FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS
ARBITRABILITY OF ANTITRUST CLAIMS: RECENT DEVELOPMENTS

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Erosion of a Doctrine

Until recently, it was generally understood that predispute agreements to arbitrate federal antitrust issues were not enforceable. The leading case was *American Safety Equip. Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), which held that the public function of a private antitrust suit - a function analagous to that of the attorney general and intended to supplement government resources for prosecution of antitrust offenses was so important that a private party could not be permitted to "bargain away" its right to bring such an action. The court believed that arbitration might not be sufficient to vindicate the important rights contained in the antitrust laws.

However, the ruling in *American Safety* was significantly undermined in the 1985 Supreme Court decision of *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985). The Supreme Court determined that an American court should enforce an agreement to resolve antitrust claims by arbitration when the agreement is part of an international commercial transaction.

In reaching this conclusion, the Supreme Court first noted the existence of the liberal federal policy favoring arbitration agreements as expressed in the *Federal Arbitration Act*, 9 U.S.C. ss.1 et. seq., and cases decided under it. It saw no reason to bar arbitration of claims merely because they were based on statutes unless Congress intended that the statutory claim not be arbitrable. According to the Supreme Court, this intention must be discernible from the text, history or purposes of the statute. The court found that Congress did not intend to bar enforcement of the predispute arbitration agreement at issue. It concluded that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" required enforcement of the arbitration agreement.

Further, the court "confessed to some skepticism of certain aspects of the *American Safety* doctrine." First, the Supreme Court observed that the mere appearance of an antitrust dispute does not validate an assumption that the contract may be one of adhesion. A party resisting arbitration may directly attack the validity of the agreement to arbitrate; however, until the agreement's invalidity is proven, the court ruled that there should be no assumption that the arbitration clause is tainted.

Second, the court noted that the potential complexity of an antitrust dispute should not suffice to ward off arbitration. The hallmarks of modern-day arbitration - adaptability and access to expertise - persuaded the court that an arbitral tribunal could properly handle an antitrust matter. Third, the court rejected the proposition that an arbitration panel would be innately hostile to the constraints posed by the antitrust laws.

Finally, the Supreme Court turned to the "core of the *American Safety* doctrine - the fundamental importance to American democratic capitalism of the regime of antitrust laws." The court noted that because a private plaintiff could obtain compensation, including treble damages, outside the courts, both the compensatory and deterrent functions of the *Clayton Act* would be served by arbitration. Moreover, the court observed that there is no reason to assume that international arbitration would not provide an adequate mechanism to resolve a dispute. To the contrary, the court stated that the tribunal would be bound to decide a dispute in accord with the national law

giving rise to the claim, thereby effectively vindicating the litigant's statutory antitrust cause of action in the arbitral forum.

Related Developments in Securities Law

In the area of securities law, the doctrine of nonarbitrability has also been eroded. This will have an impact in the antitrust field. The 1987 Supreme Court ruling in *Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. 2332 (1987), held that claims under the *Securities Exchange Act* of 1934 were arbitrable. At issue was the arbitrability of claims under ss.10(b) of the *Securities Exchange Act* and the *Racketeer Influenced Corrupt Organizations Act* (*RICO*). The court emphasized the federal policy favouring arbitration, thus requiring a rigorous enforcement of agreements to arbitrate.

Additionally, the court provided that the *Arbitration Act's* mandate that agreements to arbitrate statutory claims be enforced could be overridden by contrary Congressional command; however, the burden would be on the party opposing arbitration to show that Congress intended to preclude waiver of judicial remedies for the statutory rights at issue. The Supreme Court determined that Congress did not intend for *RICO* or the *Exchange Act* to bar enforcement of predispute arbitration agreements.

The court, in reaching its decision in *Shearson*, relied heavily upon its rationale in the *Mitsubishi* antitrust case. It was noted that "although the holding in *Mitsubishi* was limited to the international context...much of its reasoning was equally applicable" to the claims at bar. The application of the *Mitsubishi* rationale to the *Exchange Act* and *RICO* claims was a strong indication that there would be future expansion of arbitration enforcement in the domestic context of antitrust litigation. And, indeed, numerous courts have adopted the *Mitsubishi* rationale in order to compel arbitration of domestic antitrust claims.

Arbitration of Domestic Antitrust Claims

In 1986, a district court decided in *Genna* v. *Lady Foot International, Inc.*, 1986-2 Trade Cas. (CCH) 67, 317 (E.D. Pa Jan. 1986), that the Supreme Court's reasoning in *Mitsubishi*, which was limited to international antitrust disputes, dictated a similar conclusion in the domestic context. The *Genna* court decided that unlike foreign arbitrators who have little or no experience with or exposure to U.S. law and values, domestic arbitrators would have the benefit of that background, and a domestic arbitral tribunal, engrained with American antitrust jurisprudence, would be far better suited to vindicate the statutory causes of action than an international tribunal. Accordingly, the *Genna* court compelled arbitration in a context of a domestic antitrust claim.

The following year, the proposition that domestic antitrust claims were subject to arbitration was further supported by another lower court's ruling in *Gemco Latinoamerican, Inc.* v. *Seiko Time Corp.*, 671 F.Supp. 972 (S.D.N.Y. 1987). The *Gemco* court determined that none of the justifications for the *American Safety* doctrine retained their vigor after the Supreme Court rulings in *Mitsubishi* and *Shearson*. The *Gemco* court observed that the 1986 *Shearson* decision "continued a trend toward increased recognition of the federal policy favoring arbitration and away from the predicate of the *American Safety* doctrine." Hence, it was concluded that although the holding in *Mitsubishi* was limited to international transactions, its reasoning would apply with equal force in the domestic context.

Additionally, *N.Y.C. Discount Shoe Co., Inc.* v. *Coray Management, Inc.*, Nos. 87-0790, 87-0828 (E.D. Pa 1987), provided that the holding in *Mitsubishi* foreclosed a finding that Congress intended the *Sherman Act* claims to be nonarbitrable. This court was compelled, as a matter of law, to find the domestic antitrust claims arbitrable based upon the Supreme Court's ruling in *Mitsubishi* and its refutation of *American Safety's* policy-based rationale.

The trend toward compelling arbitration of domestic antitrust claims was also upheld by a 1988 district court ruling in *Chicago Tribune Co.* v. *Palermo, et al.*, Nos. 88-C-0172, 88-C-0321 (N.D. Ill. 1988). This court based its holding on the same reasons stated by the Supreme Court in *Mitsubishi*. Since it was determined in *Mitsubishi* that the compensatory purpose of the antitrust laws would not be undermined by international

arbitration, the *Chicago Tribune* court, likewise, concluded that domestic arbitration would not inherently conflict with the compensatory purpose of the antitrust laws. Thus, the court decided that domestic antitrust claims should be arbitrable.

Conclusion

The 1986 *Genna* decision evidenced a significant trend, now underscored by other courts, providing for arbitration as an alternative to traditional federal court litigation of both international and domestic antitrust claims. The Supreme Court's decision in *Mitsubishi* found it unnecessary to assess the legitimacy of the *American Safety* doctrine with respect to arbitration agreements arising from domestic transactions. However, as evidenced from the foregoing cases, the holding in *Mitsubishi* has now been expanded into domestic antitrust transactions.

It has been argued that the 1987 ruling in *Gemco* and other similar cases should not be viewed as the beginning of an assault on other manifestations of the public policy of antitrust enforcement by the federal courts. Goldfein, Shepard and Stoll, Neal R., "Arbitration of Domestic Antitrust Claims," *N.Y. Law Journal*, Vol. 199, No. 11, col. 1, p. 1, Jan. 19, 1988. Rather, the argument goes, *Gemco* and its successors should be read as a demonstration that the public policy inherent in antitrust enforcement by the federal courts must occasionally bend in favor of other important public policies.

Although this may be true, there are strong reasons to assume that the rationale of *Mitsubishi* will continue to be applied to domestic antitrust disputes. First, in *Mitsubishi*, the court ruled that a party should be held to its bargain to arbitrate unless Congress exhibited an intent in the text of the statute or the legislative history to exempt a statutory claim for arbitration. No such intent is apparent in the text or legislative history of the antitrust laws.

Second, the discussion in *Mitsubishi* makes it clear that arbitrators deciding antitrust claims can grant treble damages to successful plaintiffs. Therefore, both the compensatory and deterrent purposes of the antitrust laws are met through use of the arbitral tribunal.

Third, parties frequently resort to arbitration in hopes of streamlining dispute resolutions, saving effort and expense. Compelled arbitration would, arguably, alleviate the burdens of an already overloaded federal court system while saving the parties time and expense.

Finally, domestic arbitrators, unlike foreign arbitrators, are likely to have familiarity with U.S. antitrust laws as well as exposure to the notions of free competition. The domestic arbitrator's experience would arguably enhance the litigant's statutory antitrust cause of action.

In summary, absent Congressional legislation to the contrary, it is likely that arbitration enforcement will continue to expand within the arena of both international and domestic antitrust claims. The courts appear to be adopting a public policy favoring arbitration as an alternative dispute resolution at the expense of the long-standing policy of judicial enforcement of the federal antitrust laws.

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EXTENDING THE FRAMEWORK OF COMPETITION: THE SEVENTH REPORT OF THE GERMAN MONOPOLIES COMMISSION*

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Among the sweeping changes of the 1973 amendments to the GWB[1] was the creation of the Monopolies Commission. It is an independent commission which monitors concentration and competition in the German economy and makes recommendations where deemed necessary. As part of its mandate, the Commission submits a biennial report to the federal government. The *Seventh Report*[2] covers the 1986/1987 period and deals with the following topics.

- levels and trends of product concentration, industry concentration, and aggregate concentration (chs. I-III);

- dominant firms and merger control (ch. IV);
- competition and concentration in the media (ch. V);
- regulation and competition in the insurance sector (ch. VI);
- commercial law and concentration (ch. VII);

The present discussion will concentrate on Chapters I-IV.

Product Concentration

Concentration data are provided for 1986 and for the 300 largest of a total of 849 product classes in mining, manufacturing, and construction; the reference measure is value of production. Concentration is measured in terms of concentration ratios (CR's) for the 3,6,10,25 and 50 leading firms, the Hirschman-Herfindahl Index (HHI), and the coefficient of variation.[3] A classification of concentration levels in terms of HHI[4] shows high concentration in 59 product classes, moderate concentration in 51 product classes, and low concentration in 190 product classes (para. 176).[5] Trends of product concentration can be traced back to 1978 for 249 comparable product classes HHI had increased in 118, declined in 105, and was virtually unchanged in 26 product classes (para. 249).

Industry Concentration

As in previous reports of the Commission, 1985 data on industry concentration were assembled by the Federal Bureau of Statistics and then transmitted to the Commission for presentation and analysis.[6] Unfortunately, this analysis is seriously impeded for two reasons, *viz* (i) disclosure rules, and (ii) definition of the statistical unit. To begin with, it would appear that the confidentiality requirements to prevent disclosure of information on individual firms in concentration statistics have been unduly tightened by the Federal Bureau of Statistics in recent years: in 1985, publication of CR_3 was withheld for 123 of the 233 4-digit industries in mining, manufacturing, and construction (suppl., table II.1); this 53% withholding rate compares to only 24% in 1977.[7] Similarly, publication of HHI was withheld for 18% of all industries in 1985 vs. 8% in 1977; this is the more surprising since HHI as a summary measure of concentration should not be affected by disclosure rules. An equally bleak scenario applies to the publication of CR_3's for 2-digit major industry groups.[8] All this has led the Monopolies Commission to the involuntary cancellation of discussion and analysis of levels and trends of industry concentration (paras. 216-217, 226). In order to overcome the problem of withholding of concentration data, the Commission recommends an amendment to the federal *Statistics Act* to get access to confidential data for analysis and review without divulging information on individual firms (para. 32).

The analysis of industry concentration levels and trends is also affected by an obstacle of a methodic nature. Concentration data are systematically understated since the statistical unit is the firm as a legal unit rather than the firm as an economic unit. This means that control of firms in terms of inter-firm ownership links, be that majority control or minority control, is excluded.[9] In an era of ever-rising merger activity and multi-industry enterprises, the resulting downward bias of the concentration data is on an increasing scale. Regrettably, there are no indications of procedural changes. This is in stark contrast to industry-concentration data published by Statistics Canada and by the U.S. Bureau of the Census which include majority control. Another bias in the data on industry concentration occurs because of the omission of firms with fewer than 20 employees (food and beverages: fewer than 10 employees), albeit an almost insignificant overstatement of the concentration data.

Aggregate Concentration

The section in the *Seventh Report* dealing with aggregate concentration is a marvel and is unparalleled both in terms of detail of data presentation and in-depth analysis. The Commission assembles data on the leading firms from published sources and, where needed, via direct inquiries from the firms. This direct route is necessary because - unlike the situation in North America - noncorporate businesses are still strongly represented among the leading firms in the German economy. Among the Top 100[10] of 1986, there were 12 noncorporate firms, such as

general partnerships, limited partnerships, and foundations (para. 310). However, it must be noted that, according to the *Publicity Law* of 1969, large noncorporate firms and large private limited companies have to publish financial statements when certain size criteria are met.[11] Yet, the *Publicity Law* did not apply the same stringent requirements for the publication of consolidated financial statements as they exist for joint-stock companies (para. 250). Thus, the Commission has to piece together the missing inter-firm ownership links by survey and, in case of non-response, by estimation (para. 251). More recently, new horizons on the publicity front opened up with amendments to the *Commercial Code*: as of 1987, all private limited companies are required to publish financial statements, not just the large ones.[12] This means that all corporations (joint-stock companies and private limited companies) and large noncorporate businesses must now publish financial statements, an increase from the former 2,500 firms to more than 350,000 firms (Suppl., para. 110).

Concentration data are based on consolidated enterprises and, thus, incorporate ownership links in terms of majority-controlled domestic subsidiaries included in the parent company's consolidated accounts. The Commission's efforts to provide a comprehensive and detailed perspective on the position of the Top 100 has been manifested in the publication of Fortune-Directory-type lists since 1978, along with the respective industry or divisional totals. This procedure allows the calibration of any concentration ratio ranging from CR_1 up to CR_{100} or lower, where applicable; only the highest concentration ratio is published by the Commission. In addition, arrivals to, and departures from, the list *vis-à-vis* the previous reporting period are indicated.

The presentation of aggregate concentration is in two parts, *viz.* (i) for economic divisions, and (ii) for the entire economy. The first part deals with:

- sales concentration of the top 100 industrial firms [energy (electricity & gas), mining, manufacturing, and construction];
- sales concentration of the top 20 trade firms;
- asset concentration of the top 10 banks;
- concentration of premium revenue of the top 10 insurance firms; and
- sales concentration of the top 10 transportation and service firms (excl. the publicly-owned federal railways and the postal service).

A calibration of common reference measure in terms of CR_{10} indicates 1986 concentration levels to be highest for banking (36.6%), followed by insurance (35.0%), industry (15.1%) trade (6.9%),[13] and transportation and services (6.5%) [pp. 96-107]. A cross-sectional comparison of 1978/86 concentration trends indicates rising concentration in industry only (1.6 points), whereas concentration declined in insurance (2.5), transportation and services (1.3), banking (0.7), and trade (0.7).

The Commission's presentation of aggregate concentration for the entire economy is true "overall concentration" since it refers not only to non-financial sectors, as North American statistics do, but includes financial firms as well. The reference measure is value added which makes an inclusion of (i) goods production and services, and (ii) non-financial and financial firms economically meaningful. The analysis of the Top 100 includes:

- the 1986 Top 100 list, by value added, presenting data on value added, employment, fixed assets, and cash flow;
- a rank-shift analysis *vis-à-vis* the 1984 list;
- the economic importance of the Top 100 in terms of 1986 concentration levels and 1978/86 concentration trends (CR_{100}) and 1970/86 concentration trends (CR_{10});
- the legal organization of the Top 100;
- the ownership of, and ownership links among, the Top 100;
- interlocking directorates of the Top 100; and
- merger activity of the Top 100.

The composition of the 1986 list, by economic division, indicates the overwhelming economic importance of the manufacturing sector in terms of firm size: there were 65 manufacturing firms among the Top 100, 9 financial firms, 8 trade firms, 7 energy firms, 3 firms each in mining, construction, and services, and 2 transportation firms. Thus, it comes as no surprise that the top firm is a manufacturer (Daimler-Benz), and there are 9 manufacturers among the Top 10; the

largest mining firm is no. 4 (Ruhrkohle), the largest energy firm is no. 12 (REW), the largest financial firm is no. 13 (Deutsche Bank), the largest transport firm is no. 22 (Deutsche Lufthansa), the largest trading firm is no. 28 (Karstadt), the largest service firm is no. 40 (Bertelsmann), and the largest construction firm is no. 65 (Hochtief).

What about the relative importance of the Top 100? In 1986, the Top 100 accounted for 18.8% of total value added, slightly down from 19.3% in 1978, but marginally up from 18.7% in 1984. A breakdown of the Top 100 by deciles indicates that only the first decile, i.e. the Top 10, registered a substantial increase of their share of value added during 1978/86, *viz.* from 7% to 7.7%; for all other deciles, the respective shares either declined or remained virtually unchanged (para. 292). The increase of CR_{10} between 1984 and 1986 can be attributed almost entirely to the overproportionate growth of Daimler-Benz, which replaced Siemens as the top firm in 1986: value added of Daimler-Benz increased by 80% during 1984/86 *vis-à-vis* 11% for all firms, 12% for the Top 100, and 18% for the no. 2 firm of 1986, Siemens. At an 18% growth rate, Daimler-Benz would have remained the no. 2 in 1986 and, more importantly, CR_{10} would have declined from 7.3% in 1984 to 7.1% in 1986, when it, in fact, climbed to 7.7%. Looking at Daimler-Benz's rather modest growth during 1980/82 (10% and 1982/84 (1.5%), it is not surprising to learn that its phenomenal growth during 1984/86 was exclusively fuelled by the acquisitions of three members of the 1984 Top 100, *viz.* AEG (no. 17), MTU Motoren- und Turbinen-Union Muenchen (no. 77), and Dornier (no. 85). Recently, Daimler-Benz's position as the undisputed no. 1 has been reinforced by the assumption of a 30% stake in Messerschmitt-Boelkow-Blohm (no. 24), the lone German aerospace firm and partner in the European Airbus consortium.[14] On an international scale, the acquisition lifted Daimler-Benz to the 10th rank among the world's leading industrial enterprises.[15]

Turning to the ownership of the Top 100, a total of 59 firms is under majority control, among them are 23 privately-held firms, 18 foreign-owned firms, and 14 firms in public ownership (para. 325). The foreign-owned firms include the giant subsidiaries of IBM (no. 15), Ford (no. 16), and General Motors (Adam Opel, no. 19). Public corporations among the Top 100 consist mainly of energy and mining firms.[16] Unfortunately, an identification of minority-controlled firms among the Top 100 is missing. However, the Commission classified 16 firms as being owned by a number of significant minority holdings which, in 8 cases, add up to majority control (para. 325). Finally, there are 25 firms with widespread ownership, including Siemens (no. 2), the three chemical giants Bayer, BASE, and Hoechst (nos. 5, 6 and 7), and the four financial pillars, *viz.* Deutsche Bank, Dresdner Bank, Allianz Versicherung, and Commerzbank (nos. 13, 20, 23 and 29).

The ranks of the three leading banks (Deutsche Bank, Dresdner Bank and Commerzbank) and of the leading insurance carrier (Allianz Verischerung) in the second and third decile of the Top 100 somewhat becloud their "true" position. In fact, they can be safely labeled as the "Big Four" in the German economy.[17] Their awesome power is based on inter-corporate ownership links: of the total of 72 ownership links among the Top 100, 32 (44%) were held by the "Big Four" (para. 319), up from 36% in 1978.[18] Most spectacular is the minority control of the top firm, Daimler-Benz, by Deutsche Bank which also holds minority control of no. 2 German construction firm, Philip Holzmann (no. 77). Furthermore, combined stockholdings of members of the "Big Four" add up to minority control of Linde (no. 61) and even to majority control of the nation's largest retailer, Karstadt (no. 28). On a larger scale, the Commission identifies stockholdings of members of the Top 100 in 26 firms among the Top 100; combined stockholdings of members of the Top 100 added up to majority ownership of 8 firms and to potential minority control of another 5 firms. This means that there is a real likelihood that as many as 13 firms of the Top 100 are controlled by members of the Top 100.

The network of control is reinforced by interlocking directorates when members of the management boards of the Top 100 serve on the supervisory boards of at least two other firms in this group. In an innovative approach, the Commission has provided detailed information on this phenomenon since 1978. Once more, the

"Big Four" take the lead: Deutsche Bank sent members of its management to the supervisory boards of 33 firms of the Top 100, Allianz to 18 firms, Dresdner Bank to 17, and Commerzbank to 16. Altogether, the "Big Four" accounted for 41% of the 206 initial personal links between the Top 100 in 1986. These links led to interlocking directorates between 25 firms of the Top 100 through managers of Allianz; the respective numbers for Deutsche Bank read 20, for Dresdner Bank 18, and for Commerzbank 14 (pp. 153-154).

Merger activity of the Top 100 is important. During 1986/87, the Top 100 participated in 539 of the 1,689 notifiable transactions.[19] This 31.9% level of participation means virtually no change from the 1984/85 period (31.3%), but a decline from 1980/81 (42.1%) and from 1982/83 (34.4%). Not surprisingly, the Top 25 took the lead with 302 cases of participation in notifiable mergers, the next quartile followed a distant second with 139 cases.[20] Most active acquisitors were VEBA (no. 11) with 52 acquisitions, and Siemens (no. 2) with 37 acquisitions. A classification of merger activity of the Top 100 by numbers of mergers is only one side of the merger phenomenon. More important is the classification by size of merger, preferably by transaction price or, as second-best measures, by acquired sales or asset volume. Unfortunately, this is still missing. However, it can be safely assumed that the Top 100 are prominently involved in the largest mergers: in 9 of the 12 mergers of 1985, where the acquired firm had sales in excess of DM 1 billion, the acquiring firm was a member of the Top 100.[21]

Dominant Firms and Merger Control

There appears to be a declining trend in the number of investigations into alleged abuse of dominant positions in accordance with Sec. 22 GWB: the number of investigations declined from 69 in 1982/83 to 30 in 1984/85 and, further, to 14 in 1986/87 (para. 354). Market conduct of public enterprises has been the prime target of the Federal Cartel Bureau, especially when dominance is based on a franchise. In one case, McDonald's had applied to the Federal Highway Agency for a permit to operate its first fast-food restaurant in one of the federally-owned restaurants on federal highways. The permit was not granted. Consequently, the Federal Cartel Bureau was asked to review the reasoning of the Agency in its capacity as the sole franchiser. The Bureau eventually upheld the argumentation of the Agency that there was little commercial interest for McDonald's to operate a fast-food restaurant in a highway restaurant in view of the firm's overwhelming market potential elsewhere. Furthermore, the Bureau endorsed the Agency's contention that the broad choice of menus and service in a "classical" restaurant was preferred to a fast-food restaurant. In its assessment of the case, the Monopolies Commission disagreed with the notion of pondering the commercial interest of a newcomer or taking its market potential into account; rather, the Commission emphasized the public interest in opening markets for newcomers. Furthermore, the Commission cast doubt on the alleged superiority of "classical" restaurants and submitted that the limited choice of menus in fast-food restaurants appears to offer constant quality and satisfaction. Consequently, the Commission cannot support the requirement of the Federal Highway Agency to permit the operation of fast-food restaurants only in conjunction with adjacent "classical" restaurants (paras. 356-358).

In addition to concentration analysis, one of the main tasks of the Monopolies Commission is the assessment of merger control.[22] Merger control was introduced by an amendment of the GWB in 1973; a further amendment in 1980 widened the scope of merger control.[23] During 1973/87, there were 8,275 notifiable transactions in Germany of which 74 (0.9%) were disallowed by the Federal Cartel Bureau (para. 366). The "disallowance ratio" climbed from a low of 0.5% in the initial 1973/75 period to a peak of 1.7% in 1980/81, from where it declined to a record low of 0.3% in 1986/87 (para. 366). The Commission attributes this decline to an ever-increasing number of merger proposals which are modified or abandoned after informal consultation with the Bureau. There were 26 thus abandoned merger proposals during 1986/87, and a total of 162 such cases for the entire 1973/87 period (para. 367). At the end of 1987, the status of the 74 disallowed mergers during 1973/87 was as follows: in 34 cases the Federal Cartel Bureau was successful in the courts *vis-à-vis* 18 cases where its decision was

reversed by the courts; 5 cases were permitted by ministerial decree, and another 5 cases were still pending; finally, 12 cases were reversed by the Bureau or resolved in another way (para. 369). It is interesting to note that 4 of the 5 disallowed mergers in 1986/87 were transactions in the sector of the printed media. This leads the Commission to the conclusion that merger control appears to be directed primarily at firms which are not exposed to international competition (para. 367).

Potential merger partners have discovered ways and means to circumvent merger control. In the past, acquisitions of fractionally less than the 25% threshold were the major route. Recently, a new strategy has emerged where (i) relatives of the partners or (ii) senior management of non-corporate businesses become the acquisitors in a transaction which, otherwise, would be subject to merger control and might eventually be disallowed. In one such case, Oetker (no. 90), a leading food firm in the legal organization of a limited partnership, communicated to the Federal Cartel Bureau its plans to acquire Henkell, the leading German manufacturer of sparkling wines (Sekt). The Bureau, in turn, indicated its most likely opposition to the acquisition since Oetker owned the no. 2 "Sekt" firm, Soehnlein-Rheingold, and the combined share of the two firms in the relevant market was 28.9% (para. 371). In order to avoid the challenge, Mr. Oetker transferred ownership of Soehnlein-Rheingold to family members who then acquired Henkell. In its investigation of this peculiar case, the Bureau concluded that the transaction could no longer be attributed to the realm of the Oetker food empire and, thus, did not qualify for a challenge according to Sec. 24. para. 8 GWB since Soehnlein-Rheingold and Henkell had combined sales below the threshold of DM 500 million (para. 371). In its analysis of the case, the Commission concurred with the Bureau's decision (para. 373). In another case, REWE-Leibbrand (no. 38), a leading retailer in the legal organization of a general partnership, acquired Uhren-Christ, a retailer of watches and jewellery; this acquisition happened after REWE's earlier acquisition of a firm in the same market, Dugena. The acquisition of Uhren-Christ was performed in an even more - peculiar way than the former transaction: two senior managers of REWE-Leibbrand bought 60% of Uhren-Christ, and two under-aged children of the general partner, Mr. Leibbrand, acquired the remaining 40% (para. 374). The Bureau denied that the transaction would qualify as a transaction according to Sec. 23 GWB on the basis of interlocking management positions (para. 374). Here, the Commission disagreed with the Bureau and sees, indeed, such a personal interrelationship in the sense of the two senior managers of REWE-Leibbrand becoming partners of Uhren-Christ. However, the Commission cautions that the classification of the transaction as a qualifying acquisition according to Sec. 23 GWB may not have meant a need for prenotification of the merger or even a challenge by the Bureau (para. 377).

An alternative to disallowance of a potentially anti-competitive merger has been pursued by the Federal Cartel Bureau in terms of a kind of undertakings provision. In these cases, the Bureau issues an order for a partial restructuring of the merger, usually in the form of divestiture of specific assets in order to prevent the creation or enhancement of a dominant position in relevant markets. In its previous reports, the Monopolies Commission had critically reviewed the thus allowed mergers and had maintained a skeptical, if not negative, position *vis-à-vis* this procedure.[24] The present report provides a comprehensive overview of some 29 mergers in the undertakings program during 1976/87 (pp. 186-195). After intensive post-merger analysis of these transactions the Commission finds 18 cases where the merger partners complied with the specific restructuring orders, and 9 cases where they did not; in another 2 cases, no information was available. In none of the 9 cases of non-compliance did the Bureau enforce - or did not yet enforce - its initial order because either market conditions had changed *vis-à-vis* the initial merger scenario or the case was resolved in another way.

In the last three chapters, the Commission continues its investigation of concentration and competition in the media (ch. V), followed by recommendations for deregulation in the insurance sector (ch. VI), and a review of the impact of commercial law on concentration (ch. VII).

Like its predecessors, the *Seventh Report* is a treasure of information on concentration and

competition in the German economy combined with a balanced assessment of the enforcement of, and improvements to, competition policy.

Notes

*Die *Wettbewerbsordnung erweitern*, Hauptgutachten der Monopolkommission VII, Baden-Baden: Nomos Verlagsgesellschaft, 1988, 344 pp. (with English Summary) [*Seventh Report*]

Die Wettbewerbsordnung erweitern, Anlagenband zum Hauptgutachten der Monopolkommission VII, Baden-Baden: Nomos Verlagsgesellschaft, 1988, 283 pp [Supplement to the *Seventh Report*]

1. Gesetz gegen Wettbewerbsbesch-raenkungen of 1957 [*Act Against Restraints of Competition*].
2. For English summaries of the first five biennial reports, see Monopolkommission, *German Monopolies Commission 1973-1983*, Baden-Baden: Nomos, 1987.
3. CR's are the sum of the market shares of the leading firms in a market, HHI is the sum of the squared market shares of all firms in a market, and the coefficient of variation is the ratio of the standard deviation of firm sizes in a market and the arithmetic mean of firm sizes. For a discussion of concentration measures, see Marfels, C., "A Bird's Eye View to Measures of Concentration," *The Antitrust Bulletin*, Vol. 20, No. 3, 1975, pp. 485-503.
4. According to the U.S. Merger Guidelines high concentration means HHI> 1,800, moderate concentration means HHI in the range of 1,000 to 1,800, and low concentration means HHI< 1,000.
5. References in parentheses refer to the *Seventh Report* or its supplement.
6. The same procedure applies to the data on product concentration.
7. Marfels, C., "Economic Criteria for the Application of Antitrust," The *Antitrust Bulletin*, Vol. 31, No. 4, 1986, p. 1076.
8. In no fewer than 22 of the 41 major industry groups was publication of CR_3 withheld compared to only 4 of 35 in 1977.
9. The same understatement applies to product concentration.
10. The term "Top 100" refers to the 100 largest financial and non-financial firms, by value added. Numbers in parentheses refer to the firm's rank in the 1986 list of the Top 100.
11. Either two of the three following thresholds have to be met, *viz.* (i) total assets of more than DM 125 million, (ii) annual sales of more than DM 250 million, and (iii) employment of more than 5,000 people [Sec. 1 of the "Gesetz ueber die Rechnungslegung von bestimmten Unternehmen und Konzernen" of 1969 (*Publicity Law*)].
12. Bilanzrichtliniengesetz of 1985 [*Act on Financial Accounts*].
13. Concentration levels for trade are understated since consolidated statements were unavailable for Aldi, Tengelmann, and Metro. Estimates of the Commission indicate that the three firms would assume ranks 1, 2, and 8 in the Top-20 list in 1986 (pp. 101-102). An inclusion of the three firms in the list would raise CR_{10} from 6.9% to 9%.
14. This transaction was encouraged and supported by the Federal Government. The Chairman of the Monopolies Commission, Prof. Ulrich Immenga, voiced his strong opposition against this deal (*The Globe and Mail*, Nov, 11, 1988, p. B8).
15. *Der Spiegel*, No. 46, 1988, p. 123.
16. German Federal Railways (Deutsche Bundesbahn) and the Post Office (Deutsche Bundespost) are not included in the Top 100 list.
17. *Cf.* Marfels, C., "Aggregate Concentration in International Perspective: Canada, Federal Republic of Germany, Japan, and the United States," *Mergers, Corporate Concentration and Power in Canada*, ed. by R.S. Khemani et al., Halifax: IRPP, 1988, pp. 53-88.
18. *Fourth Report*, para. 434.
19. According to Sec. 23 GWB, merger notification to the Federal Cartel Bureau is mandatory when (i) a 20% market share is reached or exceeded through the merger or when one of the merger partners holds 20% or more of another market, or (ii) the merger partners employed at least 10,000 people altogether or had combined sales of at least DM 500 million. Given these size criteria, a merger is notifiable whenever a stake of (i) at least 25% of the acquired firm or (ii) at least 50% is reached.
20. There were 580 such cases of merger participation in the 539 transactions which means that several firms did participate in some transactions (p. 164).
21. Including two acquisitions of Philips which is represented by its German subsidiary among the Top 100 (Data from a Special Tabulation of the Federal Cartel Bureau).
22. Supervision and enforcement of merger control is in the hands of the Federal Cartel Bureau.
23. The original GWB of 1957, had in Sec. 23 a post-merger notification requirement [vid. n. 19]. The 1973 amendment introduced a general pre-merger notification requirement for large mergers where one partner has sales in excess of DM 2 billion or two partners have sales of at least DM 1 billion each (Sec. 24a). Furthermore, the Bureau can disallow a merger which is found to be anti-competitive

(Sec. 24). Such an order can be challenged in the courts. Upon application by the merger partners, a decision of the Federal Cartel Bureau may be reversed by government intervention (Minister-of-Economics override). The scope of merger control was widened through the 1980 amendment of the GWB when the "oligopoly assumption" was introduced (Sec. 23a). The assumption of creation or enhancement of a dominant position via merger refers to very large merger partners (combined sales in excess of DM 12 billion) or to oligopolistic markets where (i) three or fewer firms have a combined share of at least one-half of the market or (ii) five or fewer firms have a combined share of at least two-thirds.

24. *Fourth Report*, para. 635.