Résumée: Application of the Results of an Analysis of the Chicago School Approach Towards Industrial Concentration

This résumée will deal mainly with the question of whether the German Act Against Restraints of Competition (ARC) needs a reform along the lines of Chicago School theory. The evaluation will be based on the conclusions resulting from this contribution. In order to derive conclusions from the developments in the United States which are relevant to the Fifth Amendment of the German Act Against Restraints of Competition, we have to inquire into the question of whether a basic comparability of the two bodies of law may be established. ¹ Furthermore, we have to analyze to what extent policy elements based on Chicago theory have already found introduction into German antitrust enforcement and jurisdiction. Finally, and in the light of our conclusions on the hypotheses of Chicago theory, we will evaluate proposals for the Fifth Amendment of the ARC which are currently discussed.

I. The Legal Treatment of Industrial Concentration

In Part 1 we have briefly evaluated different approaches that can be taken by public policy-makers toward restraints of competition. Control over industrial concentration and in particular mergers, with a view to limiting and controlling economic power, is carried out according to various criteria. The different approaches that we are able to distinguish emphasize either market structure, market conduct, or a combination of both factors, the so-called market process test: these variations are analogous to the approaches of public policy already presented. ² Public policy intervention in cases where undue economic power accumulates needs specification by operational criteria on the basis of antitrust theory. These criteria have to be laid down by legal statutes and should determine the point at which undue economic power can be said to emerge. ³

We will first present the approach that the U.S. American and the German legislators have chosen, also comparing the statutes and the prerequisites for application. We will then go on to compare the two legal systems and the way by which they have solved the three fundamental problems common to every merger control system, namely:

- the determination of the point at which mergers are sufficiently relevant to merit legal scrutiny (so-called minimum threshold);
- the determination of the conditions under which mergers are subject to legal prohibition (so-called point of intervention); and
- the defenses which are available in order to have an illegal merger exceptionally declared legal (so-called overall justifications).

We will conclude by showing recent tendencies with regard to the development of the statutes in both countries.

1. The Approach

The approaches in both countries can be characterized as structural approaches, which attempt to prevent the emergence of anticompetitive market structures. As a rule, both approaches are ex post-control approaches,

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As documented by Chief Justice Earl Warren of the U.S. Federal Supreme Court in Brown Shoe: "... it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (emphasis added), Brown Shoe Co. v. U.S., 1962 Trade Cases § 70,366 at p. 76,489; this is also documented in the papers of the government bill on the Second Amendment to the ARC, cf. Begründung zum Regierungsentwurf eines Zweiten Gesetzes zur Änderung des GWB, BTDr. VI/2520, p. 29.
making exemptions from this rule only under certain conditions. These conditions will be dealt with infra.

In the Federal Republic this ex post-control by means of postmerger notification was introduced by the Second Amendment to the Act Against Restraints of Competition in 1973 and replaced a mere obligation to notify a limited class of mergers. The requirement for this postmerger notification exists in two cases. First, if a market share of 20 percent is reached or surpassed in the relevant market as a result of the merger, or, second, if the two merging parties had a combined turnover of DM 500 millions or at least 10,000 employees in the year preceding the merger. The German Bundesgerichtshof (Federal Supreme Court) has extended the requirements on information subject to publication and has therefore made this postmerger notification effective. The same amendment introduced an ex ante-control for mergers as well.

The Fourth Amendment in 1980 was primarily aimed at large sized companies, including an obligation to prenotify mergers in which one of the merging parties had DM 2,000 millions turnover or alternatively, each of the merging parties involved had a turnover of DM 1,000 millions or more.

In addition, the ARC contains a check on abuses of market dominating enterprises in cases in which this dominance emerged from internal growth of companies in particular markets or from uncontrolled external growth in the past.

Sec. 7 Clayton Act, as amended by the Celler-Kefauver Act in 1950, is the main merger law in the United States. In addition to this instrument, a premerger notification has been institutionalized in 1976 by the Hart-Scott-Rodino Improvement Act, requiring firms to give the antitrust enforcement

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7 Cf. Sec. 23 para. 1, lit. 1 and 2 ARC; and Hopt, Merger Control in Germany ..., op. cit., 82.
agencies advance notice of certain mergers. The merging parties become subject to the jurisdiction of the FTC "where the transaction involves acquisition of firms with sales or assets of $10 million or more and the acquiring firm, or the combined firms, have sales or assets of $250 million or more." Mergers falling within this category can be stopped by preliminary injunctions imposed by the courts or administrative law judges.

Unlike the ARC, United States law does not provide for control of possible abuses of market dominating enterprises with regard to a bad performance.

2. The Relevant Statutes

Secs. 24 ARC and 7 Clayton Act, as the central statutes, are aimed at all possible mergers regardless of whether they are horizontal, vertical or conglomerate. Sec. 24 ARC connects the control and prohibition of mergers to the criterion that the actual merger is expected to create or strengthen a dominant position in a market. This allows for two kinds of cases. An enterprise is in a dominant position, firstly, if a buyer or seller has no competitor in a relevant market (monopoly), or secondly, the enterprise is not subject to any substantial competition, i.e., it dominates the market by a paramount position in relation to its competitors (dominant firm). Essentially, the same applies for tight oligopolies with or without a noncompetitive fringe under Sec. 24 ARC.


11 Cf. Schmidt, Wettbewerbspolitik und Kartellrecht, op. cit., 181; and idem, Different Approaches and Problems ..., supra, 421-432. The U.S. statutes try to treat the emergence of dominant positions in their incipiency by prosecuting attempts to monopolize under Sec. 2 of the Sherman Act. Insofar, there is a parallel to Sec. 22 ARC.

12 Cf. Sandrock, Otto, Vertikale Konzentrationen im USamerikanischen Antitrustrecht, Heidelberg 1984, p. 175; and Adams/Brock, The Bigness Complex ..., op. cit., 154. Actually the relevant legal statutes encompass the Secs. 23, 24, 24a, 24b ARC and the Secs. 7, 7A and 8 Clayton Act. We will extract issues from these sections as far as necessary in the following.

The U.S. legislator has connected interference by public policy to the criterion of the creation of a monopoly and/or to a substantial lessening of competition:14

"With limited exceptions, Section 7 forbids the acquisition by one corporation in commerce of the stock or assets of another corporation in commerce where the effect may be substantially to lessen competition or the tendency to create a monopoly in any line of commerce in any section of the country" (emphasis added).

The point of intervention is therefore earlier in the U.S.A.

3. The Merger Term in the Statutes

The merger control law definition of mergers is different from the narrow one used in corporate law.

With regard to Sec. 23 para. 2 ARC the definition encompasses a variety of forms. Mergers within the meaning of this section are:

- acquisitions of the assets of other enterprises, wholly or to a significant extent (Sec. 23 para. 2 lit. 1 ARC);
- acquisitions of shares where the total, held individually or jointly with other enterprises or linked firms, amounts to 25 percent of the voting capital, or if 25 percent are already held, amounts to 50 percent, or if the merger secures the acquiring firm a majority interest (Sec. 23 para. 2 lit. 2 ARC);
- also certain forms of combined firms (concerns) and certain forms of interlocking directorates (Sec. 23 para. 2 lits. 3 and 4 ARC);
- any direct or indirect dominant control relationships between two enterprises (Sec. 23 para. 2 lit. 5 grants a catch-all clause).15

Sec. 7 Clayton Act is not as specified as Sec. 23 para. 2 ARC. It just refers to stock and assets in that the Act forbids any corporation engaged in commerce to "acquire, directly or indirectly, the whole or any part of the stock or other share capital ... (or) the whole or any part of the assets of any other such corporation ..., where in any line of commerce ..." (emphasis ad-

This resembles more or less a catch-all clause strongly emphasizing whether competition is substantially lessened or a monopoly created, regardless of the quantity of stock or assets that is responsible for this.  

4. The Minimum Thresholds

As noted above, the choice of minimum thresholds is supposed to determine at what point mergers are sufficiently relevant to merit legal scrutiny.

Firstly, under German law the combination of two originally separate enterprises must be a merger in the sense of Sec. 23 para. 2 ARC. Second, there is a de minimis consideration in the ARC, which views mergers as legally relevant only if the combined turnover of the participating enterprises equals or exceeds 500 million DM.  

With regard to the U.S. antitrust statutes, there are no such minimum thresholds in the laws. There are only thresholds that are created by the antitrust agencies by means of administrative enforcement rules such as the Merger Guidelines and the Vertical Restraints Guidelines of the Antitrust Division of the Department of Justice, which make the circumstances explicit under which the agencies will interfere. These enforcement rules are not legally binding, however, and are therefore subject to the discretion of the courts.

5. The Point of Intervention

The point of public intervention determines the conditions under which mergers are subject to legal prohibition. This point of intervention is actually

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18 Cf. Hopt, Merger Control in Germany ..., op. cit., 79 f.

19 Cf. Hopt, Merger Control in Germany ..., op. cit., 80; cf. as well Nagel, Fusion und Fusionskontrolle, op. cit., 340; and Schmidt, Wettbewerbspolitik und Kartellrecht, op. cit., 276.

an attempt to specify the wording of Secs. 24 para. 1 ARC and 7 Clayton Act.\textsuperscript{21}

As has been noted, German law makes intervention dependent on the expectation that the actual merger will create or strengthen a dominant position in a market; in this respect a certain level of probability of its occurrence is sufficient. The dominant position is evaluated first by defining the relevant market and then it is evaluated with regard to the criteria enumerated in Sec. 22 para. 3 ARC which constitute rebuttable presumptions of market domination.\textsuperscript{22} An enterprise is seen as having a dominant position if it possesses a share of the relevant market of at least one third, unless it had a turnover of less than DM 250 million in the year preceding the merger. For a group of enterprises (oligopoly) this applies if three enterprises or fewer possess a joint share of the relevant market of 50 percent or more, or five enterprises or less possess a share of the relevant market of two thirds or more. This does not apply if the turnover was less than DM 150 million each, in the year prior to the merger.\textsuperscript{23}

Moreover, the German law has specified refutable presumptions in Sec. 23a ARC covering typical groups of vertical and conglomerate mergers which tend to be subject to these presumptions and are thus assumed to create or strengthen a dominant position. This applies to mergers of single dominant firms (Sec. 23a para. 1 ARC) as well as to a group of enterprises dominating a market (Sec. 23a para. 2 ARC). The latter paragraph reverses the burden of proof, which now rests on the firms participating in the merger.\textsuperscript{24}

Sec. 7 Clayton Act uses the criterion of the creation of a monopoly or of a substantial lessening of competition as a point of intervention. The statute is viewed as a preventive instrument which attempts to rule out anticompetitive effects that can be expected with \textit{reasonable probability} in statu nascendi (\textit{inciipiency doctrine}).\textsuperscript{25} The guidelines that are issued by the Antitrust Division of the Department of Justice deserve special attention, as has been

\begin{itemize}
\item \textsuperscript{21} Cf. Hopt, Merger Control in Germany ..., op. cit., 80.
\item \textsuperscript{22} Cf. OECD (ed.), Guide to Legislation: Germany ..., op. cit., 10.
\item \textsuperscript{23} Cf. Hopt, Merger Control in Germany ..., op. cit., 80; Sandrock, Vertikale Konzentrationen ..., op. cit., 175 f.; and Schmidt, Wettbewerbspolitik und Kartellrecht, op. cit., 160.
\item \textsuperscript{24} Cf. Möschel, Recht der Wettbewerbsbeschränkungen, op. cit., 551 f.
\item \textsuperscript{25} Cf. Schmidt, Wettbewerbspolitik und Kartellrecht, op. cit., 178.
\end{itemize}
noted above, since they determine the point of intervention from the view of the enforcement agencies.

The criteria of the statutes, however, have been operationalized by decisions of the U.S. Federal Supreme Court. The court ruled a horizontal merger presumptively illegal on the basis of the evaluation of the participants' market shares, the concentration ratio of the four or eight largest enterprises in the relevant market, and the concentration trend in the past. No definite market share was postulated, but the court noticed that a market share of 20 to 30 percent was considered undue. Somewhat of a change has been brought about by the Federal Supreme Court's decision ruling that circumstances in addition to the market share and concentration ratios would have to be evaluated in an actual case (e.g., future competitiveness). Vertical mergers were judged by the foreclosure effect they were bound to initiate, the nature and purpose of the merger, the probability that squeezing of non-integrated competitors will occur, the trend towards future vertical integration, the effect on barriers to entry, and the financial capabilities of the participating parties. As in the case of horizontal mergers, market shares of 20 to 30 percent were considered undue. With regard to conglomerate mergers, only geographic or product extension mergers and mergers allowing for reciprocal dealings, deserve special attention with regard to past cases. The U.S. Federal Supreme Court has essentially postulated three criteria of intervention. The merger is deemed unlawful if:
- it creates possibilities of extensive reciprocal dealings;
- potential competition is substantially reduced; and/or
- a dominant position of an enterprise in an already relatively concentrated market is strengthened.

27 Cf. U.S. v. General Dynamics, 1974-1 Trade Cases § 74,967.
28 Cf. Sandrock, Vertikale Konzentrationen ..., op. cit., 176 f.; Schmidt, Wettbewerbspolitik und Kartellrecht, op. cit., 178 f., the latter presenting the relevant court cases.
The Federal Supreme Court has not thus far been able to develop criteria for judging pure conglomerate mergers.32

6. Overall Justification

Overall justification specifies the defenses which are available in order to have an illegal merger exceptionally declared legal.33 This is not aimed at procedural issues but at substantive merger rules.

Sec. 24 paras. 1 and 3 ARC contain a relief in two cases. Firstly, the merger can be declared exceptionally legal by Sec. 24 para. 1 ARC if it will also lead to improvements in competitive conditions and these improvements, at the same time, outweigh the anticompetitive effects of the market dominating position brought about by the merger. The burden of proof lies with the enterprise.34

Second, on the basis of Sec. 24 para. 3, the merger can be declared legal by the German Federal Minister for Economic Affairs if the detrimental effects on competition are balanced by overall economic advantages or justified by an overriding public interest.35

Sec. 7 Clayton Act does not contain such an arbitrary disposition as a kind of rule of reason.36 However, two defenses have been introduced by adjudication, i.e. the so-called failing-company defense and the defense due to perceived efficiencies as a result of a merger.37

33 Cf. Hopt, Merger Control in Germany ..., op. cit., 80.
35 Cf. Hopt, Merger Control in Germany ..., op. cit., 80; Schmidt, Wettbewerbsrecht und Kartellrecht, op. cit., 160.
36 "We are clear ... that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, ...", U.S. v. Philadelphia National Bank, op. cit., at p. 78,271.
37 Cf. the Introduction to this contribution; and Sandrock, Vertikale Konzentrationen ..., op. cit., 153-160 for a detailed analysis and 178 for this evaluation; Schmidt, Wettbewerbsrecht und Kartellrecht, op. cit., 180. For the contrary position cf. Areeda, Phillip, and Donald F. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application, Boston and Toronto 1980, vol. 4, § 941, p. 151: "In our view, neither the language nor the legislative history of §7 forecloses an economic defense. Limited case law suggestions to the contrary are dicta, internally contradictory, unsupported, or otherwise unpersuasive."
II. Trends and Tendencies in Enforcement and Adjudication

Mainly because of the former accord of antitrust policies in the United States and the Federal Republic of Germany and their currently diverging patterns, the question arises as to whether there is a new state of the art in antitrust theory based on recent findings, and whether, albeit with a certain time-lag, these may soon begin to exert influence on German antitrust policy.¹

1. The Use of Economic Evidence in Enforcement and Adjudication

In comparison to (current) antitrust policy in the United States, German legislation does not offer as much room for economic evidence. Although this applies to a somewhat lesser extent to efficiency considerations in the field of merger control², the German law is statutory law and legislature has decided to be restrictive on the use of economic evidence which also implies that there is not much room for a broad application of a rule of reason. This is considered binding for the courts.³

This basic attitude is enforced by the philosophy underlying the ARC. It is much more influenced by what has been described as the ordoliberal view of competition in this contribution, because it "is understood as an indispens-

¹ Cf., e.g., Herdzina, Klaus, Möglichkeiten und Grenzen einer wirtschaftstheoretischen Fundierung der Wettbewerbspolitik, Tübingen 1988, pp. 39 f. The question is of particular relevance because of the assertion that this former accord has been terminated by recent changes in U.S. antitrust policy, cf., e.g., Kantzenbach, Erhard, The Treatment of Dominance in German Antitrust Policy, in: de Jong, Henk W., and William G. Shepherd (eds.), Mainstreams In Industrial Organization - Book 2, Dordrecht et al. 1986, pp. 273-285, 282 f.

² Cf. the exception in Sec. 24 paras. 1 and 3 ARC, dealing with the efficiency defense that may be granted by the Minister for Economic Affairs. This does not apply for increases in internal business efficiency, however. Furthermore, the criteria for the determination of the degree of domination in Sec. 22 para. 1 lit. 2 allow for an immediate influence of economic evidence.

able correlative of an economic order which rests on freedom of action". Based on this understanding, there is a restrictive position towards a tendency to increase the use of economic evidence in general and efficiency considerations in particular because of the ambiguous nature of the latter kind. This reasoning is affirmed by recent adjudication, which is rather unwilling to accept economic evidence contrary to recent tendencies in U.S. enforcement and jurisdiction. For instance, conglomerate mergers were not permitted if a large-sized, financially strong firm merges with a firm that is dominant in a market characterized by small business, although this might eventually have resulted in efficiencies.

2. An Evaluation of Trends and Tendencies

On the basis of the structure approach and market domination, the German Federal Cartel Office (FCO) has developed a unified standard of reference, which is largely affirmed by the courts. In the following, we will try to reveal to what extent current U.S. antitrust policy and thus efficiency considerations have found introduction into current enforcement and how these are to be evaluated in the light of our findings.

a. Determining Market Delineation

Demarcation of the relevant market is considered to be the essential prerequisite for the determination of market domination because the more restric-
tive, i.e. the more narrowly the market is delineated, the more likely a merger is found to violate Sec. 24 para. 1 AEG.8

Although generalizations beyond an evaluation of single cases and actual facts are not possible, the underlying concept of substitution possibilities in consumption, which we have proposed supra, is accepted as a common basis for the definition of the relevant market, i.e. if the products are held to belong to the same relevant market, then in respect of consumers' needs the products should be substitutable for each other.9

This basic idea of substitution has led to the attempt to measure these flexibilities by cross-price elasticities of demand. On the demand side the concept holds that goods belong to the same relevant market if they show significant cross-price elasticities.10

Although theoretically correct, attempts to calculate precise numerical values for these elasticities, in addition to a 'soft' and qualitative evaluation of the substitution possibilities, is unrealistic because impracticable.

The attempt to determine whether buyers would respond to a 5% price increase by shifting to other products within a particular period of time, or whether entry of potential competition would occur, in no way furthers a realistic definition of the relevant market. This is the reason why attempts in current U.S. antitrust policy to introduce such a quantitative analysis should not be adopted.11 This procedure would not substitute taking into consideration qualitative criteria such as particular characteristics and par-

ticular uses of a product. As has been demonstrated by this contribution, this criticism also applies to the attempt to consider potential competition within a concept of the relevant market determined by production flexibilities, as has been made by the U.S. Merger Guidelines.

The procedure used by the Monopolies Commission to distinguish the relevant market from an area that is close enough to it to encompass substitution possibilities and potential competition, is adequate insofar as the procedure is based on a reliable definition of the relevant market. Although this definition is rather restrictive, the area close to the relevant market is nevertheless considered additionally through a comprehensive view of the delineation.

Contrary to widespread opinion, the international competitiveness of German firms is thoroughly appreciated and taken account of by this two stage procedure and particularly by a comprehensive view. This makes it unnecessary to adopt the current policy approach in the U.S. because this approach attempts to take into consideration foreign competition directly through the definition of the relevant market.

b. Determining Market Domination

A merger is prohibited according to Sec. 24 para. 1 ARC if it is to be expected to create or strengthen a market dominating position. The confirmation

12 For an encompassing criticism, cf. Harris/Jorde, Market Definition in the Merger Guidelines ..., supra, 476-486. Cf. as well this contribution supra.
14 Cf. Monopolkommission, Hauptgutachten V ..., op. cit., para. 609.
of a market dominating position requires the proof of a lack of sufficient competition (Sec. 22 para. 1 lit. 1 ARC), resp. a superior market position on the part of the merging parties (Sec. 22 para. 1 lit. 2 ARC), or the creation of an oligopoly (Sec. 22 para. 2). Since the lack of sufficient competition is of minor practical importance, we will emphasize the superior market position and the oligopoly as factual findings.

**aa. Superior Market Position**

The confirmation of a superior market position in turn is based primarily on a comprehensive evaluation of the essential structural factors of the particular market in question, which may allow a firm to have at its disposal a free area of conduct which is insufficiently controlled by competition.

17 Cf. Kantzenbach, Erhard, Großfusionen bedürfen einer expliziten politischen Legitimation, 66 WD (1986), pp. 379-382, 381; and Pfeiffer, Von der Autokupplung bis zu Chanel No. 5, op. cit., 211 f., who emphasizes that the presumptions have a normative character and are thus subject to interpretation on the basis of changes in fundamental knowledge in antitrust theory.


(a) Market Share

For the characterization of real circumstances in a relevant market, German merger control ascribes a crucial role to the criterion of market share. It becomes obvious that on the basis of legislation in Secs. 22 paras. 1 lit. 2 and 3 lit. 1, and 23a para. 1 enforcement and jurisdiction currently view market share as the central element of market structure. The underlying reasoning does not hold that market share and relative market share are determinants of market power, but rather that they are direct or indirect indicators of it in the sense of refutable presumptions. Decreasing market share differences among competitors over time are tendentially viewed as refuting the presumption of a superior market position. Accordingly, all cases—either in enforcement or before the courts—in which a superior market position was confirmed were based on persistent and substantial market share differences among competitors in the relevant market.

However, this majority view is challenged on the basis of recent findings by the Chicago School on the role of market structure in determining competitive conduct. They hold that market share expresses efficiency only and that there is no connection between market share and the extent of competitiveness of conduct or the extent of individual market power, or that market share will at the most play only a minor role in the future because of


the globalization of markets and the worldwide scale of the competitive game.  

The Klöckner-Becorit decision in the German Federal Supreme Court has led to speculations on whether this ruling has diminished the role of market structure and market share as presumptions in determining a superior market position. This can not be confirmed generally, however, because the Court has emphasized that the reasoning applies only to this particular case and its circumstances. This becomes even more obvious and plausible if one acknowledges that the FCO and courts have ruled cases illegal in which a market share of only 12% was considered to be critical, while others in which market shares amounted to roughly 50% have not been subject to legal examination at all. This option for discretionary decisions results from the comprehensive view that enforcement agencies and jurisdiction by the courts take of concerning the actual circumstances of individual cases.

Thus, general criticism on the role that market share and relative market share play as legal presumptions seems inappropriate, although such a case can be made in the circumstances of a particular instance. Apart from this, scholars who plead for the adoption of principles underlying current antitrust policy in the U.S. neglect the fact that the current Merger Guidelines of the U.S. Department of Justice almost encompassingly adopted the

24 Cf., e.g., Hölzler, Der Marktanteil in der Fusionskontrolle ..., op. cit., 524 f. We have demonstrated that this reasoning does not seem very convincing, cf. again, Kartte, Wolfgang, Internationale Wettbewerbsfähigkeit und Zusammenschlußkontrolle, op. cit., 531 f. For more moderate criticism, cf. Herdzina, Klaus, Wettbewerbstheorie und Wettbewerbspolitik: Stand und Entwicklungstendenzen, 66 WD (1986), pp. 525-532, 529, who holds that the final evaluation on whether market share expresses efficiency or power is still heavily disputed; but see the results of our contribution.

25 Cf., e.g., Markert, Zur Bedeutung von Marktstruktur und -verhalten ..., op. cit., 125-127; and for the case Klöckner-Becorit, op. cit., 1759.

26 Cf., e.g., Rewe-Florimex, op. cit., 2863 f.

27 In an internal discussion paper the FCO mentions Dyckerhoff/Klöckner, Siemens/Garbe Lahnmeyer, Nukem/British Nuclear Fuels, and Henkel/Loctite. Cf. as well the Fichtel & Sachs/Mannesmann merger with a market share of roughly 50%, cf. Kurzinformationen, 37 WuW (1987), pp. 445 f., 446.

28 Cf., e.g., Berg, Internationale Wettbewerbsfähigkeit und nationale Zusammenschlußkontrolle, op. cit.; Hölzler, Der Marktanteil in der Fusionskontrolle ..., op. cit., 524 f.; Knöpfle, Indiziert der Marktanteil den Wettbewerbsgrad?, supra, 1814.
comprehensive view of the German FCO and the German courts, acknowledging a structural predominance.\footnote{Cf. Emmerich, Kartellrecht, op. cit., 271. This means that the rigid prohibition policy demonstrated in several cases (e.g., United States: U.S. v. Philadelphia National Bank, 1963 Trade Cases § 70,812, p. 268; Germany: GKN/Sachs, op. cit., 1510) has largely been harmonized now on the basis of a comprehensive view in which even the U.S. Merger Guidelines have neglected to adopt some important principles underlying Chicago theory. Concerning court findings, this is pointed out by Markert, Stand und Entwicklungstendenzen des US-Antitrustrechts 1987 ..., op. cit., 210.}

As we have emphasized in our contribution, recent research strongly focuses on the role of market share as a predominant indicator of individual market power.\footnote{Cf. again for a survey on empirical studies, Pautler, Paul A., A Review of the Economic Basis for Broad-Based Horizontal-Merger Policy, 28 AB (1983), pp. 571-651.} This allows us to reject a line of reasoning that asserts that the market share orientation is based on plausibility considerations that lack a profound theoretical basis.\footnote{Cf., e.g., Holzler, Der Marktanteil in der Fusionskontrolle ..., op. cit., 519 and 524 f. For the contrary position, cf. Monopolkommission, Hauptgutachten V ..., op. cit., para. 781 f.}

The use of strategic planning and of portfolio and associated techniques by the management of modern corporations demonstrates the importance of elements of market structure, particularly that of (relative) market share for profitability and thus partly for market power (Michael E. Porter: "Key factors of success").\footnote{Cf., e.g., Abell, Derek F., and John S. Hammond, Strategic Market Planning: Problems and Analytical Approaches, Englewood Cliffs, N.J., 1979, pp. 283-289; and Porter, Michael, Competitive Advantage: Creating and Sustaining Superior Performance, New York, London 1985, pp. 221-226.}

(b) Financial Strength

As a rule, the confirmation of a superior market position is based on a comprehensive view of market share and (financial) resources. This applies in the sense that a firm possessing a large market share is unlikely to be considered to hold a superior market position \textit{vis-à-vis} its competitors if it clearly succumbs to its competitors on the basis of its (financial) resources.\footnote{Cf. Emmerich, Kartellrecht, op. cit., 271 f. Fundamental criticism of this view is found in Knöpfe, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 6-8; and Möschel, Wernhard, Finanzkraft und konglomerater Zusammenschluß, 29 AG (1984), pp. 257-260.} The underlying reasoning is based on the so-called entrenchment-doctrine. This holds that the alleged anti-competitive effect of financial resources lies within their potential for discouraging smaller rivals from competing aggres-
sively in the market or for discouraging potential competitors from entering the market.\textsuperscript{34} In the case of conglomerate mergers, in the context of which financial resources are primarily of relevance, this is enhanced by a potential for decreasing the sales volume of competitors by reciprocal dealings. Thus, if we appeal to the position which we have presented in the case of vertical mergers, conglomerate mergers cannot currently be regarded as harmful to competition because they are not output-restricting and must as a rule therefore be primarily considered efficiency-enhancing.\textsuperscript{35} The conceptions that have been developed by the traditional theory for determining the negative effects of conglomerate mergers allow the conclusion to be drawn that such mergers should in no case be impeded.\textsuperscript{36} However, this position is not held unanimously. Moderate representatives of the Chicago School or independent scholars regard conglomerate mergers in specific situations as a problem. In this context, it is held that "(p)ublic policy will be served by identifying specific instances where conglomerates pose problems rather than by mounting a broadscale attack".\textsuperscript{37}


\textsuperscript{35} Cf., e.g., Bork, The Antitrust Paradox: A Policy at War with Itself, New York 1976, 248: "It seems quite clear that antitrust should never interfere with any conglomerate merger. Like the vertical merger, the conglomerate merger does not put together rivals, and so does not create or increase the ability to restrict output through an increase in market share. Whatever their other virtues or sins, conglomerates do not threaten competition, and they may contribute valuable efficiencies."

\textsuperscript{36} Cf. again Bork, The Antitrust Paradox, op. cit., 262: "We have examined all the major theories of the ways in which conglomerate mergers may injure competition and found that none of them (... ) bears analysis. The conclusion must be, therefore, that conglomerate mergers should not be prohibited by judicial interpretation of Section 7 of the Clayton Act."

\textsuperscript{37} Williamson, Oliver E., Markets and Hierarchies: Analysis and Antitrust Implications, New York 1975, p. 170.
Based on this reasoning and the fact that the use of the entrenchment-doctrine has disappeared in enforcement and jurisdiction in the U.S.\textsuperscript{38}, there is a strong tendency for enforcement agencies and courts' jurisdiction in Germany to assert that financial resources on the part of firms possessing market dominant positions pose no problem whatsoever, and may even be essential to the rigor of competition.\textsuperscript{39} It is believed that firms with large resources are the driving motor of the economy, and enable structural change and a revitalization of markets that are often rigid and uncompetitive. A more moderate view that emphasizes a comprehensive approach and the consideration of particular circumstances does not want to apply the entrenchment-doctrine in an undifferentiated manner.\textsuperscript{40} It becomes obvious that this reasoning aims at an adoption of current U.S. antitrust policy.

It is undisputed that an accretion of financial resources does not pose a competitive problem per se, and is thus not necessarily detrimental to competitive conditions. However, there has to be an inquiry into the actual circumstances of the individual case in the context of a qualitative analysis.\textsuperscript{41} For even if we confirmed that conglomerate mergers were unharmful as a rule, this does not provide evidence that the accretion of financial resources in combination with a market dominating share can also be judged unharmful.\textsuperscript{42}


\textsuperscript{39} Cf. Harms, Gemeinschaftskommentar zum GWB, op. cit., § 24, sec. 444; and Knöpfle, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 6-8

\textsuperscript{40} This corresponds to the view put forward by Williamson, cf. Dlrrheimer, Manfred J., Ressourcenstärke und Abschreckungswirkung in der Fusionskontrolle, ln: FIW (ed.), Neuorientierung des Wettbewerbsschutzes, Köln et al. 1986, pp. 137-156; Markert, Zur Bedeutung von Marktstruktur und -verhalten ..., op. cit.

\textsuperscript{41} Cf. Bundeskartellamt, Tätigkeitsbericht 1985/86, BTDr. 11/554, pp. 12 and 61 f., referring to the AEG/Daimler-Benz case; Emmerich, Fusionskontrolle 1986/87, supra, 364, who notes that this is the guiding principle of current application; Markert, Stand und Entwicklungstendenzen des US-Antitrustrechts 1987 ..., op. cit., 222; Monopolkommission, Hauptgutachten VI ..., op. cit., para. 449; and Pfeiffer, Von der Autokupplung bis zu Chanel No. 5, op. cit., 216.

\textsuperscript{42} Cf. Schmidt, Ist Größe an sich gefährlich?, supra.
The criticism that rejects the whole notion that an accretion of financial resources can act as a restriction of competition does not consider all the possible cases. Even if potential competition is not deterred at the moment, the merger may lead to that deterrence effect in the future. Furthermore, we should not forget that capital markets and the market for corporate control do not work as frictionlessly as assumed. This tends to produce a leverage effect in favor of financially strong firms vis-à-vis their smaller (potential) competitors. There is every reason to be careful in the application of the entrenchment-doctrine and to look for further refinements; however, there is no reason for the time being to drop it completely.43

(c) Market Barriers

The use of financial resources is also closely connected with the importance and height of market barriers. Superior market shares and financial resources are necessary conditions as a rule, although not sufficient ones. Their relevance may only be determined in the light of additional structural factors, such as market barriers, market stage, technological development, structure of demand, etc. Market barriers, and particularly entry barriers, are a further element indicating whether a superior market position in an actual case may be confirmed.44

Low market barriers indicate rather strong potential competition which should be able to control free areas of conduct among incumbent competitors, even if they may be superior in terms of other structural features. The FCO as well as the courts have emphasized this aspect as well as the comprehensive view of market share and market barriers in relevant cases.

44 Cf. Möschel, Use of Economic Evidence ..., supra, 542 and 549; Monopolkommission, Hauptgutachten V ..., op. cit., paras. 786 ff.
This applies particularly to the combination of low barriers and aggressive foreign competitors.\textsuperscript{45}

Thus, the existence and height of market barriers have been considered sufficiently in actual merger cases, and there seems to be no dispute that they have to be considered if they exist.\textsuperscript{46} We have demonstrated that according to our definition, market barriers do exist and often tend to impede the proper working of the competitive mechanism. Thus, as a rule they should be taken into account. This also applies to the case of international competition, which we have emphasized in the context of the relevant market. It is often asserted that the globalization of competition renders the market barriers concept obsolete because there is always sufficient competitive pressure. Nevertheless, despite some liberalization tendencies in world trade, sufficient legal and factual barriers to new competition exist which tend to impede sufficient competitive pressure in such cases. We should be aware of that these markets often do not work frictionlessly. In this context, it is of crucial importance to what extent the national market is interwoven with international competition and what the circumstances of the individual case are.\textsuperscript{47}

However, the concept of market barriers is limited in application because there are extreme difficulties of operationalization in terms of measurement. This leads to rather significant ambiguities as to the nature and meaning of market barriers. In the contribution submitted, we have pointed out that

\textsuperscript{45} Cf. Monopolkommission, Hauptgutachten V ..., op. cit., para. 803 ff. Just recently the Mannesmann Co. has acquired the Fichtel & Sachs Co. because its market share decreased from 80 to roughly 50\% over ten years, whereas in 1978 it was prohibited for Guest, Keen & Nettlefold to acquire Fichtel & Sachs because of its dominant position. Prof. Markert of the FCO has in essence argued that increasing globalization tended to lower market barriers and that this changed the ruling, cf. Kurzinformationen, supra, 446.

\textsuperscript{46} This seems to be a matter of restrictive qualitative judgment on the basis of the comprehensive view mentioned. For instance, in the Rewe-Florimex case the Federal Supreme Court prohibited a merger with a share of only 12\% of the relevant market, despite extremely low barriers, because the rest of the market showed an almost atomistic structure concerning individual competitors' shares, cf. Rewe-Florimex, op. cit., 2865; and as well Linde-Agefko, Ww/E BKartA 2213, 2220, and Pillsbury/Sonnen-Bassermann, op. cit., 3764, that also considers market barriers.

\textsuperscript{47} In the aircraft manufacturing industry, in ship-building, or the engineering of industrial plants, for instance, even a structural monopolist in a national market might be controlled by sufficient competition on a global scale.
this seems to be a major reason for problems of application. Hence, the potential for an application of the market barriers concept seems rather limited which tends to give it a qualitative nature. Thus far, there is no adoption of a more lenient line of U.S. antitrust policy concerning market barriers in the context of mergers. Furthermore, there is no necessity to follow the trend.

(2) Market Conduct

The comprehensive view necessary to confirm a superior market position is not only based on structural features of the relevant market but eventually on actual competitive conduct also, although structural elements prevail. However, the severe criticism by the advocates of the theoretical edifice underlying current U.S. antitrust policy has revived the discussion on the importance of market structure vis-à-vis market conduct. In this context, it is argued that there is assumed to be a tension between a structural perspective and the consideration of conduct. A dilemma is believed to arise in having to perform evaluations on a case-by-case basis whereas one is only able to judge on the basis of a general interrelation between structure, conduct, and performance, the theoretical foundation of which has been seriously challenged.

48 Cf. Part 2 sec. III; cf. as well Herdzina, Wettbewerbstheorie und Wettbewerbspolitik ..., supra, 529, on the normative nature. The former Chief Justice of the German Federal Supreme Court, Pfeiffer, does not even list barriers explicitly, cf. Pfeiffer, Von der Autokupplung bis zu Chanel No. 5, op. cit., 213–218.

49 Current U.S. antitrust policy has not adopted the extreme Chicago version that meaningful barriers to entry do not exist. For instance, they are considered in the Merger Guidelines 1984 in the context of the necessity of two stage entry of newcomers in vertically integrated markets; with the same emphasis concerning jurisdiction, cf. Hölzler, Ökonomische Realität in der Fusionskontrolle ..., op. cit., 175 note 7, although much more lenient.

50 Cf., e.g., Monopolkommission, Hauptgutachten VI ..., op. cit., paras. 443-454; Pfeiffer, Entwicklung der deutschen Rechtspraxis in der Bestimmung von Marktmacht, op. cit., 72. The structural predominance was confirmed in a variety of cases, cf. GKN/Sachs, op. cit., 1506; Klöckner-Becorit, op. cit., 1754; Mannesmann-Brueninghaus, op. cit., 1716.

51 Cf. Markert, Zur Bedeutung von Marktstruktur und -verhalten ..., op. cit., 125. A number of scholars have concluded that actual conduct is the essential basis for evaluation and that structure is more or less meaningless, cf. Baur, ZGR (1982), 324; Hölzler, Der Marktanteil in der Fusionskontrolle ..., op. cit., 519 and 525; Knöpfle, Aktuelle Probleme der Zusammenschußkontrolle, supra, 2 f.
If we presuppose that the legal market domination criteria in Sec. 22 para. 1 lits. 1 and 2 are real alternatives to one another then a superior market position may be confirmed regardless of whether substantial competition is confirmed. In this context, structural predominance is interpreted in the sense that if structural features point unambiguously towards a superior market position the question of whether substantial competition is present, which is believed to control free areas of conduct becomes meaningless.52 In these cases it is not expected that a superior area of free conduct will be controlled permanently by substantial competition.

Actual market conduct is only taken into account in terms of a comprehensive view if a superior market position is not confirmed unambiguously on the basis of the underlying structural features.53 A number of recent court decisions demonstrate that there is no tendency to weaken the structural dominance criterion in the sense that market conduct is taken into account on the basis of equivalence.54 Even if substantial competition is confirmed, despite an ambiguous result concerning structural features it becomes necessary to determine whether substantiality results from structural conditions and whether these are changed by the merger. Intensity and permanence of competition, as well as the strength of the structure-based superior market position have to be predicted.55 This leaves ample room for evaluation and judgment, particularly in the face of ambiguities concerning the interrelation between structure, conduct, and performance.56

On the basis of our findings in the contribution submitted that most of the hypotheses (e.g., the new learning) underlying current antitrust policy in


56 Cf., e.g., Markert, Die Fusionskontrollpraxis des Kartellamts im Wandel?, supra, 180.
the United States cannot for the time being be confirmed unambiguously in empirical terms, we are able to conclude that for the most part these hypotheses represent more or less reinterpretations of traditional findings, although based on a different set of values and beliefs. This applies particularly to the hypothesis underlying current merger policy in the U.S. that market structure is virtually of no importance for the determination of actual conduct within a relevant market. There is no doubt about the notion that deterministic kinds of statements on structure-, conduct-, performance-relationships are of little use. This is not disputed by the adherents of the traditional tenet, however. The knowledge of this deficiency results in the necessity for a comprehensive analysis of the structural factors of a relevant market including actual conduct in ambiguous cases. This implies, for instance, that factors in addition to the ones listed in Sec. 22 para. 1 lit. 2 must be considered. This applies for example to the use of the market stage as a structural criterion for the determination of a dominant position. Contrary to current antitrust policy in the U.S., however, our findings indicate that a structural predominance must be confirmed; at the same time, however, the traditional paradigm faces a rather severe modification as now the emphasis is placed on superior market positions of individual firms rather than on collective domination.

59 It is pointed out, for instance, that there is no need for a merger control in markets that are in an introductory or growth stage because competition will sufficiently control market power. This does not render merger control obsolete in a later stage (e.g., stagnation of a market), cf. Berg, Internationale Wettbewerbsfähigkeit und nationale Zusammenschlußkontrolle, op. cit., 142 ff.; and for a case, Klöckner-Bechorit, op. cit., 1754.
60 Cf. the main results of Part 3 of this contribution.
bb. Oligopolistic Domination

Alternative to a proof of a superior market position on behalf of the merging parties, the confirmation of a market-dominating position can also be conducted by proving the creation or strengthening of an oligopoly, i.e. by collective domination (Sec. 22 para. 2).  

Collective domination via oligopoly encompasses two relevant aspects. Firstly, there is a necessity to analyze the intensity of competition within the oligopoly core, and secondly, we have to determine whether the oligopoly core is exposed to substantial competition by the fringe of firms which do not belong to the core.  

Based on traditional oligopoly theory, it was asserted in the first case that with the emergence of an oligopoly there would be a tendency for mutual interdependence among the oligopolists which would lead to conscious parallelism, i.e. collective monopolist conduct. In the contribution submitted we have found that the studies which attempted to prove the traditional concentration-collusion doctrine were largely flawed due to aggregation biases. We have concluded that individual market dominance rather than collective dominance poses the essential antitrust problem. Thus, with increasing concentration the tendency towards conscious parallelism was not confirmed in general. This implies that additional structural features of the market in the sense of a comprehensive analysis have to be considered in order to provide evidence on whether the potential for conscious parallelism is really increased.  

The German courts allow for these findings by setting relatively high standards concerning the proof that competition within the oligopoly core does

61 Cf. Emmerich, Kartellrecht, op. cit., 272; Pfeiffer, Von der Autokupplung bis zu Chanel No. 5, op. cit., 211 f.
62 This was emphasized again in the context of the Fourth Amendment of the ARC, cf. Markert, Die Fusionskontrollpraxis des Kartellamts im Wandel?, supra, 178.
63 Cf. Regulierungs begründung zum Entwurf eines Zweiten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BTDr. VI/2520, p. 23.
64 The reasoning originally underlying the oligopoly prohibition emphasized only market share aggregation, neglecting decisive structural features which would influence the conduct of the oligopolists in addition, cf. Markert, Die Fusionskontrollpraxis des Kartellamts im Wandel?, supra, 178.
65 Cf. Knöpfle, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 13. It is emphasized that empirical studies often provide evidence against the emergence of conscious parallelism, cf. Markert, Die Fusionskontrollpraxis des Kartellamts im Wandel?, supra, 178.
not exist.\textsuperscript{68} This has shifted the emphasis towards an application of the qualified oligopoly presumption in Sec. 23a para. 2, which reverses the burden of proof to the defendant. Experience thus far shows that even in highly concentrated markets, where the market share presumptions are met, effective competition may still be present, particularly in the context of a specific market stage.

Refutation of the qualified oligopoly presumptions can only be attained by application of structural criteria.\textsuperscript{67} For the prognosis on the development of future intensity of competition the existence of substantial competition before a merger serves as an indicator of whether these competitive conditions will persistently exist after the merger has been performed. Thus there is reference to structural criteria again. There is no tendency in court cases to give up the underlying reasoning.\textsuperscript{68} However, there is a rather wide area of uncertainty regarding the conditions which are thought to provide for substantial competition within an oligopoly. This is the case on the one hand because the conditions providing for substantial competition differ from industry to industry, and on the other, possibly because there is still ambiguity about the nature of the qualified presumptions in Sec. 23a para. 2 ARC.\textsuperscript{69}

As a rule, the refutation is carried out successfully by the defendant on the basis of structural criteria. These include particularly low market barriers, technological developments, specific sales conditions for investment goods, and structural overcapacity in an industry. Whereas for a variety of cases in the retailing sector this refutation was rejected by the FCO, the Berlin Court of Appeals as well as the Federal Supreme Court have reversed a

\textsuperscript{66} Cf. Texaco/Zerssen, WuW/E BGH 2025; and Tonolli/Blei- und Silberhütte Braubach, WuW/E BGH 1824.

\textsuperscript{67} Cf. Emmerich, Kartellrecht, op. cit., 282 f. This policy of the FCO has been affirmed by the Berlin Court of Appeals, cf. Klöckner-Becorit, op. cit., 1749.

\textsuperscript{68} Cf. Emmerich, Fusionskontrolle 1986/87, supra, 366 f., presenting a variety of recent cases decided by the FCO and the Berlin Court of Appeals, notes 127-132. Cf. as well Bundeskartellamt, Tätigkeitbericht 1985/86, op. cit., 59, 63, 70 f., 73, and 93.

\textsuperscript{69} The reasoning underlying the government proposal of the Fourth Amendment tends to view Sec. 23a para. 2 ARC as a rule for per se-prohibition for oligopolists with exemptions by the possibility for refutation, cf. Regierungsbegründung zum Entwurf eines Vierten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BTDr. 8/2136, p. 21 f. In contrast, it is asserted that the provision just provides a relief regarding the burden of proof, cf. Harms, Gemeinschaftskommentar zum GWB, op. cit., § 23a, sec. 233.
great number of these rulings because of structural features which in the Court's opinion would provide for sufficient competition even after the merger.  


71 Cf. Monopolkommission, Hauptgutachten VI ..., op. cit., para. 449; and Springer/Elbe Wochenblatt, WuW/E BGH 1691; and for more cases, cf. Knöpfle, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 8 note 49.

72 Cf. Emmerich, Kartellrecht, op. cit., 270.

73 Cf. Coop Schleswig Holstein/Deutscher Supermarkt, WuW/E OLG 3591 in which the Berlin Court of Appeals has ruled that accretions of 1 or 2% suffice to confirm the strengthening, although circumstances of the individual case have to be taken into consideration; cf. as well Coop/Wandmaker, WuW/E BKartA 2161; and recently, EGWA/L. Fiebig GmbH in the report of the FCO, Bundeskartellamt, Tätigkeitsbericht 1985/86, op. cit., 59.

74 Cf. GKN/Sachs, op. cit.; and Rheinmetall/WMF, op. cit.

**c. Strengthening Market Domination**

All the factors that are used to prove the emergence or existence of a superior market position can principally also be used to prove the confirmation of a strengthening of this position, regardless of the intensity of the strengthening. Confirmation of the strengthening does not necessarily entail proof of a further worsening of competitive conditions. However, there has to be a market relevant impact. This leaves ample room for discretionary judgment.

Concerning horizontal merger cases, confirmation of the strengthening of a superior market position does not pose serious problems, since market shares of the merging parties are added to each other and recalculated on the basis of the disappearance of one business unit. So far, it has been ruled that even marginal market share accretions suffice to generate a market relevant impact.

The problems which arise in confirming a strengthening in a conglomerate case have partly been discussed supra in the context of financial resources. We have emphasized that an analysis of the individual case has to be performed considering the likelihood of anticompetitive effects under actual circumstances. Market interrelatedness and the purpose of the merger (e.g., diversification) are considered to be the relevant criteria. As a rule, the generation of a market relevant impact is assumed in cases of entrepreneur-
rial diversifications but not in cases of financial ones.

We have emphasized that it is undisputed that an accretion of financial resources does not pose a competitive problem per se and thus does not necessarily generate a market relevant impact. It becomes obvious once again that we have to inquire into the actual circumstances of the individual case in the context of a qualitative analysis.\textsuperscript{75}

The so-called toehold-acquisition poses a specific problem in the context of the strengthening of oligopolistic market domination. Legislation has emphasized that a toehold-acquisition may be used as an particular argument for the refutation of the qualified presumption of oligopoly in Sec. 23a para. 2 ARC. As a rule, this does not apply to members of the oligopoly core.

Advantages resulting from an improvement in competitiveness vis-à-vis the market leader have to be balanced against the disadvantage resulting form a deterioration of the competitive situation of the members of the oligopoly fringe.\textsuperscript{76}

III. An Evaluation of the Propositions for a Reform of Merger Control in the Fifth Amendment of the ARC

Although its permanent function as a sort of "constitution of economic order" was emphasized when the German Act Against Restraints of Competition was passed, its public policy objectives are nevertheless based on knowledge from antitrust theory and are thus changeable. Changed economic conditions as well as new knowledge in antitrust theory are basically able to alter this constitution. This applies to the instrument of merger control as well. Thus far, only the German Association of Manufacturers (Bundesverband der deutschen Industrie) seems to have adopted explicitly and without any major modifications the theory and reasoning underlying Chicago School antitrust policy.\textsuperscript{1}

\textsuperscript{75} Cf. Bundeskartellamt, Tätigkeitsbericht 1985/86, BTDr. 11/554, pp. 12 and 61 f., referring to the AEG/Daimler-Benz case; Emmerich, Fusionskontrolle 1986/87, supra, 364, who notes that this is the guiding principle of current application; Markert, Stand und Entwicklungstendenzen des US-Antitrustrechts 1987 ..., op. cit., 222; Monopolkommission, Hauptgutachten VI ..., op. cit., para. 449; and Pfeiffer, Von der Autokupplung bis zu Chanel No. 5, op. cit., 216.

\textsuperscript{76} Cf. Emmerich, Fusionskontrolle 1986/87, supra, 365, who mentions the case AEG/Daimler-Benz.

\textsuperscript{1} Cf. Kantzenbach, The Treatment of Dominance ..., op. cit., 282.
However, with some exceptions this has not led to an attempt to modify the antitrust laws in the direction of Chicago School theory but to an attempt to retain the status quo.2

1. Political and Economic Order: Thoughts on Structural Complementarity

The aim of competition policy as it is understood by German and European Community Law is to maintain or help to establish competitive market structures. In this view, competition is the only means of ensuring that entrepreneurial forces are mobilized and the full potential of the efficiency of firms is exploited. This process leads not only to greater overall economic efficiency and competitiveness, but also to increased consumer welfare. Competition, in this sense, can be viewed as an unlimited sequence of moves and responses in which profits can be seen as a motive for initiation and imitation of economic efforts. The time competition needs to erode these profits indicates the degree of effectiveness of competition, i.e., determines whether competition itself performs its function in a sufficient manner and exerts sufficient competitive pressure which cannot be controlled by the incumbents. Although structure-orientated, this makes it obvious that this view of competition is a dynamic one.3

The maintenance of these competitive structures requires merger restrictions, which should be pre-merger control, as well as a legal instrument for deconcentrating industries. Until now there has been no divorcement instrument under German or European antitrust law; the EEC law contains practically no merger control at all, though the European Court of Justice has just recently pointed out in the Reynolds/BAT case that Art. 85 Treaty of

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3 Besides, the structure-approach is much more conducive to the functioning of a free enterprise system than an approach that tries to control competitors' conduct, cf. Geberth/Janicki, Kartellrecht zwischen Kontinuität und Anpassung, supra, 452 and 458.
Rome might be applied to mergers as well. Besides, the European Commission is pressing on the European Ministerial Council to adopt a merger control system proposed by the Commission in various forms since 1973.\footnote{Cf. BNA, Antitrust & Trade Regulation Report No. 1343, December 3, 1987, p. 863; and Vorschlag einer Verordnung (EWG) des Rates über die Kontrolle von Unternehmenszusammenschlüssen, 38 WuW (1988), pp. 405-412.}

Furthermore, an essential aspect of competition policy is what came to be called by the German ordoliberal economists, the "ordnungspolitische" function.\footnote{Cf., e.g., Möschel, Wernhard, Wettbewerbspolitik aus ordoliberaler Sicht, in: Gamm, Otto Friedrich Freiherr von, et al. (eds.), Strafrecht, Unternehmensrecht, Anwaltsrecht: Festschrift für Gerd Pfeiffer, Köln et al. 1987, pp. 707-725.} This view emphasizes that competition also has a sociopolitical function which should be deemed at least as important in value as its economic function of enhancing consumer welfare. In this sense, competition, acting as a controlling, selecting, and driving force through decentralized decision-making units, becomes the only appropriate counterpart and basic economic principle appropriate for free democratic states because it deprives economic aggregations of their power.\footnote{Cf. Adams, Walter, and James W. Brock, Antitrust and Efficiency: A Comment, 62 NYULR (1987), pp. 1116-1124, 1116; Möschel, Wettbewerbspolitik aus ordoliberaler Sicht, 714 f. Aside from this, the coherent development of fundamental ideas underlying the ARC is another crucial reason why an abrupt reorientation of German antitrust legislation towards Chicago ideals is rather unlikely, cf. Herdzina, Möglichkeiten und Grenzen einer wirtschaftstheoretischen Fundierung ..., op. cit., 37 f.}

To this extent, this view on competition and competition policy coincides with the one that was traditionally put forward by United States antitrust policy in numerous court cases until the early 1970s.\footnote{Cf. Northern Pacific Railway Co. v. U.S., 1958 CCH Trade Cases § 68,961. Cf. as well Schmidt, Ingo, and Jan B. Rittaler, Die Chicago School of Antitrust Analysis: Wettbewerbstheoretische und -politische Analyse eines Credos, Baden-Baden 1986, pp. 37-44.} In these court decisions, based on undisputed economic foundations, competition law was understood as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. The unrestrained interaction of competitive forces, it was argued, would yield the best allocation of the economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic, political, and social institutions.
This fundamental socioeconomic idea has been given up by the Chicago School, which may be viewed as a laisser-faire or "Nihilist" School. In essence, as we have pointed out, this school advocates dismantling the entire institution of antitrust, since competition develops almost of its own accord if the public, the government, and its agencies refrain from taking measures to control and shape it.

Giving up this ordoliberal idea and thus omitting non-economic objectives can have serious effects, since highly concentrated markets lead to decreased flexibility of large companies and to an increase in their (potential) political influence. This may lead to the use of economic power to exercise political pressure in order to get protection from competition or direct government subsidies. Adams and Brock, for instance, have stressed the close links between politics and economic organization, referring to "voluntary" export quotas in the U.S. steel and automobile industries or government subsidies as in the Lockheed or Chrysler cases.11

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8 Cf. the fundamentally different opinion of Edwards, Corwing D., Maintaining Competition, New York et al. 1949, p. 8: "But although the maintenance of competition will not guarantee that the economy will work well, impairment of competition by monopolistic restrictions, public or private, increases the chance that it will work badly"; cf. as well Audretsch, David, Divergent Views in Antitrust Economics, 33 AB (1988), forthcoming; and Möschel, Wettbewerbspolitik aus ordoliberaler Sicht, 714 f.

9 At the other end of the scale is the "Industrial Policy" School - called the "Evolutionary" School in economic literature - which calls for government planning and industrial targeting. Antitrust policy is allowed only a secondary role, if any, as a means of ensuring that planning targets are achieved. These two points of view, both sharing a strong rejection of the need for an active antitrust policy, are adopted with varying degrees of intensity by academic circles, business pressure groups or - as far as the latter school is concerned - mercantilist and Colbertian, bureaucratic planning ideologues who advocate central planning. For profound criticism, cf. Geberth/Janicki, Kartellrecht zwischen Kontinuität und Anpassung, supra, 454-456.

10 Considering the close links between the Chicago School and the Public Choice approach it seems to be curious that Chicagoans often overlook the contradictions between these two mainstream ideologies. Mancur Olson, one of the leading representatives of the Public Choice approach, has pointed to the important macroeconomic policy implications for microeconomic policy in his contribution on "The Rise and Decline of Nations", New Haven, Conn. 1982, at p. 232 in holding that "(i)f combinations dominate markets throughout the economy and the government is always intervening on behalf of special interests, there is no macroeconomic policy that can put things right".

"Contrary to current apologetics, bigness does not meekly submit to the rules of the global competitive game when confronted with the consequences of delinquent economic performance. Instead, giant corporations - often in concert with allied interest groups - reach out to manipulate the state in order to change the rules of the game, to avoid the competitive market's sanctions for poor performance, and to shift them onto society. In reality, bigness mobilizes the vast political resources at its command - funds, employees, executives, labor unions, subcontractors, suppliers, governors and mayors, senators and representatives, Republicans and Democrats - to neutralize global competition through government-imposed import quotas, tariffs, 'voluntary export' restraints, 'orderly' marketing agreements, and the like."

This kind of cooperation between industry, labor, and government leads to an economic oligarchy that strongly resembles that of a centralized planning economy.12

Competition policies in the European Community, the Federal Republic of Germany, and the United States should have nothing in common with these extreme positions. In both continents, one actually departs from the assumption, and accordingly the laws distinctively state as much, that certain forms of behaviour and action by firms are not permissible on grounds of competition considerations. Both sides, it seems, start from the basic idea that, in assessing such matters, economic criteria are ultimately of crucial importance. Competition is an economic phenomenon which is taken as fact. However, legal rules must be drawn up and adopted so as to ensure certainty and clarity as to the meaning of law, and to avoid arbitrariness.

2. The Object of Protection: Competition vs. Competitors

Basic differences concerning the law's object of protection become obvious if one compares the emphasis of 1984 U.S. Merger Guidelines to that of the ARC. Whereas the ARC protects the freedom of competition and thus views competition as a controlling, selecting, and driving force through decentralized decision-making units, current U.S. antitrust policy, although verbally emphasizing competition as the object of protection, puts efficiency considerations in the centre of its concern. Implicitly, a permanent dilemma or conflict between efficiency-enhancement and maintaining competition is

assumed; in contrast, the German legislator did not presume such conflict as the rule.\textsuperscript{13}

The tendency to protect competitors and not competition can also be found in the discussion on the reform of the ARC. In this context, it is held that the competitiveness of firms in the national economy vis-à-vis global competition is much more important than the protection of competition as an institution.\textsuperscript{14} In addition to industrial policy via promotion of sector- or product-orientated innovations, there also seems to be a renaissance of antitrust-specific protectionism. This includes export cartels, legalized cartel-like cooperations and an untrammeled laissez-faire policy towards external corporate growth.

In a general sense, the alleged goal conflict between maintaining competition and enhancing efficiency is not confirmed by the empirical studies reviewed and the conclusions drawn in our contribution. There is no case thus far, that proves the inability of German firms to compete on a global scale because of the strict merger control. Besides, in cases where a real conflict actually occurs the ARC has provided for a solution by a political decision on the part of the German Federal Minister for Economic Affairs. Aside from the aspect of global competitiveness, the aforementioned reasoning presumes that it is not the rigor of competition but relief from that rigor that makes firms more competitive. This argument may easily be reversed, however, by asserting that it was the restrictive cartel law that in the past made German firms competitive on a global scale.\textsuperscript{15}

\textsuperscript{13} The ARC allows for efficiency considerations only in a few exceptional cases, whereas the permanent conflict assumed in the Merger Guidelines led to a more lenient attitude towards competition as an object of protection, cf. the Merger Guidelines of 1984, supra.


\textsuperscript{15} The German foreign trade balance does not show any signs of a weakness concerning the ability of German firms to compete on a global scale; cf. also Stellungnahme der Bundesregierung zum Tätigkeitsbericht des Bundeskartellamtes 1985/86, op. cit., IV.
The same tendency may be confirmed by the argument that small business has to be protected particularly because the legislator considered maintaining a small business structure an objective in itself. However, small business is best protected if the freedom to compete and thus competition as an institution are protected, provided that there are no substantial competitive impairments.\textsuperscript{16}

It can be confirmed that the protection of freedom to compete and the protection of competition as an institution are closely interwoven with each other and that they may not be considered separately without endangering the workability of the competitive mechanism permanently.\textsuperscript{17} A reorientation would thus not improve the functioning of the free enterprise system.

3. An Evaluation of the Proposals on the Basis of Our State of Knowledge

There is as yet no consensus among relevant participating groups in the Federal Republic about whether the German ARC needs a reform by the addition to it of a Fifth Amendment. Nevertheless, with regard to the legal treatment of mergers there are a variety of specific pondering questions. Although we want to present most of the proposals discussed in the context of the Fifth Amendment, we will only evaluate the ones important within the context of the Chicago emphasis in the contribution submitted.

a. The Proposals

Concerning merger control, a variety of proposals for improvement of this instrument in the ARC are currently under discussion by German scholars. Subsequent proposals are either valid for a general reform of merger con-

\textsuperscript{16} For affirmation of this tendency and strong criticism, cf. Geberth/Janicki, Kartellrecht zwischen Kontinuität und Anpassung, supra, 454-456, and 455: "Such a reasoning can neither be based on the history of the Act nor on the ratio legis. It is in strict opposition to fundamental knowledge in antitrust theory on how the competitive mechanism works and faces substantial reservations concerning competition and small business", (translated by the author).

\textsuperscript{17} Cf. Geberth/Janicki, Kartellrecht zwischen Kontinuität und Anpassung, supra, 455; and Immenga, Ulrich, in: Immenga/Mestmäcker (eds.), Gemeinschaftskommentar zum GWB, 4th ed. 1981, note 11 to § 1 ARC.
control or are particularly aimed at preventing concentration tendencies in the retailing sector:18
- Uncoupling the criterion of intervention in sec. 24 para. 1 ARC from the aspect of market dominance;
- a supplementation of the criterion of market dominance in sec. 22 para. 1 ARC;
- a reform of the legal presumptions in terms of secs. 22 para. 3 and 23a para. 2 ARC; and
- a revision of the merger definition in terms of sec. 23 para. 2 ARC.

An uncoupling of the criterion of intervention from the aspect of market dominance has been stated in two forms thus far:

(1) Firstly, the criterion of market dominance should be abandoned and replaced by the criterion of an "essential lessening of competitive conditions". This may either be performed for all mergers, regardless of their size19, or only for large-sized mergers20, or only for mergers having perceived impact in a variety of markets.21

(2) Secondly, a per se-prohibition for large-sized mergers that are in excess of a distinct amount in terms of their revenues should be inserted; such mergers would be permitted only under certain circumstances in analogy to sec. 24 para. 3 ARC.22

18 Cf. Hopt, Merger Control in Germany ..., op. cit., 95-98; Knöpfle, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 15-20; Krakowski, Michael, Aktuelle Probleme der Fusionskontrolle, 66 WD (1986), pp. 67-74; Monopolkommission, Hauptgutachten VI ..., op. cit., 175-192; Schmidt, Ist Größe an sich gefährlich?, supra; and the discussion in Wirtschaftsdienst No. 8 (1986) between Kantzenbach, Schlecht, Graf Lambsdorff, and Jens.


20 Cf. Monopolkommission, Hauptgutachten VI ..., op. cit., paras. 468-483.


22 Cf. Antrag der Fraktion der SPD ..., op. cit.; and Monopolkommission, Hauptgutachten VI ..., op. cit., paras. 469 and 475.
According to the paper of the ad hoc-Council of Experts with the Ministry of Economic Affairs which was passed by the German Cabinett of Ministers, June 29, 1988, the criterion of market dominance in sec. 22 para. 1 ARC should be supplemented by adding three criteria to sec. 22 para. 1 lit. 2:

- a vertical component ("vis-à-vis a substantial number of sellers and buyers") should be introduced in order to emphasize that market dominance is not to be interpreted solely in terms of a horizontal relationship of direct competitors;
- the criterion of "flexibility" should be introduced in order to consider the extreme flexibility of the retailing sector concerning changes in its assortment which are in contrast to the low production flexibility of the manufacturing sector; and
- an introduction of a multi-market view in order to take into account conglomerate power by corporations.

Another area of reform concerns the legal presumptions in terms of secs. 22 para. 3 and 23a para. 2 ARC:

- There is a pressure for a reduction of the market share thresholds given in sec. 22 para. 3 ARC solely for the retailing sector, in order to emphasize that market dominance may emerge at market shares well below the ones indicating market power in the case of the manufacturing sector.23
- Furthermore, the refutability of the legal presumptions concerning the core of an oligopoly in terms of sec. 23a para. 2 ARC should be abandoned so that a check on the relation between the core of the oligopoly and the oligopoly fringe would suffice in order to confirm oligopolistic market domination.

The legal nature of these presumptions is strongly disputed. Although they were meant to exert material influence, from a majority's point of view they are actually of little importance in application in individual cases. In this context, their amendment would only be of a flanking character, i.e. it would be a signal for jurisdiction.

Finally, a revision of the merger definition in terms of sec. 23 para. 2 ARC is being considered in order to treat acquisitions which circumvent the 25

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percent share rule:
- In order to prevent an evasion of merger control a lowering of the share threshold for mergers that have to be notified from 25 to 10% is being discussed. This takes the possibility into consideration that firms may exert a dominating influence on others well below 25% of the share.
- This sort of formal merger definition is to be supplemented by a material one, i.e. instead of setting the threshold at a distinct predefined market share level, what should really be done is to emphasize the possible "competitively significant impact of a firm on another".

b. The Evaluation

The AEG/Daimler-Benz merger has revived the discussion on the evils of corporate size once again and led to proposals to abandon the criterion of market domination and substitute for it the criterion of a "substantial lessening of competitive conditions" in order to be able to treat possible evils. Although sec. 23a para. 1 lit. 2 ARC contains a provision or presumption aiming at absolute firm size this does not free the FCO from the duty of proving market domination in the individual case. This has rendered the rule ineffective concerning a vast number of large sized, particularly conglomerate mergers.

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24 Cf. Antrag der Fraktion der SPD ..., op. cit.
Anticompetitive effects of large sized mergers, such as an accumulation of resources, potential for predation, effects of reciprocal dealings and the like, are treated only insufficiently by the current concept of market domination. This is also the case, e.g., because of the necessity of providing distinct proof of the use of financial resources in the individual case.28 Furthermore, strong doubts have to be advanced on whether the market domination concept is able to comprehend the political dimension of such large-sized mergers29, particularly against the background of the fact that these conglomerations often represent a large proportion of relevant economic quantities nationwide, which tends to enlarge their political influence overproportionately.30

However, there are some doubts about whether an uncoupling of the merger prohibition from the market domination criterion is the appropriate instrument for a general improvement in merger control. Theoretically, the level required for an intervention against mergers would be lowered; however, the U.S. American experience shows that indeterminate legal criteria often tend to grant large free areas for discretionary judgment to enforcement agencies and the courts, and that this might even lead to a relaxation of a strict enforcement. Furthermore, the pressure of public opinion and political lobbyists on this potential for discretionary judgment has to be considered se-

28 Cf. Immenga, Zusammenschlüsse zwischen Großunternehmen ..., op. cit., 191 f.; Mestmäcker, Zur Fusionskontrolle in der Wettbewerbspolitik, supra, 184; Monopolkommission, Hauptgutachten VI ..., op. cit., paras. 470.  
29 Cf. Immenga, Zusammenschlüsse zwischen Großunternehmen ..., op. cit., 188 f. and 193; Kantzenbach, Großfusionen bedürfen einer expliziten politischen Legitimation, supra, 381; Krakowski, Aktuelle Probleme der Fusionskontrolle, supra, 72. Cf. as well Knöpfe, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 17 f., who considers this an irrelevant aspect.  
30 Cf. the remarks of the CEO of Daimler-Benz, Edzard Reuter, at the International Cartel Conference Berlin 1986, who holds that his company accounts for 5 to 10% of the total of corporate income tax revenues of the Federal Republic and that 3.8% of the employees in the manufacturing sector in Germany are employed by the Daimler-Benz Company, cf. Hansen, Knud (ed.), Firm Size and International Competitiveness, Proceedings of the International Cartel Conference Berlin 1986, Berlin 1987, pp. 60-77, 61 f. Global competition does not deprive such conglomerations of their power, since elections are conducted on a national basis and the unemployment argument always convinces politicians in the case of large firms and during sensitive election periods.
Certainly, this applies in the general case and it is questionable whether it would necessarily be otherwise in cases of large-sized mergers. In terms of undesirable economic consequences, uncertainty in the treatment of these mergers would remain.

As is clear from our conclusions, a general uncoupling from the criterion of market dominance may not be justified from an economic point of view. However, such a case can be made for large-sized conglomerate mergers because of the serious problems in comprehending their anticompetitive economic consequences and their potential for a negative sociopolitical impact. This would best be taken care of by amending sec. 24 para. 1 by inserting a second sentence which reads as follows:

"In case of neither horizontal nor vertical merger, the Cartel Authority is also entitled to the competences enumerated in the subsequent provisions if the merger is expected to result in a substantial impairment of competitive conditions in a multitude of markets."

The advantage of such a ruling would not only be an improved comprehension of large-sized conglomerate mergers but also a potential for the FCO to employ a comprehensive view because of the low number of such mergers.

On the basis of our findings, an improved comprehension of anticompetitive consequences of vertical mergers can also be attained by attaching importance to horizontal aspects at both levels of the markets affected. However, this would not make necessary an uncoupling of the intervention criterion from market domination. The intention would rather be taken into account by amending Sec. 22 para. 1 lit. 2 ARC, which is primarily aimed at horizontal relations, by a vertical component as follows (insertion in italics):

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31 Cf. Knöpfle, Aktuelle Probleme der Zusammenschlußkontrolle, supra, 16; Mestmäcker, Zur Fusionskontrolle in der Wettbewerbspolitik, supra, 184; cf. the special vote of the member of the MC, Murawski, Monopolkommission, Hauptgutachten VI ..., op. cit., para. 482; Schlecht, Ein neuer Ordnungsrahmen ..., op. cit., 38.


33 This proposal for an amendment is based on an idea by Greiffenberg, Strukturentwicklung und Konzentration ..., supra.

34 This is based on the idea of the ad hoc-Council of Experts with the Ministry for Economic Affairs, who want to supplement the criterion of market dominance in sec. 22 para. 1 lit. 2 ARC by a vertical component ("vis-à-vis a substantial number of sellers and buyers").
"(1) An enterprise is market dominating within the meaning of this Act insofar as, in its capacity as a supplier or buyer of a certain type of goods or commercial services,

1. ... 
2. it has a dominant market position in relation to its competitors or vis-à-vis a substantial number of sellers and buyers; for this purpose, in addition to its share of the market, its financial strength,..."

The provision should be introduced in order to emphasize that the evaluation of vertical market relations must also include power considerations in horizontal terms, and vice versa, and thus be interpreted in terms of competitors in subsequent or preceding levels of the market.

Strong doubts have to be raised as to whether the political influence of large economic conglomerations may be effectively stopped by an uncoupling from the criterion of market domination. In this context it seems much more effective to take into consideration a per se-prohibition of large-sized mergers because their political influence transcends economic market domination reflections. This is especially so, since efficiency increases of such large mergers are limited in their scope and as a rule rather unlikely. Furthermore, their political influence may not be comprehended accurately, although it is undoubtedly existent.35

Because large-sized mergers have economic and anticompetitive consequences they are subject to review by cartel law. However, one has to be aware of the per se-prohibition of large-sized mergers being a matter of sociopolitical

choice, since outside of the market domination concept such a decision can hardly be based on economic knowledge.36

If such a per se-prohibition for large-sized mergers is taken into consideration, a strong case can be made against an escape clause which acts in favor of well-defined exceptions in analogy to sec. 24 para. 3 ARC, since a serious danger results from lobbyists exerting pressure for the purpose of influencing the decision in order to receive political privileges. This argument is even strengthened by the fact that such political decisions cannot be reviewed by the courts.37 Because such a prohibition has a political character the decision on the criterion of prohibition seems rather subjective. However, a plausible case can be made for the prime one hundred firms in a national economy being subject to such a ruling. This would mean that firms with sales more than or equal to 1% of the gross domestic product (GDP) would be subject to such a ruling.38 Combined with a cap-and-spin-off concept, this would to some extent include considerations of efficiency and diversification on the part of the merging parties and considerations of overall structural change in the national economy.39 Apart from this, the possibility for internal corporate growth remains untouched. Such a cap-

38 Cf., e.g., Jens, Großfusionen ..., supra, 390, who emphasizes that this ruling could be modified by the so-called cap-and-spin-off conception which would provide for a refutable presumption in cases of sell-offs of parts of the merging firms. This was originally provided for by the Kennedy Bill in the United States, cf. Monopolkommission, Hauptgutachten VI ..., op. cit., para. 478.
and-spin-off concept must furthermore include an amendment of corporate and tax laws, as well as an amendment of the legal framework for the market of corporate control.\footnote{Cf. Stellungnahme der Bundesregierung zum Tätigkeitsbericht des Bundeskartellamtes 1985/86, op. cit., III f.; Immenga, Zusammenschlüsse zwischen Großunternehmen ..., op. cit., 192 and 198.}

The reduction of the market share thresholds given in Sec. 22 para. 3 ARC is solely aimed at the retailing sector. Its purpose is to emphasize that market dominance may emerge at market shares well below the ones indicating market power in the case of the manufacturing sector. However, a change in these thresholds can also serve the general purpose of making a possible conflict between efficiency increases and maintenance of sufficient competitive pressure less likely by differentiating the thresholds which serve as refutable legal presumptions. This has to be accompanied by shaping the burden of proof. As we have noted supra, the presumptions are virtually of little material importance in application. In this context, their amendment would only be of a flanking character, i.e. it would constitute solely a guide and signal for jurisdiction.

Furthermore, this particular problem has to be viewed in the context of the European Economic Community (EEC), since the Community's Commission presented a proposal for legislation on merger control.\footnote{Cf. Vorschlag einer Verordnung (EWG) des Rates ..., supra, pp. 405-412.} This proposal will have to be considered binding for the Member States if the proposal is accepted by the European Council because Community Law represents supranational law und thus precedes national law.\footnote{The proposal prohibits mergers that create or strengthen a market dominating position in the Common Market or in a substantial part of it (criterion of intervention). A merger is considered compatible with the Common Market if the joint market share of the combining firms is less than 20% of the Common Market or a substantial part of it. The latter criterion also serves as a refutable presumption.}

IV. Concluding Remarks

The derivation of conclusions from the developments in the United States for the Fifth Amendment of the German Act Against Restraints of Competition is justified by the basic comparability of the two bodies of law.

Whereas the German law contains so-called minimum thresholds that are supposed to determine at what point mergers are sufficiently relevant to merit...
legal scrutiny, the U.S. antitrust statutes have no such minimum thresholds. However, minimum thresholds are created by the antitrust enforcement agencies such as the Merger Guidelines of the Antitrust Division of the Department of Justice by means of administrative enforcement rules, making explicit the circumstances under which the agencies start legal scrutiny.

Only German law contains overall justifications which specify the defenses which are available in order to have an illegal merger exceptionally declared legal. The merger can be declared legal by the German Federal Minister for Economic Affairs if the detrimental effects on competition are outweighed by overall economic advantages or justified by an overriding public interest. The U.S. statute does not contain such an arbitrary disposition; however, the efficiency defense is used by the Antitrust Authorities increasingly.

There is a restrictive position applying the ARC towards a tendency to increase the use of economic evidence in general, and with efficiency considerations in particular, because of the ambiguous nature of the latter. This reasoning is affirmed by recent adjudication, which is rather unwilling to accept economic evidence contrary to recent tendencies in U.S. enforcement and jurisdiction. This applies to a variety of developments:

(1) Concerning the definition of the relevant market, attempts to extract precise numerical values for these elasticities in addition to a 'soft' and qualitative evaluation of the substitution possibilities is unrealistic simply because it is unfeasible. This is why attempts in current U.S. antitrust policy to introduce such a quantitative analysis are not adopted. Contrary to widespread opinion, the international competitiveness of German firms is taken into account by current market delineation procedure and particularly by the comprehensive view applied. This makes it unnecessary to adopt the current policy approach in the U.S., which attempts to take into consideration foreign competition directly through the definition of the relevant market. In addition, in case of a conflict between maintaining competition and ensuring the ability to compete internationally the Federal Minister of Economics may grant an exemption according to sec. 24 para. 3 ARC.¹

¹ It should be noted that there have only been four cases since 1973 where this justification for a merger was put forward by the merging firms, cf. Bundesministerium für Wirtschaft, Erfahrungsbericht über Ministererlaubnis-Verfahren bei Firmen-Fusionen, 36 WwW (1986), pp. 788 ff.
(2) On the basis of our results in the contribution submitted we have found that market structure is important for the determination of actual conduct within a relevant market. Contrary to current antitrust policy in the U.S., our findings indicate that a structural predominance is to be confirmed, although the traditional paradigm faces a rather severe modification, which now puts emphasis on superior market positions of individual firms rather than on collective domination. The general criticism on the role that market share and relative market share play as legal presumptions seems inappropriate.

(3) In Germany it is still undisputed that an accretion of financial resources does not pose a competitive problem per se and thus is not necessarily detrimental to competitive conditions. But even if it was confirmed that conglomerate mergers were unharmful as a rule, this does not provide evidence that the accretion of financial resources in combination with a market dominating share can equally be evaluated as unharmful. This calls for a case by case analysis. The disappearance of the use of the entrenchment-doctrine in U.S. enforcement and adjudication in the U.S. has not (yet) initiated such a tendency in German antitrust policy.

(4) In contrast to the theory guiding U.S. antitrust policy, the existence and height of market barriers have been sufficiently considered in actual merger cases in German antitrust policy and there seems to be no dispute that they have to be considered if they exist. This also applies to the case of international competition, which we have emphasized in the context of the relevant market. It is often asserted that the globalization of competition renders the market barriers concept obsolete because there is always sufficient competitive pressure. Nevertheless, despite that liberalization, meaningful legal and factual barriers to new competition do exist which tend to impede sufficient competitive pressure in such cases. In this context, it is of crucial importance to what extent the national market is interwoven with international competition and what the circumstances of the individual case are.

Thus far, there is no adoption of the somewhat more lenient line of U.S. antitrust policy in the context of mergers and there is no necessity to follow this trend.

There is no doubt about the notion that deterministic kinds of statements on structure-, conduct-, performance-relationships are of little use. This is not disputed by the adherents of traditional theory, however. This knowledge
points to the necessity for a comprehensive analysis of the structural factors of a relevant market including actual conduct in ambiguous cases. This entails, for instance, that factors in addition to the ones listed in para. 22 sec. 1 lit. 2 are to be considered. This applies for example to the use of market stage as a structural criterion for the determination of a dominant position.

An essential aspect of competition policy is, as it came to be called by the German ordoliberal economists, the "ordnungspolitische" function. This view emphasizes that competition also has a sociopolitical function which should be given at least as much importance as the economic function of enhancing consumer welfare. In this sense, competition, acting as a controlling, selecting, and driving force through decentralized decision-making units, should be seen as the only appropriate counterpart and basic economic principle appropriate for free, democratic states, since it deprives economic aggregations of their economic power.

Surrendering this ordoliberal idea and thus omitting non-economic objectives can have serious effects, since highly concentrated markets lead to a decreased flexibility of large companies and to an increase in their (potential) political influence. This may lead to the use of economic power for exercising political pressure in order to get protection from competition or receive direct government subsidies.

In current U.S. antitrust policy a permanent dilemma is implicitly assumed between efficiency-enhancement and maintaining competition; the German legislator, by contrast, has not presumed such a conflict as a rule. In a general sense, the alleged goal conflict between maintaining competition and enhancing efficiency is not confirmed by the empirical studies reviewed and the conclusions drawn in our contribution. There has not thus far been any case which demonstrates the inability of national companies to compete on a global scale because of the strict German merger control.

The same tendency may be confirmed in the argument that small business has to be protected particularly because the legislator considered maintaining a small business structure an objective in its own right. However, small business is best protected if freedom to compete, and thus competition as an institution, is protected, provided that there are no substantial competitive impairments.
Concerning merger control, the subsequent proposals for improvement of this instrument that are currently being discussed by German scholars may be evaluated as follows:

(1) There are some serious doubts as to whether an uncoupling of the merger prohibition from the market domination criterion is the appropriate measure for a general improvement of merger control. However, such a case can be made for large-sized, particularly conglomerate mergers because of the serious problems in comprehending their anticompetitive consequences. This would best be taken care of by prohibiting any merger if it "is expected to result in a substantial impairment of the competitive conditions in a multitude of markets."

(2) An improved comprehension of the anticompetitive consequences of vertical mergers can be attained by attaching importance not only to the vertical aspects of such mergers but also by taking into consideration the horizontal conditions and structural features of the markets affected. This is best taken into account by amending the law such that an enterprise is also viewed as market dominating if it has a paramount market position "vis-à-vis a significant number of sellers and buyers".

(3) It seems effective to consider a per se-prohibition of large-sized mergers because their political influence transcends economic market domination reflections. A plausible case can be made for firms with sales more than or equal to 1% of the gross domestic product (GDP) to be subject to such a ruling. Combined with a cap-and-spin-off concept, this would to some extent entail considerations of efficiency and diversification on the part of the merging parties and considerations of overall structural change in the national economy.

The reduction of the market share thresholds in Sec. 22 para. 3 ARC can serve the purpose of making a possible conflict between efficiency increases and maintaining sufficient competitive pressure less likely by differentiating the thresholds which serve as refutable legal presumptions.

However, this particular problem has to be viewed in the context of the EEC, since its Commission presented a proposal for legislation on merger control.
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