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GERMAN ANTITRUST LAW AND THE INTERNATIONALIZATION OF MARKETS

KURT E. MARKERT*

I. INTRODUCTION

The economy of the Federal Republic of Germany, since the 1950s, has been generally marked by a high and still growing degree of internationalization, especially in production and marketing of industrial products. An illustration of this is the substantial share of export and import trade in Gross National Product (GNP)\(^1\) and the amount of direct foreign investments by German investors abroad and foreign investors in Germany.\(^2\) Undoubtedly, this trend toward more economic internationalization is largely due to Germany’s active participation in the post-war European integration process and in particular its membership, since 1958, in the European Economic Community (EEC). This latter factor gained new momentum when the EEC, enlarged from the original six founding countries (France, Italy, Germany and the three Benelux countries) to twelve members (adding United Kingdom, Ireland, Denmark, Spain, Portugal, Greece), adopted the Single European Act of February 28, 1986\(^3\) as a new effort to achieve, by the end of 1992, the final goal of the EEC, which is to merge the economies of the member states into a single internal market comparable to the United States market.

Undoubtedly, the increasing global and European market internationalization has also affected the role and content of German antitrust law laid down in the Act Against Restraints of Competition (ARC).\(^4\) The growing appearance of foreign competitors on many domestic mar-

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1. In 1987 German exports of goods and services totaled 638 billion deutschmark (DM) accounting for 32.6% of the GNP. The respective figures concerning imports are 524 billion DM and 27%. 1988 WIRTSCHAFT UND STATISTIK 157 (translation of this and all other German sources by the author).

2. German direct investments abroad in 1986 totaled 11.2 billion DM; foreign investments in Germany that year totalled 5.8 billion DM. See 1986 JAHRESBERICHT DER BUNDESREGIERUNG 203, 241.


kets greatly improved competitive conditions, thereby relieving antitrust law from the difficult task of providing remedies for situations of insufficient competition. On the other hand, antitrust concern has increasingly focused on the danger that, after the abolition of public barriers to foreign competition, such barriers might be replaced by private restrictive arrangements such as home market protection agreements, "orderly marketing" schemes or other "self-restraint" systems. This concern of the German legislator is, in particular, reflected in section 98(2), already in the original text of the ARC of 1957, which expressly covers restrictions in international trade affecting competition in German territory. This text also dealt already with the relationship between German and European antitrust law. Therefore, the antitrust problems raised by the globalization of markets in general, and by the growing economic integration process in Europe in particular, do not appear to be entirely new and to call for dramatic new solutions. Rather, the question is whether in light of the present stage of this development and the experiences with antitrust law application in Germany and in the EEC the "old" solutions are still suitable to present economic conditions or whether some, perhaps only slight, modifications have become necessary.

In this article I cannot discuss the entire range of aspects involved in such a reconsideration. Rather, I shall concentrate on what I regard, from a practical point of view in the German context, as the two central issues: (1) the relevance of market internationalization to the legal questions of defining the relevant geographic market in antitrust cases and evaluating market conditions to determine whether one or several firms have market power in the legal sense; and (2) the influence of EEC antitrust law on the applicability of the national antitrust laws of the EEC member states as exemplified by German law. In dealing with these two issues I shall further concentrate on merger control law. Although these issues may also be important in regard to the various other types of conduct covered by German and EEC antitrust law, the interest of law prac-

5. ARC § 98(2) provides that the ARC applies to all restraints of competition having effects within Germany. On the interpretation of this rule and its application, see generally Gerber, The Extraterritorial Application of the German Antitrust Laws, 77 AM. J. INT'L L. 756 (1983); Markert, The Application of German Antitrust Law to International Restraints on Trade, VA. J. INT'L L., Apr. 1967, at 47.

6. ARC § 101(3) provides that the ARC does not apply insofar as the Treaty Establishing the European Coal and Steel Community of April 18, 1951 contains special provisions. On the other hand, it contains no provisions in regard to the antitrust rules of the EEC Treaty. However, this Treaty in article 87(2)(e) provides that the relationship between its antitrust rules and the antitrust laws of the member states may be specified by a Council Regulation. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, 49 [hereinafter EEC Treaty]. But the Council to date has not yet made use of this power.
titioners and the business community clearly focuses on merger law. This is reflected by the development of the discussion in Germany concerning whether, as a question of law, the relevant geographic market in antitrust cases under the ARC must always be limited to the domestic territory or may, in cases of sufficient internationalization of business activities, traverse that territory. This discussion on the admissibility of transborder market definitions became of major practical concern only after the insertion of merger control provisions into the ARC by the 1973 amendment, especially because this step was coupled with the introduction of market share presumptions relating to the statutory market domination criterion used by the law to identify anticompetitive mergers. Controversies over this issue increased when the 1980 amendment to the ARC, by adding a new section 23a, included further market share presumptions. Similarly, controversies about the priority of community antitrust law over the national antitrust laws of the member states, at least from a political and practical point of view, mainly affect merger control law. This is illustrated in particular by the great difficulties encountered by the EC-Commission in its attempt to persuade the governments of the member states to adopt an EEC regulation establishing a European system of merger control.


9. See ARC §§ 23a(1)(1)(a), 23a(2).

II. Market Definition and Foreign Competition in German Merger Control Law

The merger control provisions of the ARC (sections 23 - 24a) expressly use the terms "market" and "market share." The need to define the relevant market or markets in each case arising under these provisions is therefore even more obvious than in United States merger law under section 7 of the Clayton Act\(^\text{11}\) where market definition may be seen more as an analytical aid for assessing whether competition is likely to be substantially lessened by the merger in question.\(^\text{12}\) Market shares of twenty percent or more are also among the data that must be included to comply with the statutory merger notification requirements under sections 23(1) and 24a(1) of the ARC. Of primary importance in the substantive law context is the reliance in section 24(1) on the concept of market domination as the central criterion to identify anticompetitive mergers\(^\text{13}\) and the employment of several statutory market share presumptions as indications of dominant market power.\(^\text{14}\) That the general market domination concept requires a definition of the relevant market is confirmed by section 22(1)(2) defining, as one form of market domination, a firm that has a superior market position in relation to its competitors and stating that, for the evaluation of this position, its market share together with other specified criteria has to be taken into account. This provision also has relevance in "oligopoly" cases since, under section 22(2), a group of several leading firms on the market is deemed to be market dominating if there is no substantial competition between the group members and together they have a superior market position in relation to their outsider competitors.

The market share presumptions are specified in sections 22(3) and 23a. Section 22(3)(1) presumes market domination by a single firm, if it has a market share of one third or more, unless its global turnover proceeds during the last business year were less than 250 million Deutschmark (DM). Under section 22(3)(2) "oligopoly" market domina-


\(^{13}\) Under § 24(1) of the ARC, the Federal Cartel Office (FCO), having exclusive jurisdiction to intervene against anticompetitive mergers under ARC § 44(1)(1)(d), has to prohibit mergers not falling under the de minimis criteria of § 24(8) if there is reason to expect that the merger creates or strengthens a market dominating position, unless the parties to the merger prove that it also brings about improvements of the competitive conditions outweighing the disadvantages of the market domination. The only exception is the special ministerial power under § 24(3) to authorize, on public policy grounds, mergers prohibited by the FCO as anticompetitive.

\(^{14}\) For further details on the market domination concept of ARC § 22 and its application in cases of abusive market conduct, see Markert, The Control of Abuses by Market-Dominating Enterprises Under German Antitrust Law, 11 Cornell Int'l L.J. 275 (1978).
tion is presumed if the two or three leading firms together have an aggregate market share of fifty percent or more or the four or five leading firms together have a share of two thirds or more. Small firms with less than 100 million DM annual turnover proceeds do not fall under this presumption. The 1980 amendment, in a new section 23a, added a further “oligopoly” presumption specifically for merger control purposes. Using the same market share criteria, this presumption may be rebutted only where the parties can show either that the conditions for competition permit the expectation that substantial competition on the market will continue to prevail after the completion of the merger or that the “oligopoly” group as a whole has no superior market position in relation to the other competitors in the market.\textsuperscript{15} Section 23a also presumes that a merger will create or strengthen a superior market position of the merging firms if one of these firms, during the last business year preceding the merger, had turnover proceeds of at least 2000 million DM and the other firm is active in a market in which small and medium-sized firms together have an aggregate market share of two thirds or more and the merging firms have a market share of five percent or more (section 23a(1)(a)).

The duty of merging firms to state in merger notifications all their market shares if the latter are twenty percent or more applies both to premerger notifications under section 24a(1) and to postmerger notifications under section 23(1). In practical terms, the premerger notification requirement of section 24a(1), second sentence, which applies to “big” mergers,\textsuperscript{16} is of primary interest, because like section 7 of the Clayton Act, this requirement is coupled with waiting periods that do not begin to run until the notification is “complete.”\textsuperscript{17} Since the merging firms are usually interested in obtaining early clearance to be able to consummate the merger plan, it is of great importance to them to submit a “complete”

\textsuperscript{15} ARC § 23a(2) does not, however, apply where the merging firms’ combined market share is under 15%. For a detailed analysis of court and FCO practice regarding § 23a(2), see Markert, \textit{Die Praktische Bedeutung der Qualifizierten Oligopolvermutung in der Fusionskontrolle} (§ 23a Abs. 2 GWB), 41 \textit{Der Betriebs-Berater} [BB] 1660 (1986).

\textsuperscript{16} “Big” is defined in terms of annual turnover proceeds: either as each participating firm having one thousand million DM or more per year, or as one participant having two thousand million DM or more including, in both cases, turnover of affiliated firms.

\textsuperscript{17} The first period is up to one month. If the FCO, before the end of that period, informs the notifying firms that it will conduct a more thorough investigation of the case, the waiting period further extends to up to four months. Execution of mergers subject to compulsory advance notification before clearance is given or the waiting period has expired is an offense subject to fines and invalidation of the transactions. On the other hand, after clearance or expiration of the waiting period the merger is deemed to be immune, unless the exceptions of § 24a(2) apply (e.g., false statements by the notifying firms). Private antitrust actions against mergers are not permissible in Germany.
notification including all relevant market shares as soon as possible and thus limit their maximum waiting time. Of much less practical importance is the duty under section 23(1) to give notice of consummated mergers including those already given notice of as proposed mergers under section 24a(1).

Two aspects of section 23(1) are, however, of particular interest in the present context. Under section 23(l)(1)(a), market share of twenty percent or more of the merging firms is in itself sufficient to bring a consummated merger under the notification system of section 23(1). While failure to notify does not affect the legality of the merger, it does constitute an administrative offense subject to fines of up to fifty thousand DM. Furthermore, section 23(l)(1) expressly provides that the market share of twenty percent or more refers to "the entire territory in which this Act applies or a substantial part thereof." This wording is the strongest indication that the German legislature, while not directly dealing with the question of transborder market definitions in enacting the law on mergers, obviously proceeded on the premise that the relevant geographic market in merger cases may be, where appropriate, smaller than the entire domestic territory, but may not extend beyond national boundaries. Otherwise, the duty to give notice of market shares relating to the domestic market or a substantial part thereof would not make sense. This view is expressed, for example, in the parliamentary committee report on the 1973 amendment introducing merger control rules where it is said that the relevant geographic market can only be the domestic market as a whole or a part of it. This clarifies an earlier statement by the same committee in its report on the 1965 amendment, adopted before merger control was included in the ARC, that the relevant market in the particular case might also be the larger territory of the EEC or even the "world market."

In administering the merger control provisions of the ARC, the Federal Cartel Office (FCO) and the two appellate courts having jurisdiction in merger control cases, the Berlin Court of Appeals (Kammergericht) and Federal Supreme Court, have clearly followed the guidance

18. Under FCO practice the relevant markets for the purpose of notification are frequently determined by stipulation with merging firms. The same applies to the data and methods for computing the shares of the merging firms on the stipulated markets. The stipulated market definitions are not necessarily identical with the definitions on which the final substantive law evaluation is based. Not infrequently the latter definitions can only be made on the basis of a thorough market investigation after the notification was made.


of the 1973 legislature. In none of the seventy-two cases as of December 31, 1987 in which the FCO issued a formal prohibition order under section 24(1), stating in detail the reasons why, in the opinion of the FCO, the merger was anticompetitive in the sense of this provision, was the relevant geographic market defined as extending beyond national boundaries, although in a number of these cases internationally traded products were involved. Appellate decisions in several dozen of these cases show the same picture. The Monopolies Commission, on the basis of a thorough discussion of this practice in light of the criticism especially voiced by business circles, in its 1978/79 biennial report, has taken the same position.21

In its 1980/81 report, the Monopolies Commission suggested, however, that the FCO in several non-intervention cases had defined wider geographic markets,22 and several commentators referring to this report have seen this as an indication that the FCO is no longer adhering to its original policy.23 In my opinion, the cases mentioned by the Commission do not support this conclusion. Clarification of this controversial point is particularly difficult since the only source of information is the internal files of the FCO which are not accessible to outsiders. Although I cannot rule out the possibility that the FCO case reporters' final evaluation memoranda in these cases have not always clearly distinguished between geographic market definition and the taking into account of foreign competition in determining whether the merger in question creates or strengthens a market dominating position of the merging firms, it appears to me that the Commission has misinterpreted the statements made in these memoranda.24 However that may be, the FCO in its 1985/86

21. III Monopolkommission, Fusionskontrolle bleibt vorrangig: Hauptgutachten 1978/1979 163-77 (1980). Under § 24b the Monopolies Commission has to report every two years on the application of the law on dominant firms including merger control law. For the preparation of these reports the Commission has access to the internal FCO files.
24. It should be mentioned that under ARC § 48(2) the individual cases are to be decided by the deciding divisions to which the cases are assigned according to the economic sectors involved in the case. For making a decision a quorum of three members is required consisting of the chairman, the case reporter and a third member designated by the chairman. The final deliberation on a case is usually made on a basis of a written memorandum by the case reporter. If a majority agrees with the reporter's proposal not to oppose the merger, there is usually no separate statement of the majority's detailed reasons. The reporter's memorandum does not therefore necessarily reflect the majority view on all the issues of the case including geographic market definition. It seems that the Monopolies Commission in arriving at its conclusions on transborder market definitions in its 1980/
activity report in light of the controversy and the continuing criticism especially from business circles has again made it clear that, as a matter of law, the relevant geographic market is limited to domestic territory, and that the reasons put forward in favor of transborder market definitions can only be taken into account in the assessment of the competitive situation in the domestic market.\(^1\)

In my opinion, the FCO’s position is both legally and practically sound and the critical counterarguments, as for example those put forward in an especially pointed manner in the Oliver article,\(^2\) are unfounded. Transborder market definitions are already questionable for reasons of international law and policy. It is obvious that essentially any national merger control system’s legitimate concern can only be that domestic buyers enjoy sufficient sellers’ competition and that mergers do not jeopardize the conditions for such competition by creating too much sellers’ concentration. If, therefore, the “area of effective competition” to be dealt with by national merger control law is the geographic area where domestic buyers are located, i.e. national territory, it is only logical that this area should be the geographically relevant market with regard to which the question of whether sufficient competition exists needs closer examination and eventually, if the answer is negative, appropriate antitrust action. It goes without saying that this approach, to be sensible from an economic point of view, must take full account of all aspects that have relevance for competition within that area, including actual and potential competition by sellers from outside. The situation in this respect is not different from the domestic regional market cases where the geographic “area of effective competition” is limited to a particular section of national territory and where all competitive influences from the “outside” are also taken into account.

The opposite approach of defining a transborder market in all cases of products and services with a substantial share of international trading risks overstepping the legitimate scope of national merger control law

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\(^1\) 1981 report has not sufficiently considered this aspect. See Monopolkommission, supra note 22, at 161-63.


\(^3\) Oliver, supra note 8, at 26-27.
concern, because it necessarily leads to judgments as to the competitive situation in other countries whose territories are included in the wider market. If such a market is judged as sufficiently competitive and, in consequence, no action under merger control law is taken, the other countries will probably not regard this as an inadmissible intrusion into their internal affairs. That the same is also true in the opposite case is at least doubtful. Suppose, for example, that the FCO in a merger case which also involves British, French or Swiss firms would define a wider European geographic market including the territories of these countries and on the basis of a finding that the merging firms either by themselves, or as members of an "oligopoly" group as a result of the merger, would dominate that market and therefore prohibit the merger under section 24(1), this would seem almost certain to create problems with the governments of these countries. One cannot entirely avoid the impression that the proponents of wide transborder market definitions tacitly assume that such a conflict will never arise because in the wider market no single firm or "oligopoly" group of leading firms will ever reach the market power line.

A second aspect supporting FCO market definition policy is the enormous practical difficulty in providing the necessary information for the calculation of market share as a notification requirement and substantive law criterion that would arise, if the relevant geographic market in the particular case were to include foreign territories. FCO experience from the several thousand merger cases examined since 1973 is that the only reliable method of calculating market shares is to collect the figures about all sales actually made in the relevant market during a certain period of time. Since these figures are usually not publicly available and frequently even treated by the firms as business secrets, access by the FCO to the sales figures of the competitors of the merging firms can only be gained by applying the investigatory powers under section 46 of the ARC. These powers are clearly not available with respect to information regarding sales of foreign enterprises in foreign territories. The merging firms, being interested in early clearance, may be able to submit

27. The duty to comply with FCO requests for information under ARC § 46 also includes firms not involved in the particular case. Incorrect or incomplete answers are an offense under ARC § 39(1) and subject to fines up to 50,000 DM. This sanction ensures a high degree of reliability together with the power, also provided under § 46, to inspect and examine the business records of the firms at their locations. The fact that requested information includes business secrets is no justification to refuse to submit them. The FCO is, however, under a duty to protect such information. On the special problems raised by protecting business secrets in court proceedings involving mergers, see Werner, Der Konflikt zwischen Geheimnisschutz und Sachaufklärung im Kartellverfahren, in Festschrift für Gerd Pfeiffer, supra note 25, at 821.

their own foreign sales figures, but will usually be unable to provide reliable data about their competitors' sales. Direct contacts with the antitrust authorities of the other countries, even in those cases where no general "blocking" attitude as to the supply of information to foreign authorities and courts in antitrust matters prevails, are not a reliable source of information either, especially where confidential information about national firms is involved. It would be rather peculiar to assume that the German legislature enacted a largely market-share-based merger law system while realizing that such a system was widely unworkable because in all cases of economically international markets the market shares of the firms involved which would be necessary for the application of the market share criteria could not be reliably ascertained.

Despite these foreign policy and information collection problems, the present position on possible transborder market definitions could probably not be maintained any longer, if what the critics of this policy assert were basically correct, namely that the limitation of the geographic market to the domestic territory, regardless of whether there is substantial international trading in the relevant product or service, frequently results in relatively high market shares of the domestic firms on the market and thereby forces the FCO and the courts to prohibit, as anticompetitive under section 24(1), more mergers than is justified by real market conditions. Admittedly, the actual market shares of the domestic firms, for such reasons as local buyer preferences, transportation costs or even "buy-at-home" mentality, are usually higher, if the geographic market is limited to national territory, than they would be in a wider transborder market. But "optically" high market shares of the leading domestic seller or sellers calculated on the basis of a geographic market limited to domestic territory would lead to "wrong" findings of actual market power only if market share data were given too much weight in this context. However, neither the fact that the market share in section 22(1)(2) is expressly listed among the factors to be considered for the

29. This assertion is made in a particularly pointed manner by Oliver, who argues, inter alia, that "the fundamental flaw of presuming merger activity to be prohibited on the basis of inaccurate market share data discourages mergers and acquisitions needed for competing in larger international markets" and that "[t]he limitation of geographic markets to within the Federal Republic, combined with the presumption of market domination based on market shares, is overly rigid, inefficient, and disguises inaccurate analysis." Oliver, supra note 8, at 31. In discussing one of the cases in which the FCO prohibited a merger (the Thyssen-Hüller merger), Oliver even accuses the FCO of "blind reliance on the Federal Republic as the relevant geographic market, with the virtual exclusion of an analysis of international data and the general competitive situation in international markets." Id. at 35.

30. This is true also if a national market is divided into several regional or local markets. The market share figures of the firms selling in all these markets will remain the same only if they all sell nationwide and if there is no regional or local sales concentration of particular sellers.
finding of a superior market position as a form of market domination, nor the various market share presumptions in sections 22(3) and 23a as interpreted by court jurisprudence justify such a conclusion.

In its judgment in the merger case of Klöckner-Becorit the Federal Supreme Court held that the market share presumptions of section 22(3) do not relieve the FCO and the Court of Appeals of their "normal" fact-finding obligation. The court also held that, if the firm under review has a market share of a third or more, actual competition on the market cannot be automatically disregarded for the final assessment of whether that firm was in fact market dominating. In its later judgment in the Metro-Kauhof merger case the Federal Supreme Court treated the presumptions of section 23a(1) as having the same legal status as the presumptions in section 22(3). Only the "qualified" "oligopoly" presumption of section 23a(2) has not yet been interpreted by the Supreme Court. But the Berlin Court of Appeals in its judgment in the Morris-Rothmans merger case has held that even though section 23a(2) formally shifts the burden of proof to the merging firms, it does not extend to

31. Judgment of Dec. 2, 1980, Bundesgerichtshof, W. Ger., WuW/E [BGH] 1749, 1754-55 (Klöckner-Becorit) [hereinafter Klöckner-Becorit]. The case involved a horizontal merger between two leading German manufacturers of mining machinery with an aggregate domestic market share in 1975-1977 of 42%. The main competitor, a relatively small firm, had 31%. While the Berlin Court of Appeals affirmed the FCO prohibition order, the Federal Supreme Court reversed, mainly on grounds of actual competition and strong buyer concentration. Potential competition by the British manufacturer Gullick Dobson was not an issue because that firm had capital links with one of the merging firms.

32. Under general administrative law, the FCO as an administrative authority has to investigate and establish all necessary factual elements for applying its powers in a particular case. Under ARC § 69(1), the Berlin Court of Appeals, when asked on appeal to review an FCO decision, is also required to investigate the facts of the case on its own motion. This obligation is particularly important in merger cases, since the Court of Appeals has to render its decision on the legality of the merger under review on the basis of the factual situation at the time of its final hearing.

33. On the relevance of actual competition before the merger for the prediction of whether or not the merger under review will give rise to market dominating power under § 24(1), see Markert, Zur Bedeutung von Marktstruktur und Verhalten in der materiellen Fusionskontrolle des GWB, in Neuorientierung des Wettbewerbschutzes 123 (1986).

34. Judgment of Mar, 11, 1986, Bundesgerichtshof, W. Ger., WuW/E [BGH] 2231, 2237 (Metro-Kauhof). The Supreme Court in this case reversed the appellate court decision, which had affirmed the FCO prohibition order, mainly on product market definition grounds ("cash and carry" food wholesaling, excluding all other supply alternatives open to retailers, is too narrow). The court's holding on § 23a(1) refers to the size presumption of § 23a(1)(2).

35. In the Philip Morris-Rothmans merger case where the court, for the first time, was asked to review a prohibition based on § 23a(2), the court did not reach the substantive and international law issues of the case. Instead, the court merely held that, after the restructuring of the arrangement between the parties, the result no longer technically constituted a merger in the legal sense. See Judgment of Oct. 29, 1985, Bundesgerichtshof, W. Ger., WuW/E [BGH] 2211 (Morris-Rothmans) [hereinafter Morris-Rothmans II]. On further details of this case, see Gerber, supra note 5, at 776-79. Clearance, in view of the restructuring of the deal, was also given under EC antitrust law. See British Am. Tobacco Co. v. Commission of the Eur. Comm., supra note 10.
factors which are not within these firms' control. Contrary to what is asserted by critics of present German practice, it has therefore been unnecessary to resort to the "corrective provisions" of the law to compensate for the alleged rigidity of domestic market definitions.

The fact that the various market share presumptions have not led to overly rigid restrictions on merger activity in Germany is reflected in the FCO merger statistics. In the 802 cases of proposed or completed mergers in 1987 which fell under substantive merger control law and were examined thereunder, only two prohibition orders were issued. There is no statistical record of the number of merger cases where the participating firms had a market share of one third or more, but the presumption of market domination in section 22(3)(1) was regarded by the FCO as having been rebutted. In my estimation the percentage of such cases is far higher than fifty. My analysis of FCO enforcement practice regarding the "qualified" oligopoly presumption of section 23a(2) from 1980 to 1985 showed that the rate of "no-rebuttal" cases was, at best, less than ten percent. The respective rate concerning the presumption of section 23a(1) No. 1a appears to be much lower, in fact there is only one case where this presumption was used by the Berlin Court of Appeals as a


37. See, e.g., Oliver, supra note 8, at 27-31.

38. Rebuttal of the presumptions cannot be regarded as such a "corrective provision" because, as was pointed out earlier, the presumptions do not affect the duty of the FCO and the Court of Appeals to conduct a full investigation of all aspects of the case. The "balancing-clause" in § 24(1) is also irrelevant in the present context, since "improvements of the competitive conditions" within the meaning of this clause can only refer to the domestic market. Contrary to what is said in Mr. Oliver's article, Oliver, supra note 8, at 29 & n.56, the FCO decision in the Böhringer-Bio Dynamics merger case is no exception. The FCO, in holding that the merger with Bio Dynamics did not strengthen Böhringer's domestic market dominating position, merely noted that the improved access by Böhringer to the U.S. market was not sufficient to strengthen domestic market domination. The "balancing clause" of § 24(1) in this context was neither discussed nor applied. The only "corrective provision" in the present context is therefore § 24(3) allowing for ministerial exemptions in cases of market dominating mergers. Although § 24(3) expressly provides that for the decision on applications for such an exemption "regard shall also be given to the competitive capability of the participating enterprises in markets outside the territory in which this Act applies," exemptions on such grounds were neither applied for nor granted. See also Bundeskartellamt, supra note 25.


40. Markert, supra note 15. This analysis also takes into account cases of clearance after a settlement on the basis of partial divestiture (25 cases as of December 31, 1986).

41. Id. at 1664-65. The case of the merger between Philip Morris and Rothmans is one of the few examples where the FCO, in prohibiting a merger, primarily relied on the presumption of ARC § 23a(2). On the other hand, in the Court of Appeals opinion upholding the FCO order the presumption is only used as a supplementary argument. Morris-Rothmans I, supra note 36. The Federal Supreme Court's opinion in this case did not deal with § 23a(2). Morris-Rothmans II, supra note 35.
supplementary reason for its finding that the merger under review resulted in a market dominating position. Even if one takes into account that there are cases where merger plans were dropped by the parties after the FCO had indicated opposition based on the market share presumptions, this does not significantly change the general picture.

Of course, the full impact of limiting the relevant geographic market to German territory and of the various market share presumptions can only be assessed on the basis of a thorough analysis of a sufficiently broad variety of cases involving international competition aspects. However, the limited space available in this article prevents me from attempting such a comprehensive operation. Therefore, the following description must be limited to a few, in my estimation, typical examples.

In 1986 the FCO did not oppose the acquisition by Kraftwerk Union (KWU) AG, a subsidiary of Siemens AG, of an eighty-five percent interest in the Exxon Nuclear Company (ENC), a United States subsidiary of Exxon Corporation, New Jersey. KWU and ENC, through its German subsidiary Exxon Nuclear GmbH, Lingen, were the only two domestic producers of fuel elements for nuclear power plants, with an aggregate share in the actual supply of such elements to German electricity generating enterprises operating such plants of almost 100 percent. Nevertheless, the FCO did not regard the merger as giving rise to, or strengthening, a market dominating position on the domestic market for nuclear fuel elements. The main reasons for this conclusion were the existence of fully competitive foreign suppliers in France and Sweden which had already made small amounts of actual sales to domestic buyers and the policy of these buyers not to rely, for security reasons, on a single source of supply. KWU and ENC, in the opinion of the FCO, could therefore not be expected to preserve their extremely high combined market share. The fact that the purpose of the merger, as presented by KWU, was to enter the United States market did not play a decisive role in the FCO's assessment.

That the actual market shares of foreign suppliers frequently do not

42. Judgment of March 22, 1983, Kammergericht, W. Ger., WuW/E [OLG] 2862 (Rewe-Florimex). The relevant market was flower wholesaling in southern Germany.

43. According to the 1985/86 FCO Activity Report, there are 150 cases where merger plans were given up or modified or completed mergers were dissolved after a preliminary examination by the FCO Bundeskartellamt. BUNDESKARTELLAMT, supra note 25, at 7. It is not possible to identify the actual reasons of the firms involved for not pursuing their merger. My estimation is that in a substantial number of these cases antitrust considerations were not ultimately decisive.

44. No official publication on this case was made by the FCO. Had the finding in this case been that the merger was anticompetitive on the German market, the argument that the merger improved KWU's competitive position on the U.S. market could only have been taken into account as a reason for granting a ministerial exemption under ARC § 24(3). See also supra note 38.
show the full competitive potential of these suppliers and must therefore be “upgraded” when being considered in an overall evaluation, is also illustrated by the case of the acquisition of Garbe Lahmeyer & Co. (GL) AG by Bergmann Electro Gesellschaft mbH, a company controlled by Siemens AG. The relevant market in this case was the supply of heavy electric motors to German industrial buyers. Although Siemens was already the leading seller before the merger and together with GL reached over fifty percent market share, the FCO did not find the merger to be anticompetitive in the sense of ARC section 24(1). It was found that the product was relatively homogeneous and technically simple, that the market had been strongly competitive for many years and that there were other potent competitors on the market including such worldwide selling manufacturers as ASEA (Sweden) and Alsthom (France). That the domestic market shares of these manufacturers were relatively small was attributed to the fact that prices in Germany, as a result of hard competition, were relatively low as compared with foreign markets so that foreign suppliers were not particularly interested in expanding their sales activities in Germany. Actual and potential competition by the other domestic and foreign suppliers was regarded as sufficiently strong to exclude dominant market power of Siemens after the merger with GL.

An illustration that the FCO uses the same approach also in “oligopoly” cases covered by the presumption of section 23a(2) is the 1986 merger between Olivetti and TA Triumph-Adler AG, previously owned by Volkswagen AG. The FCO investigation in this case centered on the domestic market for typewriters, including electronic typewriters, accounting for 87% of all typewriter sales in Germany in 1985. The domestic market shares of the leading sellers in 1985 were: TA and Olympia AG (a subsidiary of AEG-Daimler-Benz AG) each approximately 28%, IBM and Olivetti each approximately 10%, Brother nearly 7% and Canon slightly under 3%. In holding that the competitive conditions on the relevant market justified the expectation of substantial competition for the time after the merger and that the presumption of market dominating “oligopoly” power under section 23a(2) was thereby rebutted, the FCO relied largely on the competitive strength of Japanese suppliers such as Brother and Canon which had entered the German market only a few years earlier and had since then engaged in active

45. Bundeskartellamt, 1983/84 Tätigkeitbericht 80-81 (1985) (BT Drucksache 10/3550). A further example of “upgrading” small market shares of foreign suppliers is the merger case between Krupp and Werner & Pfleiderer, reported in Bundeskartellamt, supra note 25, at 7. (See appendix to this article).

price and quality competition. The fact that the EC Commission had only recently imposed antidumping tariffs on imported Japanese typewriters was not regarded by the FCO as a high barrier to competition by Japanese suppliers, since several of these suppliers, including Brother, already manufactured in Europe and the tariffs were relatively modest.

The three cases just described, although reflecting in my opinion the general trend in German merger control practice, should, however, not be misinterpreted as if there were no reason for criticism at all. But the critical aspects of this practice appear to relate more to general features of the German system than to the special situation of applying it to mergers in an international trade context discussed in this article. The following remarks on German merger control practice in general can therefore be limited to what appear to be, from a practical point of view, the central issues.

The application of the substantive law standard of section 24(1) of the ARC can only be made on the basis of a prediction of the future development of the market. Even where mergers already consummated are involved, the question of whether the merger under review gives rise to or strengthens dominant market power is not limited to the time prior to the decision on the legality of the merger, but also includes future market developments. It is obvious that such predictions necessarily involve a considerable risk of error. It can therefore be of no surprise that in a number of cases decided by the FCO, former findings that a merger will lead to dominant market power, or strengthen such power where it already existed, could not be upheld in light of subsequent empirical evidence about actual market performance.

In two merger cases involving internationally traded products, the FCO for this reason revoked earlier prohibitions of consummated mergers. In the case of the Thyssen-Hüller merger, lawfully consummated in 1975, the FCO, after the merger had been notified under section 23(1) of the ARC, issued a prohibition order on the basis of the resulting relatively high market shares (between 25% and 30%) combined with Thyssen’s financial power.

47. Since the extension, by the 1980 ARC amendment, of the criteria for compulsory notification, about two-thirds of all cases falling under substantive merger control law are premerger notifications under the ARC § 24a(1). Since the smaller mergers, not subject to the statutory premerger notification requirements, have to be notified only immediately after their consummation and may be prohibited only within the first year after the notification was duly filed, the FCO can normally not base its decision on a relatively long post-merger observation period. This period may, however, be substantially longer in appeal cases, see supra note 32, or in cases with subsequent divestiture proceedings as in the Thyssen-Hüller case, see infra notes 48-51 and accompanying text.

48. Order of Dec. 17, 1976, Bundeskartellamt, W. Ger., WuW/E [BkartA] 1657 (Rheinstahl-Hüller). The merger was brought about by Thyssen-Industrie AG (then Rheinstahl AG), an affiliate
order. Meanwhile Thyssen had obtained a ministerial exemption under section 24(3), limited, however, to a 45% interest in the company formed as a result of the merger. Under an agreement with the FCO the remaining 55% was to be sold to third parties by the end of 1984. In that year a second investigation of the two relevant markets showed that Thyssen's market-position, mainly as a result of increased sales by foreign suppliers, had weakened rather than, as predicted in 1976/77, grown stronger. The FCO thereupon no longer insisted on the agreed divestiture and the case was terminated.

A similar example is the case of the partly consummated merger between Klöckner and Seitz-Enzinger-Noll (SEN) prohibited by the FCO in 1984. After an unsuccessful attempt by the merging firms to obtain a ministerial exemption, a new investigation of the market by the FCO in the course of the ensuing divestiture proceedings showed substantial advances by competitors, especially by the Italian supplier Simonazzi, reducing the market shares of the merging firms to below fifty percent. Since in the FCO's opinion these firms could no longer be regarded as having dominant market power, it no longer upheld its request for divestiture and the case was terminated.

of the Thyssen group, acquiring all of the capital of Karl Hüller GmbH and merging this company with its Hille division into a new company: Hüller-Hille GmbH. The main relevant product market involved was numeric controlled metal processing centers.


50. Decision of Aug. 1, 1977, Bundesminister für Wirtschaft, W. Ger., WuW/E [BWM] 159 (Thyssen-Hüller). The reason for granting the exemption was the public interest in preventing Hüller, a technologically leading firm, from being dissolved in a bankruptcy proceeding. The question of an alternative buyer at the time of the takeover of Hüller by Thyssen was not further explored. An appeal by Thyssen of the limitation of the exemption to a 45% interest was rejected by the Court of Appeals. Thyssen-Hüller, supra note 49, at 1973.

51. See Bundeskartellamt, supra note 45, at 75. The FCO in stating its reasons for terminating the case also pointed to the Supreme Court's 1980 decision in the Klöckner-Bercorit case where the Court had emphasized that market share data had only a limited relevance to the finding of market power. Klöckner-Bercorit, supra note 31. For a critical, but in my opinion, overly one-sided and factually inaccurate description and comment of the case, see Oliver, supra note 8, at 33-35. Contrary to Oliver's assertion, international competition, to the extent it was ascertainable, was taken into account in all stages of the case.

52. Order of Oct. 10, 1984, Bundeskartellamt, W. Ger., WuW/E [BKartA] 2178 (Klöckner-Seitz). Klöckner had only acquired a little less than 25% of SEN capital. Twenty-six percent was bought by a bank. But since the FCO regarded this bank as Klöckner's fiduciary, it took the view that Klöckner had acquired a majority interest in SEN. The relevant markets in the case were cleaning and filling machines for beer and soft-drink bottles. Holstein & Kappert, a Klöckner subsidiary, and SEN were found to be the two leading suppliers with an aggregated market share of up to 70%. Both firms exported most of their products to foreign countries.

53. See Bundeskartellamt, supra note 25, at 58. The pending appeal against the prohibition order of the FCO became obsolete by the outcome of this case.
The need to adapt the application of merger control law to changing market conditions, including increased foreign competition, can also be seen from two merger cases involving the German automobile components manufacturer Sachs. In 1976 the FCO prohibited the proposed acquisition of Sachs by the British firm Guest, Keen & Nettlefolds (GKN) on the grounds that the dominant position of Sachs as the leading supplier of automobile clutches to domestic car manufacturers would have been strengthened by the merger.\textsuperscript{54} While the Court of Appeals reversed the FCO order for lack of evidence that Sachs' market position would be "entrenched,"\textsuperscript{55} the Federal Supreme Court reversed and upheld this order, reasoning that the evidence in the case was sufficient to assume such "entrenchment."\textsuperscript{56} GKN thereupon dropped its merger plan. However, in 1987 the FCO gave clearance to the proposed acquisition of Sachs by Mannesmann.\textsuperscript{57} After conducting a new investigation of the market, the FCO had found that, since 1975, the other domestic manufacturer LuK had substantially increased its market share at the expense of Sachs and that suppliers from France and Italy had meanwhile entered the German market and achieved significant sales volumes. The reason for this change of the market situation was largely seen in modifications of the buying strategy of the German automobile industry which had formerly given less attention to "double-sourcing" purchase and also largely followed a policy of "at-home buying."

Examples of such prediction "errors" as in the three cases just described are inherent to any system of pre-merger control, unless one accepts that, to exclude any risk of error, the application of merger law in effect never leads to the prohibition of a merger. But neither such a "zero option," nor the substitution of pre-merger control by a system whereunder the legality of mergers would be examined only after their consummation so that the effects on competition could be empirically verified during a sufficiently long "testing period," seem to be satisfactory alternatives. On the contrary, the enormous practical difficulties in dis-

\textsuperscript{54} Order of May 12, 1976, Bundeskartellamt, W. Ger., WuW/E [BKartA] 1625 (GKN-Sachs). Consummation of the merger was automatically stayed as a result of the FCO order pending appeal proceedings.


\textsuperscript{56} Judgment of Feb. 21, 1978, Bundesgerichtshof, W. Ger., WuW/E [BGH] 501 (Kfz-Kupplungen). Although GKN manufactured automobile clutches in the United Kingdom, it was not regarded as a potential competitor in Germany, since it had withdrawn from that market only a few years earlier by selling its German production facilities to a third party. Increase of market power by lessening potential competition could therefore not be relied on by the courts as an additional reason for finding the merger to be anticompetitive.

\textsuperscript{57} To be reported in the 1987/1988 FCO Activity Report (forthcoming).
solving mergers years after their consummation caused the German antitrust legislature in 1980 to expand the scope of compulsory pre-merger control although it was obviously fully aware of the unavoidable risk of prediction "errors." The central question therefore is not whether such "errors" have in fact occurred, but whether through shaping statutory law and its enforcement, the risk of error can be kept within reasonable limits. Only the following two aspects of this question can be briefly taken up in this article: (1) the degree of "structuralism," i.e. reliance on market structure criteria such as market shares rather than on past competitive conduct of the firms on the market as a basis for predicting how the merger will affect the future operation of competition on the market; and (2) the practical methods for identifying and weighing potential competition by foreign suppliers.

A pre-merger control system as applied in Germany, which requires a final decision on the legality of a merger before it is consummated, can only be based on a primarily "structuralist" approach. This applies especially where, as in section 24(1) of the ARC, the legal standard for identifying anticompetitive mergers is the structural aspect of dominant market power rather than the conduct aspect of lessening competitive activity on the market. While the extended use of market structure criteria and structure based presumptions in German merger law is thus only logical, special care is needed to ensure that such a "structuralism" remains sufficiently realistic and dynamic, taking into account in particular the fact that there is no strict correlation between market structure and market conduct.

In a recent analysis of German merger control law enforcement practice under this aspect, I reached the conclusion that in accordance with the guidelines laid down in the Klöckner-Becorit judgment of the Federal Supreme Court, this practice may be generally characterized as reflecting a "realistic, market-oriented structuralism" under the motto "structure approach as far as possible---conduct approach as far as necessary." But I also noted that in several of the cases where mergers were challenged by the FCO or the courts as anticompetitive, the structure approach appeared to be overly rigid and static. This critical aspect

58. For a detailed analysis of German experience with the dissolution of prohibited consummated mergers and of the complex legal problems presented by such cases, see Kerber, Die Unternehmenssentflechtung nach dem GWB (1987).
60. Markert, supra note 33, at 134.
would become even more important, if in the current discussion about further amendments to the ARC the legislature would take up such proposals as extending the statutory market domination concept to situations of vertical dependence, or aggravating the conditions for rebutting the market share presumptions, or submitting very large mergers to an absolute size control system. But at present no steps in that direction appear to be likely. It should also be said that the examples of a possibly exaggerated "structuralism" are mostly pure domestic cases including several mergers in food retailing. In the international competition

In the latter article I have compared the FCO policy in relation to food trade mergers with the "populist" attitude in the United States in the 1960s represented by such cases as Brown Shoe and Von\'s Grocery. In the meantime the Berlin Court of Appeals, by its judgment in the Coop-Wandmaker case, reversing the FCO prohibition order, has brought about the necessary corrections. Judgement of Nov. 5, 1986, Kammergericht, W. Ger., WuW/E [OLG] 3917 (Coop-Wandmaker) [hereinafter Coop-Wandmaker].


63. See, e.g., Ulmer, Brauchen wir eine Kartellgesetznovelle?, 1987 Der Markenartikel 326, 332-34. As to vertical dependency as a German antitrust law concept, see ARC § 26(2).

64. The main proposal in this context is to exclude, in the "qualifried" oligopoly presumption of § 23a(2), the possibility to rebut, on intra-group competition grounds, the presumption in all cases where consumer products with a very large market volume are involved. This proposal obviously aims at a per se prohibition of mergers between the largest, nation-wide operating food retailing enterprises, after the attempt to achieve this goal already on the basis of present law failed as a result of the Court of Appeals decision in the Coop-Wandmaker case. Coop-Wandmaker, supra note 61.

65. The recent discussion about the introduction of stricter absolute size control criteria was mainly caused by the merger between Daimler-Benz and AEG, making Daimler-Benz the largest German enterprise with a turnover of over 70 billion DM in 1987. Bundeskartellamt, supra note 25, at 61-62. See, e.g., VI MONOPOLKOMMISSION, GESAMTWIRTSCHAFTLICHE CHANCEN UND RISIKEN WACHSENDER UNTERNEHMENSGROSSEN: HAUPTGUTACHTEN 1984/1985 184-92 (1986); Immenga, ZUSAMMENSLUSE ZWISCHEN GROSSUNTERNEHMEN ALS GEGENSTAND DES RECHTS DER WETTBEWERBSBESCHRANKUNGEN, in WETTBEWERBSRECHT: ZUR DISKUSION UM DIE NOVELLIERUNG DES GWB 185 (H. Helmrich ed. 1987). The Monopolies Commission has also played, in my opinion, a hardly constructive role in criticizing the FCO for its allegedly too soft policy in administering the presumptions of ARC §§ 22(3) & 23a.

66. According to the administration bill of February 1, 1989, the only proposed change of substantive merger law is to add, in the list of criteria to be considered for the finding of a superior market position within the meaning of ARC § 22(1), the following two points: (1) the capability of the firms involved to change over to other products or services; (2) the absence of another supply of purchasing alternatives. See Draft Bill, supra note 62. This would not alter the basic approach under this provision requiring an overall assessment of all relevant factors. See, e.g., supra note 32.

67. The latest example of a possibly too "structuralist" application of merger law is the case of the merger between the two grain-milling enterprises, Kampffmeyer and Plange. The relevant geographic market in this case was northern Germany. The FCO prohibited the merger mainly on pure market share and financial power grounds. See Order of Nov. 8, 1985, Bundeskartellamt, W. Ger., WuW/E [DKartA] 2223 (Kampffmeyer-Plange). The Berlin Court of Appeals affirmed this decision without any consideration of whether, in view of the fact that the market before the merger was highly competitive, a reduction of competition on the market as a result of the merger could be expected. See Judgment of Dec. 16, 1987, Kammergericht, W. Ger., WuW/E [OLG] 4146 (Kampffmeyer-Plange). The Court of Appeals did not discuss whether its approach was consistent
Within the moderately "structuralist" approach characterizing merger law enforcement in Germany, all factors which may have an influence on competition on the market have to be taken into account in assessing whether or not the merger under review is likely to be anticompetitive. Since such an influence may also be exerted by firms with no actual sales on the relevant product and geographic market, competition both by sellers of substitute products and by potential domestic and foreign competitors is a necessary part of merger analysis. Potential competition by suppliers which already sell the same product on foreign markets is of course of particular importance in this context. As is illustrated by some of the cases described earlier in this article and by the FCO policy statement in its 1985/86 Activity Report, the principle of including foreign potential competition is undisputed. But, as is also indicated in the FCO statement, the implementation of this principle is facing considerable practical difficulties. The central question is obviously to find appropriate criteria for identifying foreign sources of supply as competitive alternatives accessible to domestic buyers and for assessing their potential as a countervailing factor in relation to the possible market power of the actual suppliers on the market.

In dealing with geographic market definition, I already underlined the enormous difficulties frequently confronting antitrust authorities and national courts in attempting to obtain reliable information on foreign enterprises. This is true not only for data relating to sales in territories of other countries and to foreign production capacities, but especially to information about the entrepreneurial strategy of foreign firms as a basis for assessing whether, having sufficient capability and incentive to enter the domestic market, such firms may be regarded as influential potential competitors. This assessment is further aggravated by the uncertainties of international trade relations and foreign exchange rates, factors which obviously determine to a large extent the possibilities of foreign firms to enter the domestic market. Where the firms to be assessed under this aspect are already active in domestic territory—as suppliers of other,

with the Federal Supreme Court's decision in the Klöckner-Becorit case. See Klöckner-Becorit, supra note 31. The Federal Supreme Court has meanwhile affirmed the Court of Appeals judgment.

68. Of course, should merger law in Germany generally move in the direction of a stricter "structuralism," its hitherto rather flexible application to mergers with a major international competition dimension could probably no longer be fully maintained.

69. See appendix to this article.

70. See, e.g., Calvani, The Uncertainties of International Geographic Markets, WORLD COMPETITION L. & ECON. REV., Feb. 1988, at 93, also discussing other U.S. literature on the subject.
possibly related, products or of smaller quantities of the relevant product—direct contacts with the domestic representatives of these firms can frequently clarify the reasons why sales of the relevant product to domestic buyers were either small or not taking place at all.71 Commercial domestic buyers following an international buying strategy, such as most industrial buyers of raw materials, semi-finishes, manufacturing equipment, and components, or large trading enterprises such as supermarket chains, department store enterprises or mailorder houses, are also often in a position to provide reliable information about whether a particular foreign firm may be expected to enter the domestic market in a foreseeable future or, if it is already in that market, what its competitive perspective is likely to be. Finally, where foreign firms, as demonstrated by many Japanese suppliers of electronics products, have already, by aggressive competition, penetrated the domestic market with similar products, there is normally good reason to expect that they will follow the same strategy as to other products as well, unless special circumstances such as import restrictions prevent them from doing so.72

The uncertainties of international trade policy and foreign exchange rates are primarily a problem affecting non-European firms. Inside the EEC, and to a large extent also in regard to the other western European countries having association agreements with the EEC, public and private trade barriers have lost a great deal of their former importance, and the uncertainties of foreign exchange rates have been substantially reduced by the European Monetary System. The Single European Act73 and the measures taken in the course of its implementation are further accelerating the process of abolishing trade barriers within the EEC. As a general rule, suppliers from other EEC member states and to a large extent also from other western European countries are therefore more likely to be considered as potential competitors in Germany than overseas firms. On the other hand, in particular cases the competitive potential of such firms may well turn out to be by far greater than that of neighboring European suppliers.

All of this calls for a careful case-by-case approach to the problem of foreign potential competition in merger analysis, avoiding extremist solutions in both directions. It is also not permissible to ignore this problem for reasons either of insufficient sources of information regarding the

71. See, e.g., supra note 45 and accompanying text.
72. See, e.g., supra note 46 and accompanying text. Other examples are several merger cases involving domestic consumer electronics products manufacturers. See Bundeskartellamt, supra note 45, at 79.
73. See Signing of the Single European Act, supra note 3.
activities of firms not present on domestic territory or of the uncertainties of international trade relations including foreign exchange rates. Nor can, as frequently demanded by businessmen and the antitrust bar, every foreign supplier of internationally traded products be automatically regarded as a highly influential potential competitor on the domestic market. The latter approach, as a long-run perspective, appears to be feasible only inside the EEC, provided the goal of the Single European Act to create a fully integrated internal market can be essentially achieved. I doubt whether in German merger control practice the time has already come to accept, under international competition aspects, a merger of the two main domestic manufacturers of automotive bearings with a combined market share of ninety-four percent, as the British Office of Fair Trading has recently done under British merger law.\(^74\) Of course, where strong domestic commercial buyers with expertise in international purchasing, such as large automobile manufacturers, can easily turn to fully competitive foreign suppliers, but prefer to “buy national,” it is hard to see why they should be protected by merger law against high domestic seller concentration. Nor are private consumers’ preferences for national suppliers, if they cannot be explained by such “rational” grounds as better price, quality, or after-sale service, an entirely convincing reason for such protection. The crucial question of any merger control system, namely “how much concentration is too much?,” is in such situations as difficult to answer as in many purely domestic cases. What is certain, however, is that the “too much” verdict will become rarer as international competition makes further progress.

### III. Influence of European Merger Control Law

Of the three treaties establishing European communities for coal and steel,\(^75\) atomic energy\(^76\) and all other economic activities,\(^77\) only the Treaty Establishing the European Coal and Steel Community (ECSC Treaty), contains special provisions on the control of the anticompetitive effects of mergers. Under article 66 mergers of firms engaged in business activities falling under the ECSC Treaty\(^78\) are subject to prior authorization by the EC Commission,\(^79\) if the merging firms reach or pass the size

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75. ECSC Treaty, supra note 10.
77. EEC Treaty, supra note 6, as amended by the Single European Act of February 28, 1986, supra note 3.
78. See the definition in Annex I of the ECSC Treaty. ECSC Treaty, supra note 10, at 229-32.
79. As a result of the Treaty Establishing a Single Council and a Single Commission of the
criteria fixed by the Commission under article 66(3). The Commission has to authorize the merger if it finds that the merger in question will not give the participating firms "the power to determine prices to control or restrict production or distribution, or to prevent the maintenance of effective competition in a substantial part of the market for such products; or to evade the rules of competition as they result from the execution of this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets." There is no exemption clause for cases where the Commission finds that a merger has such anticompetitive effects.

It is a long settled question that the control of mergers under article 66 of the ECSC Treaty is exclusive in the sense that the national merger control laws of the member states do not apply. This is reflected in section 101 No. 3 of the ARC which states that the Act shall not apply to the extent the ESCS Treaty contains special provisions. While community law has absolute priority over national merger control law where there is overlap, the latter remains fully applicable insofar as the merger under review involves products not covered by the ECSC Treaty. The concurrent applicability of both bodies of merger control law in "mixed" merger cases was confirmed in the German Federal Supreme Court's decision in the Sachs-GKN merger case, where the court held that authorizations granted under article 66 of the ECSC Treaty do not prevent German authorities and courts from challenging the same merger under German merger control law, if it has anticompetitive effects on domestic product markets other than coal and steel products covered by the ECSC Treaty. The EC Commission has taken the same stand on this issue.

It is generally accepted in German merger control practice that the applicability of German merger control law to "mixed" coal and steel merger cases not only includes the power to challenge mergers under ARC section 24(1), but also the notification requirements of sections 23(1) and 24a(1) and the waiting periods in section 24a(4). Because in reality all European Communities (Merger Treaty), the EC Commission has the powers of the High Authority within the meaning of the ECSC Treaty. Traité Instituant un Conseil Unique et une Commission Unigve des Communautis Europiennes, 10 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES (No. L 152) 2 (1967).


81. See supra note 55.

82. See EUROPEAN COMMISSION, SIXTH REPORT ON COMPETITION POLICY 63-64 (1977).

83. A recent example is the case of the merger between the two leading German coal mining enterprises: Ruhrkohle AG and Eschweiler Bergwerks-Verein AG. Since both firms also have activities in areas other than coal, notice of the merger was also given under German merger control law to the Federal Cartel Office which granted clearance. The EC Commission in December 1988 authorized the merger under article 66 of the ECSC Treaty.
German coal and steel manufacturing and trading enterprises are also active in other fields, "double" merger control both under ECSC and German law in coal and steel merger cases is current practice.

In contrast to what applies under the ECSC Treaty, the law on mergers under the EEC Treaty is much more complicated both as to its content and to its relationship to the national merger control laws in the member states. Although the antitrust provisions of the EEC Treaty contained in articles 85 and 86 do not refer to mergers at all, the European Court of Justice in two judgments declared both provisions to be applicable in merger cases. In its judgment in the Continental Can case the Court held that a merger may violate article 86 which prohibits abuse of a dominant position, if a dominant firm, as a result of a merger, strengthens its position "to the point where the degree of domination achieved substantially hampered competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market." This Continental Can doctrine has, however, only a very limited practical relevance, as is already indicated by the fact that no mergers were as yet prohibited on this basis.

Meanwhile, the court in Philip Morris-Rothmans held that mergers by acquisition of an equity interest in another enterprise may also be covered by article 85 prohibiting restrictive agreements, where "the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation." The impact of this holding is rather unclear. Although the facts of the case and the confirmation by the Court of the EC Commission’s denial of a violation of article 85 suggest a narrow interpretation, some commentators have gone much further, in one case even including purchases on the stock exchange. If, however, the transaction underlying the Court’s judgment is regarded as the formation of a joint venture, the Court’s holding appears much less

84. Such laws exist at present in France, Germany, Ireland and in the United Kingdom.
86. Id. at 8300.
87. Examples of merger cases examined by the EC Commission under article 86 are reported in the EC annual reports on competition policy.
88. Supra note 10.
89. Id. at 17,762 (emphasis omitted).
dramatic, given the fact that it is long established EEC practice that joint venture agreements between actual or potential competitors are treated as being covered by article 85.\textsuperscript{92}

Like the scope of application of articles 85 and 86 to mergers, the relationship between these articles and the national antitrust laws of the member states in cases of overlap is also unclear. In contrast to what applies to coal and steel products covered by the ECSC Treaty, there are no national law provisions, as in ARC section 101 No. 3, to the effect that community law, where applicable, shall exclude the application of national law. The European Court of Justice in its judgment of February 13th, 1969 in the Dyestuff case\textsuperscript{93} acknowledged the principle already expressed in the Treaty itself, (article 87(2)(e) that ECC and national antitrust law apply concurrently, but added that the application of national antitrust law in the same case may not "jeopardize the uniform application throughout the Common Market of the Community cartel rules or the full effect of the measures taken under such rules." In a later judgment,\textsuperscript{94} the Court held that informal negative clearances issued by the EC Commission ("comfort letters") stating that the Commission sees no reason for intervention under articles 85 and 86, do not prevent national authorities and courts from applying national antitrust law prohibition to the same facts.\textsuperscript{95}

While it is clear from these two judgments that prohibition orders under EEC law in merger cases have priority over clearances given under national merger control law and that formal and informal negative clearances by the EC Commission do not prevent the member states from prohibiting the same merger under their own laws, the effect of exemptions granted by the EC-Commission under article 85(3) on the power of the member states to prohibit mergers under their merger control laws is still an unsettled question. The Court in the Dyestuff case\textsuperscript{96} merely noted


\textsuperscript{95} Id. at 8542-43.

\textsuperscript{96} Wilhelm v. Bundeskartellamt, supra note 93.
that the EEC Treaty "also enables the Community authorities to exercise some positive, albeit indirect, action, in order to promote a harmonious development of economic activities throughout the Community, in accordance with Article 2 of the Treaty." Most commentators have interpreted this wording as the court's attempt to attribute, at least to individual exemptions under article 85(3), priority over national antitrust law in the sense that no action under this law may be taken which would have the effect of making the exempted practice impossible. While many commentators go even further and would include all block exemptions, others take a much narrower view, some even upholding the "double barrier" theory under which community law exemptions are without any effect on the applicability of national antitrust law.

This unsettled question of the relationship between EEC and national antitrust law is an important reason why the attempt by the EC Commission to persuade the Council of Ministers to pass, by a unanimous decision under article 235 of the EEC Treaty, a regulation establishing within the EEC a European merger control system, has so far been unsuccessful. The Commission's first draft of such a regulation already dates back to 1973. After no action on this draft had been taken by the Council, the Commission in 1988 presented an entirely revised new draft. Under the new text, all mergers of a "Community dimension" would be subject to a compulsory advance clearance procedure.

97. Id. at 7866.
100. See, e.g., KOMMENTAR ZUM GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN 48-55 (U. Immenga & E.J. Meßmäcker eds. 1981); Markert, supra note 93 at 886-94.
102. See Markert, supra note 10.
103. Merger Regulation, supra note 10.
104. Mergers are generally defined in article 3(1) as acquisition of "direct or indirect control of the whole or parts of one or more undertakings." Id. at 6.

"Community dimension" is defined in article 1(2)(a) as:

- where at least two of the undertakings effecting the concentration have their principal field of Community activities in a different member State; or
- where the undertakings effecting the concentration have their principal field of Community activities in one and the same Member State, but where at least one of them has substantial operations in other Member States in particular through subsidiaries or direct sales.

Id. at 5.

Article 1(3)(a) provides, however, that a merger does not have such a dimension, where the aggregate worldwide turnover of all the undertakings concerned is less than 1000 million ECU; or (b) where the aggregate worldwide turnover of all the undertakings con-
by the EC Commission. Article 2(2) provides that such mergers are incompatible with the common market, "where they give rise to or strengthen a dominant position in the common market or a substantial part thereof." 105

Mergers having this effect would, however, have to be authorized by the Commission under article 2(4),

where they contribute to the attainment of the basic objectives of the Treaty, in particular to improving the production and distribution, to promoting technical or economic progress or to improving the competitive structure within the common market, taking due account of the competitiveness of the undertakings concerned with regard to international competition and of the interests of consumers, provided that they do not (a) impose on the undertakings concerned restrictions which are not indispensable to the achievement of the concentration, (b) do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Article 19(3) further provides that mergers shall be considered to have been authorized, if the Commission has not issued a prohibition order under Article 2(2) within a period of four months following the date of commencement of the proceedings, unless the participating firms agree to extend that period. 106

Compared with German merger law, the European control system proposed in the EC Commission's 1988 draft seems to be based on the same substantive standard of market domination. But since this term is not specified in the draft by definitions and presumptions as in German law in ARC sections 22(1)-(3) and 23a, it is doubtful whether the market domination standard laid down in article 2(2) of the Commission's draft would extend as far as the corresponding standard in ARC section 24(1), for example as regards the inclusion of market dominating oligopolies. 107

cerned exceeds 1000 million ECU, but where the aggregate worldwide turnover of the undertaking to be acquired is less than 50 million ECU; or (c) where all the undertakings effecting the concentration achieve more than three-quarters of their aggregate Community-wide turnover within one and the same Member state.

Id. at 6.

105. As to the term "dominant position," see article 86 of the EEC Treaty as interpreted by several judgments of the European Court of Justice. See, e.g., Hoffmann-La Roche & Co. AG v. Commission of the Eur. Comm., [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8527 at 7503, 7540-59 (Feb. 13, 1979); II B. HAWK, supra note 93. Article 2(3) of the draft merger regulation provides for a presumption of compatibility "with the common market where the market-share of the [participating firms] in the common market or in a substantial part thereof is less than 20%." Merger Regulation, supra note 10, at 6.

106. Under article 6(5) the Commission loses its power to challenge a merger on grounds of article 2(2), if it has not commenced proceedings within two months after the notification of the merger was made, unless the participating firms agree to an extension of that period or have supplied false or misleading information in the notification. Merger Regulation, supra note 10, at 7-8.

107. See supra notes 13-15 and accompanying text.
On the other hand, the EEC draft is stricter in the sense that it subjects all relevant mergers to compulsory advance clearance. The critical point of the EEC draft as compared with German law is the broad power of the EC Commission under article 2(4) to authorize anticompetitive mergers on public policy grounds. Since any "contribution to the attainment of the basic objectives of the Treaty" is sufficient, the Commission's exemption power would be limited only by clause (b) excluding authorization where the firms involved achieve the power to eliminate competition. Thus only "monopolistic" mergers would not qualify for an authorization. The situation is further aggravated by the fact that there is no institutional division, as in Germany, between the assessment of the effects of the merger on competition and the decision whether there are overriding public policy reasons justifying an exemption. But even more questionable is the "fictitious" authorization provided for in article 19(3) of the draft. As a result, public policy exemptions could be granted without stating any reason for it, including cases where such grounds were perhaps not even asserted by the merging firms. In view of the very limited time the Commission has under the draft for rendering a formal decision, normally not more than six months after notification was made, and the enormous administrative problems involved in the Commission's decision-making process, the danger that article 19(3) may determine the outcome in many big merger cases is no mere hypothesis.

As long as these problems raised by the present text of the Commission's draft are not solved in a satisfactory, competition-oriented manner, the idea that new European merger control system shall have full priority over national merger control law does not appear acceptable. The Commission's draft, in number 23 of its introductory reasons, contains only an indirect reference to this issue by stating as one of its goals, "to avoid concurrent proceedings." It is no secret, however, that the Commission's draft rests on the premise that, based upon the prevailing interpretation of what the Court of Justice in the Dyestuff case referred to as "positive action," all mergers authorized by the Commission under article 2(4), including "fictitious" authorizations under article 19(3), are to be immune from national merger law. Arguing that "double" control of mergers in the EEC should be avoided entirely, the business community


109. See supra note 97 and accompanying text.

and private antitrust practitioners go even much further and demand that all mergers within the scope of the EEC merger regulation, irrespective of their effects on particular national markets, shall be exclusively covered by EEC law. This solution would correspond to what already applies in regard to the merger control law of the ECSC Treaty. On the basis of estimations that under the present text of the Commission’s draft between 200 and 300 merger cases a year would fall under the new European control system, “exclusivity” in relation to national merger control law would undoubtedly amount to a dramatic reduction of the present role of German antitrust law as a merger control instrument.

In an earlier analysis of the Commission’s 1973 draft, I pointed out that “in view of the high degree of concentration already reached in a number of important industries in the Common Market and the continuing wave of mergers, such powers (to control mergers) are necessary to an active Community competition policy.” Today, fifteen years later, in spite of the enlargement of the EEC by three new members and the much higher degree of internationalization of markets reached in the meantime, there is even more of a need for an effective European merger control system, especially in view of the goal to achieve an internal European market by the end of 1992. I also expressed, however, the view that “without a properly equipped and organized administrative machinery the proposed merger control risks becoming a bureaucratic farce which would discredit the name of competition and place unnecessary burdens on merger candidates.”

Federalism in the EEC even after 1992 will still be incomplete. Attributing “exclusivity” to “federal” merger control law in relation to state law is therefore, in the European context, still much less self-evident than in present United States antitrust law. It would be absurd if the introduction of a “federal” law on merger control in Europe, by eliminating at the same time well-functioning national control systems such as the German one, resulted in weakening instead of strengthening the pol-


111. See, e.g., Riesenkampff, supra note 90.
112. Markert, supra note 10, at 139.
icy against the anticompetitive effects of mergers. That there is a real danger may be seen from the almost enthusiastic reaction of the German Federation of Industries to the Commission's proposal which radically contrasts its decidedly negative attitude vis-à-vis German merger control. I can therefore, in conclusion, only repeat what I wrote in 1969: "What is needed in the Common Market is not a centralized but powerless antitrust system that may perhaps be closer to the ideal of the 'purist' adherents of the supremacy of Community law, but a dual system of both Community and national antitrust law and coordinated cooperation by Community and national authorities."  

IV. CONCLUSION

This article has attempted to demonstrate the impact of the growing internationalization of markets on antitrust law by focusing on merger control law in the Federal Republic of Germany. This law is a particularly illustrative example of this impact both in general terms and in the particular context of progressing market integration in Europe and the present efforts by the European Economic Community to introduce a European system of merger control. In accordance with the central position of merger control in antitrust law and its especially "political" nature, it is no surprise to observe that the antitrust law and policy problems resulting from market internationalization under both aspects are primarily arising in connection with merger policy.

Undoubtedly, the most far-reaching effects of this development on the future role of antitrust law in Germany could be brought about by the introduction of a new European merger control system. This will depend on how broad a scope the EC Council and eventually the Court of Justice decide to give to this control and on its relationship to the national merger control laws of the member states. It may well be that in the very long run the role of these laws is approaching that of the merger control provisions in many state antitrust laws in the United States. But to be acceptable, this perspective presupposes a fully developed and effectively operating "federal" merger control system in Europe. Overstretched "exclusivity" models in favor of community law as are presently envisaged by many, including the EC Commission, can under present conditions, only create an unreasonable risk of reducing effective merger control in Europe rather than reinforcing it.

Of course, any EC merger control system, even one limited to pres-

116. See supra note 105.
117. Markert, supra note 93, at 893.
ent law under article 85 and 86 of the EEC Treaty and article 66 of the ECSC Treaty, would also have to cope with the general consequences of market internationalization. As far as German merger law is concerned, it appears to be sufficiently flexible to take account of any increase of competitive alternatives as a result of better accessibility of many foreign suppliers to the domestic market. The crucial problem in this context is not geographic market definition as a "technical" question, but rather the development, as a practical matter, of operational criteria and procedures for assessing the real impact of foreign suppliers on the domestic competitive situation. Here also, the danger of going too far and arriving at overly simplistic solutions is evident. Antitrust legislators and law enforcement institutions should therefore advance in this field only with a special degree of realism and prudence.

Whether the various national merger control laws in the world and possibly also a future EEC merger law are, in the long run, an adequate basis to deal with the antitrust problems of business concentration in a wider, perhaps even global international context, is another question. In spite of all legal and practical flexibility these laws may have in relation to international and foreign mergers, their scope is necessarily limited to the effects of such mergers on the territory in which the respective law applies. To deal with the wider concentration issues would require, in whatever context, a true system of international antitrust control. But such a system will remain a pure vision still for a very long time. In an earlier study\(^\text{118}\) I therefore pointed out that the need for more international coordination of national and EC antitrust law enforcement also extends to merger control, even though this part of antitrust law, because of its highly "political" nature and the weight of national governments' interests involved in many merger cases, presents the greatest difficulties in trying to find agreed solutions in particular cases. In the meantime not very much progress has been made. But in the absence of any other alternative, the difficult path to more international cooperation must still be pursued.

**Addendum**

In regard to the plan to introduce a European merger control system discussed in more detail in part III, new important developments have taken place since the completion of the manuscript in June 1988 which also have considerable relevance in the present context.

At the end of 1988 the adoption by the EC Council of Ministers of a

regulation on merger control as part of EEC competition law was still uncertain. The attempt by the Commission to achieve adoption by submitting, in November 1988, a completely revised draft,\textsuperscript{119} replacing its earlier draft of February 1988, was not successful. The Council meeting on December 21, 1988, showed substantial differences among states as to the coverage of the proposed regulation and also as to its relationship with the national merger control laws existing in several member states.\textsuperscript{120}

The new draft of the Commission further exacerbated the latter problem in two respects: first, by providing in article 20(2) that "Member States shall not apply their national legislation on competition to concentrations having a Community dimension, unless expressly empowered by the Commission in accordance with the provisions of the last sentence of Article 8(2)," and second, by providing in article 8(2) for a formal decision by the Commission also in those cases where the merger under review is found to have no anticompetitive effects as defined in article 2(2).\textsuperscript{121} Quite obviously, such decisions merely declaring the merger to be "compatible with the common market" are designed to provide the legal basis for the exclusion of national merger control law as provided in article 20(2) on the premise that they also are to be regarded as a "positive action" within the meaning of the \textit{Dyestuff} judgment of the European Court of Justice.\textsuperscript{122} As a result, like under ECSC law, all mergers covered by EEC merger control law would fall exclusively under European law, with only one difference: ECSC law and related national competition law rules such as section 101 No. 3 of the German Act against Restraints of Competition do not provide for an exemption similar to article 20(2) of the Commission's draft. It should also be noted that article 20(2) contains no criteria for such exemptions, thus giving the Commission unlimited discretion in this respect.

The Commission's attempt to attribute to the planned regulation such a sweeping preemptive force vis-à-vis the national merger control laws of the member states, thereby excluding even the application of national law notification requirements, has led to critical reactions espe-


\textsuperscript{120} See EC Continues Gradual Pace Towards Merger Control Regulation, 56 ANTITRUST & TRADE REG. REP. (BNA) 26 (January 5, 1989).

\textsuperscript{121} Article 2(2) provides: "Concentrations which do not create or strengthen a position as a result of which the maintenance or development of effective competition would be impeded in the common market or in a substantial part thereof shall be declared compatible with the common market." Amended Merger Regulation, supra note 119, at 16.

\textsuperscript{122} See supra notes 92-96 and accompanying text.
cially from the German side, not only in the legal literature, but also politically. My concern expressed at the end of part III of this article that "exclusivity" of the new European merger control system, by shutting out effective national control systems in several member countries, might eventually do more harm than good to competition in Europe appears to be all the more justified now that the Commission itself is openly supporting the "exclusivity" claim originally advanced by the business side. This change of the Commission's earlier position is not only highly problematic from a competition policy point of view, but also raises the constitutional law question of whether in the absence in the EEC Treaty of a similar general clause as in the United States Constitution (Art. I § 8 cl. 3), to regulate interstate commerce, a council regulation can generally preempt the application of national statutory law in all cases covered by the regulation. Furthermore, I cannot see any justification why merger control law, as far as the relationship between community and national law is concerned, should be governed by substantially different rules than the other parts of competition law. In regard to Article 85 of the EEC Treaty there is general accord, based on the Dyestuff judgment of the European Court, that the conflict area to be solved by community law priority is limited to cases of express Commission authorizations under Article 85(3). "Exclusivity" of merger control under the new regulation should therefore be restricted to the exceptional cases in which the Commission expressly authorizes a merger under article 2(3).

125. See supra notes 92-96 and accompanying text.
126. Article 2(3) provides:
Concentrations which create or strengthen a position as a result of which the maintenance or development of effective competition is impeded in the common market or in a substantial part thereof shall be declared incompatible with the common market unless authorized on the ground that their contribution to improving production and distribution, to promoting technical or economic progress or to improving the competitive structure within the common market outweighs the damage to competition. In this respect, the competitiveness of the sectors concerned with regard to international competition and the interests of consumers shall be taken into account.
Amended Merger Regulation, supra note 119, at 16.
APPENDIX

Excerpt from the 1985/1986 Activity Report
of the Federal Cartel Office

2.6 International Competitive Conditions

In analyzing the competitive situation on the relevant market, the FCO attributes increasing importance to the influence of international competition. The workability of domestic competition depends to a large extent also on actual and potential competition by foreign enterprises. Following the system of the ARC, the FCO bases its analysis of competitive conditions on the domestic market or a part thereof as the geographically relevant market. From an economic point of view, the market where competitive forces meet may extend beyond national borders. But even where the economically relevant market is not identical with the domestic market, the market influences emanating from foreign competition can be adequately taken into account by a "two-stage analysis." To the extent that foreign suppliers are present on the German market their supplies are included already in the first stage. They are part of the domestically available market volume and are fully accounted for in the calculation of market shares. If competitive relationships go beyond the borders of the Federal Republic, but supplies from abroad so far have not yet or only insignificantly occurred, the FCO examines in a second stage, which competitive influences emanate from the foreign suppliers. Potential foreign competition is effective only, if domestic buyers, when confronted for example with excessive price demands or deteriorating market performances by the domestic suppliers, can easily turn to foreign suppliers. But these suppliers must be willing and capable to offer competitive products in Germany, and German buyers must have access to international buying markets. Such supply alternatives exist especially as far as demand for investment products by large commercial buyers is concerned, for example as regards aeroplanes, ocean ships, machine tools and construction of large production plants. Here the FCO did not oppose a number of mergers especially in view of international competitive relations. Thus, the firm Friedrich Krupp GmbH could acquire a majority interest in the largest German baking machine manufacturer Werner & Pfeiderer, because potential competition by the worldwide selling British manufacturer Baker Perkins excluded the expectation of market domination.

However, the effectiveness of potential competition is doubtful,

127. **BUNDESKARTELLAMT, supra** note 25, at 15-17.
where actual supplies have for a long time not occurred and there is little likelihood of a change. This applies above all to the consumer products sector and generally where foreign suppliers, in spite of all liberalization of world trade and trade within the EC, are still facing open or hidden trade barriers. The more the various national markets are merging and consumer habits are harmonizing, the more the definition of national markets loses its importance. In regard to products with low transportation costs the shares of the various suppliers on the individual geographic submarkets will more and more become identical, so that domestic market shares and world market shares are approaching each other and the competitive situation on the domestic market largely reflects the competitive situation on world markets.

From time to time the accusation is made that the German merger control, while correctly identifying the competitive conditions on the domestic markets, hinders German firms to maintain or expand their competitive position on foreign markets. This accusation is rebutted by merger control practice.