF USURY (1957).

15. *See, e.g.*, de Roover, *The Concept of Just Price: Theory and Economic Policy*, 18 J. ECON. HIST. 418 (1958); Kaulla, *Die Lehre vom gerechten Preis in der Scholastik*, 60 ZEITSCHRIFT FÜR DAS GESAMTE STAATSWESEN 579 (1904). *See also generally* H. SCHMIDT, DIE LEHRE VON DER SITTENWIDRIGKEIT DES RECHTSGESCHÄFTS IN HISTORISCHER SICHT (1973); Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981).

16. *See* J. GILCHRIST, THE CHURCH AND ECONOMIC ACTIVITY IN THE MIDDLE AGES 58-70 (1969).

17. *See, e.g.*, Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position Within the Common Market*, 53 NOTRE DAME LAW. 768, 769 (1978).

framework of unfair competition law. Most European legal systems have developed a distinct body of legal principles that define standards of fairness in business behavior and provide private remedies for competitors injured by violations of these standards.[18] Moreover, these principles tend to be well-developed, much used, and highly important.[19]

This body of unfair competition law helped set the stage for the development of the abuse concept, because it expanded the idea that legal processes could determine whether a *price* was fair to include determination of whether particular *business conduct* was fair. From here it was a short step to the idea that conduct which normally would be fair might become unfair when engaged in by a firm with substantial economic power.[20]

B. Initial Steps Toward Competition Law

Although the idea of passing legislation to combat restraints on competition began to be discussed in Europe around the turn of the century,[21] such legislation was rejected as inappropriate for European conditions until after the First World War.[22] The proposals conflicted sharply with the then dominant conception that laws should not restrict freedom of economic activity, even in the name of protecting the process of competition.[23]

With the close of World War I, however, political changes

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18. In the nineteenth century the French courts led this development. *See* Derenberg, *The Influence of the French Code Civil on the Modern Law of Unfair Competition*, 4 AM. J. COMP. L. 1, 2-4 (1955).

19. For a discussion of unfair competition law in Germany, see F. RITTNER, WIRTSCHAFTSRECHT 185-267 (1979).

20. The fact that there was a significant and effective body of law to protect competitors from unfair conduct eliminated an important impetus for the development of competition law in general and control over economically powerful enterprises in particular. In addition, it meant that competition laws did not need to be concerned with unfairness as such, but only with unfairness as a function of market dominance.

21. For discussion, see generally H. SCHULTE, DAS ÖSTERREICHISCHE KARTELLRECHT VOR 1938 (1979); Grossfeld, *Zur Kartellrechtsdiskussion vor dem ersten Weltkrieg*, in H. COING AND W. WILHELM, WISSENSCHAFT UND KODIFIKATION DES PRIVATRECHTS IM 19. JAHRHUNDERT 255 (1979).

22. *See* A. ROTTHEGE, DIE BEURTEILUNG VON KARTELLEN UND GENOSSENSCHAFTEN DURCH DIE RECHTSWISSENSCHAFT 76-78 (1982).

23. *See generally* F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT, pts. 5 & 6 (2d ed. 1967). Closely associated with concepts of political liberty, economic liberalism held that entrepreneurs should be free to do as they wished and that state interference should be kept to a minimum. The process of emancipating economic activity from mercantilism and guild-based restrictions reached different stages at different times in different parts of Europe, but it dominated the century.

and severe economic adjustments led to attempts to control certain uses of economic power. The primary impetus to early competition legislation was the post-war inflation of the early 1920s.[24] Cartels and economically powerful enterprises were seen as contributing to inflationary pressures,[25] and the first European competition laws were designed to combat such price increases.[26] These initial measures aimed at controlling cartels and monopolies were, in general, tentative and quite limited, typically requiring powerful enterprises or groups of enterprises to provide information to governmental organizations.[27] Such measures were based on the belief that publicity would itself inhibit enterprises from engaging in conduct that was harmful to society.

In Germany, however, postwar economic problems led to more substantial measures.[28] In response to crisis-level inflation, the German government in 1923 issued a Regulation Against Abuse of Economic Power Positions ("Abuse Regulation"), which became the forerunner of modern European competition laws.[29] The immediate aim of the regulation was to limit the ability of cartels and market-dominating enterprises to manipulate shortages and thereby increase consumer prices.[30] It was thus conceived as a means of combating harms caused by hold-

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24. For discussion, see H. HOLBORN, A HISTORY OF MODERN GERMANY: 1840-1945, at 595-601 (1969).

25. *See* R. ISAY & O. TSCHIERSCHKY, KARTELLVERORDNUNG 31-34 (2d ed. 1930).

26. This is particularly true for the Scandinavian countries. *See generally* W. VON EYBEN, MONOPOLER OG PRISER (1981).

An additional goal was economic growth. The newly democratic governments were compelled to produce results to justify their existence, and they saw improved economic performance as a source of legitimization.

27. *See, e.g.*, Wetter, *Swedish Antitrust Law*, 10 AM. J. COMP. L. 19, 20-21 (1961).

In Norway a more substantial competition statute, the Trust Law (*Trustlov*), was passed in 1926. It contained the basic elements of the administrative control model of antitrust law which was further expanded in other European countries after the war. It was also closely associated with price control objectives. It established registration requirements for cartel agreements and authorized a specially-created administrative body to intervene in cases of abuse of power. The law's substantive provisions were conceived as legal rules, embodying judicially applicable standards. The actions of this administrative body were subject to review by a special council which functioned on legal and judicial principles. For a description of the Norwegian legislation, see U. BERNITZ, *supra* note 7, at 394-98.

28. For the economic situation, see 2 H. KELLENBENZ, DEUTSCHE WIRTSCHAFTSGESCHICHTE 355-65 (1981).

29. Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen, 1923 REICHSGESETZBLATT [RGBl.]I 1067 (W. Ger.). An English translation appears in R. LEIFMAN, CARTELS, CONCERNS AND TRUSTS 351-57 (1932).

30. R. ISAY & O. TCHIERSCHKY, *supra* note 25, at 35-36.

ers of economic power, and it identified the socially harmful use of power as an abuse of that power. The Abuse Regulation granted to the Minister of Economics the authority to bring actions before a specially-created cartel court in cases where economic power was used so as to "endanger the economy or societal welfare."[31] The court's sanctions were generally limited, however, to voiding contracts.[32]

The German legislation was applied, with varied effectiveness, throughout the 1920s,[33] but it was replaced in 1933 by National Socialist legislation which mandated the formation of cartels.[34] Moreover, during the depression of the 1930s European governments generally encouraged rather than discouraged cartels and other forms of anticompetitive activity.[35] Thus, the first European experiments with competition law did not lead to a lasting legal framework. They did establish, however, an identifiable European approach to competition law which shaped subsequent developments.

II. THE ADMINISTRATIVE CONTROL OF ECONOMIC POWER

During the first decade after the close of the Second World War, most Western European governments considered the introduction of competition legislation. Such legislation was eventually enacted in all major states except Italy.[36] In part, this was a response to specific problems of the post-war period. Widespread shortages and cartelization led to strong inflationary pressures, and competition laws were often viewed primarily as means to combat these pressures. The development of competition legislation also resulted from dissatisfaction with the political and economic consequences of pre-war dirigistic economic policies. Against this background, competitive processes were seen as the

31. "Basically, the statute was the expression of a kind of syndicalistic cooperation between the state, on the one hand, and business on the other, oriented according to administrative, public-law categories. . . ." W. MÖSCHEL, RECHT DER WETTBEWERBSBESCHRÄNKUNGEN 19 (1983).

32. For example, according to § 10 of the regulation, the cartel court could invalidate contractual terms where they were likely to "endanger the economy or general welfare through the exploitation of a position of economic power . . . ."

33. For a description, see A. ROTTHEGE, *supra* note 22, at 167-216.

34. Zwangskartellgesetz of July 15, 1933, RGB1.I 488 (W. Ger.).

35. *See generally* H. FRIEDLÄNDER, DIE RECHTSPRAXIS DER KARTELLE UND KONZERNE IN EUROPA (1938).

36. For discussion, see generally Thorelli, *Antitrust in Europe: National Policies After 1945*, 26 U. CHI. L. REV. 222 (1959).

preferable means of organizing economic behavior.[37]

The European competition laws formed during the post-war period—including those of the United Kingdom, the Netherlands, Sweden, Norway, Denmark and Belgium[38]—were based on what may be called the administrative control model of competition law, the essential components of which had been worked out by 1930.[39] The administrative control model is based on two related notions. The first is that no particular conduct—be it the formation of a cartel or the monopolization of a market—is necessarily "bad." There may always be circumstances which justify particular conduct, and, therefore, no conduct should be prohibited per se. Conduct should be prohibited only where it is "abusive"—i.e., where the socially harmful effects of the conduct are not outweighed by other benefits to society. This "abuse" or "public interest" standard was conceived and developed as a counterpoint to the "prohibition" model which is closely associated with United States antitrust law, and it continues to be so viewed.[40]

Related to this broad concept of the nature of the legal standard to be used is the assumption that competition law should be applied primarily by administrative bodies rather than by courts. Such institutions are considered more appropriate for determining whether conduct is socially harmful.[41] Consequently, in most administrative control systems a specialized governmental organ administers a system in which legal norms are viewed primarily as guides for administrative action. Private suits are generally not permitted, and judicial review of administrative action, if allowed at all, is assigned to specialized or administrative courts rather than to the regular courts.

The combined effect of these two concepts is that administrative control systems typically accept a high degree of discretion on the part of those administering the competition

37. For discussion of the objectives sought to be achieved through competition legislation, see C. EDWARDS, *supra* note 3, at 6-13.

38. For discussions of individual statutes, see *id.* and ANTITRUST LAWS, *supra* note 4.

39. These concepts were crystallized at least by 1930, when cartel issues were a focus of debate at an important meeting of the Interparliamentary Union. *See* UNION INTERPARLEMENTAIRE, COMPTE RENDU DE LE XXVI. CONFERENCE INTERPARLEMENTAIRE 33-34, 145-71, 335-73 (1930).

40. *See generally* Von Eyben, *Forbud eller misbrugskontrol i konkurrence og markedsforingsretten*, in TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 236 (1979).

41. *See, e.g.*, Gerber, *supra* note 4, at 5, 15-23.

legislation. Competition law thus tends to be subject to political influence, and its concepts often remain poorly defined.[42]

Since administrative control systems apply an "abuse" standard, violation of that standard by powerful enterprises is generally labeled "abuse of power" or "abuse of a market-dominating position." In some systems the concept is used in the legislation itself,[43] while in others it is used generally to refer to violations of the public interest standard by dominant firms.[44] In both cases, however, the abuse concept generally remains devoid of substantial analytical content. There has been a tendency in recent years to introduce judicial processes into administrative control systems in order to increase predictability in the application of the law. Typically, this has meant subjecting administrative decisions to review by a specialized court. In Sweden, for example, a so-called "Market Court" was created in 1974 to hear appeals from decisions of the administrative body which enforces the competition law.[45] This court is comprised of professionally-trained judges as well as economic experts and representatives of interest groups. With respect to the abuse concept, however, this type of change has yet to produce significant conceptual developments.

III. THE CONCEPT OF ABUSE IN GERMAN COMPETITION LAW

A critical step in the development of the abuse concept was its inclusion in the German Law Against Restraints of Competition (GWB), which was enacted in 1957.[46] This statute created what has become the most developed and influential competition law system in Europe, and thus codification of the abuse concept in the GWB helped establish that concept as the main legal tool in Europe for dealing with economically powerful enterprises. In Germany, competition law has been the object of intensive and widespread legislative, judicial, and scholarly attention, and

42. *See generally* C. EDWARDS, *supra* note 3, at 32-35.

43. *See, e.g.*, Belgian Law of May 27, 1960 for Protection Against the Abuse of Economic Power, as described in Bellis, *Belgium*, in 2 WORLD LAW OF COMPETITION §§ 2.01-2.03 (J. von Kalinowski ed. 1987).

44. This is the case, for example, in the United Kingdom. *See, e.g.*, Barounos & Allan, *United Kingdom*, in 4 WORLD LAW OF COMPETITION § 2.02 (J. von Kalinowski ed. 1987).

45. For a description, see Gerber, *supra* note 4, at 21-23.

46. Gesetz gegen Wettbewerbsbeschränkungen [GWB], 1957 BUNDESGESETZBLATT [BGB1.]I 1081 (W. Ger.).

it is in this context that the abuse concept has been most vigorously applied and most intensively analyzed.

A. German Antitrust Law: The Context of the Abuse Concept

The development of the abuse concept in German competition law has been molded by the essentially judicial character of the legal process in which it has operated.[47] For the first time in Europe, the German system subjected competition law concepts to the full rigors of judicial scrutiny and legal science.[48]

As with most other European states, Germany began to consider modern competition legislation after the Second World War.[49] Drawing heavily on the Abuse Regulation of the 1920s,[50] the initial plans envisioned a system similar to the administrative control systems elsewhere being established. Germany did not, however, finally enact a competition statute until 1957, after a decade of often highly controversial efforts to achieve a politically acceptable system.[51] This longer gestation period, together with Germany's status as an occupied country, exposed the new system to outside influences, including, in particular, United States antitrust thinking.[52] The system that resulted was a hybrid. It combined basic elements of the administrative control model with other elements often drawn from American antitrust

47. *See infra* text accompanying notes 54-58.

48. The term "legal science" describes a conception of law that is characteristic of the Civil Law tradition. *See generally* J. MERRYMAN, THE CIVIL LAW TRADITION 65-73 (1969).

49. For discussion, see R. ROBERT, KONZENTRATIONSPOLITIK IN DER BUNDESREPUBLIK—DAS BEISPIEL DER ENTSTEHUNG DES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN 97-110 (1976).

50. Verordnung gegen Missbrauch wirtschaftlicher Machtstellungen, *supra* note 29; *see also supra* notes 29-33 and accompanying text.

51. For a detailed discussion of early efforts, see generally R. ROBERT, *supra* note 49.

52. The GWB was greatly influenced, both directly and indirectly, by U.S. antitrust law experience. U.S. occupation forces insisted that the German government agree to pass antitrust-type legislation to curb the concentration of economic power that was widely believed to have aided Hitler's rise and which American authorities feared might subvert democratic institutions. *See* F. RITTNER, *supra* note 19, at 276. For a discussion of the decartellization laws in effect during the occupation, see Bock & Korsch, *Decartellization and Deconcentration in the West German Economy Since 1945*, in ANTITRUST LAWS, *supra* note 4, at 138-53.

Equally important, however, was the indirect influence. Many of those who had a significant impact on the GWB studied the U.S. experience with antitrust law. *See generally* Mestmäcker, *Diskriminierungen, Dirigismus und Wettbewerb*, 1957 WIRTSCHAFT UND WETTBEWERB [WuW] 21. For bibliography, see Fikentscher, *Die deutsche Kartellrechtswissenschaft 1945-1954*, 1955 WuW 205, 208 n.18.

law, chief among which was the notion that competition law should be subject to the judicial process.

Basic elements of the administrative control model are present in the German system. For example, an administrative body called the *Bundeskartellamt* (Federal Cartel Office or FCO) is primarily responsible for applying and enforcing the law.[53] Private antitrust suits are permitted only with respect to certain provisions,[54] and such suits generally play a limited role in enforcement of the statute.[55] Thus, administrative sanctions represent the primary means of enforcing the provisions of the GWB.

In other ways, however, the German system deviates significantly from the administrative control model. It does not treat competition law merely as an instrument of economic policy. The FCO is essentially independent and largely protected from the exercise of political influence.[56] Its role is not that of discretionary policy creation or implementation; rather, its function is to interpret and apply a detailed statutory enactment.[57] Accordingly, enforcement action is reviewed internally according to judicially-oriented procedures to determine whether it is based on a legally-justified interpretation of the GWB. In addition, the German system provides a critically important incentive for the FCO to operate according to judicially-oriented principles, because it makes the decisions of the FCO reviewable

53. For discussion in English of the enforcement activities and concepts of the FCO, see Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471 (1984).

54. Private suits may be instituted in the regular courts to secure damages or injunctions based on violation of certain provisions, namely, those which are considered to provide "individual protection" (*Individualschutz*). *See* GWB, *supra* note 46, at § 35. Private legal actions are an important means of enforcing certain provisions of the GWB, but they are far less important as an enforcement mechanism than is the case in the U.S.

55. In one area, however, private suits play a central role in enforcing competition law concepts. According to § 26(2) of the GWB, injured purchasers or competitors can bring suit in the regular courts against firms which engage in price discrimination or other forms of business discrimination. For discussion, see Gerber, *The German Approach to Price Discrimination and Other Forms of Business Discrimination*, 27 ANTITRUST BULL. 241 (1982).

56. For discussion of the role of the FCO, see Stockman & Strauch, *Federal Republic of Germany*, in 5 WORLD LAW OF COMPETITION 23-25 (1985); *see also generally* U. IMMENGA, DIE POLITISCHE INSTRUMENTALISIERUNG DES WIRTSCHAFTSRECHTS (1976).

57. *See generally* Rittner, *Das Ermessen der Kartellbehörde*, in BEITRÄGE ZUM WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR HEINZ KAUFMANN 307 (1972); Weber, *Geschichte und Aufbau des Bundeskartellamtes*, in ZEHN JAHRE BUNDESKARTELLAMT 263 (1968).

by the regular courts.[58] In particular, the federal appeals court in Berlin (the Berlin Appeals Court or *Kammergericht*) and the Federal Supreme Court (*Bundesgerichtshof*) play a central role in the development of the law.

The judicial orientation of the system is underscored by the fact that the GWB's substantive provisions are drafted as legal norms rather than as administrative authorizations.[59] They require characterization of conduct and subsumation of fact patterns rather than administrative judgment about the welfare of society.

B. The Concept of "As-If" Competition and the Original Role of the Abuse Concept

The changes in the proposed system that were made during its ten-year gestation period were especially important for the development of the abuse concept because the changes in the system altered the function of the concept in that system. The original draft of the GWB, the so-called Josten draft,[60] was based on the ideas of the "Ordo-Liberal School" of economists.[61] The Ordo-Liberals believed that socialism and classical *laissez-faire* economics had been discredited, respectively, by the rise of authoritarianism and by the Great Depression.[62] They developed, therefore, a set of ideas about the relationship between political and economic institutions which combined classical *laissez-faire* economics with concepts of state intervention.[63]

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58. The decisions of the FCO are appealable to the *Kammergericht*, which is the federal appeals court for Berlin, where the FCO is located.

59. Certain of the GWB's substantive norms also reflect the influence of the administrative control model. In addition to the concept of abuse of a market-dominating position, there are, for example, a large number of specific exceptions to the prohibition against horizontal agreements that permit cartels where they are considered likely to be in the public interest. In addition, several of the provisions relating to vertical restraints on competition are very broadly drafted and give the FCO substantial discretion in applying them.

60. Entwurf zu einem Gesetz zur Sicherung des Leistungswettbewerbs und zu einem Gesetz über das Monopolamt (Bundeswirtschaftsminister pub. 1949).

61. Among the leading representatives of this school were Walter Eucken and Franz Böhm. For general background discussion, see F. BÖHM, WETTBEWERB UND MONOPOLKAMPF (1933); W. EUCKEN, DIE GRUNDLAGEN DER NATIONALÖKONOMIE (1939). For discussion of the Ordo-Liberal school, see R. ROBERT, *supra* note 49, at 73-85; W. Möschel, Competition Policy from an ORDO-point of view (date unknown) (unpublished manuscript).

62. *See generally* Günther, *Die Geistigen Grundlagen des Sogenannten Josten-Entwurfes*, in WIRTSCHAFTSORDNUNG UND STAATSVERFASSUNG: FESTSCHRIFT FÜR FRANZ BÖHM 183, 189-93 (1975).

63. In their view, history had demonstrated that without government intervention

One of the central components of the Ordo-Liberal program was the idea that where competition was weak or non-existent, the state should require enterprises to conduct themselves *as if* there were essentially perfect competition. This concept of "as-if" competition rested on the assumption that economic science could determine with reasonable accuracy whether conduct was consistent with conditions defined as "competitive." This notion of "as-if" competition was closely associated with the concept of "performance competition" or "competition on the merits."[64] The Ordo-Liberals assumed that in enforcing the standard of "as-if" competition the state would be assuring that success in the marketplace was the result of better performance rather than of the use of economic power.

Under the competition law envisioned in the Josten draft, a governmental office was to require powerful enterprises and groups of enterprises to act "as-if" they were constrained by competition. In subsequent drafts the concept of abuse was then used to designate conduct by powerful enterprises which deviated from the competitive norm. Thus, for the first time, the abuse concept was associated with a defined standard rather than with a vague public interest standard.

Although the competition law system finally established in the GWB was significantly different from the system envisioned by the Ordo-Liberals, the abuse concept remained part of the legislation.[65] Consequently, a concept originally designed to authorize actions by an administrative agency now had to function as part of a system of legal norms that was to be applied according to the judicial process.[66] The concept of "as-if" competition was assumed, however, to continue to provide a means of giving content to the abuse concept.[67] If economic science could determine for a given market the parameters which com-

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competitive processes tended to collapse, because enterprises preferred private (i.e., contractual) regulation of business activities rather than competition, and because market-dominating enterprises often acquired such power that they were not affected by competitive pressures. Thus, the state had to enforce competitiion. *See* R. ROBERT, *supra* note 49, at 78-82.

64. The title of the Josten Draft, *see supra* note 60, was, in fact, "Draft of an Act to Protect Competition Based on Performance and an Act Concerning the Monopoly Office."

65. For discussion of the various changes made in the development of the legislation, see R. ROBERT, *supra* note 49.

66. *See generally* Rittner, *§ 22 GWB im Spannungsfeld wirtschaftswissenschaftlicher Theorien und rechtsstaatlicher Postulate*, in FESTSCHRIFT FÜR GÜNTHER HARTMANN 251 (1976).

67. *Id.* at 259-62.

petition would create, the FCO and the judge could apply the statute by determining whether particular conduct was within those parameters. At least in theory, the abuse standard could be consistently and objectively applied.

In order to assure that the abuse concept would not be interpreted too broadly, however, the legislation did place limitations on its scope. According to section 22 of the GWB, as originally enacted, the FCO was authorized to take action against the abuse of power by market-dominating enterprises only in conjunction with (1) the establishment of prices, (2) the formulation of terms or conditions of sale, and (3) tying arrangements.

C. *Interpreting the Abuse Concept: Early Problems and Basic Principles*

For well over a decade after enactment of the GWB, section 22 was little used.[68] In part this was due to the fact that the FCO was a new governmental office with sometimes uncertain political backing.[69] This caused it generally to avoid potentially controversial issues, especially where there were likely to be significant conflicts with powerful interests. Consequently, it tended to avoid applying the abuse concept, at least in part because powerful segments of German industry were opposed to the potential government "interference" with business activity represented by that concept.[70]

The FCO's reluctance to enforce section 22 was also related to Germany's economic situation.[71] The process of post-war economic recovery was not yet complete. As a result, the international competitiveness of German industry was a dominant political concern of the period, and there was little support for any government activity that might hamper the activities of the

68. *See* W. MÖSCHEL, DER OLIGOPOLMISSBRAUCH IM RECHT DER WETTBEWERBSBESCHRÄNKUNGEN 134-37 (1974).

69. For discussion, see Günther, *Zehn Jahre Gesetzes gegen Wettbewerbsbeschränkungen: Rückblick und Ausblick*, in ZEHN JAHRE GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 29 (1968).

70. For a discussion of the view of industry, see Riffel, *Industrie und Wettbewerbspolitik—Erfahrungen und Ausblick*, in ZEHN JAHRE GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 53 (1968).

The FCO's reluctance to use the concept also meant that there was little opportunity for the courts to develop the law, because private suits cannot be brought under § 22.

71. *See generally* Küster, *Germany*, in BIG BUSINESS AND THE STATE: CHANGING RELATIONS IN WESTERN EUROPE 64-86 (R. Vernon ed. 1974).

major corporations that were viewed as the engines of economic recovery.[72]

Resistance to the abuse concept was particularly strong, however, because of the concept's vagueness. In German law a court must generally refuse to apply a statutory provision which is so vague that the accepted methods of legal reasoning cannot be used to interpret it—i.e., where the judge must "legislate" rather than interpret.[73] The vagueness of the abuse concept thus created a significant risk that the courts would overturn enforcement actions based on it and increased the FCO's reluctance to enforce the concept.[74]

In 1965, the legislature expanded the scope of application of the abuse concept in order to make section 22 a more effective tool in the hands of the FCO.[75] It eliminated reference to specific types of abuse and authorized the FCO to take action against any conduct which was determined to represent abuse of a market-dominating position.[76] The substantive scope of the provision has remained unchanged since then.[77]

Expansion of the scope of the concept generated often intense scholarly controversy during the latter half of the 1960s,[78] and only after this activity had generated a degree of clarity concerning basic principles to be used in interpreting sec-

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72. *See id.* at 78-82.

73. K. LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 410 (5th ed. 1983).

74. Developments in economic thought were also undermining confidence in the applicability of the abuse concept. The assumption that the concept of "as-if" competition would provide clear guidelines for applying the abuse concept had been based on the proposition that economic science could effectively use "perfect competition" as a model against which to measure actual economic behavior. In the post-war period, however, economic thinking largely rejected the notion that a model of perfect competition could be used to evaluate actual economic conditions. The work of economists such as John M. Clark and Erhard Kantzenbach focused economic thinking instead on concepts of "workable competition." This development thus left the abuse concept without the reference framework which, it had been assumed, could give it content. For discussion, see the seminal article by Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940). *See also generally* J. CLARK, COMPETITION AS A DYNAMIC PROCESS (1961); E. KANTZENBACH, DIE FUNKTIONSFÄHIGKEIT DES WETTBEWERBS (2d ed. 1967).

75. GESETZ ZUR ÄNDERUNG DES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN, 1965 BGB1.I 1363 (W. Ger.).

76. *See* W. JÄCKERING, DIE POLITISCHEN AUSEINANDERSETZUNGEN UM DIE NOVELLIERUNG DES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN (GWB) 38-42 (1977).

77. The legislature has, however, expanded the concept of market-domination. *See* Zweites Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, *infra* note 79.

78. For a description, see J. BAUR, DER MISSBRAUCHSAUFSICHT IM DEUTSCHEN KARTELLRECHT 43-54 (1972).

tion 22 did the FCO begin to apply that section on a regular basis. The FCO increased its application of the abuse concept during the early 1970s, and it has continued actively to apply it. Part of the reason for the increased activity has been increased popular and hence political concern about the power of large enterprises.[79] This has been manifested through repeated parliamentary urging of the FCO to increase its use of section 22 as well as through several expansions of the concept of a market-dominating position.[80]

By the mid 1970s, case law and legal scholarship had produced a general consensus regarding certain basic contours of the abuse concept. First, the guiding principle in applying the abuse concept is protection of the process of economic competition.[81] The central value is, therefore, freedom of enterprise. This notion is derived from the general principle that the GWB is to be interpreted according to the "ordering principles of a competitive economy."[82] Thus, guidance for interpreting the abuse concept is derived deductively from a more general principle of interpretation for the statute as a whole.

Related to this basic principle of interpretation and in part derived from it are several other basic principles. First, neither motive nor intent to harm are relevant to the application of the concept; it is to be applied solely with reference to the objective characteristics of the conduct involved.[83] Second, the concept of abuse does not involve moral or ethical values; its interpretation, therefore, is to be based solely on political and economic values and ordering concepts.[84] Third, in order to be abusive within

79. *See* W. JÄCKERING, *supra* note 76, at 127-65. Moreover, especially during the 1970s, the comparative strength of the German economy has reduced political opposition to efforts to control large enterprises.

80. For references to the legislature's appeals to the FCO for stronger enforcement, see Baur, *Missbrauchsaufsicht über marktbeherrschende Unternehmen*, in KONTROLLE VON MARKTMACHT NACH DEUTSCHEM, EUROPÄISCHEM UND AMERIKANISCHEM KARTELLRECHT 131, 133 n.14 (1981).

The most important expansion of the concept of market-domination occurred in 1973, when the legislature (1) included in the category of market-dominating enterprises those enterprises that merely had a superior market position, and (2) facilitated application of the concept by including a set of statutory presumptions. Zweites Gesetz zur Anderung des Gesetzes gegen Wettbewerbsbeschränkungen, 1973 BGBl.I 917 (W. Ger.).

81. *See generally* W. MÖSCHEL, *supra* note 31, at 294.

82. *See generally* F. RITTNER, *supra* note 19, at 281-84.

83. *See* U. IMMENGA & E. MESTMÄCKER, KOMMENTAR ZUM GWB: GESETZ GEGEN WETTBEWERBSBECHRÄNKUNGEN 678 (1981).

84. *See* V. EMMERICH, DAS WIRTSCHAFTSRECHT DER ÖFFENTLICHEN UNTERNEHMEN 133 (2d ed. 1971).

the meaning of the statute, conduct must be related to the firm's economic power. Either the firm's economic power must make possible the conduct, or such power must cause the harmful effects of the conduct.[85]

D. Application of the Abuse Concept

Analogizing from the basic conceptual structure of the GWB, German legal scholars quickly distinguished between two basic forms of abuse—namely, "exploitation abuse" (*Ausbeutungsmissbrauch*) which includes harm to those who either buy from or sell to market-dominating enterprises, and "impediment abuse" (*Behinderungsmissbrauch*) which includes harm to other enterprises, typically competitors of the dominant enterprise. During the past ten years, the focus of application of the abuse concept has shifted dramatically from the former to the latter category of abuse.

1. Exploitation Abuse

The concept of exploitation abuse is based on the Ordo-Liberal notion of "as-if" competition, and it is used to prevent dominant enterprises from "exploiting" those dealing with them, as, for example, where such enterprises raise prices beyond a level that a competitive market would allow, or force suppliers or purchasers to grant terms more favorable than those that would exist under competition.[86] Such conduct is seen as inconsistent with a competitive economy, for it allows powerful firms to use their power to "distort" the competitive process.[87]

This concept of exploitation abuse has been viewed primarily as a means of combating high consumer prices.[88] In order to apply section 22 in such cases, however, German law had to resolve a basic issue concerning the relationship between the substantive concept of abuse and the FCO's enforcement power. If the FCO could merely levy a fine against an enterprise for having charged a price above the "competitive" price, its ability

85. E. LANGEN, E. NIEDERLEITHINGER, L. RITTER & U. SCHMIDT, KOMMENTAR ZUM KARTELLGESETZ 680-81 (6th ed. 1982).

86. For discussion, see MONOPOLKOMMISSION, ANWENDUNG UND MÖGLICHKEITEN DER MISSBRAUCHSAUFSICHT ÜBER MARKTBEHERRSCHENDE UNTERNEHMEN SEIT INKRAFTTRETEN DER KARTELLGESETZNOVELLE 31-35, 415 (Sondergutachten 1, 1977).

87. *See* V. EMMERICH, *supra* note 84, at 123-24.

88. *See* U. IMMENGA & E. MESTMÄCKER, *supra* note 83, at 746.

to prevent such pricing abuses might be quite limited. On the other hand, if the FCO could order enterprises not to raise prices above a level that it determined to be "competitive," this might be viewed as economic dirigism and thus inconsistent with the GWB's basic goal of protecting economic freedom.[89]

The Federal Supreme Court faced this issue in 1976 in the *Vitamin B12* case.[90] The case involved the sale of vitamins in Germany at prices significantly above those in neighboring countries.[91] The FCO had found German prices to be above those which could have been charged in a competitive market and ordered the seller to reduce its prices by a specific percentage so as to bring them within the range of competitive prices.[92] The Berlin Appeals Court had confirmed the FCO's authority to take such action, while changing the percentage reduction required.[93]

The BGH held that the FCO could indeed order the defendant to reduce its prices.[94] According to the court, such an order did not represent administrative interference with the defendant's economic freedom. It merely established a limit beyond which prices would be considered abusive. The defendant could then determine how to respond to that specific order. The court emphasized that section 22 was not to be understood to justify ongoing control by the FCO of business activity; it could merely be used to determine whether specific conduct—such as setting prices above a specified level—was abusive.

The *Vitamin B12* decision clarified and strengthened the FCO's position in applying section 22, but on another key issue—namely, the standard of proof applicable in pricing cases—the BGH soon undermined that position. In order to apply section 22 in exploitation cases, it is necessary to utilize a hypothetical standard. One must posit a hypothetical "competitive" price range and then ask whether the prices at issue fall

89. For discussion, see Baur, *supra* note 80, at 138-40.

90. Judgment of July 3, 1976, Bundesgerichtshof [BGH], W. Ger., WIRTSCHAFT UND WETTBEWERB ENTSCHEIDUNGSSAMMLUNG [WuW/E] [BGH] 1435 (*Vitamin B12*).

91. *See* Markert, *Recent Developments in German Antitrust Law*, 43 FORDHAM L. REV. 697, 711-14 (1975).

92. Decision of March 21, 1974, Federal Cartel Office [FCO], W. Ger. WuW/E [BKartA] 1482 (*Vitamin B12*).

93. Judgment of March 19, 1975, Kammergericht [KG], W. Ger., WuW/E [OLG] 1599 (*Vitamin B12*).

94. Judgment of July 3, 1976, WuW/E [BGH] at 1437.

within that range. Thus, the question of how one establishes that standard is fundamental to application of the concept.

This issue came before the BGH in late 1976 in the *Valium* case.[95] In that case, the FCO had ordered the manufacturer of Valium and Librium to reduce the prices of those drugs in Germany. In order to establish that the prices were abusive, the FCO compared the prices on the German market with prices in neighboring Holland, where the market was more competitive.[96] The Berlin Appeals Court upheld the FCO's determination of abuse.[97]

The BGH approved the comparison market method of establishing abuse. Accordingly, abuse can be established by comparing the market results achieved by the dominant firm with the results of firms offering the same or similar goods on markets with a significantly higher degree of competitive intensity. The court held, however, that the FCO had not established the comparability of the markets. It analyzed the various adjustments which had been made by the FCO in order to take account of the structural differences between the dominated market and the comparison market and held that the FCO had not provided sufficient proof that the adjustments were proper. The case thus requires that in order to establish abuse by means of market comparison, the FCO must provide a detailed factual and theoretical analysis of every significant structural difference between the two markets. In addition, the court held that prices in the dominated market would be considered abusive only where they exceeded the comparison market price by a "substantial margin" and that the FCO would also have to provide a detailed analysis of the reasons for its standard of substantiality in each case.[98]

The *Valium* decision demonstrated the difficulty of applying the concept of exploitation abuse in a manner which satisfied judicial standards. The BGH was unwilling to allow the application of a hypothetical standard of conduct without adequate proof of each of the elements on which the derivation of the

95. Judgment of Dec. 16, 1976, BGH, W. Ger., WuW/E [BGH] 1445 (*Valium*).

96. Decision of Oct. 16, 1974, FCO, W. Ger., WuW/E [BKartA] 1526 (*Valium/Librium*).

97. Judgment of Jan. 5, 1976, KG, W. Ger., WuW/E [OLG] 1645 (*Valium/Librium*).

98. Judgment of Dec. 16, 1976, WuW/E [BGH] at 1452.

standard was based. The result was to make proof of abuse extremely difficult.

In an attempt to facilitate application of the exploitation abuse concept, the legislature in 1980 amended section 22 to provide that abuse exists where an enterprise demands terms or prices which deviate from those "which with a high degree of probability would exist if there were effective competition in the market."[99] This change has been interpreted to eliminate the requirement that prices exceed comparison market prices by a "substantial margin," but it does not significantly alter the general requirements established by the *Valium* case.[100]

The FCO has continued to apply section 22 to exploitation cases, but the problems of proof have reduced its effectiveness. Relatively few of these cases have reached the courts or even public hearings,[101] and there is a widespread belief that the concept of exploitation abuse is ill-adapted to judicial application.[102]

2. Impediment Abuse

While application of the exploitation abuse concept has been shown to be of limited effectiveness, interest and enforcement activity have increased in recent years with regard to impediment abuse.[103] The main objective here is to protect the process of competition by preventing dominant firms from using their power to harm competitors, but there is much controversy concerning the analysis to be applied in impediment cases.[104]

The central problem with this category of cases is how to distinguish "abusive" from competitive conduct. Competition assumes, by definition, that enterprises attempt to "win" the battle of the marketplace—i.e., to cause economic harm to competi-

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99. Viertes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 1980 BGB1.I 458 (W. Ger.).

100. Niederleithinger, *Probleme der Missbrauchsaufsicht aus der Sicht des Bundeskartellamtes* in DIE MISSBRAUCHSAUFSICHT VOR DEM HINTERGRUND DER ENTWICKLUNGEN DER NEUEREN WETTBEWERBSTHEORIE 65, 72-73 (B. Röper ed. 1982).

101. *See* U. IMMENGA & E. MESTMÄCKER, *supra* note 83, at 675-76.

102. *See, e.g.*, Baur, *supra* note 80, at 132.

103. Among the leading works that have recently treated the subject are E. MESTMÄCKER, DER VERWALTETE WETTBEWERB (1984); K. MARKERT, DIE WETTBEWERBERBEHINDERUNG IM GWB NACH DER VIERTEN KARTELLNOVELLE (1982); O. TYLLACK, WETTBEWERB UND BEHINDERUNG (1984).

104. For an overview of the controversy, see Ulmer, *Kartellrechtswidrige Konkurrentenbehinderung durch Leistungsfremdes Verhalten marktbeherrschender Unternehmen*, in RECHT UND WIRTSCHAFT HEUTE: FESTGABE ZUM 65. GEBURTSTAG VON MAX KUMMER 565 (1980).

tors. The fact that conduct is intended to cause such harm and that such harm results cannot, therefore, be the criterion for abusive conduct; that criterion must be sought in the characteristics of the conduct or in its other effects. The early impediment abuse cases struggled to find an analysis which could identify conduct as abusive.[105]

An early example of this struggle can be found in the 1969 *Labeling Devices* case in which the Berlin Appeals Court was faced with competitor impediment in the form of a tying agreement.[106] The defendant, dominant in the market for hand-held labeling devices, required purchasers of its labelers also to purchase all of their labels from it during a 5-year warranty period. The court held that such tying arrangements violated section 22 "because they cement a market-dominating position other than by better performance and strangle future competition."[107] The central element in the court's reasoning was the concept of competition on the merits; increased sales of the tied product were achieved not because of improved performance but as a result of power derived from the market position of the tying product. The court also included, however, a balancing element in its opinion. It found that the tie-in was not necessary to the defendant's operations. If it had been found necessary, the court indicated that the arrangement might have been approved for reasons of fairness.[108]

These two basic approaches to applying the abuse concept to impediment abuse situations—the concepts of competition on the merits and balancing—have been further developed and modified, and they have become the focus of the controversy concerning the application of section 22.

The merit competition analysis was given a theoretical base during the latter half of the 1970s by Professor Peter Ulmer of the University of Heidelberg.[109] Ulmer developed a performance

105. *See, e.g.*, Judgment of March 3, 1969, BGH, W. Ger., WuW/E [BGH] 1027 (*Sportartikelmesse II*).

106. Judgment of Feb. 2, 1969, KG, W. Ger., WuW/E [OLG] 995 (*Handpreisauszeichner*).

107. *Id.* at 1000.

108. *Id.*

109. *See, e.g.*, Ulmer, *supra* note 104. *See also generally* P. ULMER, SCHRANKEN ZULÄSSIGEN WETTBEWERBS MARKTBEHERRSCHENDER UNTERNEHMEN (1977); Ulmer, *Der Begriff "Leistungswettbewerb" und seine Bedeutung für die Anwendung von GWB-und UWG-Tatbeständen*, 1977 GEWERBLICHER RECHTSCHUTZ UND URHEBERRECHT [GRUR] 566.

competition test which was quickly adopted by the Berlin Appeals Court[110] and which continues to represent that court's analysis. According to this test, the conduct of a dominant firm constitutes "abuse" where two conditions are met. First, the conduct must constitute "non-performance competition"—i.e., it must represent competition which is not "on the merits."[111] Second, the effect of the conduct must be to restrict competition remaining in the dominated market.

The central concept in this analysis is that of performance competition, which Ulmer borrowed from the German law of unfair competition.[112] It was introduced by scholars in the 1930s in order to help determine whether conduct was unfair for purposes of that statute.[113] Conduct which represents improved performance in the marketplace generally cannot violate the unfair competition law, whereas non-performance competition may violate that statute. For purposes of section 22 of the GWB, this performance competition concept is used to provide a higher standard of conduct for dominant firms than is required for other firms. Accordingly, non-performance competition that does not violate the unfair competition statute may be abusive under section 22, provided it also restricts competition in the dominated market.

The performance competition standard was first applied by the Berlin Appeals Court in the *Combination Price Schedule* case.[114] The FCO there had ordered a publishing company to discontinue use of a combination price schedule for advertising in two separate newspapers owned by the company in Berlin. One newspaper had a market-dominating position; the other was struggling financially. The combination price schedule listed advertising rates for the two newspapers only in combined form, and it was apparently presented to any potential advertiser who wanted to advertise in the dominant newspaper. The FCO argued that this was a tying arrangement and, therefore, an abuse under section 22.

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110. Judgment of Jan. 26, 1977, KG, W. Ger., WuW/E [OLG] 1767, 1773 (*Kombinationstarif*).

111. For discussion of the performance competition standard in the context of § 22, see R. HAHN, BEHINDERUNGSMISSBRÄUCHE MARKTBEHERRSCHENDER UNTERNEHMEN 53-79 (1984).

112. For a general discussion of unfair competition law, see F. RITTNER, *supra* note 19.

113. *See* O. TYLLACK, *supra* note 103, at 188-213.

114. *See* Judgment of Jan. 26, 1977, KG, W. Ger., WuW/E [OLG] 1767.

The Berlin Appeals Court's analysis began with the proposition that the strengthening of a market-dominating position reduced the intensity of competition in the market and that, consequently, dominant enterprises should be subject to a standard of conduct higher than that of non-dominant firms. Conduct which did not represent "competition on the merits" was, under such circumstances, a particularly grave threat to the competitive process, for such conduct necessarily distorted competition and increased barriers to entry. Therefore, since the combined price schedule improved sales of the tied product by using the power of the tying product rather than through improved performance, it was classified as non-performance competition and a potential abuse under section 22.

A second part of the analysis required that abuse be found only where the conduct led to the destruction or serious impairment of the competition remaining in the dominated market.[115] According to the court, this limitation on the scope of the non-performance test was necessary in order not to interfere with the dominant enterprise's right to *use* its market power. The court found that the structural effects of the conduct had not been substantial enough to apply section 22.

The Berlin Appeals Court has consistently applied this basic analysis in its subsequent decisions.[116] In the *Rama-Mädchen* case, for example, it found that the use of fidelity rebates in an advertising campaign constituted non-performance competition for purposes of applying section 22.[117] Similarly, in its *Fertigfutter* decision it held that the use of a bonus rebate system for distributors based either on total firm revenues or on the extent of the distributors' requirements violated the performance competition standard.[118]

Despite this consistent application of the performance-competition analysis by the Berlin Appeals Court, the status of the analysis remains uncertain. The BGH has yet to take a position concerning the proper analysis of impediment abuse cases under section 22. Moreover, the performance competition analysis has not been widely accepted by legal scholars.[119] Although that

115. *Id.* at 1772.

116. *See generally* R. HAHN, *supra* note 111, at 33-37.

117. Judgment of April 14, 1978, KG, W. Ger., WuW/E [OLG] 1983 (*Rama-Mädchen*).

118. Judgment of Nov. 12, 1980, KG, W. Ger., WuW/E [OLG] 2403 (*Fertigfutter*).

119. *See, e.g.*, U. IMMENGA & E. MESTMÄCKER, *supra* note 83, at 681-82.

analysis admittedly identifies some conduct which is potentially harmful, its critics claim that with regard to many important fact situations it does not effectively distinguish between conduct which is economically justified and that which is not.[120] In addition, under this analysis economic power renders conduct illegal which would otherwise be legal, and critics claim that it is unclear how much power makes what kinds of conduct illegal. Finally, the performance competition concept does not deal directly with certain harms to which section 22 is thought to be addressed, and it does not relate to the restriction of competition.[121] For example, if a dominant firm intentionally injures competitors in an overt attempt to monopolize a market, this intentional injury would not necessarily be abusive under the performance competition analysis.

Such criticism of the performance competition analysis has led to substantial support in the legal literature for an alternative analysis of impediment abuse based on interest balancing.[122] According to this view, the conduct of a dominant firm is considered abusive when it impedes the competitive opportunities of another firm and cannot be justified by resulting improvements either in consumer welfare or in the structure or intensity of competition in the market. The courts must, therefore, weigh the harm to competitors against the expected economic benefits to society. Proponents of this approach argue that the abuse concept is so vague that it can be given content only through case-by-case analysis of the economic consequences of the dominant firm's behavior.[123] Moreover, they claim, conduct by dominant firms should lead to state interference only when harm to competitors clearly outweighs any resulting economic benefits to society.[124]

In an effort to clarify the legal situation relating to impediment abuse, the legislature in 1980 amended section 22 by adding a provision that finds abuse when a market-dominating enterprise "impedes, without a factually justified reason, the competitive opportunities of other enterprises in a way which is

120. W. MÖSCHEL, *supra* note 31, at 328-31.

121. *See* U. IMMENGA & E. MESTMÄCKER, *supra* note 83, at 726-27.

122. *See id.* at 681-82.

123. The main criticism of the balancing test also focuses, however, on its vagueness. Critics argue that it is so vague that it cannot provide effective guidance to economic decision-makers. *See, e.g.*, Ulmer, *supra* note 104, at 570-71.

124. W. MÖSCHEL, *supra* note 31, at 332.

significant for competition in the market."[125] These amendments establish that impeding conduct need only have a "significant" effect on competition in order to violate section 22;[126] it need not have the extensive effect which originally had been required by the Berlin Appeals Court.[127]

Beyond this, however, the amendments do not clarify the analysis required in impediment abuse cases. There is no reference to the concept of performance competition, although the concept was included in several drafts of the amendments;[128] nor is there direct reference to its alternative, the balancing test. Included within the statute is any impeding conduct, provided that it has a significant competitive impact and is not "factually justified."[129] This language does not, however, address the core analytical issue of how to distinguish impeding conduct from acceptable competitive conduct. Moreover, the amendments have created a new level of complexity, because the language "without a factually justified reason" now must also be interpreted and applied.

The German attempts to utilize the abuse concept to protect the competitive process against particular types of competitor-harmful conduct thus remain inconclusive. The interest shown in this issue in recent years reflects a widespread belief that the abuse concept should be used to accomplish this objective. Serious doubts remain, however, as to whether sufficient analytical content can be ascribed to the concept to allow it to perform this task effectively.

IV. THE CONCEPT OF ABUSE IN THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY

In 1958, the same year in which the German GWB became effective, the Treaty of Rome established the European Economic Community (EEC), and it included the abuse concept as one of two central competition law concepts.[130] This fact is sig-

125. Viertes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 1980 BGB1.I 458 (W. Ger.).

126. Judgment of April 14, 1978, KG, W. Ger., WuW/E [OLG] 2403, 2406.

127. *See supra*, note 115.

128. *See* Niederleithinger, *supra* note 100, at 74.

129. This term was borrowed from another section of the GWB—§ 26—which provides a private cause of action for firms harmed by economic discrimination. *See generally* Gerber, *supra* note 55.

130. Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957 (effective Jan. 1, 1958).

nificant for two main reasons. First, the Treaty's provisions are applicable wherever conduct affects trade between states of the Community,[131] and, as a result, the abuse concept is applicable to conduct throughout Europe. In addition, Community competition law has a major influence on the development of national antitrust regimes, for member states have a strong incentive generally to conform their own legal systems to Community law.[132] Several member states have adopted the abuse concept because it is part of Community law.[133]

A. Community Competition Law: The Conceptual and Institutional Contexts

The Treaty of Rome created a new legal system and new legal institutions.[134] On the one hand, this has provided freedom to find new solutions; conceptual development has not been confined by the traditions or doctrines of a particular legal order.[135] On the other hand, it also means that the institutions charged with interpreting and applying Community law do not have the benefit of having a well-established legal tradition that can serve as an authoritative source of ideas as well as of conceptual guidance.

Community competition law operates through one process and two institutions. In general, the law develops through the process of adjudication. The competition law provisions of the

131. Competition law concepts are applicable to conduct which either occurs within the territory of member states or has an effect within the community. *See, e.g.*, Beguelin Import Co. v. G.L. Import Export S.A., [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8149, at 7697 (Ct. J.E. Comm., Nov. 25, 1971), and Imperial Chem. Indus. v. E.C. Comm'n, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161, at 8001 (Ct. J.E. Comm. July 14, 1972).

132. In Italy, for example, the use of Community competition law by domestic courts has developed to such an extent that specific domestic legislation is considered unnecessary. For a study of the application of Community competition law in the French courts, see Behrens & Korb-Schikaneder, *Europäisches Wettbewerbsrecht vor Französischen Gerichten*, 48 RABELS ZEITSCHRIFT 457 (1984).

133. For example, France adopted its abuse provisions largely in order to be consistent with the Treaty of Rome. *See* J. BURST & R. KOVAR, DROIT DE LA CONCURRENCE 284 (1981). *See also* Rocas & Perakis, *Greece*, in 7 WORLD LAW OF COMPETITION GRE 1-1 (von Kalinowski ed. 1987).

134. For discussion of the system and its institutions, see generally T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (1981).

135. The original signatories of the Treaty of Rome were all part of the civil law tradition, and all current members, except the United Kingdom and the Republic of Ireland, are part of that tradition. This does not, however, seem to have been a controlling factor in the development of the legal concepts. For a general description of the civil law tradition, see J. MERRYMAN, *supra* note 48.

Treaty itself have not been changed since its inception, and they could be changed only with great difficulty.[136] The European Commission can issue regulations regarding the application of the competition law provisions, but such regulations serve merely as administrative interpretations of the Treaty.[137] Moreover, the Commission has issued such regulations infrequently, preferring to rely on adjudicative procedures to develop competition law principles.

Community competition law is developed primarily by the European Court of Justice.[138] The decisions of this court are the sole authoritative interpretations of the Treaty,[139] and the Community legal system contains neither lower courts nor intermediate appeals courts.[140]

The Commission's role is to develop competition policy and to apply and enforce provisions of the Treaty.[141] Consequently, its decisions provide a substantial body of case law interpreting the Treaty. In addition, the Commission shapes Community competition law by determining the kinds of cases on which the European court has the opportunity to rule, because the court generally can take appeals (other than advisory appeals) only from Commission actions.[142]

B. The Abuse Concept in the Treaty of Rome

The EEC was created in order to reduce the barriers to trade between the member states and to establish an institutional framework by means of which the member states could more closely integrate their economies. The Treaty of Rome included competition law provisions in order to prevent private barriers

136. Substantive changes in the Treaty would require the unanimous consent of all members. *See* Treaty Establishing the European Economic Community (Treaty of Rome), art. 238, Mar. 25, 1957 (effective Jan. 1, 1958).

137. *See* L. BROWN & F. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 91-117 (2d ed. 1983).

138. For a description of the court, its role and its mode of operation, see *id.*

139. The national courts of the member states apply community law under certain circumstances. Such applications are not, however, binding on Community institutions.

140. The role of the court is limited, however, by the fact that it can rule only where there is an application from a decision of the European Commission or a referral from a national court. For a discussion of the court and the referral mechanism, see L. BROWN & F. JACOBS, *supra* note 137, at ch. 9.

141. *See generally* 4 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 5-156.1-252 (1986).

142. *See* L. BROWN & F. JACOBS, *supra* note 137, at ch. 9.

to trade from obstructing these objectives.[143]

The Treaty contains two substantive articles relating to competition. Article 85 prohibits certain concerted actions to restrict competition,[144] while article 86 aims at unilateral actions,[145] prohibiting "any abuse by one or more undertakings

143. *See* A. GLEISS, COMMON MARKET CARTEL LAW 14 (3d Amer. ed. 1981).

144. According to article 85:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

b) the limitation or control of production, markets, technical development or investment;

c) market-sharing or the sharing of sources of supply;

d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

- any agreements or classes of agreements between enterprises;
- any decisions or classes of decisions by associations of enterprises; and
- any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom and which:

a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of these objectives;

b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

145. According to article 86:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may in particular, consist in:

a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

b) the limitation of production, markets or technical development to the prejudice of consumers;

c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage;

d) the subjecting of the conclusion of a contract to the acceptance, by a party, of

of a dominant position . . . in so far as it may affect trade between Member states." The Treaty does not define the concept of abuse, and there are no official preparatory materials which might reveal the intent of the framers in drafting article 86. It does, however, designate four specific examples of abusive conduct: unfair prices or contract terms; limiting production, markets, or technical development to the prejudice of consumers; discrimination; and tying practices.

The Treaty's abuse concept derives from two main sources—the law of the European Coal and Steel Community (ECSC) and German law.[146] The 1951 treaty establishing the ECSC was envisaged as the first step in the development of the European Community.[147] It contains an abuse concept whose primary aim is to prevent dominant enterprises from extracting excessive prices or unduly favorable terms.[148] The influence of the German GWB derives primarily from the fact that the controversy surrounding its drafting was a focus of European competition law thinking during the period in which the EEC treaty was being considered. Reference is made to both of these sources in interpreting article 86 of the Treaty of Rome.[149]

C. *Development of the Abuse Concept*

The development of the abuse concept in Community law can be divided into three main phases. During the first, the Commission sought to establish a theoretical framework for interpretation of the concept; during the second, the European Court established basic interpretative principles; and during the third, the court has been developing application concepts—i.e., concepts which determine how the general principles are to be applied.

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additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

146. *See* Focsaneau, *La Notion d'Abus dans le Système de l'Article 86 du Traité Instituant la Communauté Économique Européenne*, in REGULATING THE BEHAVIOR OF MONOPOLIES AND DOMINANT UNDERTAKINGS IN COMMUNITY LAW 324, 336-40 (J.A. van Damme ed. 1977).

147. Treaty of Paris, April 18, 1951, 261 U.N.T.S. 142. For a general discussion, see Bebr, *The European Coal and Steel Community: A Political and Legal Innovation*, 63 YALE L. REV. 1 (1953).

148. W. DIEBOLD, THE SCHUMANN PLAN 353-54 (1959); *see also* R. KRAWIELICKI, DAS MONOPOLVERBOT IM SCHUMANN PLAN 57-58 (1952).

149. *See, e.g.*, Europemballage & Continental Can Co. v. Comm'n of the European Communities, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171, at 8279-3, 8299 (Ct. J.E. Comm. Feb. 21, 1973).

1. The Period of Restraint: 1958-1968

During the EEC's first decade, article 86 was little used. The legal officers of the Commission as well as the judges of the European Court were trained in the civil law tradition and were, therefore, reluctant to apply overly vague legal concepts. In addition, Community economic policy during this period was focused on the creation of business enterprises of sufficient size to compete with American corporations, and the Commission hesitated to apply legal provisions which might reduce the ability of such enterprises to compete internationally. The lack of enforcement under article 86 led to concern in the early 1960s that it would simply remain a "dead letter."[150]

During this period, however, the Commission was attempting to establish a theoretical framework for interpreting the abuse concept. It created an advisory group composed primarily of professors and charged this group with working out basic principles. The conclusions of this group were then published in 1966 as the core of the Commission's first major statement concerning interpretation of the abuse concept, its *Memorandum on Concentration*.[151]

The method chosen by the Commission to develop the abuse concept reflects its civil law context. First, in relying on scholars for guidance as well as for legitimation,[152] the Commission obviously believed that conclusions reached by a group of professors would carry substantially more authority than its own conclusions. Second, the Commission sought to establish abstract principles of interpretation before attempting to apply the Treaty's provisions to specific facts.

The *Memorandum* contained two basic principles relating to the interpretation of the abuse concept. The first was that abuse occurs where a dominant firm utilizes the possibilities which flow from its position of dominance in order to obtain benefits which it could not obtain if it were exposed to "effective competition."[153] Accordingly, a direct causal link was required

150. *See, e.g.*, Samkalden & Druker, *Legal Problems Relating to Article 86 of the Rome Treaty*, 1965-66 COMMON MKT. L. REV. 158, 162 (1966).

151. European Economic Community Comm'n, Memorandum Sur le Probleme de la Concentration dans le Marché Commun (Dec. 1, 1965), *reprinted in* REVUE TRIMESTRIELLE DE DROIT EUROPÈEN 651-77 (1966) [hereinafter Memorandum on Concentration].

152. For a discussion of the role of legal scholars in the civil-law tradition, see J. MERRYMAN, *supra* note 48, at 59-65.

153. Memorandum on Concentration, *supra* note 151, at 670.

between the enterprise's power and its results in the market. This link was not intended as a definition of abuse, for such a definition obviously would be overbroad and would label as abusive virtually any conduct by a dominant firm. It represented merely a starting point for interpreting the abuse concept.

The second principle of interpretation utilized a different conceptual reference point. It claimed that abuse is found where a dominant firm's conduct is "wrong (*fautif*) in regard to the fixed objectives of the Treaty."[154] In defining abuse in relation to the objectives of the Treaty, the *Memorandum* merely was applying a basic method of interpretation—namely, the teleological method—to the abuse concept. The decision to do so was of crucial importance, however, for it established the framework within which subsequent development was to take place.

2. The Establishment of Basic Principles by the European Court

The European Court's first opportunities to interpret article 86 came in the late 1960s and early 1970s in a series of three cases that were referred to the court by national courts.[155] In each of these cases the court was asked for an advisory opinion as to whether a dominant firm possessing industrial property rights could violate article 86 by using those rights to increase its prices. The court took the position that "[t]he price level of a product is not in itself necessarily indicative of an abuse of a dominant position within the meaning of article 86, but it can be a decisive indication where it is particularly high and is not justified by the facts."[156] The court did not elaborate on what it meant by justification, nor did it discuss in detail any interpretative issues relating to article 86.

In 1972 the court, in its first regular (non-advisory) opinion under article 86, established a general principle which has guided its interpretation of abuse ever since. In the *Continental Can* case the issue was whether a corporate acquisition could

154. *Id.* at 676.

155. Sirena S.r.l. v. Eda GmbH, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8101, at 7103 (Ct. J.E. Comm. Feb. 18, 1971); Deutsche Grammophon GmbH v. Metro-SB-Grossmärkte GmbH, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8106, at 7183-3 (Ct. J.E. Comm. June 8, 1971); Parke, Davis and Co. v. Probel, Reese, Beintema-Interpharm, & Centrafarm Companies, [1961-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8054, at 7810 (Ct. J.E. Comm. Feb. 29, 1968).

156. *Sirena S.r.l. v. Eda GmbH*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8101, at 7112.

constitute abuse under article 86.[157] The issue was politically charged because there was growing concern in Europe about excessive concentration of industry.[158] More importantly, however, there was great concern about the acquisition of European firms by American firms,[159] and article 86 was the only potential legal mechanism for attacking such acquisitions under the Treaty of Rome.

The Commission applied article 86 to prohibit the acquisition by Continental Can, a United States corporation, of controlling shares in a Netherlands company that had been a licensee of certain European patents held by Continental Can.[160] The Commission argued that an acquisition by a dominant firm of another market participant could severely damage competition in the market and, therefore, that the objectives of the Treaty could only be accomplished by interpreting abuse to apply to acquisitions which had that effect. On appeal, Continental Can argued that abuse could only be found where the dominant firm actually used its power to accomplish a result that it could not have achieved had there been competition.[161] Since Continental Can did not use its market power to make the acquisition, the conduct could not constitute an abuse of its power. This position had substantial support in the legal literature.[162]

The court was thus faced with a fundamental methodological choice. A technical legal analysis of article 86, as urged by Continental Can as well as by the Advocate General,[163] called for the conclusion that power could not be *abused* unless it was *used*. On the other hand, a teleological interpretation centering on the needs and objectives of the Community would allow the court to support the Commission's enforcement action.

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157. Europemballage & Continental Can Co. v. Comm'n of the European Communities, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171, at 8279-3.

158. *See, e.g.*, O.E.C.D., *supra* note 1, at 13-14.

159. *See* Communication from the Commission to the Council (Nov. 8, 1973), Multinational Undertakings and Community Regulations, O.J. C114, *reprinted in* 19 ANTITRUST BULL. 555, 561 (1974). *See also generally* J. SERVAN-SCHREIBER, LE DÉFI AMÉRICAIN (1967).

160. Commission Decision of December 9, 1971, [1970-1972 New Developments] Common Mkt. Rep. (CCH) ¶ 9481, at 9020.

161. *Europemballage & Continental Can Co.*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171 at 8285-8287.

162. *See* Focsaneau, *supra* note 146, at 247-52; Joliet, *Der Begriff der Missbräuchlichen Ausnutzung in Art. 86 EWG-Vertrag*, 8 EUROPARECHT 97, 120-23 (1973).

163. *Europemballage & Continental Can Co.*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171, at 8303 (Conclusions of Advocate General K. Roemer).

The court sided with the Commission and held that in interpreting the abuse concept the primary guidelines were to be derived from the general objectives of the Treaty rather than from analysis of the language of article 86 itself.[164] In the court's view, article 86 was to be given content through analysis of its role in the Treaty scheme.

Using this teleological method to interpret article 86, the court turned to the Community goals as expressed in the Treaty, specifically to article 3(f), according to which the goals of the Community include "the establishment of a system ensuring that competition within the Common Market . . . not [be] distorted."[165] On the basis of this provision, the court held that article 86 was to be interpreted in such a way as to prohibit the distortion of competition. As a result, the concept of competitive distortion became the central source of guidance in applying article 86.

Applying this concept to the acquisition by Continental Can, the court stated that abuse may occur where an enterprise acquires a dominant position that undermines the objectives of the Treaty by substantially altering the supply situation and thus jeopardizing the consumer's freedom of action. This is necessarily the case where virtually all competition is eliminated.[166] Since the acquisition eliminated "virtually all competition" in the relevant market, it was held to violate article 86.

In the 1974 *Commercial Solvents* case, the court confirmed the central analytical role of the notion of competitive distortion and expanded its scope.[167] The case involved a refusal to deal in which a United States corporation, Commercial Solvents (CSC), was the target of Commission enforcement activities. CSC had a virtual monopoly on the world production of certain chemicals that it had been selling in the EEC through a joint venture in Italy. CSC then decided it would no longer supply the chemicals in Europe, except to the joint venture company for its own manufacturing uses; resale would no longer be permitted. The

164. *Instituto Chemioterapico Italiano S.p.A. & Commercial Solvents Corp.*, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8209, at 8299.

165. *Id.*

166. *Id.* at 8301.

167. Istituto Chemioterapico Italiano S.p.A. & Commercial Solvents Corp. v. Comm'n of the European Communities, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8209, at 8800 (Ct. J.E. Comm. Mar. 6, 1974). For discussion, see Scott, *The Concept of Abuse in EEC Competition Law: An American View*, 92 L.Q. REV. 242, 253-56 (1976).

effect of this decision was virtually to eliminate a former competitor of CSC from the market for certain products manufactured from those chemicals. The court held that this represented an abuse of CSC's market-dominating position.[168] It reasoned that where a dominant firm's refusal to supply a competitor would effectively eliminate the competitor from the market, this elimination of competition necessarily distorted the competitive structure of the market and, therefore, violated article 86, at least where the competitor was a major force in the market.

Having established in *Continental Can* that the actual elimination of a competitor through acquisition could constitute abuse, the court in *Commercial Solvents* also labeled as "abusive" conduct that destroyed the ability of a significant competitor effectively to compete. The court's conclusion was based on the conduct's "effect on the structure of supply of the market."[169]

3. Refinement of the Abuse Concept

Defining abuse by reference to the concept of competitive distortion created an extremely broad principle of interpretation: Any conduct which significantly affected the structure of competition could constitute a violation of article 86.[170] In its subsequent decisions, however, the court has been developing principles of application which determine when competitive distortion represents abuse.[171]

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168. *Id.* at 8820.

169. *Id.*

170. *See, e.g.*, A. GLEISS, *supra* note 143, at 341: "[A]buse is an objective term. It comprises every conduct of a dominant enterprise which might adversely affect the structure of a market in which competition is weakened . . . ."

171. The term "application principle" is chosen here to make clear that these principles relate to the application of a more general principle—namely, that of competitive distortion—to specific fact situations. The European Court is not always explicit about the relationship between these principles and the concept of competitive distortion, but analysis of the cases indicates that this is the reasoning that the Court is using.

The discussion here does not include all such application principles but merely those most central to the development of the abuse concept. For discussions of the development of the abuse concept, using slightly different conceptual frameworks, see C. BELLAMY & G. CHILD, COMMON MARKET LAW OF COMPETITION 185-202 (1978); Korah, *supra* note 17; Lang, *Monopolization and the Definition of "Abuse" of a Dominant Position under Article 86 EEC Treaty*, 16 COMMON MKT. L. REV. 345 (1979).

a. *Consumer Welfare, Potential Elimination of a Competitor, and the Protection of Small and Medium-Sized Firms*

The court developed several important application principles in its 1978 *United Brands* opinion.[172] The case applied the abuse concept to three types of conduct—resale restrictions, refusal to sell to a former customer, and the charging of "excessive" prices.

According to the court, United Brands Company (UBC), a United States company with a dominant position in the European banana market, abused its dominant position by requiring European ripener/wholesalers not to sell bananas acquired from UBC to other ripeners, not to sell such bananas when still green, and, in some cases, not to sell such bananas unless they carried UBC brand names. The court held that these resale restrictions constituted an abuse "since they limit markets to the prejudice of consumers. . . ."[173] The court thus used a consumer welfare standard rather than the broader concept of competitive distortion that also would have been applicable. Accordingly, in analyzing resale restrictions the issue is whether they distort competition by significantly affecting the structure of supply on the market *and*, as a result, harm consumers.

The court also applied the abuse concept to UBC's refusal to deal with one of its former distributors. UBC had stopped supplying its former customer because the latter had cooperated with a major competitor of UBC in certain activities, including an advertising campaign. The court announced as a general rule that a dominant enterprise "cannot stop supplying a long-standing customer who abides by regular commercial practice if the orders placed by this customer are in no way out of the ordinary . . ."[174] at least where the sale is of a branded product with established goodwill. According to the court, such a practice constituted abuse because it limited markets to the prejudice of consumers and because it constituted discrimination which might eventually eliminate a firm from the relevant market.[175] Thus, whereas previous refusals to deal had been found abusive

172. United Brands Co. & United Brands Continental B.V. v. Comm'n of the European Communities, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429, at 7655 (Ct. J.E. Comm. Feb. 14, 1978).

173. *Id.* at 7713.

174. *Id.* at 7714.

175. *Id.* For discussion of the price-discrimination issue, see di Valgiurata, *Price*

where they necessarily eliminated a competitor from the market and thus posed an immediate threat to the structure of competition, UBC's refusal to deal was found abusive because it had the potential, if repeated often enough, to drive firms from the market.

The court buttressed its conclusions concerning UBC's refusal to deal by referring to its impact on the independence of small and medium-sized enterprises. It held that under the circumstances of the case a refusal to sell "amounts to a serious interference with the independence of small and medium-sized firms in their commercial relations with the undertaking in a dominant position . . . ."[176] The court thus introduced a concept of economic coercion into the law of abuse. At least where such coercion would have a "serious adverse effect on competition . . . by allowing only firms dependent upon the dominant undertaking to stay in business,"[177] a refusal to sell could not be used to coerce purchasers to adhere to a dominant firm's policies.

The court's reference to the independence of small and medium-sized firms reflected a growing concern throughout Europe about the economic position of smaller firms. This concern has focused on the issue of so-called "demand-side power"—i.e., the ability of large firms to extract unfair prices and terms from smaller enterprises.[178] It is also based on a conceptual development. In the 1960s the German economist Helmut Arndt began to analyze the economic consequences of dependency relationships between firms.[179] According to Arndt, a firm which is dependent on another firm for either supplies or sales is subject to the power of the dominant firm, and abuse of this power by the dominant firm could have negative consequences for both the dependent firm and the economy as a whole. This concept of relational power had been introduced

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Discrimination under Article 86 of the E.E.C. Treaty: The United Brands Case, 31 INT'L & COMP. L. Q. 36 (1982).

176. *United Brands Co. & United Brands Continental B.V.*, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429, at 7714.

177. *Id.* at 7715.

178. *See, e.g.*, MONOPOLKOMMISSION, MISSBRÄUCHE DER NACHFRAGEMACHT UND MÖGLICHKEITEN ZU IHRER KONTROLLE IM RAHMEN DES GWB (Sondergutachten 7, 1977). *See also* Gerber, *supra* note 55, at 244-49.

179. For example, see generally H. ARNDT, MARKT UND MACHT (2d ed. 1973); H. ARNDT, RECHT, MACHT UND WIRTSCHAFT (1968); H. ARNDT, WIRTSCHAFTLICHE MACHT (3d ed. 1980).

into the German GWB in 1973,[180] and in *United Brands*, it became part of Community law as well.

b. Abuse and "Excessive" Prices

A third abuse issue in the *United Brands* case related to UBC's prices. Example (a) of article 86 specifies that abuse may consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions," and the court previously had held that excessively high prices could be sufficient to establish abuse.[181] The court had not yet established, however, a method by which the fairness of prices could be determined.

The Commission found that in certain countries UBC's prices for bananas were excessive and ordered a reduction of such prices.[182] It based this conclusion on the comparative market method that had been approved by the German Supreme Court in 1976.[183] The European Court did not accept the Commission's use of the comparison market approach, however, holding that the Commission had not proven its case.[184]

The court focused on the relationship between the dominant firm's costs and its prices and held that abuse occurs where a dominant firm charges a price which "has no reasonable relation to the economic value of the product supplied. . . ."[185] The court thus required that the firm's costs be compared to its prices. An "excessive" profit margin would be evidence of abuse. The court did not explain, however, what it meant by an "excessive" profit margin. Moreover, it indicated that other factors may have to be considered in determining whether an "excessive" price was, in fact, abusive, but it did not discuss what those factors were.

The court's analysis was impelled by its general analytical reference point—namely, the concept of competitive distortion.

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180. Zweites Gesetz zur Anderung des Gesetzes gegen Wettbewerbsbeschränkungen, *supra* note 80.

181. *See supra* note 155.

182. Commission Decision of December 17, 1975, [1976-1977 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9800, at 9774.

183. *See supra* text accompanying notes 95-98.

184. *Id.*

185. United Brands Co. & United Brands Continental B.V., v. Comm'n of the European Communities, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429, at 7655, 7718 (Ct. J.E. Comm. Feb. 14, 1978). For discussion, see A. GLEISS, *supra* note 143, at 345-48.

If a firm's prices are "excessive" in relation to its costs, this necessarily "distorts" the competitive process. At the core of the analysis is a notion of transactional equivalence—specifically, the idea that a dominant firm acts abusively where it uses its economic power to achieve a gross disproportion between the respective performances required in a transaction.

This standard has proven to be as difficult to apply as its German counterpart.[186] It requires the Commission to engage in an expensive, complex and uncertain process of allocating costs in relation to specific products. Yet there is little guidance as to how great the disparity between costs and prices must be in order to be considered excessive. Moreover, the court has provided no guidance as to when "excessive" prices are also "abusive." As a result, the *United Brands* decision has discouraged efforts to use the abuse concept to reduce the prices charged by dominant firms.

c. *Dependency and Transactional Equivalence: Exclusive Dealing and Rebates*

In the 1979 case of *Hoffmann-LaRoche*, the European Court developed a new principle of application in order to analyze measures taken by a dominant firm to induce loyalty from its distributors.[187] The case involved exclusive dealing contracts and fidelity rebate systems used by Hoffmann-LaRoche, a Swiss chemical producer, in distributing its products within the EEC. The rebates found abusive by the Commission were of two kinds: loyalty rebates, which provided direct incentives for not purchasing from other suppliers, and total purchase rebates, which indirectly provided similar incentives by calculating rebates on the basis of total purchases of all drugs from Hoffmann-LaRoche rather than on the purchase of particular drugs.

The court found that Hoffmann-LaRoche's exclusive dealing contracts, as well as both types of rebates, constituted abuse under article 86. The first step in the court's reasoning was to analyze the agreements as well as the rebates according to their function. Therefore, an agreement by a distributor to purchase its requirements from Hoffmann-LaRoche was to be analyzed in

186. *See supra* text accompanying notes 95-102.

187. Hoffmann-LaRoche & Co. AG v. Comm'n of the European Communities, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8527, at 7503 (Ct. J.E. Comm. Feb. 13, 1979).

the same way as rebates which created incentives not to purchase from other suppliers.

The court found the practices abusive because there was both a lack of equivalence in the transactions and a dependency relationship between Hoffmann-LaRoche and its distributors. According to the court, such practices are considered

> incompatible with the objective of undistorted competition . . . because . . . they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.[188]

Thus, the court spliced together two concepts used in *United Brands*—namely, the notions of transactional equivalency and of dependency—in order to produce a new test for abuse.

The court placed two limitations on the reach of its reasoning. First, in order to be abusive, such restrictive obligations and incentives must have "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[189] Second, the dominant enterprise must use methods which are "different from those which condition normal competition in products or services on the basis of the transactions of commercial operators . . . ."[190] This commercial usage limitation appears to create a defense against abuse charges where the conduct would be normal business practice for firms not in a dominant position in similar markets.

In 1983, the court applied the same analysis in its *Michelin* decision.[191] At issue was the so-called "target rebate" system that Michelin used in its relationships with distributors of replacement tires for heavy vehicles. This system provided an annual variable discount to the dealers that was determined according to the dealer's attainment of targets for annual sales. The sales targets were discussed at the beginning of the year, but

188. *Id.* at 7553. For discussion, see Dhaeyer, *L'Article 86 du Traité de Rome et les Contrats d'Approvisionnement Assortis de Rabais de Fidelité*, 94 JOURNAL DES TRIBUNAUX 401 (June 16, 1979).

189. *Hoffmann-LaRoche & Co. AG*, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8527, at 7553.

190. *Id.*

191. N.V. Nederlandsche Banden-Industrie Michelin v. Comm'n of the European Communities, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,031 at 14,488 (Ct. J.E. Comm. Nov. 9, 1983).

Michelin apparently provided written confirmation of the targets only on request.

The Commission argued that such a system had essentially the same effect as the loyalty rebates in *Hoffmann-LaRoche*.[192] The court agreed, finding that the rebate system distorted competition because it was "not based on any economic service justifying it."[193] Michelin received no cost savings from the scheme, and, therefore, there was no economic equivalency. Moreover, the scheme had the effect of restricting the dealer's "freedom to choose his sources of supply" by putting pressure on the dealer to purchase from Michelin.[194] The court explicitly rejected two arguments made to justify the scheme and concluded that "[n]either the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence."[195]

The *Hoffmann-LaRoche* and *Michelin* cases thus designate as abuse any conduct which places significant pressure on an enterprise to deal with a dominant enterprise unless (1) there is economic equivalency in the transactions, (2) the conduct has no significant effect on the structure of competition, or (3) the conduct is normal for non-dominant firms.

d. Abuse and Competitive Fairness

Although Community abuse law has focused on vertical relationships, the Commission recently has begun to apply article 86 to horizontal abuse—i.e., conduct that does not involve transactions between the dominant firm and the firm seeking protection. The Commission's objective in such cases is to prevent the distortion of competition which may result from the use of economic power to eliminate or discipline competitors.

The Commission first applied a theory of horizontal abuse in its investigation of IBM's marketing practices in the early 1980s.[196] The Commission claimed, *inter alia*, that IBM violated article 86 where it failed to make public certain information about its computer hardware products which European

192. *Id.* at 14,519.

193. *Id.* at 14,520.

194. *Id.*

195. *Id.* at 14,521.

196. For materials relating to the investigation, including IBM's undertaking to modify its operations, see *Commission of the European Economic Communities Suspends Proceedings Against International Business Machines Corporation*, 26 HARV. INT'L L.J. 189 (1985).

firms would have had to receive in order to compete effectively with IBM in manufacturing and selling compatible equipment. The investigation did not lead to formal action by the Commission, because IBM consented to make such information available, but the proceedings did establish the Commission's position.[197]

The Commission's only formal decision on this issue was taken in 1985 against Akzo, a Dutch soap manufacturer accused of predatory pricing.[198] In that case the Commission levied its largest fine ever when it found that Akzo had systematically attempted to eliminate a competitor, primarily by lowering its prices to a point that it believed would drive the smaller competitor out of business. The Commission's theory was that a distortion of competition caused by the unfair use of power necessarily represented an abuse of that power. "Unfair or unreasonable behavior which tend(s) to exclude competitors from the market" may be an abuse, because it has a negative effect on the structure of competition and, therefore, on consumer welfare.[199] According to the Commission: "Any unfair commercial practices on the part of a dominant undertaking intended to eliminate, discipline or deter smaller competitors would thus fall within the scope of the prohibition of Article 86 if the other conditions for its application were fulfilled."[200] The effect of this reasoning is to introduce concepts of unfair competition into Community law via article 86.

The Commission's notion of what constitutes "unfair or unreasonable behavior" was based on the concept of "competition on the merits." It stated that:

> A dominant firm is entitled to compete on the merits. . . . The maintenance of a system of effective competition does, however, require that a small competitor be protected against behavior by a dominant undertaking designed to exclude it from the market not by virtue of greater efficiency or superior

197. For discussion, see Dryander, Hehn & Lohmann, *Entwicklungen im EWG-Kartellrecht im Jahr 1984*, in RECHT DER INTERNATIONALEN WIRTSCHAFT 352, 360-62 (1985).

198. Commission Decision of December 14, 1985, [New Developments] Common Mkt. Rep. (CCH) ¶ 10,748, at 11,733-34.

199. *Id.* at 11,733-23. For a discussion of predatory pricing prior to the *Akzo* decision, see Ashley, *Predatory Pricing Under Article 86 of the Treaty of Rome*, 32 INT'L & COMP. L.Q. 1004 (1983).

200. Commission Decision of December 14, 1985, [New Developments] Common Mkt. Rep. (CCH) ¶ 10,748, at 11,733-23.

performance, but by an abuse of power.[201]

According to the Commission, therefore, abuse occurs where a dominant firm utilizes its economic power to gain a competitive advantage other than by "competition on the merits" and where this conduct has a substantial effect on the structure of competition.

Community abuse law thus has been built around the concept of competitive distortion. The court has used this concept to provide a cohesive reference point for interpretation of article 86. The court has, however, refined the concept by developing a set of principles that determine its application in specific types of situations. The result has been a flexible, if not always completely predictable, approach to giving meaning to the concept of abuse.

V. COMPARATIVE PERSPECTIVES

The concept of abuse of a market-dominating position began as the expression of two simple ideas—one substantive, the other procedural. The substantive notion was that society must be protected against those uses of economic power which cause more societal harm than can be justified by their societal benefits; the procedural notion was that such protection should be provided through an administrative process. Important European competition law systems have abandoned or modified both of these ideas, and in so doing they have transformed the abuse concept.

The catalyst for this transformation has been the subjection of the abuse concept to the judicial process. The vagueness of the original substantive standard was intimately tied to its procedural role. Where the function of the concept is to authorize administrators to take action against dominant firms on the basis of a public interest standard, vagueness may be not only acceptable, but preferable. Where the concept must be judicially interpreted and applied, the responsible institutions must attempt to ascribe content to it in a rationally defensible and reasonably predictable manner. Moreover, under such circumstances, success in achieving the policy goals behind the abuse concept depends on the extent to which those institutions effectively perform this ascriptive function.

Judicial application of the abuse concept has been most

201. *Id.* at 11,733-25.

extensive under German and European Community law, and thus comparative analysis of their combined experiences reveals the extent of the concept's development, the impact of its transformation, and the likely direction of its future development.

A. Conceptual Structure

Certain basic principles are common to the conceptual structure of abuse under both German and Community law. For example, abuse is analyzed according to objective criteria in both systems, with state of mind generally playing little role. Moreover, neither moral nor ethical issues are considered relevant to the application of the abuse concept. The abuse standard is based either on the characteristics of the conduct or on its effects.

Apart from these shared principles, however, the two systems have conceptualized abuse law in quite different ways. In Community law the broad principle of competitive distortion is the central mechanism for giving content to the abuse concept. It is generally applied, however, according to a developing set of case-law principles fashioned to protect particular interests. These application principles protect, for example, the interests of consumers and small and medium-sized firms. They also protect dominant enterprises by providing that conduct which otherwise would be a violation of article 86 may be justified under certain circumstances. Analysis generally begins, therefore, with the issue of whether conduct "distorts competition" and then turns to case law to determine whether the competitive distortion harms interests whose protection is required under existing guidelines.

German law, in contrast, does not utilize an over-arching principle such as that of competitive distortion in interpreting the abuse concept. Rather, it has identified two basic forms of abuse—namely, exploitation abuse and impediment abuse—and the ideas used to give meaning to these two categories of abuse remain separate and distinct. Exploitation abuse, analyzed by reference to a hypothetical standard of competition, occurs where a dominant firm utilizes economic power to achieve a transactional result that is significantly more advantageous than it could have achieved under this standard. Impediment abuse occurs where a dominant firm impedes another firm's competitive activities; under current judicial interpretations, the determination of what constitutes impediment is made by reference to

a performance competition standard. In order to be abusive, conduct must be brought within one of these two categories, and this conceptual bifurcation of abuse law has created significant difficulties in the development of German abuse law.

B. The Application of Abuse Law Concepts

Despite differences between the two systems in the concepts used to interpret abuse, there are important similarities in the results obtained—i.e., in the conduct which is identified as abusive and in the effectiveness of applying the abuse concept to particular types of conduct.

This is particularly true with regard to use of the abuse concept to protect consumers against high prices. Both systems originally focused on this use of the concept, and in both it has been ineffective. The basic theory of application is the same in both systems: where a dominant firm uses its economic power to raise prices significantly above levels that would be obtainable if there had been "effective" competition, this represents harm to those transacting business with the dominant firm as well as to the competitive process. The differences are in the means of proving abusive prices. In Community law abuse is determined by reference to the costs of the firm, whereas in German law abuse is primarily established by comparing prices on the dominant market to prices in comparable markets.

Both approaches to the problem have faltered on the inherent difficulty of proving a hypothetical standard. In each system the courts have established standards of proof which represent substantial disincentives to enforcement, and there is general agreement that the abuse concept has not been effectively applied to this category of conduct. The experiences of both systems suggest, therefore, that application of the abuse concept to deter dominant firms from using the bargaining advantages which inhere in their economic power is largely incompatible with the judicial process.

Both systems have also identified competitive unfairness as a category of abuse. Here the abuse concept is used to prevent dominant firms from using their power to achieve an unfair advantage in competition with other firms, such as, for example, through predatory pricing. In German law competitive unfairness is included within the concept of impediment abuse, whereas the European Commission applies article 86 to such

conduct because it distorts competition to the detriment of smaller competitors and, in the long run, consumers.

Both systems have encountered, however, significant difficulties in conceptualizing competitive unfairness for purposes of judicial application. Each has turned primarily to the intuitively appealing idea of competition on the merits in order to provide a fairness standard, but this method of giving content to the abuse concept has not been finally accepted in either system, and there are many who doubt its viability.[202] These doubts relate to whether the merit competition notion has sufficient analytical power to make justifiable and reasonably predictable distinctions among the various types of conduct available to economically powerful firms. Neither system has yet had sufficient experience with this concept to warrant final conclusions about its effectiveness. Nevertheless, the fact that both systems have chosen to rely on it in using the abuse concept to combat competitive unfairness means that the future of the idea of unfairness as part of abuse law may well depend on the amenability to judicial application of the concept of merit competition.

A third category of practices that are considered abusive in both systems includes those by which dominant producers exercise control over firms that distribute their products. In both systems loyalty rebates, exclusive dealing contracts, and similar control measures may be abusive. With regard to this category of abuse, however, differences in analysis between the two systems have had a significant impact on the results achieved. Under Community law, such control mechanisms are found abusive when they distort competition to the detriment of consumers and interfere with the freedom of small and medium-sized firms. This analysis refers directly to the power that a dominant producer may have over distributors as well as to its effects. The result has been the development of flexible and judicially applicable principles to guide business behavior.

In Germany, on the other hand, the conceptual structure of abuse law has impeded effective application of the abuse concept to this category of conduct. Such conduct does not fit easily into either of the existing categories of abuse,[203] but bipartite conceptualization of abuse law requires that one or the other of these

202. *See supra*, text accompanying notes 119-22.

203. It does not fit easily into the category of exploitation abuse, because that category of abuse refers to a lack of transactional equivalence, and there is typically no imbalance in such transactions. It also does not fit easily into the concept of impediment

categories be used to analyze them. Thus, German law generally analyzes such conduct under the principles of impediment abuse. The principles of impediment abuse are primarily designed, however, to protect against harm to competitors. Consequently, they do not relate to the type of relational power which a producer has over its distributors, nor do they take into account the effects of the use of that power. Because these principles are poorly adapted to this type of conduct, the results of trying to apply the abuse concept in this area have been predictably awkward, and the law remains particularly unclear.[204]

C. *Methods of Interpretation*

A key factor in the conceptualization and application of abuse in German and Community law has been the choice of methods to interpret the concept. Neither German nor Community law has found interpretative guidance by reference to the abuse concept itself—i.e., neither linguistic nor grammatical analysis has been a significant factor in interpreting abuse. In both systems the concept has been viewed as too vague to allow such analysis.

In Community law the decision in *Continental Can* to interpret abuse teleologically—i.e., by reference to the objectives of the Community—has determined the structure and development of abuse law, because it established the concept of competitive distortion as the analytical starting point. In addition, the court often fashions its application principles according to its perception of the systemic needs of the Community. For example, the court's application of the abuse concept to loyalty rebates is based on the perceived need to protect the structure of competition by protecting the competitive freedom of small and medium-sized firms. Although the court occasionally also finds guidance by analogizing to the examples provided in article 86, the teleological method has been the dominant means of ascribing meaning to abuse in Community law.

Despite criticism for failure fully to utilize more predictable methods of interpretation, the European Court has fashioned a

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abuse, because a producer typically does not seek to impede the competitive opportunities of its distributors.

204. German competition law does, however, contain other provisions which may be used to restrict this type of conduct by dominant firms, thus limiting the impact of the defect. The most important such provision is § 26 of the GWB. For discussion, see Gerber, *supra* note 55.

body of legal principles with sufficient integrity and coherence to have achieved general acceptance. Its success in doing so is clearly related, however, to a general consensus concerning the basic objectives of articles 85 and 86—principally, the elimination of barriers to trade within the Community—as well as to the articulation of Community objectives in the governing treaty.

In Germany there has been little agreement concerning the methods to be applied in interpreting the abuse concept, and this lack of a generally accepted frame of reference for interpreting the concept has been an obstacle to its development. Analogical and historical methods have been the primary sources of major interpretative concepts. For example, the analytically critical bifurcation of abuse into the categories of exploitation and impediment abuse was based on analogy to the division of the GWB itself into vertical and horizontal restraints and supported by reference to the legislative intent to use the abuse concept to protect both consumers and competitors. These methods generally have not provided effective guidance in developing the abuse concept. The impact of the historical method has been limited by the major changes which occurred in the process of drafting the GWB and by the relative lack of consideration of how the abuse concept would function in the system which finally emerged.[205] The general ineffectiveness of the analogical method results from the sharp differences in function between the abuse concept and most other sections of the statute.

German law also has utilized the teleological method. Although reference is often made to the role of the abuse concept in the system of the GWB,[206] lack of agreement concerning the objectives of German competition law has made use of this method much less effective than it has been in Community law. For example, in the controversy surrounding impediment abuse each side has argued that its interpretation best serves the GWB's general goal of maintaining an economy based on competitive freedom. This goal is, however, so vague that reference to it has yielded little interpretative clarity.

D. The Process of Legal Development

Comparison of the processes by which abuse law has been

205. *See supra* text accompanying notes 60-66.

206. *See, e.g.*, U. IMMENGA & E. MESTMÄCKER, *supra* note 83, at 676-79.

developed in the two systems helps explain differences in methodological and conceptual choices as well as in practical results.

Both systems have followed identifiably civil law, as opposed to common law, developmental patterns. Each has developed abuse law by first establishing abstract principles of interpretation and then concretizing these principles by reference to specific fact situations. Moreover, both systems have assigned important roles in the development of the law to university professors.

There are, however, important differences between the two developmental processes. Although basic principles of analysis in Community abuse law were provided through the authority of outside experts, the subsequent development of the law has been primarily the product of adjudication by the European Court. The court has established a basic framework for giving content to the abuse concept and has consistently applied this framework and the ideas generated thereby to new fact situations. Consequently, it is the court's central role that has dominated the developmental process.

The Commission has shaped this development through both policy and enforcement decisions. Its identification and articulation of Community policy goals has been particularly influential because of the court's focus on using the abuse concept to achieve the fundamental objectives of the Community. Moreover, not only has the Commission's enforcement policy determined the fact situations which would reach the court, but its decisions have also established lines of conceptual development which the court has later adopted.

Except during its formative stages, scholarly writing generally has had limited impact on the development of abuse law. There are recognized experts on Community competition law, but the group is small, and its impact is restricted by geographical dispersion and language variety. Moreover, neither the court nor the Commission generally cite scholarly writings in their opinions, thereby further limiting the role of such writing and reducing incentives for scholars to publish in the area.

In German law the process of developing the abuse concept has been more complex, with legislation and legal scholarship playing major roles in addition to those of the courts and the FCO. Scholars generally have provided the key ideas in the development of German abuse law. The notion of "as-if" competition, which created the conceptual framework for exploita-

tion abuse, as well as the concept of performance competition, around which the law of impediment abuse has been shaped, were, for example, both derived from scholarly work. Scholarly debate has also played a major role in determining the success of legal ideas, with such ideas being accorded full status as law only where they have been generally accepted in the scholarly community. The concept of "performance competition," for example, has yet to be generally accepted by legal scholars, and, as a result, its future remains uncertain.

The courts generally have not developed new ideas, but they have shared with legal scholarship the role of determining the success of ideas generated elsewhere. In particular, the courts have shaped the development of the law by subjecting the application of the abuse concept to judicial standards of proof. The German Supreme Court's insistence, for example, that a finding of exploitation abuse under the comparison market method be based on rigorous analysis of all significant market differences was the critical factor in undermining development of what had been expected to be a major area of application of the abuse concept.

The legislature's role generally has been to consolidate and attempt to clarify developments made by legal scholarship or by the courts; it generally has not provided significant developmental impulses. Moreover, its efforts to clarify the law have not always been successful. In the 1980 amendments, for example, it did clarify principles relating to exploitation abuse, but its attempts to do the same regarding impediment abuse were largely unsuccessful and may even have created additional uncertainty.[207] The legislature also has repeatedly and publicly urged the FCO to utilize the abuse provisions to protect consumers, particularly against the pricing practices of dominant firms, and it is likely that such pressure has been reflected in the FCO's enforcement activity.

The FCO has influenced the development of abuse law primarily by shaping enforcement policy and thus determining the fact situations in which the concept's application would be tested and by carefully articulating the reasoning behind its enforcement decisions. Moreover, the fact that its own enforcement decisions are made according to judicially-oriented procedures

207. *See supra* text accompanying notes 128-29.

provides an important additional mechanism for testing the application of the abuse concept to concrete fact situations.

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The concept of abuse of a market-dominating position is the primary legal tool for regulating the exercise of economic power in Europe, and as such its interpretation and application are critically important to the relationship between government and private economic activity. To the extent that European legal systems succeed in ascribing content to the concept in a manner which is rational, predictable and otherwise in conformity with judicial standards and social and economic objectives, the concept is likely to play a key role in economic and legal life in Europe. To the extent that they do not, the interests that the abuse concept is expected to protect will be protected in other ways or not at all.

Because of the concept's vagueness, some have feared that it would be interpreted so broadly as to create significant discretionary interference with business conduct, while others have feared that it would be interpreted so narrowly that it would not protect interests generally considered to deserve protection. In some cases these apprehensions have resulted from failure to appreciate the transformation of the abuse concept that has been described in this article. Experience in applying the abuse concept according to judicial standards has significantly limited the scope of application of the concept, identified some areas in which the concept appears compatible with judicial application and other areas in which it does not, and generally provided evidence that the abuse concept can be effectively used as a legal tool.