COMMENT AND ANALYSIS

The following article is taken from "M&A Today", Vol. 1, No. 34, April 23, 1990, and is reprinted by permission.

USING U.S. ANTITRUST LAW TO OPEN UP FOREIGN MARKETS FOR U.S. EXPORTS. A NEW U.S. TRADE POLICY?

Douglas Rosenthal and Robert Lipstein[1]

The head of the Justice Department's Antitrust Division, Jim Rill, has a background in both trade and antitrust law. He shares these two areas of competence with Carla Hills, the U.S. Trade Representative. On April 9, 1990, Rill held a press conference to announce the results of a nine month U.S. intergovernmental negotiation with Japan to develop new trade initiatives to remove structural impediments (SII) to U.S. exports to that nation. He declared that an important part of the SII agreement is that the Japanese government pledges itself to enforce more aggressively the Japanese antimonopoly law, and to amend that law to increase the monetary penalties for offenses as well as take further steps to enforce the criminal sanctions of that Act, including potential imprisonment. The agreement also commits the Japanese government to make more readily available and more effective a private antitrust damage remedy where anticompetitive injury had been sustained by exporters to Japan, and to specify and make clear the practices that are unlawful in the distribution system in Japan and within the system of *keiretsu*, the network of Japanese corporate family relationships.

In response to reporters' questions, Rill went on to say that the Department is reassessing its enforcement policy and expects, within the next few months, to formulate a clarified policy that can lead to bringing cases under U.S. antitrust law in U.S. courts against foreign (he took pains to make clear not just Japanese) firms which acted in foreign markets to "impair export opportunities for U.S. businesses". This press conference did not get immediate press attention. However, last Monday, (March 16, 1990), *The New York Times* carried an extended story about the Administration's "considering a significant extension of antitrust laws to strike at American subsidiaries of foreign companies" that engage in anticompetitive practices aimed at U.S. exports to their home markets.

Contrary to *The New York Times* report, what Jim Rill is proposing is nothing new. Even before World War I, the U.S. government filed antitrust cases under the *Sherman Act*, passed by Congress 100 years ago, to reach a market allocation agreement between American and British tobacco trusts, under which each agreed to stay out of each other's home markets and to cöoperate in facilitating their dominance of those markets against competitors.

For at least 80 years, U.S. antitrust laws have been consistently applied in United States foreign commerce to two basic types of restrictions: restrictions on U.S. import trade and the foreclosure by anticompetitive private acts of U.S. export trade. Most foreign commerce antitrust cases over the years have involved import as rather than exports. Nonetheless, there have been more than a dozen export restraint cases since World War II either brought by the Justice Department, the Federal Trade Commission, or private plaintiffs, that challenge export foreclosure.

In the late 1970's, the Gulf Oil Corporation was subjected to criminal prosecution for its participation in a uranium fuel cartel, charged with having systematically denied an American export competitor of Gulf's, the Westinghouse Corporation, opportunities for effectuating export sales in foreign markets of U.S.-made nuclear powered generation plants. Early in the first Reagan administration, the Antitrust Division brought its last enforcement action against export foreclosures by challenging a Japanese buyers cartel. The buyers groups was formed to give Japanese purchasers of Pacific Coast seafood countervailing bargaining power in negotiating with a U.S. supplier of processed seafood. At the same time, a U.S. woodchip cooperative successfully challenged an alleged Japanese cartel purchasing their products for importation into Japan. There is currently pending in the 9th Circuit Court of Appeals an action brought by the Union Carbide Corporation against several purchasers of high purity polysilicon. The suit alleges, among other things, that several leading Japanese manufacturers of wafers, used as the base material on the surface of which semiconductor devices are fabricated, coordinated to keep down the price of the purified polysilicon, the basic ingredient in the wafers. It is alleged that this price suppressing conspiracy took place in and substantially affected the flow of U.S. interstate and foreign commerce.

In 1982, the Congress passed legislation codifying this jurisprudence in the *Foreign Trade Antitrust Improvements Act* of 1982, Pub.L.No. 97.290, ss.401-403, 96 Stmt. 1246. Nonetheless, the head of the Antitrust Division in the second Reagan Administration, Rick Rule, announced that the Justice Department was only concerned about enforcing the antitrust laws to promote consumer welfare in the United States. He said that export foreclosure was not a problem directly affecting U.S. consumers and therefore not a problem for his department. This astonishing enforcement position was taken just two years ago, at a time when trade officials in the Reagan Administration were under constant attack for not doing enough to help U.S. exporters get access to protected foreign markets. This was a notable failure of coordination between U.S. antitrust and trade policy, an episode in a long and erratic history of non-cooperation between the two policy teams in the same Administrations.

U.S. trade and antitrust policy have rarely been coordinated. Frequently, U.S. trade policy has sought to limit foreign competition in U.S. markets for the benefit of U.S. industry, while U.S. antitrust policy was seeking to increase the access of foreign products into U.S. markets for the benefit of U.S. consumers. When these conflicts arose, trade policy usually prevailed, as in the implementation of voluntary restraints on the sale of Japanese automobiles into the United States and governmentally organized international cartels in the textile, steel and semiconductor industries. At the very least, Jim Rill's announcement of a policy revision is a sensible attempt to begin to coordinate U.S. antitrust and trade policy in a way which promotes both trade and competition goals. This is the administration of George Bush taking a more sophisticated tack than its predecessor.

The *New York Times* article suggest that this policy change is likely to be abused. Extraterritorial U.S. antitrust (and export control) enforcement over persons and activities abroad has been a significant foreign policy issue since World War II between the United States and our leading European allies, especially the United Kingdom, and between the United States and Canada and the United States and Australia. During the last fifteen years, these problems have engaged heads of state on five occasions. The first two in the mid 1970's involved the Middle East; one was a U.S. government antitrust action against the Bechtel Corporation for illegal participation in the Arab boycott against Israel; a second related to the U.S. government's response to a private antitrust suit challenging OPEC as a cartel in violation of U.S. antitrust law. The third was the Justice Department's criminal investigation of the international uranium cartel. Fourth was the U.S. embargo on sales of equipment by U.S. subsidiaries in Europe for the building of a Soviet natural gas pipeline; and fifth, was the U.S. antitrust investigation of an alleged conspiracy to raise passenger fares on North Atlantic airline routes.

What worries some people about Jim Rill's press conference is the fear that it will trigger a new series of attacks on long standing commercial practices outside the United States, practices that have been assumed to be legal by authorities in foreign countries having direct jurisdiction over them. If that were to happen, there would be new concerns about the United States acting as a rogue elephant, attacking the sovereignty of other nations and their ability to control their own economic destinies within their borders.

Viewed historically, there is reason for concern. Applying U.S. antritrust laws to help U.S. exporters get access to foreign markets can undermine foreign government policies directed at the foreign home market.

> One such became a major issue between the United States and Canada in the late 1950s. At the time, the Canadian federal government had embarked upon a policy of relative self-sufficiency for certain Canadian industries. Among other things, there was the desire to decrease Canadian dependency on imports – especially consumer durables. Carrying out this policy, the Canadian government consulted with the Canadian subsidiaries of a few large foreign appliance manufacturers, especially the American firms General Electric, Westinghouse and Hazeltine Corporation. Their Canadian branches were encouraged to produce domestically for the Canadian market. In return, they would be permitted to pool their patents and technology so that each would have the benefits of the best features the others had developed. This sharing of information dampened competition among them, to the detriment of the Canadian consumer. But at least some Canadian officials appear to have made the conscious choice of building up the supply side, at the expense of the demand side, of the Canadian market.
>
> To complicate matters, the pool seemed such a good idea that it was extended to markets outside Canada – including the United States. Now the Zenith Corporation enters the picture. An American enterprise competing with General Electric, Westinghouse and Hazeltine for export customers of radios and televisions, it seeks to sell in the Canadian market, but chooses not to manufacture in Canada. Encouraged by the Canadian government, the competing multinationals with Canadian manufacturing subsidiaires, refuse to share their technology with Zenith and otherwise coordinate to discourage Zenith import sales.
>
> The U.S. Department of Justice sued to enjoin the Canadian conspiracy, in part on the grounds that it constituted the foreclosure of U.S. export competition by American firms competing in foreign markets. In a subsequent treble damages action, Zenith succeeded in obtaining a substantial monetary settlement as well.... The Canadian government strongly protested, to no avail, other than inducing commencement of an unstructured intergovernmental consultation mechanism between U.S. and Canadian antitrust enforcement agencies.... In neither litigation did the court seriously consider the possibility that Canadian policy interests in not having U.S. antitrust law enforced so as to undercut Canadian policy in Canadian markets, should at least be weighed against U.S. interests in promoting export opportunites for U.S. businesses selling to Canada.[2]

U.S. antitrust law is not international law. The norms of U.S. antitrust law are not universally accepted elsewhere in the world. In fact, there are numerous exceptions to the antitrust laws in our own domestic economy where conduct in one economic sector is legal (e.g., price fixing by farmers in an agricultural cooperative) which, in other economic sectors, would be criminal misconduct. If the antitrust laws were used as a supplement to trade diplomacy to force open foreign markets which foreign governments have the sovereign (even if in our view misguided) right to keep closed, these laws will be misused. The United States and Japan, and most major trading nations, are signatories to the *GATT* treaty. While the United States and Europe have become increasingly impatient with the multilateral trade dispute resolution mechanism it provides, it would be principled and consistent with international law to seek to resolve these disputes either in the *GATT*, or by bilateral diplomacy such as the ITT, instead of resorting to U.S. antitrust enforcement undermining foreign sovereignty.

A second reason for concern is that the U.S. law enforcement officials have become increasingly aggressive of late in their policy statements about the rights of U.S. law enforcers to exercise jurisdiction over conduct which has much more significant connections with foreign markets and foreign jurisdictions than with the United States. As Learned Hand observed in a leading antitrust case:

> There may be agreements made beyond our borders not intended to affect imports, which do affect them.... Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country

> to treat such agreements as unlawful, it is safe to assume that Congress did not intend the [*Sherman*] *Act* to cover them.

U.S. enforcement should, for example, make a distinction between private restrictions in the Japanese internal market which apply to broad categories of suppliers, from those which are focused on American or Western exporters. The latter are more clearly intended to and more directly affect U.S. commerce. Similarly, a significant factor in determining whether it is appropriate to apply U.S. antitrust law should be whether foreign restrictive practices are engaged in the United States, whether the purchasers come to these shores. That should be quite different from situations where U.S. exporters are encountering difficulties in foreign internal markets. Those problems should be attacked, with the help of the U.S. government where appropriate, using the legal institutions of the foreign jurisdiction.

American companies should not assume that aggressive extraterritorial U.S. antitrust enforcement can only help and not hurt them. It is U.S. companies abroad which bear the brunt of foreign sovereign retaliation against what are perceived to be U.S. violations of international law. The Gulf Oil Company had a default judgment of $1 billion entered against it by a New Mexico court when the Canadian government ordered its Canadian subsidiary not to produce documents in Canada for discovery in the United States in that legal proceeding. U.S. and foreign corporations are caught in the middle when sovereign governments clash.

Even an overly zealous enforcement program under this newly-announced policy will have no direct impact on antitrust merger enforcement. United States officials know their limitations in trying to block purely foreign acquisitions, even if federal judges sometimes do not (witness the *Minorco-Goldfields* decision). Nonetheless, such an enforcement program could disrupt not only international political relations but also the willingness of foreign companies to invest in the United States and of U.S. firms to expand their operations abroad.

Applied with due regard for principles of international law and respect for the sovereignty of foreign states within their territory, the antitrust laws can be responsibly applied to help firms doing business in the United States (including foreign firms) defend themselves when they are the victims of private international cartels. However, both the head of the Antitrust Division and lawyers representing U.S. plaintiffs should not see their role as one supplanting the U.S. Trade Representative or the Secretary of State.

Notes

[1] Partners in the Washington, D.C. Office of the International Law Firm Coudert Brothers, both of whom specialize in international competition law issues. From 1977 to 1980, Mr. Rosenthal was Chief of the Foreign Commerce Section of the Antitrust Division and has been involved in many of the cases referred to in this article.

[2] Quoted from D. Rosenthal and W. Knighton, *National Laws and International Commerce: The Problem of Extraterritoriality.* The Royal Institute of International Affairs, 1982.

THE ULTIMATE TEST OF MERGER CONTROL: AN ASSESSMENT OF THE ACQUISITION OF MESSERSCHMITT-BÖLKOW-BLOHM BY DAIMLER-BENZ

By: Professor Christian Marfels
Economics Department
Dalhousie University

Introduction

The acquisition of a controlling stake of the capital of Messerschmitt-Bölkow-Blohm GmbH (MBB) by Daimler-Benz AG (DB) ranks as one of the largest German mergers, and perhaps as the most controversial one. Never before has a merger received so much coverage in the media. In a nutshell, here are the milestones: in November 1988, DB announced its intention to acquire a majority of MBB. Subsequently, a merger pre-notification was submitted to the Federal Cartel Bureau (Bureau). After careful review, the Bureau disallowed the merger in April 1989. Rather than appealing this decision in the courts, DB applied directly to the Minister of Economics for a ministerial override of the Bureau's ruling. Before making a decision, the Minister asked the independent Monopolies (Commission) for an assessment of the merger. In its report, the Commission approved the merger under the condition that certain assets would have to be sold. Subsequently, the Minister allowed the acquisition in September 1989, subject to certain conditions, including the divestiture of assets. Two months later, the shareholders of MBB accepted the terms and conditions of the merger.

After a presentation of a profile of the merger partners and of the legal framework of German merger control, the review and assessment of the merger follows the aforementioned sequence.

Daimler-Benz

Until the mid-1980s, DB was an exclusive manufacturer of the whole range of motor vehicles: in addition to its well-known high-priced automobiles, DB was, and still is, Europe's leading manufacturer of trucks and buses. In 1984, DB diversified into electronics, electrical equipment, turbines, and aircraft with the successive acquisitions of AEG, MTU and Dornier. The diversification into non-automotive sectors can be seen from the following comparison of 1980 and 1988 sales data:[1]

SALES	1980		1988	
Division	DM Bill.	%	DM Bill.	%
Automobiles	14.1	45	31.8	43
Trucks and Buses	15.8	51	23.1	31
AEG	–		13.2	18
MTU	–		3.1	4
Dornier	–		1.9	3
Total	31.0	100	73.5	100

In 1988, DB was the largest firm in Germany, ahead of Siemens and Volkswagen. On a worldwide scale, DB was no. 11 on Fortune's list of the world's leading industrial corporations.[2] The acquisition of MBB will raise DB's sales to almost DM 81 billion (approx. C$ 57 billion). As a result of its diversification drive, DB reorganized its corporate structure into a holding, Daimler-Benz AG, and three separate subsidiaries, *viz.* Mercedez-Benz AG (motor vehicles), AEG AG (electronics), and Deutsche Aerospace AG (aircraft & aerospace).

Messerschmitt-Bölkow-Blohm

MBB was founded in 1969 in a merger of several aircraft manufacturers. The merger was sponsored by the provincial governments of Bavaria, Hamburg and Bremen and, thus, resulted in an extremely complicated ownership structure of MBB: apart from the aforementioned governments, which altogether held a majority, shareholders included several private corporations, as well as members of the Messerschmitt, Bölkow, and Blohm families. The MBB consolidation was established in order to create an efficient German aerospace group. Not surprisingly, MBB was to become the nation's premier supplier of military hardware ranging from helicopters and military and civilian aircraft to guided missiles. An important holding of MBB is Deutsche Airbus GmbH which, in turn, holds a 37.9% stake in Airbus Industrie, the French/German/British/Spanish consortium.[3] However, it must be noted that Deutsche Airbus is not consolidated in the accounts of MBB; rather, it is a kind of fiduciary trust holding for the federal government. With 1988 sales of DM 7.1 billion, MBB is said to account for 54% of the German military technology market.[4] Military and civivilian aircraft made up 54% of MBB's 1987 sales, military technology 24%, space technology 9%, and helicopters 8%.[5]

Despite its commanding position in the market for military hardware, MBB depended on government subsidies, and was only marginally profitable. Thus, the Bavarian Government and the federal government began a search for a potent corporate buyer in 1985. Among the designated candidates were BMW, Siemens and Bosch.[6] However, none of these firms showed any interest. Finally, the federal government contacted DB in early 1987 to consider a takeover of MBB. This step is important: the initiative for the takeover came from the Federal Government, and not from DB, and this sponsorship eventually proved to be an insurmountable barrier for the Federal Cartel Bureau. However, before the Bureau's findings can be reviewed, a brief glance at the rules of German merger control is needed.

German Merger Control

Merger control is codified in ss. 23-24a GWB.[7] Supervision and enforcement of merger control is performed by the Federal Cartel Bureau (Bureau). According to s. 23, para. 1 GWB, merger notification to the Bureau is mandatory when (i) a 20% market 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. A merger is notifiable whenever a stake of (i) at least 25% of the acquired firm or (ii) at least 50% is reached (s. 23, para. 2 GWB).

Prior to the 1973 amendment of the GWB, there was no merger control but just a post-merger notification requirement for large mergers. The 1973 amendment to the GWB introduced a general pre-merger notification for large mergers where (i) one merger partner has sales in excess of DM 2 billion or (ii) at least two merger partners have sales in excess of DM 1 billion each (s. 24a, para. 1 GWB). Furthermore, the Bureau can disallow a merger which is found to be anti-competitive (s. 24, para. 2 GWB). Such an order can be challenged in the courts. Upon application by the merger partners, a decision of the Bureau may also be reversed by government intervention in terms of the Minister-of-Economics override (s. 24, para. 3 GWB).

The scope of merger control was widened through the 1980 amendment of the GWB, when the "oligopoly assumption" was introduced (s. 23a GWB). The assumption of creation or enhancement of a dominant position via merger refers to very large merger partners with 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.

During the 1973-88 period, the Bureau examined a total of 7,121 mergers, of which 79 were disallowed.[8] The status of the disallowed mergers at the end of 1988 was as follows:[9]

- Disallowance final (38 cases);
- Court challenge pending (8 cases);
- Court reversal of disallowance (28 cases;
- Ministerial override of disallowance (5 cases).

By economic division of the merger partners, the vast majority of disallowed mergers involved manufacturing enterprises (32 cases), followed by press enterprises (15 cases), trade enterprises (11 cases), and electricity and gas enterprises (10 cases).

The Decision of the Federal Cartel Bureau

The disallowance of the merger by the Bureau in April 1989, is based on grounds that the merger would (i) create market dominance in the sectors of military technology and space technology, and (ii) strengthen the already existing market dominance in the truck market.[10]

According to the Bureau, the relevant product market in the present merger with regard to the military technology sector involves military hardware, which is supplied to a monopsonist, *viz.* the Department of Defense. With regard to he relevant geographic market, the national market is viewed as the proper delineation rather than international markets. Although the Bureau recognizes international linkages and cooperation in the supply of military hardware, it nevertheless clearly determines the defense market as domestic in scope because of the involvement of the federal government as the sole buyer.[11] In its reasoning, the Bureau emphasizes the character of military hardware as an "unproductive" public good in contrast to other public goods. This being so, empirical evidence indicates that public funds to acquire military hardware are predominantly channelled to domestic firms in order to generate and secure jobs. Data on military procurement clearly put MBB and DB on top of the list of prime contractors: of the total volume of military procurement of DM 212.6 billion,[12] MBB was found to account for 36.9% and DB for 13.6%; thus, the post-merger share would amount to 50.5%. This share would rise to 67% when only those projects are considered where a prime contractor has already been determined, of which 49% is held by MBB and 18% by DB.[13] When selected military sub-markets are considered, MBB has a dominant pre-merger position in terms of s. 22, para. 1 GWB, in the markets of military aircraft, military helicopters, and guided missiles. Since there is basically only one other competitor in these markets, *viz.* Dornier, the post-merger scenario would be a virtual monopoly.[14]

When it comes to the space-technology sector, the Bureau establishes a division into two relevant sub-markets, *viz.* the market of commercial space projects, and the market for non-commercial space projects.[15] With regard to the former market, the Bureau recognizes strong international competition, which would still prevail after the merger. However, the competitive situation of the latter market is entirely different: the relevant geographic is national rather than international in scope since there is no foreign competition for research-oriented space projects, which are funded by the federal Department of Research and Technology and the by the European Space Agency (ESA).[16] During the past decade, MBB and Dornier received the lion's share of these funds: according to estimates of the Bureau, MBB received 27% and Dornier 28% of federal funds of DM 990 million for non-commercial space research projects during 1983-87; similarly, MBB received 35.1% and Dornier 21.6% of total ESA funds of DM 2.3 billion during 1980-87.[17] The post-merger scenario would place DB at 56% of the total federal funding, and at 62.5% of the ESA funds. In its assessment of the merger impact on specific sub-markets, the Bureau notes (i) the elimination of potential competition for MBB from Dornier in the market of orbital systems through the merger, and (ii) the likely creation of dominance in terms of s. 22, para 1, no. 1 GWB. A similar merger-induced dominance is recognized in the market of research satellites. This dominance raises the Bureau's concern with regard to the intentions of publicly-sponsored space research, which is based on expectations of competitively-fuelled innovative activities. Specific reference is also made of the enormous post-merger buying power of DB *vis-à-vis* smaller independent suppliers and sub-contractors.[18]

The third relevant product market to be affected by the merger is the German truck market. The Bureau expects the already existing dominance in this market in terms of s. 22, para. 1, no. 2 GWB, to further increase through the merger.[19] This conclusion is based on the assumption that MBB's high R&D potential will become an instrumental vehicle to further strengthen DB's superior position in the truck market.[20]

In its overall cost-benefit analysis of the proposed merger, the Bureau does not see any potential merger-created gains which might outweigh the detrimental aspects of the merger according to s. 24, para. 1 GWB. Even the notion of a merger-induced strengthening of Deutsche Airbus GmbH,[21] which was advocated by the merger partners, is not accepted by the Bureau on grounds of Airbus' dependence on government subsidies, which remains unaltered through the merger.[22]

The Report of the Monopolies Commission

Upon request by the Minister of Economics, the Monopolies Commission (Commission) analyzed the proposed merger and submitted its Report in August 1989. The Report of the Commission can be divided into three parts, *viz.*:

(i) a stepwise analysis of the Bureau's decision;
(ii) the beneficial aspects of the merger; and
(iii) the detrimental aspects of the merger.

In its discussion of the potential benefits of the merger, the Commission makes reference to the *Fourth Report of the State Coordinator for Air Transport and Space Exploration*, where a positive balance of the merger was presented. However, the Commission cautions that this endorsement cannot immediately be equated with the merger being a public benefit.[23] At the same time, the Commission recognizes the economic, strategic, and political role of the aerospace industry, which makes government interference mandatory. With regard to the merger-induced strengthening of the German position in the Airbus consortium, the Commission strikes a cautious, but affirmative note:

> The shift of entrepreneurial decision-making *re* Airbus from the Federal Government to private industrial initiative will most likely mean better operationality and rationalization; however, the privatization of risk will come only in the long run because of the longevity of federal guarantees, which will limit the risk of DB.[24]

Further, on the potential benefits of the merger, the Commission analyzes the merger impact on (i) rationalization, and (ii) improvement of the international competitiveness of the German aerospace industry. With regard to the former issue, the Commission cannot see concrete evidence on how and where further rationalization in the sense of synergistic effects can be realized, despite claims of the merger partners to the contrary.[25] However, the Commission notes substantial benefits in the realm of international competitiveness: in a list of joint ventures among EC manufacturers of military hardware and space-research equipment, the Commission sees, on balance, a stronger position for German participation because of DB's superior economic performance.[26] This is important when it comes to the selection of the prime contractor in international cooperative manufacture of military hardware such as, for example, the European Fighter Aircraft.

Among the detrimental aspects of the merger, the Commission singles out (i) the magnitude of Daimler-Benz and its past external growth, (ii) the minority control of DB by Deutcsche Bank, and (iii) the overall anti-competitive effects of the merger on relevant product markets. With regard to the influence of banks the Commission renews, once more, its long-standing recommendation to limit the non-bank holdings of banks to 5% of stock. In the present merger, the Commission points to Deutsche Bank's role as an influential promoter of the merger; in addition, reference is made to the Bank's control of another important supplier of military hardware, *viz.*Klockner-Humboldt-Deutz, as well as the danger of interlocking directorates through the Bank's numerous representations on supervisory boards of other firms in the relevant product market. This leads the Commission to a recommendation to prohibit such representation of banks on supervisory boards of competing firms.[27]

In its overall assessment of the merger, the Commission assumes a positive but guarded view and recommends approval of the merger by the Minister of Economics under the condition of divestiture of certain assets. Among the assets targeted for divestiture are engines for fighter aircraft and helicopters or significant parts of military technology, such as missiles and military electronics.[28] Apparently, the Commission felt they should recommend a scenario of alternative divestiture of assets in order to diminish the overall anti-competitive impact of the merger and, thus, make it more acceptable rather than recommending divestiture of either one group of assets or both, which would have represented a clearer position.

It should be mentioned that the Commission's recommendation was not unanimous. Rather, the Commission Chairman, Professor Immenga, dissented and in fact recommended disallowance of the merger on grounds of the overwhelming anti-competitive aspects of the merger.[29] In his dissenting statement, Immenga indicates concern and uneasiness about the federal government's sponsorship of the merger because of the mix-up of economic and political considerations.[30] Furthermore, he views the sheer size of DB as a potential entry barrier, based on increasing dominance of numerous relevant product markets and sub-markets. On balance, Immenga sees little, if any, benefits of the merger. Thus, he is unable to support a recommendation for approval to the Minister of Economics. He is equally critical of the approval of the merger subject to divestiture of certain assets as adopted by the Commission's majority.

The Argumentation of Daimler-Benz

At a public hearing in the Ministry of Economics in August 1989, representatives of DB strongly reaffirmed the resolve to acquire MBB for the betterment of the German aerospace industry.[31] First, there is DB's interest in a stronger participation in the German aerospace industry in terms of providing a private-enterprise solution to the nation's need for a strengthened and viable industry. Next, reference is made to the increased competitive pressure on the German aerospace industry from abroad. This statement gains momentum in view of the scant 0.6% contribution of the German aerospace industry to GDP compared to 1.7% in both England and France; as a consequence, Europe's strongest economy accounts for less than one-fifth of the EC's aerospace production *vis-à-vis* one-third each for England and France.[32] Thus, DB is convinced that the federal government, as the sole buyer of military hardware, should have a vested interest in an efficient domestic industry structure. DB is highly critical of the Bureau's assessment of the detrimental aspects of the merger in a domestic scenario, which, according to DB, is not valid when the international dimension of the industry is taken into account. Likewise, DB feels that the Commission's suggested divestiture of certain assets is not warranted: such a divestiture would cut into long-standing technological integration of the production of engines for civilian and military use, and the proposed sell-off of other divisions of military technology would seriously endanger the viability of the merger and, thus, would have adverse repercussions on the whole aerospace industry. Consequently, DB contends that a denial of the override of the Bureau's disallowance would eventually lead to a disintegration of MBB.

An Assessment of the Merger

The requested government override of the Bureau's decision was granted by the Minister of Economics in September 1989. The only conditions were to divest of the naval-technology divisions in Hamburg (MBB) and Bremen (AEG) and to sell MBB's 12.5% stake in Krauss-Maffei AG, a manufacturer of tanks. After approval by MBB's shareholders, DB bought an initial 30% stake of MBB's stock for DM 800 million, which will eventually be extended to a majority. Towards yearend 1989, MBB was consolidated with Dornier, MTU, and divisions of AEG in the new Deutsche Aerospace AG (DASA), a subsidiary of the Daimler-Benz holding. Among the world's leading arms manufacturers DASA will assume the 12th rank, behind the 10 leading U.S.-based manufacturers and British Aerospace, but ahead of Aerospatiale of France.[33] In the wake of the recent joint venture between Siemens and Plessey, DASA is actively searching for a link with a foreign competitor; these plans may soon materialize in a cooperative agreement with Mitsubishi.

As was mentioned earlier, the great problem of the DB-MBB merger was its sponsorship by the federal government. Thus, critics have labeled the whole investigative procedure by the Bureau and the Commission as a non-starter, inasmuch as the eventual override was a foregone conclusion.[34] And in defence of DB, it must also be clearly stated that the Corporation was approached by the federal government to consider the acquisition, and not vice versa. As a consequence, the onus to defend the benefits of the merger ought to have rested with the federal government rather than with DB. But this was a classical case of conflict of interest, since the initial promoter of the merger was eventually the one who, finally, approved of the merger. Apart from this political ingredient, the anti-competitive aspects of the merger are simply too great to be outweighed by any potential benefits. This was documented extensively by the Federal Cartel Bureau and supported by the Chairman of the Monopolies Commission in his dissenting statement. Likewise, the Commission approved of the merger - and one might add, did so reluctantly - only under the conditions of divestiture of certain assets in order to alleviate the anti-competitive aspects. None of the Commission's recommendations for divestiture was adopted by the Minister of Economics in his approval, which means that there was not only an override of the Bureau's disallowance, but of the Commission's recommendations as well.

Notes

[1] Daimler-Benz AG, *Annual Reports for 1980 and 1988.*

[2] *Fortune 1989 World Business Directory*

[3] Aerospatiale (37.9%), Deutsche Airbus (37.9%), British Aerospace (20%), CASA (4.2%).

[4] *The German Tribune*, Sept. 24, 1989, p. 8.

[5] Monopolkommission, *Zusammenschlussvorhaben der Daimler-Benz AG mit der Messerschmitt-Bölkow-Blohm Gmbh*, Köln, Aug. 2, 1989, p. 16 (Mimeograph).

[6] *Süddeutsche Zeitung*, Aug. 23, 1989, p. 21.

[7] Gesetz gegen Wettbewerbsbeschrankungen [Law against Restraints of Competition] of May 27, 1957 (with Amendments in 1965, 1973, 1976, 1980, and 1989).

[8] Among the disallowances were 2 non-notified mergers.

[9] *Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 1987/88*, BT-Drucksache 11/4611, Bonn, 1989, p. 116 [Biennal Report of Federal Cartel Bureau for 1987/88].

[10] Bundeskartellamt, *Daimler-Benz AG - Messerschmitt-Bölkow-Blohm GmbH*, Berlin, April 20, 1989 (Mimeograph).

[11] *Id.*, pp. 37-38.

[12] This amount includes past military procurement contracts, which are still ongoing, and approved

military projects, for which a prime contractor has yet to be selected.

[13] Bundeskartellamt, *Daimler-Benz AG – Messerschmitt-Bölkow-Blohm GmbH*, Berlin, April 20, 1989, pp. 54-55.

[14] *Id.*, pp. 68-69.

[15] *Id.*, pp. 82-84.

[16] Funded projects include design and development of research satellites and of orbital systems.

[17] Bundeskartellamt, *Daimler-Benz AG – Messerschmitt-Bölkow-Blohm GmbH*, Berlin, April 20, 1989, p. 98.

[18] *Id.*, pp. 105-106.

[19] *Id.*, p. 107.

[20] *Id.*, p. 116.

[21] Subsidiary of MBB [*vid. supra*].

[22] Bundeskartellamt, *Daimler-Benz AG – Messerschmitt-Bölkow-Blohm GmbH*, Berlin, April 20, 1989, p. 128.

[23] Monopolkommission, *Zusammenschlussvorhaben der Daimler-Benz AG mit der Messerschmitt-Bölkow-Blohm Gmbh*, Köln, Aug. 2, 1989, p. 51 (Mimeograph).

[24] *Id.*, p. 71.

[25] *Id.*, p. 90.

[26] *Id.*, pp. 96-100.

[27] *Id.*, p. 115.

[28] *Id.*, p. 129.

[29] *Id.*, pp. 132-162.
As a consequence of the majority decision, the Chairman resigned from the Five-Member Commission – another member of the Commission, Mr. Haastert, did not support the recommendation for divestiture on grounds that this might jeopardize DB's merger plans [Monopolkommikssion, pp. 130-131].

[30] *Id.*, pp. 133-134.

[31] Statement by Mr. J.E. Schrempp, Executive Vice-President of Daimler-Benz AG and CEO of Deutsche Aerospace AG.

[32] *Id.*, p. 10.

[33] Schmidt, H., "Plädoyer für die Fusion", *Die Zeit* (North American Edition), Aug. 4, 1989, p. 8.

[34] Büschemann, K.-H., "Votum nach Wunsch", *Die Zeit* (North American Edition), Aug. 11, 1989, pp. 6-7.

CANADIAN COMPETITION POLICY RECORD

HIGHLIGHTS

CONSPIRACY PROVISIONS HELD UNCONSTITUTIONAL

UPDATES ON PALM DAIRIES, NUTRASWEET AND XEROX

LIMITS PLACED ON TRIBUNAL'S CONTEMPT POWER

PREDATORY PRICING GUIDELINES UPDATE

NEW FEDERAL ENVIRONMENTAL REVIEW LEGISLATION

OIL UNDER THE ICE

CRTC DENIES NFLD. TEL RATE INCREASE

CANADIAN TRADE UPDATE

URUGUAY ROUND PROGRESS REPORT

WINDS OF CHANGE IN U.S. MERGER ENFORCEMENT

INTERNATIONAL TRADE UPDATE

FEATURE ARTICLES

GOLDMAN & BODRUG: THE CANADIAN COMPETITION ACT AND INVESTMENT CANADA ACT: IMPLICATIONS OF THE FTA

HUNTER: PROPOSED PRICE DISCRIMINATION GUIDELINES — A DISTINCTION WITHOUT A DIFFERENCE

VOL.11 , NO. 3 SEPTEMBER 1990

CANADIAN COMPETITION POLICY RECORD

Suite 1201-180 Elgin St.
Ottawa, Ontario, Canada
K2P 2K7

EDITOR IN CHIEF
Lawson A. W. Hunter, Q.C.

ASSOCIATE EDITOR
Eric A. Milligan, LL.B., LL.M.

Published by Fraser & Beatty Legal Publications Inc.

Second Class Mail Registration Number 5150
Return Postage Guaranteed

The Canadian Competition Policy Record is published quarterly. It is intended to provide readers with information regarding developments in the areas of Competition Policy and Trade Policy. Readers are cautioned that the publisher and the editors are not, through this publication, engaged in giving legal or other professional advice. If legal advice or other professional services are required, the assistance of a qualified professional should be obtained.

Readers are invited to submit concise pieces for publication as well as to alert the Editors to matters of interest such as conferences, papers, speeches, and submissions. Views expressed by contributors are not necessarily those of the editors or the publisher.

ISSN 0228-1961

SUBSCRIPTION ORDER FORM

Canadian Competition Policy Record
Suite 1201-180 Elgin St.
Ottawa, Ontario, Canada
K2P 2K7

Phone: (613) 235-0690

Please enter my subscription for ....years.

Name...

Firm/Institution..

Address..City..........................

Province/State............................Country.........................Postal Code...........

Subscription Rates:	$200 per year (four issues)	No. of Subscriptions	....
	$100 per year for academic institutions	Total Amount	....
	$35 per year for academic persons	Cheque Enclosed	□
		Please Bill Me	□

© Fraser & Beatty Legal Publications Inc. 1990