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# On the Growth of the Antitrust Idea

By

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Wolfgang Fikentscher\*\*

Antitrust is an ambiguous term, especially in an international setting. It refers to a competition policy dealing with business structure and conduct and, more broadly, with the appropriate role of business in modern life. To describe antitrust, then, one must assume a context. One must identify both the government (or governments) whose policy is being considered and a particular historical stage of development. Furthermore, one should be aware of the fact that the meaning of the term antitrust changes depending on various factors: the nation, the time period, the state of technology, the capacity and social demands on business, the overall business culture, the currently accepted economic theories, as well as the overall national concerns and values. Only after accounting for all of these various factors can a description of antitrust begin to be complete.

Historically, and in most current manifestations, antitrust is linked to liberal conceptions about the economic and political function of the market. Antitrust is also a highly adaptable instrument. While its basic role is to protect open, competitive markets, it can be useful, or potentially so, as applied to markets at various stages of development, even to market segments embedded in socially controlled economies. Antitrust is also flexible in another sense. Markets may be valued for many reasons, both economic and political. Antitrust can be defined selectively to emphasize one set of values or another. In the years since World War II antitrust has spread quite widely. This facilitates trade and commerce, reinforcing integrative tendencies in a world which often seems at risk of shattering. The spread of antitrust has been largely through national or (as in the case of the EC) regional initiations, not through any broader international activity. There have been efforts, however, to deal with antitrust on a wider basis and it is perhaps time, once again, for antitrust to be placed on the international agenda.

Our purposes here are ambitious. We try to provide a sophisticated conception of what antitrust is all about. To do this we compare and describe the current state of antitrust in three particular regimes, and also the major develop-

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mental stages and dynamic influences that have, in each of these regimes, brought antitrust to its current state. We focus upon two systems where, today, antitrust is significant: The United States and the Federal Republic of Germany. In evaluating the potential of transnational antitrust as an integrative force in the world economy, it is important to keep in mind both the deeply liberal roots of antitrust and its flexibility. In Part I we discuss the American antitrust development.

A sub-theme of this comparative inquiry is the influence of the earlier American antitrust system upon the German and EC systems, a matter tinged with irony. The American antitrust system has been an important model for both Germany and the EC, yet their developmental paths have varied considerably. By the 1970's American antitrust had reached a complex, multi-valued, and seemingly robust state. During the 1980's, however, the American system was pruned into a simpler and narrower policy instrument. During that same dynamic period German and EC antitrust grew increasingly complex and multi-valued. Eventually these two systems diverged, each followed its own developmental course. While we emphasize this developmental dichotomy, we try not to overstate it, but rather to explain it in terms of differences in the factors—economic, theoretical, and political—which inevitably influence the development of antitrust policy in each system.

Parts II and III emphasize the spread of antitrust internationally. The antitrust systems in Germany (II) and the EC (III) are the best established of the systems that were created after World War II.

The growth, as we note, has been mainly, but not entirely, an extension of antitrust among market-oriented democracies. In Parts IV and V we briefly identify some of the many unresolved issues to which antitrust inevitably gives rise.

With respect to the liberal democracies, two of the more salient issues are these: Does antitrust tend to lock liberal, western democracies into relying solely on market-oriented solutions to deal with their developmental issues, thus diminishing the realm of industrial policy? Can antitrust play a significant role in breaking down trade barriers and facilitating international market integration, through the WTO or otherwise?

With respect to former and still existing socialist countries there are other questions: Will indigenous, socialist antitrust systems facilitate national planning by providing market-validated cost data? Can a national antitrust policy in a “socialized state” serve the interest of the state by preventing sub-optimal performance in liberalized sectors?

Finally, there is the question whether antitrust policy utilized in other nations or in the developing nations themselves would facilitate or inhibit economic progress in the developing nations. While much of what we will cursorily say on all of these issues is cautious and tentative, we are optimistic, by and large, about the potential value of sensible antitrust policy for developed democracies, for the socialist and transient states and for the developing countries.

## I.

## AMERICAN ANTITRUST DEVELOPMENT

A. *Antitrust Genesis*

While there is an earlier English and American common law tradition, and even an ancient Roman “antitrust” law<sup>1</sup>, antitrust had its genesis in America as a social response to industrial development and change. Before 1870, the American industrial structure was still simple. Owner-artisans produced goods with a small number of employees, often family members or neighbors or apprentices learning the trade. Though the development of technology and the factory system progressed rapidly — as a result of the government’s greater need, and hence, increased purchases during the civil war — the scale of enterprise remained modest and the manufactured products reached the public only after a series of market transactions. Manufacturers purchased needed inputs, sold their output to wholesalers who, in turn, resold to retailers who stocked the products that consumers would ultimately buy. However, as urban populations exploded, marketing opportunities expanded through national communication and transportation networks, and as production technologies advanced apace, growth increased quickly. Domestic and foreign savings accumulated, the capital market developed, and new industries underwent ambitious expansion. Firms that had once been local and isolated found themselves operating as major players in regional and national markets, with large work forces, substantial sunk capital, and significant competition. As over-expansion and volatile demand led to periods of “cut throat” competition, price fixing “pools” became common. When these proved unstable—vulnerable both to “cheating” and to new entry—horizontal consolidation was attempted and proved to be a more effective way to avoid both over-expansion and non-remunerative prices during periods of weak demand.

The first successful industry-wide consolidation was achieved through the efforts of John D. Rockefeller in the petroleum industry. After consolidating horizontally in the form of a trust, Standard Oil expanded vertically, both backward to inputs and forward through the marketing chain. By doing this, Standard Oil became the prototypical modern “big business.” As other industries followed this “trustification” process, the face of American industry transformed rapidly. The small, locally owned and managed firm gave way to the new, vast bureaucratic firm managed by hired technocrats.

Laborers, small entrepreneurs, and farmers responded to these developments with apprehension: The political debate had many facets. People generally valued the rapid economic expansion that the nation underwent and many conceded a good deal to the apparent efficiency and technological progress of

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1. Ulpian, D. 48, 12, 2 (lex Julia de annonae); C.4, 59, 2 (constitution of Emperor Zenon, 483 A.D.); H. v. BRUNN, VOM KARTELLRECHT DER RÖMER, 47 (1938); PIOTRECKOSKI, CARTELS AND TRUSTS: THEIR ORIGIN AND HISTORICAL DEVELOPMENT FROM THE ECONOMIC AND LEGAL ASPECT (1933); REINHOLD TRINKNER, DIE KARTELLGESETZGEBUNG DES CORPUS JURIS JUSTINIANI IM VERGLEICH ZUM MODERNEN RECHT 860 (1973).

the new large firms. But the trusts were often aggressive as well as efficient, and both price gouging and tactical excesses were not beyond them. As stories of such abuses became widespread, hostility towards the trusts grew. In 1888, both the Democratic and Republican party platforms contained antitrust planks, and the Sherman Antitrust Act was passed in 1890 with widespread support.

The political and legislative history of that enactment has been much explored. While there was diversity of opinion among the public and in the Congress, the commonly held goals were the preservation of competition in order to protect buyers from excessive prices, assuring that markets remained open, and protecting competitors from abusive tactics. As James May has shown, these goals were seen as directly linked to those goals associated with the then dominant, liberal, constitutional tradition. The constitution the nation knew in 1890 was attuned to protect economic opportunity, property, contract, and political liberty from the excesses of governmental power. Accordingly, antitrust would protect these same values from the excesses of the new "autocrat[s] of trade." It, too, would be informed by the classical economic conviction that to assure the common welfare, markets should remain open and competitive. Moreover, the implicit assumption was that the efficiency and progressiveness for which the trusts were valued could be obtained without giving up competitive markets and without having to tolerate tactical excesses from large and powerful firms. It was felt, and sometimes even understood theoretically, that political and economic freedom were related, and that a commonwealth must protect and develop both.

At its inception, then, antitrust was a uniquely American institution. It sought to advance a variety of libertarian economic and political values, and to do so by neither mandating nor by constraining the end results of business activity, but rather by assuring that the industrial and business processes remained competitive. Problems, such as the relationships between scale economies, the potential for entry, and monopoly pricing, were either dimly perceived or not perceived at all. The strategy was to embody common law conceptions in the statute and to let the courts work out the problems deductively when they were encountered in specific, fact-intensive industrial contexts. It was assumed, apparently, that courts could perform this role as effectively and in much the same way that under the constitution they had protected the populace against the excesses of bureaucratic Government.

### *B. Laissez-Faire and Industrial Organization*

Thus launched, American antitrust went through several developmental stages. These were influenced, of course, by judicial attitudes and by the state of theoretical knowledge (or belief) prevailing from time to time. As Professor May shows, figures like Justices Peckham and White, who strongly influenced the development of the law, may have disagreed about the appropriate limits of judicial discretion, but they shared core beliefs that are reflected in their constitutional and antitrust opinions and votes. For each of them, and for the American courts generally in the early part of this century, both the constitution and

antitrust decisions were informed by classical, *laissez-faire* thinking. Both the constitution and the Sherman Act were placed in the service of “a natural right-based political and economic order that simultaneously tended to ensure opportunity, efficiency, prosperity, justice, harmony, and freedom.”<sup>2</sup>

But antitrust development was not solely in the hands of judges. The level and direction of antitrust enforcement was probably influenced even more by the beliefs and commitments held, and the compromises made, in the executive branch.

The ambivalence in the public’s attitude toward the trusts, apparent since their inception, persisted. Indeed, as big business grew more common and the economy expanded more quickly, public uncertainty about the constraints on large firms increased. At any rate, enforcement agencies were slow to challenge the trusts and when they first did the result was not an unqualified success. During the first decade of the Sherman Act, cartels were challenged, but consolidation and related vertical integration – the very process of “trustification” which led to the statute – were not contested. In consequence, an even greater consolidation movement occurred after the Sherman Act was passed. Trust development was being challenged in the second stage — indeed, quite aggressively during the Teddy Roosevelt and Taft administrations — but with limited success in the courts. In a series of cases involving railroad consolidations the courts seemed to hold that mergers among significant competitors in a concentrated market were *per se* unlawful. Relatedly (or, perhaps, by way of contrast) the Court, upon announcing the “rule of reason,” held in the *Standard Oil*<sup>3</sup> case that the attainment of monopoly power, other than by ordinary methods of industrial development, was unlawful. However, shortly thereafter, in the *Steel*<sup>4</sup> case, the court held that attaining dominance by consolidation did not violate the act, at least in circumstances where the only abuse shown preceded consolidation and where the firm’s post-consolidation power was eroding in response to normal market forces.

By this time, major lines of legal doctrinal development were in place. Certainly cartelization – horizontal price fixing by unintegrated firms — and in all probability other cartel activities, such as market division or the assignment of production quotas, were *per se* unlawful. Also, consolidation that led to monopoly was clearly unlawful when followed by abusive competitive tactics. Furthermore, consolidation was probably unlawful even without such tactics if challenged as soon as monopoly was achieved. Yet it was apparently not unlawful if abuses were avoided and power seemed to be eroding.

Later in this century, antitrust enforcement was largely aborted during the First World War and during the Harding-Coolidge years. President Hoover, elected in 1928, conceded only a marginal role to antitrust. While he opposed blatant cartelization, he believed that the cooperative exchange of technological

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2. James May, *Antitrust in the Formative Era: Political and Economical Theory in Constitutional and Antitrust Analysis, 1889-1918*, 50 OHIO STATE L.J. 258, 391 (1989).

3. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S.1, 31 S.Ct. 502, 555 L.Ed. 519 (1911).

4. *U.S. v. U.S. Steel Corp.*, 251 U.S. 417, 440 S.Ct. 293, 364 L.Ed. 343 (1920).

and market information would assure both orderly and progressive markets, and would also keep small firms viable by providing them with the skills and information they needed to be progressive.

Franklin D. Roosevelt (FDR), elected following the Great Depression, took an even dimmer view of antitrust. The initial response during his administration – the enactment of the National Industrial Recovery Act – was aimed at aborting antitrust almost completely. The Act encouraged cartelization, but also encouraged the organization of labor and the establishment of industry-wide codes of fair practice. These, it was hoped, would lead the country out of the depression.

Despite that unpromising beginning, the most significant years in American antitrust development began during FDR's presidency. First, drawing upon the liberal, *laissez-faire*, constitutional tradition with which the enactment of the Sherman Act was itself linked, the Supreme Court held the National Recovery Act (NRA) legislation unconstitutional.<sup>5</sup> Second, advisers to the President, like much of the nation, grew increasingly concerned about developments in Nazi Germany. A widely held American perception was that concentration and cartelization in Germany had facilitated Hitler's effort to draw industry into the service of the Nazi state. This invited the inference that cartels, whatever their economic merits or demerits in a time of economic crisis, were a grave political risk, especially given the existence of numerous links between leading American firms and German cartels.

Roosevelt responded with characteristic boldness both in the legislative and the executive realms. He proposed, Congress provided for, and he appointed a Temporary National Economic Committee charged with gathering and analyzing all available factual information about industrial concentration and its dangers. This step fueled much of the antitrust discussion that occurred during and after the Second World War and led, in 1950, to the passage of a new anti-merger law. Roosevelt appointed Thurman Arnold, the very model of the aggressive antitrust enforcer, as Assistant Attorney General in charge of the Antitrust Division of the Justice Department. These moves initiated the period of structural consensus — a stable, energetic antitrust enforcement — which began in the late 1930's and lasted into the 1970's.

### C. Structural Consensus

#### 1. Structure, conduct, performance

During that lengthy period, the original intentions of the framers of the antitrust statutes were methodically tested and generally successfully. By the time the structural consensus began, the orthodox theoretical position among American antitrust enforcers was no longer the unstructured classical view accepted by Congress in 1890. Nor was it the newer neo-classical position which

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5. Concerning these early decision on the New Deal *see*, e.g., LOCKHART, ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS, 83-91 (8<sup>th</sup> ed., 1996).

identified competition with the rigorous theoretical assumption that it was necessary to convert buyers and sellers into powerless price followers.

Rather, both antitrust enforcers and courts drew from the insights of industrial organization economics which stressed the relationship between: (1) market structure (level of concentration among buyers and sellers; extent of product differentiation; high or low barriers to entry; extent of vertical integration); (2) conduct (or behavior) in the marketplace (determined by examining whether firms colluded on price or engaged in interdependent pricing, as well as examining the character of strategic activity: investment in excess capacity, product variation intended to inhibit interconnections, predatory litigation or advertising, etc.); and (3) performance (productive, allocative and distributive efficiency, stability and fairness).

The basic insight of industrial organization economics was that the higher the level of concentration, the greater was the likelihood that there would be anticompetitive conduct and socially unsatisfactory performance, such as allocatively inefficient prices well in excess of cost, wasteful expenditures (so called "x-inefficiencies" and "rent-chasing" expenditures, such as investment in unneeded capacity intended to deter entry), and socially inadequate research and development (or even product manipulation undertaken not for progressive, but for rent-chasing purposes).

Drawing on these insights, relating them to the language of the statutes, and mindful of the simplifications needed to fashion a manageable, understandable, and reasonably cohesive set of antitrust norms, Congress, antitrust enforcement officials, scholars, lawyers, and courts all made their contributions toward the development of the law during the consensus period.

In 1950, Congress passed a tough antimerger law.<sup>6</sup> For years thereafter the enforcement agencies during both Republican and Democratic administrations enforced it vigorously, and the Courts responded in ways consistent with the legislative intent. From 1950 to 1980, throughout the administrations of six successive presidents, merger policy included certain norms. First, a market or sub-market under the law was any line of commerce in any section of the country in which participating firms have some advantage over other firms. Mergers of any significant competitors (say a 4% firm with a 5% firm) within a market could be successfully challenged. So could mergers of substantial buyers and sellers in concentrated markets where competitors of either the substantial buyer or seller would be foreclosed from a significant source of supply or demand. Second, market extension mergers between leading firms could be successfully challenged if they contributed to further entrenching a leader or if, but for the merger, *de novo* entry might occur. Indeed, even conglomerate mergers were suspect where reciprocal restraints might result.

During the same period, the case law concerning monopolization was developed and refined. The extent of power was to be inferred from concentration data in a well-defined "relevant market." If monopoly power existed, or its

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6. Celler-Kefauver Act of December 29, 1950, 1184, 64 Stat. 1125.

achievement was threatened, then all “exclusionary,” “restrictive,” or “anticompetitive” conduct violated section 2 of the Sherman Act.

For several reasons, a concrete monopoly and supra-competitive pricing by a monopolist were not alone unlawful. Monopoly may, in a narrow market, be the only way to attain efficient scale. Even in wider markets the hope of monopoly and supra-competitive returns may spur competitive efforts. It was argued that it would be unfair and inefficient to punish a firm that gained monopoly by the very conduct the law encourages.

Furthermore, to forbid supra-competitive pricing by an otherwise innocent monopolist would require courts to continually engage in economic regulation, for which they are ill-equipped. But once it was shown that a monopolist had gained, protected, or expanded its power by conduct that need not be tolerated for the reasons summarized above, the law reacted strongly. The remedy was not to regulate the power and restore or establish competitive conditions. If this could be done with reasonable effect by enjoining conduct that proved essential to maintain the monopoly, a conduct remedy might do. But if only divestiture would effectively end the power, divestiture was in order.

This area of the law – the control of monopolization – was not as precise and predictable as was merger law. Market definition would often be contentious. Courts had some discretion in deciding whether monopoly power, or the danger of it, had been proved. Conduct evaluation was also – indeed, remains – something less than a precise art. But there can be little question that throughout the consensus years the rules constraining the conduct of powerful American firms were formidable. Nor can it be doubted that these norms caused leading firms to temper their more aggressive competitive impulses.

Concerted conduct by firms competing horizontally was also evaluated rigorously during the consensus years. Cartel-like activity was *per se* unlawful. In concentrated markets any conduct likely to facilitate cartelization or oligopolistic interdependence in pricing was subject to challenge. Boycotts, or other forms of concerted aggression, directed against horizontal competitors were also unlawful, regardless of any showing of market power. The competitive process requires that markets be open to entry. Existing firms may not blockade them.

Rules against vertical restraints were also strict, and were aimed at protecting dealer independence as well as the allocation and other efficiency values associated with competition. Restraints that hindered the pricing option of downstream firms were *per se* unlawful. So, for a time, were those restricting other marketing options. Restraints that limited the access of horizontal competitors to outlets or inputs were also *per se* unlawful. And, of course, any vertical restraints shown to significantly restrain horizontal competition at any level would violate the rule of reason.

It would not do to overstate the harmony of this structural consensus period. While differences of enforcement emphasis were apparent between one administration and another, the structure-conduct-performance paradigm dominated throughout. The technical debate, discussion (and sometimes confusion) that went on amongst economists was basically committed to that paradigm, and

this commitment had its reflection in policy. Some enforcement officials were tougher than others, points of emphasis sometimes shifted, and adherents to the consensus often parted company and debated particular points of economics, policy or legal judgement. Yet throughout the period the beliefs held in common were more significant than those held in opposition. Structural antitrust was alive and well, whether it was Eisenhower, Kennedy, Johnson, Nixon, Ford or Carter occupying the Oval Office.

## 2. *Structural consensus ideology*

Can one specify the convictions and beliefs so widely shared during the period of structural consensus and determine their sources? To attempt to do so is, in some degree, to speculate. Yet some of the relevant factors can be confidently identified. We have already mentioned industrial organization economics.

At a minimum, industrial organization economics played a role that theoretical knowledge often plays in policy development: it provided a rationale for the policy with protective appeal. But more than this can be inferred; industrial organization economics was a particularly useful rationale for the widely accepted policy because it shared some basic characteristics with the prevailing policy attitudes.

Industrial organization economics is an inductive system that makes the study of particular industries compellingly evident. It avoids excessive rigor in its formulations. In the traditional paradigm, industrial organization economics identifies the tendencies of significant relationships, and its generalizations do no more than point in a direction. They invite either fact-intensive inquiries into particular cases — as in those involving monopoly conduct or practices facilitating interdependence — or the fashioning of general rules with the full knowledge that it will result in some false positives as well as many accurate ones, as in the case of horizontal merger norms. Industrial organization economics is, moreover, a bold, confident, and ambitious mode of inquiry. It does not hesitate to try and understand the particular, to identify what is of value, what is obsolete, and what might be changed.

These features of this mode of inquiry fit remarkably well with the politically dominant attitude in America during the consensus years. The country, too, was bold and confident. People thought that they could figure things out, preserve what was right, and eradicate or improve what was wrong. In large numbers, moreover, they thought there were social responsibilities — things that could and should be done through government. Peace was to be restored, tyranny contained, and democratic nations revitalized. Civil rights were to be achieved for all, poverty abolished, cities beautified, the environment purified, and prosperity protected by fine-tuning the economy. All this was to be done by a socially responsible government.

However, there were, no doubt, other strands of thought that fed into this consensus. The old constitutional notion — that government should leave markets alone and not interfere with individual economic initiative and mobility —

had faded long ago. But during the consensus period another view came into its full flower: that those possessed of private economic power should be constrained.

A notion sometimes called populist came into play. There were those who mistrusted big business in any form, and some who were revolted by any display of wealth and power. The consensus was wide enough to allow both groups elbow room. During much of the consensus period, enforcement efforts kept to terrain where claims of moral rectitude, or of judicious and fair minded law enforcement could be made.

Enforcement, by and large, was aimed at conduct, and mostly conduct that would be publicly regarded as inappropriate. Price fixing and other forms of cartelization certainly met this standard, as did predatory pricing. Many vertical restraints subject to challenge were perceived to be unfair. Mergers, at least by big firms, were and still are viewed with suspicion, and are seen as manifestations of greed. While a few residual areas of enforcement (small mergers and information exchanges in concentrated markets) may not themselves evoke sympathetic public responses, antitrust is generally regarded by the public and many, if not most business people, as a system of fair rules for the competitive arena.

No state of affairs persists indefinitely. During the 1970's one could identify strains in the consensus. Some enforcement efforts exceeded the cautious bounds assumed above. Neoclassical theorists of the "Chicago School" — long critical of traditional enforcement but mostly ignored — became more prominent. What they wrote and said began to shape, if not the law, then at least the agenda for debate and discussion. In a few important opinions, the Supreme Court moved away from earlier pro-enforcement holdings. In other cases, important lower courts rendered decisions for defendants that probably would not have been reached a decade earlier. With hindsight, one can say conditions were right for significant change.

#### D. *Chicago School*

Change — indeed a revolution in enforcement policy — began with the election of President Reagan in 1981. He appointed prominent Chicago School theorists to head the Antitrust Division and the Federal Trade Commission (FTC), and named three of them to the federal appellate bench. Chicago theory became federal antitrust policy in the enforcement agencies.

Enforcement ceased. Merger guidelines were revised and even sometimes ignored as enforcement agencies approved mergers that seemed clearly vulnerable under settled law. A major monopoly case against IBM was abandoned on the threshold of victory in 1982, contrary to the results of a settlement unfavorable for IBM before the European Commission in a similar case.<sup>7</sup> Enforcement energies were turned to fashioning guidelines that articulated why vertical restraints should not be challenged, to acting as *amicus curiae* in favor of defendants in private litigation, to pressing for legislative revisions that would weaken

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7. *Commission v. IBM*, WuW 686, 964 (1984).

existing law, and to developing, articulating, and litigating to obtain acceptance of theories that would reduce the standing of private parties to challenge antitrust violations.

Just as industrial organization economics has affinities with the belief system that yielded the structural consensus, so Chicago theory has affinities with the belief system that fashioned the revolution. Chicago theory is attuned to one goal — efficiency, mainly allocative efficiency. Important aspects of productive efficiency, for example waste that is often associated with non-competitive markets, is largely ignored, and dynamic efficiency is often wholly ignored.

Chicago theory assumes that all market conduct is rational, profit-maximizing conduct. That being so, all conduct is either efficient conduct or monopolizing conduct. Chicago theory applies a simple test to differentiate between the two: does the conduct discernibly result in a reduction in output and a consequent increase in price? If yes, then it is monopoly conduct. As such, it should be forbidden unless it yields productive efficiencies which outweigh the allocative inefficiencies. (This is where productive efficiencies are taken into account). If productive efficiencies are attained, and exceed the allocative inefficiencies, it does not matter that price has gone up, even if all the efficiency benefits go to the monopolists and none to the consumers. Theory cannot attribute greater social value to a dollar in the hands of a monopolist than to a dollar in the hands of a consumer. If the conduct does not reduce output and increase price it is by definition efficient. Efficiency is the residual category.

The related policy attitude of the administration that adopted the Chicago theory is nearly the opposite of the attitude that formed the earlier consensus. The new attitude assumes that markets, however they may be structured, are very robust, self-correcting institutions. It also assumes that government intervention into markets almost always arises out of capture by private interests seeking to use the government as a means of distorting market allocation. Either that, or the intervention is simply ill-informed and inept. The new attitude relies for public support on anti-government ideology. And sufficient support there has been.

Just as Americans have been ambivalent about private power, so too have they been ambivalent about Government power. If the consensus period was one of confidence, the Reagan years were of doubt and concern. Americans had seen two earlier governmental policies go wrong. The war on poverty, the model cities program, and fighting crime proved only to be partly successful. They had seen that even success and progress in the protection of civil rights could yield its own backlash. They had seen scandal in high places — indeed in the highest. They had seen disastrous decisions with respect to Vietnam. All the while, America could no longer manufacture products with the same degree of skill as other manufacturing nations — cars included. In such an environment, the call to “get the government off the back of business,” had a certain appeal. So did the assertion that efficiency should be the sole concern — that America cannot afford to indulge itself with economic policies aimed at other goals. So the pendulum swung. With Baxter, Ginsberg and even Rill, with

Scalia, Bork, Easterbrook and Posner, the Chicago ideology came to ascendancy throughout the enforcement agencies and to some extent in the courts.

One can only speculate whether Chicago thinking will remain influential and if so for how long. The Chicago position on vertical restraints and on private antitrust standing have both been largely, if not completely successful in the courts, though subject to considerable criticism in Congress, which could lead to eventual modification. The Chicago position on mergers has not really been tested in the courts because mergers are now so seldom challenged. The few judicial materials available tell a mixed story. The Chicago position on horizontal restraints and on monopolization has not been notably successful in the courts. While one can hardly predict a rapid return to consensus thinking and policy, neither can one assume that Chicago thinking continues to dominate in the enforcement agencies or the courts. There are indications that even the more rigorous price theory analysts are, today, going beyond the over-broad assumptions on which Chicago School antitrust analysis has been based.

## II.

### THE GERMAN ANTITRUST DEVELOPMENT

#### A. *The Inception of Antitrust Through the Havana Charter and the Decartelization Law*

American antitrust, in a form much closer to that which it had during the consensus years than to its present ambiguous form, has spread among other nations. This diffusion of law and legal philosophy was made possible by the Havana Charter of 1945, which provided for the International Trade Organization ("ITO"). As such, the Havana Charter never went into force. A review of the transfers of laws in legal history demonstrates that such a diffusion, one effectuated via an unsuccessful international instrument, is a rather special case.<sup>8</sup>

Chapter V of the Havana Charter contains an international antitrust law. The insight of the drafters was that it made little sense to regulate tariffs without dealing with business concentrations, cartels, and their trade practices.<sup>9</sup>

The Western Allied occupation powers were convinced that the norms of Chapter V, by facilitating international trade, would aid post war recovery in

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8. There are some comparative accounts on what is called transfer or reception of law. Here follow some examples: A survey on the spread of civil and common law in A.T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 3 (2<sup>nd</sup> ed. 1997); on the acceptance of common law in the world see K. ZWEIGERT AND HEINZ KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS*, 214, 237 (3<sup>rd</sup> ed. 1996); on various ways of legal transfer see M. Alliot, *Über die Arten des "Rechts-Transfers,"* in *ENTSTEHUNG UND WANDEL RECHTLICHER TRADITIONEN*, 161 (Fikentscher, Franke, and Köhler eds., 1980); a view from anthropology is contributed by L. POSPÍŠIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* (1974), in particular Chapter 6 (Internationalization vs. Enforced Legal Transfer); and from legal history WOLFGANG WIEGAND, *STUDIEN ZUR RECHTSANWENDUNGSLEHRE DER REZEPTIONSZEIT* (1977); W. Wiegand, *Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991); W. Wiegand, *Americanization of Law: Reception or Convergence?*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 137-152 (Lawrence M. Friedman and Harry N. Scheiber eds., 1996).

9. The text of Chapter V is set forth in Appendix A, United Nations Publications Sales N° 1948, II D. 4 (*Reprinted in* A. GLEISS AND WOLFGANG FIKENTSCHER, *WUW* 245-252 (1953)).

Germany and Europe as a whole. They also apparently thought that free market norms were related to a democratic constitution. Therefore, they used Chapter V as a basis for decartelization statutes in their respective occupation zones, thus eliminating a broad range of practices in restraint of trade which had been common in Germany.

By doing so, they indirectly influenced the present German law against restrictive trade practices, as well as Article 85 the EC Treaty. Both the West German anti-trust law and the EC Treaty went into force on January 1, 1958. Consequently, substantive provisions of Chapter V of the Havana Charter on restrictive trade practices had a significant impact on the present status both of German law and European economic law.

The German decartelization law became the only legal binding form of Chapter V of the Havana Charter. From February 12, 1947, to May 5, 1955, the decartelization law was part of the legislation of the occupation powers. From May 5, 1955, to December 31, 1957, the same legislation became federal law of the Federal Republic of Germany.<sup>10</sup> On January 1, 1958, a new Law Against Restraints of Competition, drafted and enacted by authorities of the Federal Republic of Germany, went into force and repealed the three occupation laws. The German law was prepared, in part on the lines and on the basis of the philosophy of the occupation statutes. Thus, the present German Law Against Trade Restraints (GWB) is—maternally—a daughter of the Allied occupation legislation, a grandchild of the Havana Charter and great grandchild of U.S. American anti-trust law.

Since its enactment, the Law Against Trade Restraints has been amended six times. In 1966, cooperation between small and medium-sized enterprise was made easier.<sup>11</sup> Moreover, section 22 on abuses of market dominating positions was expanded from an enumerative list of abuse. There was a controversy whether the abuse was to occur on the same market which was dominated or whether an effect on a third market by the abuse would be sufficient. The text of the amendment decided on the latter theory.

By the second amendment in 1973, apart from minor additions, the Law underwent five major changes.<sup>12</sup> Again, the control over market-dominating enterprises was considerably expanded. Resale price maintenance for trade-marked goods was abolished and, taking French and Canadian law as a model,

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10. On the basis of the Paris Protocol of October 23, 1954, *Bundesgesetzblatt* (Federal Gazette) 1955 II 213; for American Occupation Zones, the decartelization statute of the Military Government Law N° 56 of February 12, 1947, *in* ABI, Apr. 1, 1947, at 2, *in* R. HEINKE, *SAMMLUNG DER VOM ALLIIERTEN KONTROLLRAT UND DER AMERIKANISCHEN MILITÄRREGIERUNG ERLASSENEN PROKLAMATIONEN* (n.d.); for the British Occupation Zone, the decartelization law was the Military Government Ordinance N° 78 of February 12, 1947, ABI 16, p. 412; for the French Occupation Zones, the decartelization law was the Military Government Ordinance of N° 96 of June 9, 1947, *Jour., Off.* p. 784; the texts of the U.S. law and the British Ordinance were identical; the French version was slightly different. For details *see* A. GLEISS & WOLFGANG FIKENTSCHE, *WUW* 525-533 (1955). On January 1, 1955, the Law Against Restraint of Competition of June 27, 1957 (BGBl. I 1081) ended the era of occupation antitrust.

11. Law of September 15, 1965 (BGBl. S.1363).

12. Law of August 5, 1973 (BGBl. I S. 918).

compulsory contracting was provided for the marketing of goods to retailers, who needed these goods to be competitive. In this way, the prohibition on resale price maintenance was made difficult to evade by refusing delivery to retailers who sold at low prices. Section 25 was extended to make concerted actions (Gentlemen's Agreements, "Gary Diners") an offense. A more effective merger control was introduced. Finally, in the third amendment of 1976, merger control for press mergers was profoundly strengthened.<sup>13</sup> Since then, press mergers have become a risky business in the Federal Republic. Hardly any case taken up by the *Federal Cartel Office* and brought before the court has been won by the defendant.

The fourth amendment of 1980, among other tightening provisions, stiffened merger control and the discrimination prohibitions.<sup>14</sup> It also limited the exemptions for banking, insurance, and utility corporations.

A fifth amendment followed in 1989.<sup>15</sup> Under section 26, al. 2, a compulsory contracting phrase in favor of retailers was restricted to small and medium-sized retailers. (Goods could now be kept out of the hands of large retailers known to be price cutters). The presumptions in section 26, al. 2 and 3, were made more precise. Predatory behavior against small and medium-sized competitors was more clearly prohibited (section 26, al. 4 and 5, formerly section 37, al. 3, a provision originally added to the Law by the amendment of 1980). Section 47 entitled the Federal Cartel Office to act under Articles 87, 88, and 89 of the EC Treaty.

A sixth amendment went into force on January 1, 1999.<sup>16</sup> It streamlined the whole Law Against Restraints of Competition — which in some of its chapters had become unorganized by the impact of earlier amendments, and partially renumbered sections, integrated important case law reduced the number of exemptions from the law and, to some degree, harmonized German and European antitrust law. The main changes introduced by the sixth amendment include the identification of competition and the market in section 1 (and thus the adoption of the theory of the subjective market), the enactment of a limited rule of reason for cartels in Section 7<sup>17</sup> (new), and the replacement of a regulation proscribing administrative abuse<sup>18</sup> by legislation prohibiting<sup>19</sup> the abusive exercise of a market dominating position.<sup>20</sup> As a result, it is now possible to bring private

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13. Law of June 28, 1976 (BGBl. I S. 697).

14. Law of April 26, 1980 (BGBl. I S. 458).

15. Law of November 12, 1989 (BGBl. I S. 2486).

16. Law of August 26, 1998 (BGBl. I S. 2546); for a discussion of the essential features of the sixth amendment see Rainer Bechtold, *Das Neue Kartellgesetz* NJW 2769-2774 (1998). The *Gesetz zur Bereinigung wirtschaftsrechtlicher Vorschriften* [Law for the Rearrangement of Legal-economic Rules], v. 27.2.1985 (BGBl. I S. 457), while it was not a substantive amendment to the Law Against Restraints of Competition, it did rephrase some of its provisions without changing their contents; some authors count it as the 5<sup>th</sup> amendment, which would make the 5<sup>th</sup> amendment of 1989 the 6<sup>th</sup>, and the 6<sup>th</sup> amendment of August 26, 1998, would become the 7<sup>th</sup> amendment.

17. Cf. Article 85, number 3, EC Treaty.

18. The old version of Section 22.

19. The new version of Section 19.

20. Cf. Article 86 EC Treaty.

law suits alleging market-dominating behavior under section 35. There are no longer any restrictions on antitrust arbitration. Also, there is closer scrutiny of discriminatory behavior (including sales below cost), mergers, and denied access to essential facilities. Finally, the future seat of the Federal Antitrust Authority will now be in Bonn, instead of Berlin.

## B. The West German Development in Antitrust Philosophy

### 1. The Freiburg School and the Discussion of Economic Value Systems

But this descent does not tell the entire story. Antitrust, a transplant from a failed international treaty forced on a defeated nation by an occupying power, has thrived in Germany to a remarkable degree. The reason lies in German political and economic culture. Besides its maternal lineage, German antitrust also had a father; the so-called Freiburg School. The Freiburg School had been constrained during the Nazi period but came to life after the war. The teachings of the Freiburg School, also termed the German "Neoliberalism" or "ORDO-Liberalism," developed after 1936 primarily in the Freiburg University Faculty of Economics. There is an "outer" story of Freiburg, and an "inner" story. Both should be told because there not much is widely known of either of them.<sup>21</sup>

### 2. The Public Story of the Freiburg School

In 1933, the year the of the national, socialist *Machtergreifung*, Professor Walter Eucken who taught economics at the University of Freiburg met the two law professors, Franz Böhm and Hans Grossmann-Doerth. Franz Böhm had just published his seminal book *Wettbewerb und Monopolkampf* [Competition and the Struggle for Monopoly] in which he attempted to define the interrelation of economic liberalism and "the positive legal order." Grossmann-Doerth had written against the abuse of the adhesion contract. Franz Böhm was a very good friend of Heinrich Kronstein.<sup>22</sup> In 1932, Kronstein had just published his book *Die abhängige juristische Person* [The Dependent Corporation], which was to become another classic. Here, for the first time in German law, a modern critical theory of law against the possible abuse of the corporate entity was developed ("piercing the corporate veil"). Kronstein had to leave Germany in 1934 to escape persecution, as had Wilhelm Roepke and Alexander Rüstow, other friends of Eucken, Böhm and Grossmann-Doerth. In 1936, these three began to publish a monograph series *Ordnung der Wirtschaft* [Order of the Economy], which later, in 1948, grew into the *ORDO-Jahrbücher*, the basic theoretical journal of the ORDO-Liberalism, developed by the Freiburg School.

21. For details see ANDREAS HEINEMANN, *DIE FREIBURGER SCHULE UND IHRE GEISTIGEN WURZELN*, MÜNCHEN (1989), and David J. Gerber, *Constitutionalizing the Economy: German Neoliberalism, Competition Law, and the "New" Europe*, 42 AM. J. COMP. L. 25-84 (1994), and DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

22. Heinrich Kronstein to Wolfgang Fikentscher in 1966: "We knew each other from sandbox."

In spite of repeated persecution, attempts by Nazi authorities to stop their research enterprise were never carried to a successful end. The Freiburg Faculty of Economics was regarded as “a kind of natural park of liberal economic theory.”<sup>23</sup> Soon, a larger group of like-minded writers and researchers assembled around the three founders.<sup>24</sup> Among the younger followers and contributors was Professor Ludwig Erhard who later in 1949 became the first German minister of economics after the war, and the German chancellor to follow Konrad Adenauer. Thus, it was Erhard and Müller-Armack who developed from ORDO-liberal thought the concept of *Soziale Marktwirtschaft*, which was to be the economic system that essentially — although in varying forms — remained an unchallenged, all-party platform from the founding of the Federal Republic of Germany in 1949 until today.

*Soziale Marktwirtschaft*, the basic principle underlying German antitrust policy from its beginning to this day, insists that there be a close link between a liberal economic order that values property, freedom of contract, and economic mobility, and a political order that builds on democracy and personal liberty. Interestingly enough, *Soziale Marktwirtschaft* thus brings together in a theoretical, even philosophical manner, essentially the same insights and elements that were pragmatically combined when the Sherman Act was passed. The liberal constitutional regime that was in place in America at that time protected its citizens’ political and economic liberty from undue interference by the government. The Sherman Act, on the other hand, was a law that curtailed economic liberty by protecting its citizens from undue interference by those exercising private economic power.

### 3. *The Private Story of the Freiburg School*

The Freiburg School of thought took shape in an environment of dictatorship after 1933, when it was exposed to political persecution. Fortunately, the Freiburg School of thought fit reasonably well into the broader development of post-World War II German law and legal theory. Freiburg neoliberalism was linked to the post-war development of German law in the following way: German tradition already had a theoretical, but practically influential, feature that combined the three factors of property, contract, and competition. All three to-

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23. G. SCHMÖLDERS, *PERSONALISTISCHER SOZIALISMUS. DIE WIRTSCHAFTSORDNUNGSKONZEPTION DES KREISAUER KREISES DER DEUTSCHEN WIDERSTANDBEWEGUNG. DEMOKRATISCHE EXISTENZ HEUTE*, (1969). For other literature besides HEINEMANN and GERBER, see *supra* note 21; on the rise and teaching of the Freiburg School see WOLFGANG FIKENTSCHER, *WETTBEWERB UND GEWERBLICHER RECHTSSCHUTZ. DIE STELLUNG DES RECHTS DER WETTBEWERBSBESCHRÄNKUNGEN IN DER RECHTSORDNUNG* (1958); FRANCOIS BILGER, *LA PENSÉE ECONOMIQUE LIBERALE DANS L’ALLEMAGNE CONTEMPORAINE* (1964); FRITZ HOLWARTH, *ORDNUNG DER WIRTSCHAFT DURCH WETTBEWERB, ENTWICKLUNG DER IDEEN DER FREIBURGER SCHULE, SCHRIFTENREIHE DES INSTITUTS FÜR ALLGEMEINE WIRTSCHAFTSFORSCHUNG DER ALBERT-LUDWIGS-UNIVERSITÄT FREIBURG* (1985).

24. These included Edith Eucken-Erdsiek, Constantin von Dietze, A. Friedrich Lutz, Bernard Pfister, Hans Gestrich, Fritz W. Meyer, Adolf Lampe, Karl-Friedrich Maier, Leonhard Miksch, K. Paul Hensel and Alfred Müller-Armack, who, in 1948, proposed to Ludwig Erhard the renaming of Neo- (or ORDO-) liberalism as “Social Market Economy,” in order to make it politically easier to sell to the German electorate.

gether were thought of as the basis of general, private, and commercial law. These three factors came together as a result of a four-stage developmental process:

(1) In 1923, Professor Martin Wolff from the Berlin University School of Law, published a groundbreaking article on how the traditional Roman law concept of property<sup>25</sup> changed in response to the then new German Constitution of 1919. The Constitution made property both a basic right, an entitlement of the individual, and also an instrument that was to be used for the benefit of society.<sup>26</sup> Thus, property was now embedded in a social context that the German Republic needed for it to continue functioning.<sup>27</sup> Wolff's article introduced into the German legal tradition an idea that is still part of German property law; that property rights, including contractual rights, should be construed in ways consistent with the needs of society.

(2) Sometime around 1927, Wolff's student, Heinrich Kronstein, integrated this line of thought into the field of corporate entity and business combines.<sup>28</sup> Thereafter, as a result of the publication in 1932 of Heinrich Kronstein's book, *Die abhängige juristische Person*, the corporation was widely understood to be a concept responsive to the legal and sociological purposes of a modern society.<sup>29</sup>

(3) As has been said, Heinrich Kronstein and Franz Böhm were friends since boyhood and consequently, they exchanged views on what Kronstein was attempting to accomplish with his book *Die abhängige juristische Person*. Now it was Franz Böhm, professor of law, who extended the idea of the individual's and corporate property's socio-economic functionality to contract and competition. Martin Wolff's inclusion of contractual rights in the constitutional sense of property prepared the ground for such an extension. Böhm, however, radicalized the functionality of the contract system for societal purposes. In 1927, Böhm tied contract to competition when he wrote an article on the "problem of economic power."<sup>30</sup> From 1924 to 1931, Böhm served in various capacities in the Cartel Department of the *Reichswirtschaftsministerium* [Reich Ministry of

25. § 903 Bürgerliches Gesetzbuch (Civil Code).

26. Article 153 German Constitution ("Weimar Constitution") (1919).

27. MARTIN WOLFF, REICHsverfassung und Eigentum, Festschrift für KAHL, 3-30 (1923).

28. It is uncertain whether it was Wolff's or Kronstein's idea to apply the limiting principle of property to the concept of the corporation. Fikentscher thinks it was Kronstein's for the following reasons: In his doctoral dissertation on *Heimstättenrecht* [a sort of homestead law], which Kronstein wrote under the supervision of Wolff in 1923 and 1924, Kronstein tried to analyze some concepts of property law "historically and sociologically," but Wolff insisted that he should drop this and concentrate instead on the positive law; KRONSTEIN, BRIEFE AN EINEN JUNGEN DEUTSCHEN [Letters to a Young German, an autobiography] 91 (1967). Later, apparently, Martin Wolff became convinced that the young Kronstein was able to handle the approach which he, Wolff, had so successfully applied in 1923 on a broader basis, permeating the whole of civil law. See also WOLFGANG FIKENTSCHER, GATT - GRUNDSÄTZE, PROPERTY RIGHTS UND DER SCHUTZ DES FREIEN UND LAUTEREN WETTBEWERTS, Festschrift Rudolf Lukes, Köln etc. 377-394 (1989).

29. In the common law tradition, this notion is older, and dates back to the "chartered corporation" of the 17<sup>th</sup> century.

30. FRANZ BÖHM, *Das Problem der wirtschaftlichen Macht*, 3 DIE JUSTIZ 324 (1927/1928) reprinted in FRANZ BÖHM, REDEN UND SCHRIFTEN, KARLSRUHE, 25 (1960).

Economics]. Böhm's book, *Wettbewerb und Monopolkampf* [COMPETITION AND THE STRUGGLE FOR MONOPOLY] (1933), laid the foundation for German jurisprudence's theory that a working system of civil and commercial contracts requires state-protected competition.

(4) After World War II, as a member of the Christian Democratic Party, Böhm became a Member of the Federal Diet and was one of the primary initiators and defenders of the 1958 German antitrust law.<sup>31</sup>

The theme of property rights, including contractual rights, and their relation to a competitive system was raised in several studies which accompanied the aftermath of the Havana Charter, the Allied decartelization laws for Germany based on the Havana Charter, and the rise of a German antitrust law. This resulted in a linkage between an individual's right to participate in a free economy, as protected by antitrust rules and rules against unfair trading, and its rights in tangible, intangible, and contractual property.<sup>32</sup>

Thus, antitrust law became a central component of German constitutional and private law. It was derived from a constitutional understanding that insisted upon a socially conditioned framework for property, contract, and corporate law on the one hand, and a framework for competition law on the other in which property rights and antitrust were seen as being complementary to one another, each being essential to the shaping of the private law.

From here, a final synthesis was envisaged: Legal rules established to safeguard free and fair competition presuppose that ownership of tangible, intangible, and contractual property rights are the aims of competition. Property rights, however, are not entitlements for their own sake that provide their owners with an unlimited assignment of power. Their justification and strength depend on competition.

Property rights in this sense include both rights in tangible and intangible property and rights in contracts that have been freely and fairly negotiated between parties with comparable bargaining power. They also include lasting property rights, for example, in chattels, land, intellectual property, and estates in general. This system implies that there is a conditioning of the parts that form

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31. His student and friend Ernst-Joachim Mestmäcker, a professor in Münster, later Bielefeld, and the first President of the German Monopoly Commission, then Director of the Max-Planck-Institute for Foreign and International Private Law at Hamburg, became influential in the application and development of both German and European antitrust law.

32. See generally E.-J. MESTMÄCKER, *DER BÖHM-Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen*, (1955); OSKAR LEHNICH, *DIE WETTBEWERBSBESCHRÄNKUNG*, (1956); BIEDENKOPF, CALLMANN AND DERINGER, *AKTUELLE GRUNDSATZFRAGEN DES KARTELLRECHTS*, (1957); O. LIEBERKNECHT, *PATENTE, LIZENZVERTRÄGE UND VERBOT VON WETTBEWERBSBESCHRÄNKUNGEN* (1953); RUDOLF LUKES, *DER KARTELLVERTRAG, DAS KARTELL ALS VERTRAG MIT AUßENWIRKUNG* (1959); K. BORCHARDT & W. FIKENTSCHER, *WETTBEWERB, WETTBEWERBSBESCHRÄNKUNG, MARKTBEHERRSCHUNG* (1957); W. FIKENTSCHER, *WETTBEWERB UND GEWERBLICHER RECHTSSCHUTZ* (1958); E. STEINDORFF, *ZWECKMÄßIGKEIT IM WETTBEWERBSRECHT* (1959); E.-J. Mestmäcker, *ÜBER DIE NORMATIVE KRAFT PRIVATRECHTLICHER VERTRÄGE*, JZ 441(1964). For a recent summary see W. FIKENTSCHER, *PROPERTY RIGHTS AND LIBERTY RIGHTS: NORMATIVER ZUSAMMENHANG VON GEISTIGEM EIGENTUM UND WIRTSCHAFTSRECHT*, Festschrift Helmut Schippel 563-568 (1996). Of course, there are differences as to the weight given to the Freiburg School influence.

it: There can be no legitimate property rights without free and fair competition<sup>33</sup>, nor free and fair competition without property rights.<sup>34</sup> For German law, this has been the philosophy of antitrust from its initial formulation in the context of the Freiburg teachings, after 1933, up until today.

One of these teachings of the Freiburg School is that liberty, if not protected by law, may abolish itself.<sup>35</sup> Kronstein's and Böhm's critique of the abuse of corporate power and monopoly provided economic examples. Hitler's election as a dictator, achieved under the liberal and democratic Weimar constitution (1919), was a political illustration of the same phenomenon.

Meanwhile, in the background, Freiburg ORDO-liberalism developed a legal-economic model of a society which, in controlling its economy, tries to protect long-term liberty. This model was based on the premise that liberty, unplanned and unprotected, tends to degenerate. The Freiburg School holds that freedom can only be maintained if it is legally established. It must be protected and controlled in such a way that it could not be abused and result in a lack of freedom. The primary legal instrument a government should use to achieve this general aim in the economic field is antitrust or, in Franz Böhm's terms, a legal order establishing and safeguarding competition. ORDO-liberalism asserts that without a vigorous antitrust doctrine, freedom cannot be claimed in good conscience.<sup>36</sup>

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33. See *supra* II.B. It should be noted, however, that the mainstream property rights theorists, especially in the U.S.A., would either speak of competitive standing as just another "property right," thereby not treating the idea of property rights and the liberty to engage in free and fair competition as opposites, or would simply not discuss the problem at all. See, e.g., THE ECONOMIC FOUNDATIONS OF PROPERTY LAW (Bruce Ackerman ed., 1976); A.M. Polinsky, *Controlling Externalities and Protecting Entitlements: Property Rights, Liability Rules, and Tax-Subsidy Approaches*, 8 J. LEGAL STUD. 1 (1979). More tending to the dichotomy: "[...] property [is] the institution that, by allocating things to people, give liberty over things [...]. Property law thus established [...] a market structure for allocating resources," R. COOTER ET AL., LAW AND ECONOMICS, 117 (1988); in their 2<sup>nd</sup> edition of 1997, p. 106, the text has been condensed.

34. There are some German antitrust theorists who place competition above property expectations. They are sometimes jokingly referred to as the defenders of the "pure doctrine." These "pure doctrine" defenders, however, overlook the dependency of competition on something over which to compete, i.e., property, whether tangible or intangible.

35. This "paradox of liberty" or "liberal paradox," an idea discussed in Plato, was restated in KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 1 (1945). On the role of the "paradox of liberty" in antitrust see W. Fikentscher, *Germany: Proposed Antitrust Legislation and Price Discrimination*, AM. J. COMP. L. 523, 523 (1953); W. FIKENTSCHER, WETTBEWERB UND GEWERBLICHER RECHTSSCHUTZ 307 (1958); W. FIKENTSCHER, DIE FREIHEIT UND IHR PARADOX, GRÄFELFING (1997) (on the freedom paradox in politics and economics); A. HEINEMANN, DIE FREIBURGER SCHULE UND IHRE GEISTIGEN WURZELN (1989); David J. Gerber, *Constitutionalizing the Economy: German Neoliberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25-84 (1994). DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE, *supra* note 21. Popper, however, never mentioned the Freiburg School.

36. In the thirties, the Freiburg School consisted of several "circles." Each was devoted to elaborating concrete ideas and legislative measures to be implemented after Germany would have lost the war. Membership in the *Freiburger Kreise* [circles] was only partly congruent with the faculty of Freiburg University. See sources cited *supra* notes 21 to 24. The Freiburg School and the Freiburg circles were resistance groups who worked under the constant threat of persecution and arrest. One of the Freiburg circles, the *Arbeitsgemeinschaft Erwin von Beckerath*, even succeeded in using the rooms and the financial resources of the *Akademie für Deutsches Recht* [Academy of German Law] in Munich, a Nazi institution for the preparation of the *Volksgesetzbuch* [People's

It was historically unique that the ideas of the Freiburg School's theorists became the country's socio-economic reality. Franz Böhm became a representative in the German Diet and participated in the preparation of the German Law against Trade Restraints. Alfred Müller-Armack, a man who described the Freiburg School's neoliberalism as a "*Soziale Marktwirtschaft*," or "social market economy" with "social" meaning the defense of the conditions of economic liberty, including antitrust, became the Federal Secretary of Economics. One day after the Currency Reform of June 20, 1948, Ludwig Erhard, as Director of Economic Affairs for the Occupation Authorities in the Western Zone of Occupation, promulgated the repeal of the restrictionist laws enacted by the occupation forces for the administration of the devastated post-war German economy. When Erhard was disciplined by his Allied superiors on the grounds that he had no authority to change occupation law, he answered: "I did not change it, I abolished it."<sup>37</sup>

A considerable number of younger teachers and researchers of law and economics, as well as practitioners, politicians, officeholders, and members of parliament were educated and influenced by this first generation of the "Freiburgians." Today, they are to be found in both of the two large democratic parties, the Christian Democratic Union (in Bavaria: Christian Social Union), and the Social Democratic Party of Germany (SPD). This is not the place to list names for this second generation of neoliberals "German style."<sup>38</sup>

However, one should be mentioned here, Professor Kurt H. Biedenkopf, Prime Minister of the German state ("Land") of Saxony, a student of Heinrich Kronstein, whose theory of the subjective right drives the Freiburg doctrine to a logical extreme.<sup>39</sup> In short, Biedenkopf states that the contents of a subjective right<sup>40</sup> are inversely proportional to the economic power of the owner of the

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Law Book], to further their cause. After the attempted assassination of Hitler on July 20, 1944, the Gestapo discovered the draft legislation that the circles had been working on in anticipation of the defeat of Germany. Constantin von Dietze and Adolf Lampe were arrested and transferred to Gestapo jails in Berlin. See Christine Blumenberg-Lampe, *Das wirtschaftspolitische Programm der "Freiburger Kreise,"* in *VOLKSWIRTSCHAFTLICHE SCHRIFTEN*, 208 (1973); BEARBEITET VON BLUMENBERG-LAMPE, CHRISTINE, *FORSCHUNGEN UND QUELLEN ZUR ZEITGESCHICHTE, DER WEG IN DIE SOZIALE MARKTWIRTSCHAFT. REFERATE, PROTOKOLLE, GUTACHTEN DER ARBEITSGEMEINSCHAFT ERWIN VON BECKERATH 1943-1947* (1986). They were liberated in April 1945 by the Allied forces. Walter Eucken got away with an investigation in October 1944.

37. Schickling, *ENTSCHEIDUNG IN FRANKFURT: LUDWIG ERHARDS DURCHBRUCH ZUR FREIHEIT* 89 (1978). Erhard pled for German economic reform, including a currency reform, as early as 1945.

38. It would be misleading to call them "neoclassicists" because neoclassic economics can be defined by the neglect of the importance of the liberty paradox; for details see W. FIKENTSCHER, *DIE FREIHEIT UND IHR PARADOX* (1997).

39. KURT BIEDENKOPF, *ÜBER DAS VERHÄLTNISS WIRTSCHAFTLICHER MACHT ZUM PRIVATRECHT, FESTSCHRIFT FRANZ BÖHM*, 113 (1965).

40. The subjective right, in German jurisprudence, is the entitlement of a person with the power to cause a result whenever the law makes the causing of the result dependent on the will of the person. In other words, the subjective right is the main vehicle of private autonomy. Therefore, subjective rights embrace what in Anglo-American tradition is called "property rights," but they add to them the liberties cast into legal form to acquire and to transfer property rights. Cf. BAUMANN, J., *EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT*, 251 (8<sup>th</sup> ed. 1989). An approximate translation for the subjective right: "Hohfeldian claim."

right. Thus, rights have variable contents. The more power, the less potent the right, and vice versa.

This concept may be difficult to handle in everyday legal practice.<sup>41</sup> But as a general principle of antitrust, as a general formula for the relation of law and might, the concept has its merits. It contributes to the understanding of what law is about: The taming and redistribution of power.

In historical and international comparison, the Freiburg School model of legally established and protected freedom of economy has become of considerable importance. It provided for the philosophy of German economic recovery after World War II in general, and German antitrust and its Law Against Trade Restraints of 1958 in particular, serving as a common denominator for all shifts in West German economic (including antitrust) policy since 1948.<sup>42</sup> To some extent, it has also influenced the antitrust policy of the European Union.

### C. Substance of German Antitrust Law<sup>43</sup>

German antitrust, embodied in the Act Against Restraints of Competition (GWB) that became effective on January 1, 1958, has on the whole remained consistent with the Freiburg tradition.<sup>44</sup>

The central concept of the law is the "restraint of competition." This notion comprises restrains of trade effecting competition by concerted actions, horizontal and vertical loose associations, concentrations, and monopolies. Competition is seen as the independent striving to achieve commercial advantage among competitors (sellers or buyers) by offering the best possible terms of trade. Therefore, at least two competitors must strive for the business of a third party, thereby involving themselves in competitive tension. Competition includes actual and potential competition (contestable markets, market entry). Since Janu-

41. See W. FIKENTSCHER, VERTRAG UND WIRTSCHAFTLICHE MACHT, Festschrift Wolfgang Hefermehl zum 65. Geburtstag 54, 41-57 (1971).

42. For an account of these policy shifts between 1958 and 1988, see Michael Lehmann, *Das Prinzip Wettbewerb, Ein gemeinsames Gesetz für Biologie, Ökonomie und Wirtschaftsrecht*, JZ 61-67 (1990); Karte & Holtschneider, *Konzeptionelle Ansätze und Anwendungsprinzipien im Gesetz gegen Wettbewerbsbeschränkungen – Zur Geschichte des GWB*, in *Handbuch des Wettbewerbs* 193 (Cox, Jens & Markert eds., 1981). For the time after 1988, some hints are given in Gerber, *Constitutionalizing*, *supra* note 21, at 75. There is need for a more elaborate review of that period.

43. See also W. Fikentscher, *Part III: Cartel Law (Restrictive Practices Law)*, in BEIER, SCHRICKER & FIKENTSCHER, GERMAN INDUSTRIAL PROPERTY, COPYRIGHT, AND ANTITRUST LAW (3<sup>rd</sup> ed. 1996).

44. After a number of amendments, the present text of the Law bears the date of August 26, 1998, BGBl. I S. 2546. For details see *supra* notes 10-16. Several enforcement regulations have been issued, for example, on costs of proceedings and on the cartel register. The German Act Against Restraints of Competition is, of course, not the only cartel law in force in Germany. To the extent that trade between the Member States of the European Economic Community (EC) is affected, the cartel law of the EC Treaty (Arts. 85-92 EC Treaty) and of the European Coal and Steel Community (Arts. 65-66 ECSC Treaty) apply. European cartel law is enforced both by the Commission of the European Communities in Brussels and by national antitrust agencies. National courts also decide questions of nullity and of recovery for damage in cases that resort to European jurisdictions. Appeals (*Beschwerde*, *Rechtsbeschwerde*) against decisions of the German cartel authorities may be made to the tribunals at the state and federal levels (*Oberlandesgerichts*). Further, the German courts decide private actions arising under the Act Against Restraints of Competition, and those brought concerning cartel agreements or decisions of cartels.

ary 1, 1999 (sixth amendment) restraint of competition and market influence are treated as identical, and the objective market-influence-test has been given up.

Compared with US antitrust law, which addresses formal categories (loose associations, cartels, naked cartels, tyings, mergers, etc.) German antitrust law focuses on the abstract but economically essential concept of “restraint of competition” also giving less attention to legal categories such as contract, decision, boycott, corporate merger, codes of ethics, etc.

The system of sanctioned restraints of competition is as follows: The restraints of competition comprise restraints by conduct (competition is being restrained, *Wettbewerb wird beschränkt*) or by circumstance (competition is already restrained, *Wettbewerb ist beschränkt*).

The classic example of restraint of competition by conduct is a price cartel, by which several sellers agree to raise prices in order to exact so-called “cartel rents”; it is prohibited by section 1 of the GWB. Similarly, “binding rents” are drawn from vertical restraints of competition by conduct and controlled under sections 14 and 15. The prototype of a restraint of competition by circumstance is a natural monopoly: an enterprise that is subject to insubstantial competition or none at all; the abuse of a dominant position in the market is prohibited by section 19 of the GWB to prevent it from earning “monopoly rents.” The Act Against Restraints of Competition governs restraints by conduct in sections 1-18, and 21-27, subjecting them basically to a prohibition principle with certain exceptions. The law subjects restraints of competition by circumstance to the prohibitions and regulations of conduct in sections 19 and 20 (discriminations).

In contrast to American antitrust law and the decartelization law effective in Germany until 1958, the present law in Germany does not include a general “rule of reason” principle. There is no general exception of “commercial reasonableness” to the two basic prohibition and abuse principles. Instead, all exceptions are in principle specifically enumerated in the law. The number of exceptions is therefore not capable of being increased. This has correctly given German cartel law the reputation of being particularly stringent. However, on January 1, 1999, a general proviso in favor of useful cartels was introduced into section 7.

To the extent that restraints of competition by circumstance result from either one of two particularly high degrees of restraint of competition, “market domination” or a “controlling market position,” either one held by one or more enterprises, the law may prohibit abusive conduct based on that domination or position under section 19 of the GWB. This provision establishes rebuttable presumptions as to the existence of such restraints of competition, and it contains a non-exhaustive list of prototypes of abuse.

Pressure to enter a cartel, boycotts, active and passive discrimination, exploitation of dependent relationships, and predatory practices are prohibited by sections 21-23.

Anticompetitive agreements lead either to a combination between enterprises which remain economically independent (cartels and other restrictive agreements), or their loss of economic independence (by forming a multi-corporate

enterprise – *konzern*; or by entering into a merger – *fusion*). Anticompetitive integrations of both kinds are subject to control or prohibition under sections 35-43 of the GWB. The cartel authority must prohibit the forming of a *konzern* or a merger if it creates or strengthens a market dominating position.<sup>45</sup> In deciding whether or not to do so it considers the likely competitive effect of the agreement. This *Zusammenschlußkontrolle* [merger control] has become one of the most important fields of application of the law.

There are also two classes of anticompetitive agreements in which the partners remain economically independent. Those who compete with one another are named “cartels” (sections 1-13 of the GWB). Those which do not are referred to as “vertical agreements.” The “vertical agreements” are governed by sections 4-18 of the GWB. Accordingly, the freedom to choose one’s contracting partner is protected against abuse under Section 16,<sup>46</sup> while restraints on the contents of agreements lead to the affected agreements being voided under section 14. Only the price of published matter may be fixed<sup>47</sup> and these prices are subject in turn to control against abuse.<sup>48</sup> Restrictions on the right to conclude patent and know-how agreements and on the contents of such arrangements are governed separately<sup>49</sup>; the contractual restraints may not exceed the scope of the legal monopoly.

Terms of business, structural crises, rationalization, specialization, small business cooperation, and in some cases “reasonable” cartels may be permitted or authorized (sections 2, 3, 4, 5, 6, 7 of the GWB). An even more far-reaching, seldom utilized, general exception (the so-called Minister Cartel) is provided for by Section 8. While there is no general “rule of reason” (and hence no *per se* doctrine) in German cartel law these authorization provisions mitigate the apparent stringency.

Further exceptions allow rules of competition for businesses and professional associations (“codes of ethics”) which encourage conduct that conforms with the principles of fair and undistorted competition. Business and professional associations may file such rules of competition. After examination by the cartel authority, designed to prevent the indirect establishment of cartels by such rules of competition (Sections 24-27) these rules are entered into a register. While a code of standardization that might be challenged under American law may receive approval, provisions that signify or threaten cartelization are forbidden.

Finally, sections 28-31 contain so-called “industry” or “field exceptions,” by which certain provisions of the law, principally sections 14 and 15, are declared inapplicable to specifically designated branches of industry. These general exemptions are in turn subjected to control against abuse. Such industry exceptions apply to agricultural cooperatives, banking and credit institutions,

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45. Section 36 (1) GWB.

46. Previously Section 18.

47. Section 15 GWB.

48. Section 15(3) GWB.

49. Section 17-18 GWB.

insurance companies, copyright collection societies, and the television rights to sporting events. In most of these fields, however, control by specialized independent agencies, as well as cartel authority over abuse of dominant position and merger control are applicable.

#### D. Policy Changes under the German Law Against Trade Restraints

Since its enactment in 1958, German Antitrust Law underwent various minor, but significant changes of policy. Altogether, five successive policies can be distinguished, some of them overlapping and in part being followed today.

##### 1. The "Workable Competition" Period (about 1958-65)

The government's "official motivation" that accompanied the draft of the Law Against Restraints of Competition that the government presented to parliament prior to its enactment, says that the general purpose of the Law is "to safeguard complete competition to the largest possible extent."<sup>50</sup> However, under the influence of the then popular American concept of "workable competition," and in order to harmonize the concept of competition in the new Law with the old German Law Against Unfair Competition of 1909, the cartel authorities and the courts quickly began to use a pragmatic workable competition concept, not as a second best of "perfect competition" but as the "best" guideline for applying the Law.

This concept presupposes the potential for some market influence as a requirement for active strategies in the market place, and thus for competition itself. The workable competition concept was used in three alternative theoretical forms: As the model of "intensive competition" (*intensiver Wettbewerb*),<sup>51</sup> as a concept of "effective competition" (*wirksamer Wettbewerb*),<sup>52</sup> and as a concept of "pragmatic competition" (*praktischer Wettbewerbsbegriff*). The latter was oriented, in principle, at the wide, heterogeneous oligopoly (the form of the market where buyers and sellers look for alternative offers and one's success amounts to the detriment of the other).<sup>53</sup>

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50. *Amliche Begründung zum Regierungsentwurf des GWB, Bundestagsdrucksache II/1158*, at 22, WuW 462 (1952), reprinted in MÜLLER-HENNEBERG ET AL., *GEMEINSCHAFTSKOMMENTAR ZUM GWB*, 1 AUFL. KÖLN, ETC. 1035 (1958). See, however, the postulation of imperfect competition as the Law's guideline in the Federal Diet, LANGEN, *DAS KARTELLGESETZ* 54 (2<sup>nd</sup> ed., 1957).

51. HAERRY, *DER INTENSIVE WETTBEWERB* (1954); H.E. LAMPE, *WETTBEWERB, WETTBEWERBSBEZIEHUNGEN, WETTBEWERBSINTENSITÄT* (1979); HAERRY, *DIE WETTBEWERBSINTENSITÄT ALS WIRTSCHAFTLICHES BEURTEILUNGSKRITERIUM, WIRTSCHAFTSDIENST* 254 (1980).

52. See, e.g., HEUSS, *ALLGEMEINE MARKTTHEORIE* (1965); KAUFFER, *INDUSTRIEÖKONOMIK, EINE EINFÜHRUNG IN DIE WETTBEWERBSTHEORIE* 147 (1980).

53. K. BORCHARDT & W. FIKENTSCHER, *WETTBEWERB, WETTBEWERBSBESCHRÄNKUNG, MARKTBEHERRSCHUNG* 10 (1957); W. FIKENTSCHER, *WETTBEWERB UND GEWERBLICHER RECHTSCHUTZ, DIE STELLUNG DES RECHTS DER WETTBEWERBSBESCHRÄNKUNGEN IN DER RECHTSORDNUNG* 36 (1958); 2 W. FIKENTSCHER, *WIRTSCHAFTSRECHT* 193 (1983); O. SANDROCK, *GRUNDBEGRIFFE DES GESETZES GEGEN WETTBEWERBSBESCHRÄNKUNGEN* 98 (1968), preferring the term "polypoly."

2. *Structure, Conduct, Performance School (1962 – The Present)*

After 1960, responding to developments in industrial organization economics mainly in America,<sup>54</sup> a more refined concept of effective competition took hold. Authorities and courts began to analyze the efficiency of competition with the help of the structure, conduct, and performance tests.<sup>55</sup> However, this paradigm, which was central to analysis in the U.S. for several decades, had less influence in Germany. The performance test always remained controversial, and the appropriateness of the structure and the conduct tests became more and more doubtful as time went by. And while the paradigm was integrated into the concepts that prevailed after 1965, it was only one of several.

3. *The “Functioning Competition” Concept (about 1965-1982)*

Together with other causes, the economic decline in the middle of the 1960’s laid the ground for the “Great Coalition” of CDU/CSU (which was, on the federal level, the main governing party combination since the foundation of the Federal Republic) and the Social Democratic Party (SPD). A reorientation of the economic policy, including antitrust, was in demand. Three factors contributed to what would become the concept of “functioning competition” (*funktionsfähiger Wettbewerb*), an expression coined by Erhard Kantzenbach, who would soon become the second President of the Monopoly Commission (following E.J. Mestmäcker).

The first factor was the recognition that complete competition, still the official goal of the Law, was not a realistic legal guideline. Public policy should, in any given structural situation, look for the highest possible intensity of competition that is feasible. Inevitably, this intensity will be found somewhere between “atomistic” competition and narrow oligopoly and monopoly. In general, then, the wide and heterogeneous oligopoly should be the goal. The second factor was the decline of the influence of the structure, conduct, and performance tests that were gradually being identified with the workable competition concept as a whole.<sup>56</sup> The third factor was the desire to give a more “socialist” or “leftist” touch to the new antitrust policy, and for some time this was found in John Galbraith’s theory of countervailing powers. As a result of these shifts in accent within the concept of “social market economy,” under the key-word of *funktionsfähiger Wettbewerb*, German antitrust became less dogmatic, more critical of size (merger control was effectuated in 1973) and, on the whole, more refined. However, this did not render the German antitrust system any less effective.

54. *Supra* section I.c.1.

55. See Sosnick, *A Critique of Concepts of Workable Competition*, 72 Q.J. ECON. 380 (1958), with a survey of 26 market structure, conduct and performance tests that had been proposed till then by 18 authors; Michael Lehmann, *supra* note 42.

56. E. KANTZENBACH, *DIE FUNKTIONSFÄHIGKEIT DES WETTBEWERBS* (2<sup>nd</sup> ed. 1967); E. Kantzenbach & Kallfas, in COX ET AL., *supra* note 42, at 108; for the reasons why Kantzenbach’s concept did not take a firm hold on German antitrust policy see V. EMMERICH, *KARTELLRECHT* 12 (7<sup>th</sup> ed. 1994), and MICHAEL LEHMANN, *supra* note 42.

4. *The Concept of "Competitive Liberty" as a Counterpoint to "Functioning Competition"*

"Functioning competition" became the guideline not only for the antitrust policy under the Great Coalition, but also for some time after 1969, when the Social Democratic Party took over the federal administration. During the 1970s and thereafter, however, some commentators insisted that the approach based on functioning competition was too dirigiste, too pretentious as to having all the necessary information — in short, too "state-interventionist." At the same time, there was continued discontent with the older workability and industrial organization ("structure, conduct, performance") concepts. No doubt there was some truth to these objections. Pragmatic compromises are rarely wholly satisfactory. In time, critics developed a new formulation that was soon called "neoclassics" or the "concept of competitive liberty" (*Konzept der Wettbewerbsfreiheit*). These critics were re-evaluating older theories of Wilhelm Röpke,<sup>57</sup> Erich Hoppmann,<sup>58</sup> and F.A. v. Hayek.<sup>59</sup> They pleaded for a concept of competition that was process-oriented, dynamic, and aimed at political and economic liberty. They conceded that such a concept would take ephemeral monopolies as a trade-off. As long as some realistic freedom remained to enter the market place, those monopolies would disappear in the long run. Hayek's competition as a (*zieloffener Wettbewerb*) "discovery procedure" (*Entdeckungsverfahren*) became the ideal to be followed.

Apparently, this approach has much in common with Chicago school analysis, and some regard the "concept of economic liberty" as a side branch of Chicago economic thought. However, some defenders of the neoclassical approach (Emmerich<sup>60</sup> and Schmidtchen<sup>61</sup>) show at least one distinctly German characteristic, a characteristic with antecedents much earlier than Chicago antitrust, and not emphasized by Chicago: the awareness of the link between economic and political liberty that developed from the Freiburg school.<sup>62</sup> Still, a close relationship between American neoclassics and German "competitive liberty," in other words, the lack of confidence in regulating competition both by cartel agencies and by private business associations, can be detected in Ernst-

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57. WILHELM RÖPKE, *THE PROBLEM OF ECONOMIC ORDER* (1951).

58. ERICH HOPPMANN, *ZEITSCHRIFT DES BERNISCHEN JURISTENVEREINS* 102, 249 (1966); ERICH HOPPMANN, *JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK* 179, 286 (1966); ERICH HOPPMANN, *FESTSCHRIFT FÜR TH. WESSELS* 145 (1967); ERICH HOPPMANN, *SCHRIFTEN DES VEREINS FÜR SOCIALPOLITIK, NEUE FOLGE* 48, 49 (1968); ERICH HOPPMANN, *WETTBEWERB ALS AUFGABENACH 10 JAHREN GWB* 61(1968); ERICH HOPPMANN, *JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK* 184, 397 (1970).

59. AUGUST FRIEDRICH VON HAYEK, *DIE THEORIE KOMPLEXER PHÄNOMENE* 25 (1972); AUGUST DIE VERFASSUNG DER FREIHEIT 30 (1971); AUGUST FRIEDRICH VON HAYEK, *Der Wettbewerb als Entdeckungsverfahren*, *Kieler Vorträge Neue Folge*, Heft 56 (1968); *FREIBURGER STUDIEN* 249 (1969).

60. V. EMMERICH, *see supra* note 56, at 19.

61. DIETER SCHMIDTCHEN, *JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK* 191, 428 (1976/77); DIETER SCHMIDTCHEN, *WETTBEWERBSPOLITIK ALS AUFGABE* (1978); *see also* the Report on the *Wettbewerbskolloquium, Freiheitliche Politik für Markt und Staat*, in *WuW* 207 (1988). *See also* LEHMANN, *supra* note 42, thinks that the functioning competition test has had its best days.

62. *See supra* II.2.

Joachim Mestmäcker's influential monograph *Der verwaltete Wettbewerb* [The Regulated Competition].<sup>63</sup>

The concept of *economic liberty* as a discovery procedure has thus far received some acclaim in the courts but little from the cartel authorities. Under the influence of Hoppmann's thinking, some cases dealing with alleged price abuses by pharmaceutical firms, holding narrow oligopolies, were decided in favor of the defendants.<sup>64</sup> These cases weakened, to a considerable degree, the applicability of section 19<sup>65</sup> of the Law against Restraints of Competition, the provision against the abuse of dominant positions.

The objection that the concept of economic liberty favors, at least in its practical results, some kind of monopoly power is not the only criticism that has been leveled against it. In dissertation, C.W. Neumann has demonstrated that Erich Hoppmann, upon close examination, defines competition by liberty, and liberty by competition. Therefore, Hoppmann's approach appears to be tautological, and hence theoretically unsound.<sup>66</sup> In sum, the concept of economic liberty, after having made some inroads into the functionality concept, has never been accepted as the general antitrust policy in the Federal Republic. To a great extent, German neoclassics have remained on the edge.

##### 5. *The Policy after 1982: Market Optimizing Antitrust*

Following the election of a conservative CDU/CSU/FDP coalition administration in 1981 — the *Wende* ("the turn") — another reorientation took place in general antitrust policy. It has not yet received a fixed label, but it could be called "market optimizing antitrust."

The new approach is eclectic and pragmatic. It adopts from "Freiburg" a general philosophy, from Kantzenbach's functionalism a general orientation toward the wide, heterogeneous oligopoly, and from the concept of economic liberty the "discovery" approach to competition and the special emphasis on freedom of market entry.

Another feature of this market optimizing policy is the conscious decoupling of German antitrust from the U.S. pattern. Specifically, the efficiency-oriented antitrust teachings of the Chicago School of Economics are

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63. E.J. MESTMÄCKER, *DER VERWALTETE WETTBEWERB, EINE VERGLEICHENDE UNTERSUCHUNG ÜBER DEN SCHUTZ VON FREIHEIT UND LAUTERKEIT IM WETTBEWERBSRECHT* (1984).

64. BGHZ 68, 23 — Valium/Librium; BGHZ 76, 142 — WuW/E; BGH 1678 — Valium II; KG WuW/E OLG 1599 — Vitamin B 12.

65. Previously Section 22.

66. CARL WOLFGANG NEUMANN, *HISTORISCHE ENTWICKLUNG UND HEUTIGER STAND DER WETTBEWERBSTHEORIE. KRITISCHE BESTANDSAUFNAHME ZUM DISPUT ZWISCHEN "FUNKTIONSFÄHIGEM WETTBEWERB" UND "NEUKLASSISCHEM/FREIEM WETTBEWERB" UM EIN ANGEMESSENES WETTBEWERBSKONZEPT, EINSCHLIEßLICH DER DOGMENHISTORISCHEN WURZELN, SCHRIFTEN ZUM WIRTSCHAFTS-, ARBEITS- UND SOZIALRECHT* 225 (1982). His work has favorably been received; cf. TOLKSDORF, WuW 704 (1983). Emmerich himself lists a number of difficulties the concept of economic liberty is encountering, among them the dilemma of a multi-valued antitrust. Emmerich, *supra* note 56, at 20.

more or less officially rejected. The assumption is that they would not deliver antitrust results acceptable to the Federal Republic of Germany.<sup>67</sup>

Again, another tendency of present German antitrust is a careful interpretation of the relevant market concept, with the aim of strengthening an active antitrust policy.<sup>68</sup>

### E. The Present Situation

The present status of German antitrust law may be characterized as follows. There are four salient points.

a) The bulk of antitrust litigation is to be found in two fields: In the distribution business, and in the field of merger control (press and media mergers forming an area of special interest and importance). Two more fields of litigation deal with the old classic cartels and other horizontal agreements – their number seems to have decreased – and the antitrust law of the licensing business. The latter sub-field received the nickname “green cartel law” because two leading journals on the law of intellectual property and competition bear green covers.<sup>69</sup> The “green cartel law” is under strong EC influence.

b) A major issue under discussion is the general role that *administrative action* should play in conserving competition. There have been favorable remarks by an American author about the appropriateness and effectiveness of German antitrust administration, in comparison with the American experience.<sup>70</sup> A not so favorable evaluation of the “German line” has been made by Ernst-Joachim Mestmäcker who is convinced that the cartel authorities give too much protection to small competitors, as distinguished from giving protection to competition.<sup>71</sup> Mestmäcker’s study is, essentially, a criticism of the seemingly inevitable fact that, in order to keep competition free from state interaction, state interaction must take place. This reflects Judge Robert Bork’s policy at war with itself, that is, the so-called antitrust paradox.<sup>72</sup>

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67. Wernhard Möschel, *Divergierende Entwicklungen im amerikanischen und deutschen Kartellrecht*, 12 WIRTSCHAFTSWISSENSCHAFTLICHES STUDIUM 603-609 (1983); Werhard Möchel, *Antitrust and Economic Analysis of Law*, 140 ZEITSCHRIFT F.D. GES. STAATSWISSENSCHAFT 156-171 (1984); Utz Toepke, *Antitrust-Spruchpraxis* (1981/82), in SCHWERPUNKTE DES KARTELLRECHTS 137 (1981/1982); Utz Toepke, *Antitrustpraxis* (1986/87), in SCHWERPUNKTE DES KARTELLRECHTS 91 (1986/87); UTZ TOEPKE, *FIW Forschungsinstitut für Wirtschaftserfassung*, in SCHWERPUNKTE DES KARTELLRECHTS 67-81 (1987/88), thinks that under President Bush the policy of the Chicago School as applied by Antitrust Division and FTC continued to be followed. Also, the courts were likely to follow this approach since many court positions have been filled under President Reagan with judges of this line. This would also hold true for the Supreme Court. On the other hand, the legislative bodies in which the Democrats are in the majority could work as countervailing powers by the enactment of stricter laws

68. MONOPOLKOMMISSION, *ÖKONOMISCHE KRITERIEN FÜR DIE RECHTSANWENDUNG*, Hauptgutachten V(1982/83), Baden-Baden 1984; NOMOS, at 23 and 195.

69. GRUR and GRUR Int.

70. JAMES MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY* (1986); see also John O. Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471-508 (1983).

71. ERNST-JOACHIM MESTMÄCKER, see *supra* note 63.

72. ROBERT H. BORK, *THE ANTITRUST PARADOX, A POLICY AT WAR WITH ITSELF* (1978).

In reality, Bork's paradox is a misunderstanding, because the real paradox in economic law is that economic liberty tends to abolish economic liberty (Plato's and Popper's freedom paradox).<sup>73</sup> Inhibiting the results of this paradox – monopoly – is not in itself paradoxical: Deregulation requires *stricter* antitrust regulation. In other words, the paradox does not concern antitrust, rather liberty. Using Winston Churchill's metaphor, Robert Bork did not exactly "slaughter the wrong pig"; rather, using a German adage, he "embarked on the wrong steamer."

Once Wolfgang Fikentscher embarrassed a Hayekian scholar by asking him: "What happens when aimless competition, as a process of discovery, discovers the monopoly?" After some thinking, the scholar answered, not without some irritation: "Then the state must interfere, what else?" Fikentscher was reminded of Mestmäcker's "administered competition" and replied: "This is the point where we antitrust people *start* thinking."

For Mestmäcker, German antitrust practice has been flooded by administration. "Administered competition seems to be the only possible competition left."<sup>74</sup> In terms of antitrust philosophy, his position is somewhat in line with Hayek's and Hoppmann's concepts. The problem with this approach is that the ideals proclaimed are fixed high in the skies of regulated freedom. In other words, the unreality of perfect competition may not have entirely lost its fascination with these authors. To one who sees competition as a matter of a just equilibrium of small entitlement holders vying with each other for success, the seemingly ominous "administration of competition" means what the Freiburg School was always pleading for: creating and safe-guarding competition by law.<sup>75</sup>

c) Finally, the ongoing integration into the Common European Market is foreshadowing the future of German antitrust. This integration demands compromises, and for the Federal Republic of Germany and its antitrust policy, these compromises sometimes mean allowing more restrictive behavior than would be permissible under German law. Examples are the law of joint ventures<sup>76</sup> and merger control.<sup>77</sup>

On the other hand, the European legislative practice of "block" or "group exemptions" to Article 85, Section 1, has contributed to legal predictability, in spite of many minor questions of interpretation and doubt. On the whole, it may be regarded as superior to the crude German instrument of Section 6 of the Law against Trade Restraints. In some respects, a "Europeanization" of German anti-

73. See *supra* notes 35 and 38.

74. MESTMÄCKER, *supra* note 63, at 30.

75. See also Gunther Teubner, *Verrechtlichung – Begriffe, Merkmale, Grenzen, Auswege*, in VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT: VERGLEICHENDE ANALYSEN, 290, 331 (Zacher et. al. eds., 1984), where problems of legalizing competition are discussed. It is exactly this *Verrechtlichung* [legalizing] of antitrust that Maxeiner, *supra* note 70, believes is better solved and administered in German antitrust law than in U.S. antitrust law.

76. ERNST STEINDORFF, WETTBEWERB DURCH GEMEINSCHAFTSUNTERNEHMEN, Betriebsberater, Beilage 1 zu Heft (8/1988).

77. *Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb* e.V. (ed.), Europäische Fusionskontrolle, Referate der Informationstagung in Brüssel am, Skript 10 (21./22. 6. 1988).

trust would lead to stricter antitrust control, e.g., an abolition of "sectorial exceptions," and an even more effective prohibition of monopoly abuse with the consequence of private cease and desist claims, disgorgement of profits, and damage claims.

There is the plea that the Common Market should have a common antitrust law.<sup>78</sup> The fallacy of this claim may be that business culture and psychology in Europe are different. French diversity, British pragmatism, and the high degree of German organizability, when applied to business, may lead to different results, and may therefore require distinctly different standards of antitrust law on the national level.<sup>79</sup> This, of course, does not foreclose an appropriate and effective EU or even a wider, multilateral, transnational, antitrust.

### III.

#### EUROPEAN COMMUNITY (EC) ANTITRUST: A BRIEF COMPARISON

At the regional level in Europe, there are cartel rules of the European Community (EC), of the European Community of Steel and Coal (ECSC), and of the European Atomic Community (EAC). The most important is EC antitrust. It is contained in Article 3(g), Article 3(a), Article 6, and Articles 85-94 of the EC Treaty plus a large number of implementing regulations, decision, recommendations, and administrative announcements. EC law is directly applicable in the Member States and thus entitles and obligates the citizens of these states.<sup>80</sup> The application of EC antitrust requires that trade between the Member States be affected. Pure intra-state situations are not covered. Although EC law may tend to weaken German control of mergers or joint ventures, EC antitrust is, in general, as strict as the German law and, in certain respects, appears to be stricter.

Though less directly than the German law, EC antitrust can also be traced to the Havana Charter and, in a sense, to the American tradition. Indeed, because Havana Charter antitrust can be viewed as aiming toward widening international integration through trade, EC antitrust has a special relationship to the Havana Charter tradition. The basic goal of the Treaty of Rome is European market integration, and the EC antitrust law is put explicitly to the service of that goal. It must be recognized, nevertheless, that there is a great deal that is not known about the genesis of EC antitrust or about the forces that influenced its early development. While some suspect a strong German influence simply because of the signatory parties, only Germany had a strong antitrust tradition. Others see the United States as influencing the Treaty of Rome at least in this respect.

There is also a functional explanation for Articles 85 and 86. A commitment was being made to assist Europe economically. If the signers were to rely on the dirigiste tradition, which is strong, for example, in France, and anticipate

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78. Ernst Steindorff, *Chaos der europäischen Fusionskontrolle nach Phillip Morris?*, in FORSCHUNGSINSTITUT ETC., *supra* note 77, at 23.

79. Even on the subnational level East Germany, after unification, needs considerably more protection from vertical restraints than West Germany.

80. Art. 189, al. 2 EC Treaty.

unifying Europe through industrial policy, they would have forced upon themselves an impossible task of working harmoniously to resolve planning issues in which their respective national interest might often collide. Alternatively, they agreed to unleash the more automatic forces of competitive markets to start the work of integration.

Therefore, antitrust in the United States, in Germany and in the EC is certainly one genus and may fairly be described as one species. In all three systems, the basic, underlying commitment is to maintain competition in order to attain and protect important social goals for the economy. For all three systems the basic concept, *competition*, has the same essential meaning: competitive commercial and industrial conduct that constrains and reduces the economic power exercised by any single firm or combination of firms.

There are, of course, differences not just of legal detail but also in underlying policy formulation among the three systems. These, moreover, may change over time, such that two of the systems (or all three) may be more alike at one time than another, or one system may appear to be more like an older version of another of the systems than it is like the present version. There are three differences and similarities — including at least some of their dynamic characteristics — which are best explained in terms of cultural attitudes, as well as political and economic commitments and beliefs. Let us first examine some legal differences, and then some developmental differences.

#### IV.

#### SOME DIFFERENCES IN U.S., GERMAN, AND EC ANTITRUST

##### A. *Contrasting Legal Approaches*

There are conceptual differences between U.S. antitrust and that of both Germany and the EC. These differences have led to divergent theoretical explanations and can lead to different practical results. The more important of these include:

##### 1. *The Subjective Market Concept*

At a high enough level of generality the definition of a relevant market (commonly used as the starting point for an antitrust evaluation) is the same in U.S., German, and EC theory and practice. The market is defined by three constituents — subject matter (including substitutes), geographic area, and time. In U.S. law and practice these three factors are viewed from an objective, sometimes even statistical, point of view. Preferable bases for decision are cost data series suggestive of the existence of cross elasticities or their lack, expert economic evaluation, and sometimes market research data.

EC and German antitrust theory and practice both tend to prefer what is called the “subjective market concept” or, synonymously, the “demand concept”

(*Bedarfsmarkt-konzept*).<sup>81</sup> This means that the view of the participants on the other side of the market exchange is constitutive for defining the market as to subject matter, area, and time. Only what forms an alternative for a certain demand, or supply, is encompassed by the market. The case law uses the term “functional exchangeability.”<sup>82</sup> In effect, this approach gives to administrations and courts a greater discretionary power of market evaluation and a capacity to rely on the view of market participants. At the same time, there is less need to rely on economic, statistical, or consumer survey expertise. To an American eye, this enhanced discretion of enforcement agencies greatly reduces legal certainty and predictability.

The U.S. approach prefers, in German antitrust terminology, the “objective market concept.” Of course, statistics are widely used in both German and EC antitrust administrative and court proceedings. But on the whole, they are not regarded as nearly so compelling or decisive as they currently seem to be in America. They are seen, rather, as arguments that may support one or another alternative-based “subjective” (demand- or supply-viewed) market definition in a particular case.

## 2. *No Per-se/Rule of Reason Distinction*

In the U.S., the *per se* rule and the rule of reason have tended in recent years to fade one into one another. Nevertheless, both analytical concepts retain validity in U.S. law. Neither German nor EC statutory law knows this dichotomy at all, whereas European antitrust theory discusses them thoroughly.

However, both German and EC law make another basic distinction that on first sight may be related to this dichotomy. In European antitrust, provisions are distinguished as being derived either from the “prohibition principle” (*Verbotsgesetzgebung*), or from the “abuse principle” (*Mißbrauchsgesetzgebung*).

The prohibition principle implies that a certain restrictive activity is, to begin with, prohibited. The burden of proof is on the defendant to demonstrate that there are factual and legal reasons for the alleged restraint. The abuse principle, by contrast, gives everybody permission to go ahead with the restrictive conduct in question — subject, however, to the allegation that in a particular instance the restraint will, by the evidence produced by the plaintiff, be shown to

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81. Cf., WOLFGANG FIKENTSCHER, *MEHRZIELIGE MARKTWIRTSCHAFT SUBJEKTIVER MÄRKTE: WIDER DAS EUROPA- UND DAS WELTMARKTARGUMENT*, Festschrift Mestmäcker 567-578 (1996). For a differing view see Th. Baums & Ulrich Huber, *Frankfurter Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen mit einer Darstellung ausländischer Kartellrechtsordnungen*, (3rd ed. 1994), 30th update, Sec. 1 GWB, Nos. 127-129, 388, 392. Section 1 GWB, as amended as of January 1, 1999, decided the issue in favor of Fikentscher; see text following *supra* note 16.

82. 59 BGH WuW/E 991 — Papierfiltertüten —; BGH WuW/E 1440 — Vitamin B12 —; BGH WuW/E 117: Valium —; BGH WuW/E 1714 — Mannesmann/Brueninghaus —; and many more. The same test is applied by the Court of the European Communities: The alternative, exchangeability, in the eyes of the demanding or the supplying party is conclusive: EuGH Coll. 1978, 282 — United Brands —; EuGH Coll. 1973, 248 — EuGH Coll. 1975, 1379 — General Motors —; etc.

be abusive. Hence, when this principle applies, the burden of proof is on the cartel authorities or, in private law suits, on the private plaintiff.<sup>83</sup>

The difference between the *per se* approach and the “prohibition principle” is that under the prohibition principle a certain restraint of competition may be prohibited and therefore presumably illegal even outside of any *per se* situation. A counterproof by the defendant that, for exceptional reasons, the prohibition should not apply remains admissible.

The difference between the rule of reason and the “abuse principle” is that under US antitrust law, absent a *per se* situation and thus within the range of the rule of reason, the plaintiff must assert not only the prima facie illegality of the offense but also its unreasonableness. Thus the burden of fact of (un)reasonableness is on the plaintiff. This, together with the competition-neutral “objective market concept” used in the U.S., may be responsible for the costly paperwork involved in typical U.S. antitrust litigation.

Under the European abuse principle, a restraint of competition is prima facie legal, and the plaintiff has to demonstrate that this prima facie legality under the law is being abused.

Given the difference between the two systems of antitrust, the rule of reason was understood to be an exception to the general prohibition of a restraint of competition law under German and related EC law, (the facts to be established by the defendant), whereas in the US the rule of reason became an evaluation mechanism.

After 1947, the former rule of reason concept was developed in Germany under the Allied occupation decartelization statutes that forbade every restraint of competition unless it was “reasonable.” However, the rule of reason was not transplanted to the German Law against Restraints of Competition in 1958. Article 85.3 of the EC Treaty may nevertheless be considered a formalized and specialized rule of reason (formalized by a decision by the EC Commission) in the European sense. Germany has not yet followed suit. Sections 7 and 8 of the Law do not contain a general “rule of reason,” in spite of some similarity with article 85, al. 3 of the EC Treaty.

### 3. Sanctions for Monopolizing

A third difference between U.S. and German and EC antitrust is that in the United States, legal requirements and legal consequences are combined, especially in monopolization cases. When a firm has committed “monopolization” in violation of section 2 of the Sherman Act, the monopoly should be eliminated. If this can be achieved in a short enough time by a conduct remedy, that course may be followed. However, if a conduct remedy will not rapidly dissipate the power, the court should order divestiture. This may, at least psychologically, induce many judges to resist finding monopolization when the facts leave

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83. The legal consequences under the abuse principle vary from an order to cease and desist (e.g., Section 6), to the modification of a contract (e.g., Section 1, al. 1, no. 2), to the imposition of conditions (Section 40, al. 3), etc.

open the possibility of alternative interpretations. Finding monopolization might lead to dismemberment of a successful firm.

By contrast, the main legal consequence of monopolizing in German and the EC is to compel the monopolist to engage in competitive-like behavior. Divestiture or dissolution is not ordered as a consequence of a restraint of competition by circumstance (as opposed to conduct). The Law attempts to stop the abuse of the dominant power. This makes authorities and courts more inclined to confirm the requirements of monopolizing.

#### 4. *Plurality of Purposes*

German and EC antitrust have always been “multi-valued.” There is seldom, if ever, an argument presented that the sole goal, even in a particular case, ought to be efficiency. Efficiency is just one legislative goal among others. Other legislative goals for German antitrust are to maximize the number of competitors; to promote the freedom of market entry; to protect small business against unfair inroads made by big industry or trade; to increase the plurality of publicized opinions in press merger cases; to protect the environment; to increase employment; and to achieve international competitiveness.

Most of these are also EC goals, as is, of course, the goal of market integration. The “Chicago School” ideology has never had a significant influence on German and EC antitrust. This is not to say that all the legislative policies listed above are indiscriminately followed in a given antitrust case. It is acknowledged that they may conflict with one another. The main goal in solving these policy conflicts is still to assure as much competition as possible. Other values, however, may be weighed against this paramount goal. In America, by contrast, it is sometimes asserted that only (short-term) efficiency counts. Moreover, even when American courts recognize that competition is valued because it is instrumental in attaining other social and economic values in addition to efficiency, they tend to focus solely on maintaining the competitive process. Other public values — say, health, safety, or the environment — cannot be used as a basis for mitigating antitrust law.

The European multi-valued antitrust philosophy may have a negative effect on pure economic policy-setting. There is considerable criticism when the German Minister of Economics overrules, for non-economic reasons, the Federal Cartel Authority policy on mergers. Indeed, this is an issue that will make the decision of the Federal Cartel Authority, and the final decision of the Minister of Economics on appeal, a matter of prime interest to everyone concerned with German antitrust.

### *B. Contrasting Developmental Themes*

#### *1. Political and Economic Liberty*

A striking point is the considerable similarity between the liberal constitutionalism that developed in America during the pre-New Deal years and the Freiburg school of thought with which German antitrust is so closely associated.

Both traditions link political and economic liberty. Both see the protection of the individual against powerful private economic interests as an analogue to the protection of the individual against undue state intrusion. Both value competition as instrumental to the attainment of a range of related political and economic objectives. Even the Freiburg concept "*Soziale Marktwirtschaft*" had analogues in both American constitutional and American antitrust law. The antitrust prohibition of non-ancillary competitive restraints (even of resale price maintenance and some refusals to deal) and the constitutional concept of a business affected with a public interest come to mind as examples where, in terms of Freiburg theory, rights of property and contract must be exercised in ways consistent with the social goals of the market. Still, Freiburg thought is more central to everyday antitrust practice and its development over time than the now discounted "societal antitrust" ingredients of U.S. policy.

## 2. *Multi-value Theory*

In Germany, basic multi-valued Freiburg commitments have continued to exist in modernized forms, even despite marked political changes and marked changes in economic theory. In America, however, the multi-valued antitrust tradition is under attack. The reason for this might be that the German intellectual style is more given to comprehensive theorizing and to maintaining theoretical consistency, while the American approach is easier to adopt and is more pragmatic.

Even in the debate on critical legal thought, one finds more rigorous theorizing on the German side and more result-oriented advocacy on the American side. However, such an explanation seems facile, because other influences can be identified. For example, the American antitrust tradition has been buffeted by a variety of other cultural changes over a full century, while German antitrust is essentially a post-war phenomenon. Moreover, the link in America between anti-trust and liberal constitutionalism was severed in the New Deal era when the Roosevelt court undid much of the earlier constitutional prohibitions against economic power in the interest of the welfare state.

The "Chicago revolution," which overtook American antitrust in the 1980's, at least in the enforcement agencies, is in no sense a return to the antitrust conceptions of the earlier, liberal days, and does not bring American antitrust into a closer link with German and EC tradition. Quite the contrary on both counts: Chicago theory, by focusing solely on allocative efficiency, and by rejecting fairness, economic crises, stability, market access, and mobility as legitimate bases for protecting the competitive process, would purge antitrust of the pieces that have sustained it, politically, for a century, and would thereby radically differentiate American antitrust from the multivalued traditions prevailing elsewhere.

EC, as well as German antitrust, is also being buffeted by "micro-theoretical" commentators who focus solely on efficiency. In academic and professional discussion in the EC, as well as in Germany, these commentators are affecting the agenda to some extent. Setting the agenda, as American experience

shows, is the beginning of influence. However, in both Germany and the EC, it is not only a deeply ingrained tradition that forecloses making efficiency the sole value. Explicit provisions of the governing law do as well, for they point unerringly to concerns about fairness and, in the EC, about integration. Also, a favorite argument made by Chicagoans asserts that an antitrust aimed at multiple values gives courts such an excess of discretion that it places them in a legislative role. If the judicial focus is on protecting the competitive process with the intent of promoting all the goals associated with competition, rather than on playing off goals against one another in particular, the dilemma vanishes. Even if goal weighting were involved, however, the EC Commission is institutionally well equipped to engage in that process. Will efficiency become a more important antitrust goal for the EC when integration is more fully achieved through harmonization, a common industrial policy, and other Council and Commission measures? Perhaps so, but there is little reason to suppose allocative efficiency will become the sole or even a dominant goal.

## V.

### THE SPREAD OF ANTITRUST THROUGH INTERNATIONAL AGREEMENTS AND THROUGH IMITATION: THE WORLD TRADE ORGANIZATION.

We have noted already the direct impact of Chapter V of the Havana Charter on German antitrust and its indirect influence on EC antitrust. Most nations have their antitrust laws today. These antitrust laws differ in legal scope and legislative policy. Will an international antitrust emerge in the international community?

Perhaps the strongest reason for thinking that the time is right for international antitrust is the nearly world-wide proliferation of anti-cartel policies.

All of the individual steps leading to the expansion of the antitrust idea into all parts of the world cannot be described here. The counterpoint to this growing body of national antitrust laws is an international antitrust law that aims at coping with the growth of the international economy. While bilateral cooperation among enforcement agencies has become common, the task of negotiating a meaningful multilateral agreement is formidable indeed, particularly in light of the divergences between U.S. and European antitrust highlighted in this article.<sup>84</sup>

The agenda of the World Trade Organization (WTO) includes the creation of a number of basic rules of international antitrust. In 1993, a private group of experts submitted a *Draft International Antitrust Code* to the General Agreement on Trade Tariffs (GATT), the predecessor of the WTO, in order to stimulate discussion and to demonstrate the feasibility of internationally applicable

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84. See, e.g., the Agreement between the European Communities and the Government of the United States of America on the application of positive Comity Principles in the enforcement of their Competition Laws, of Jan. 24, 1997, <<http://europa.eu.int/en/comm/dg04/interna/poscopr2.html>>. The dropping of the standard of market influence and the sole use of the standard of "restraint of competition" in the rephrased Section 1 of the law, as of January 1, 1999, might be regarded as indicative of this development; see *supra* note 81.

antitrust rules. The co-authors of this article participated in its preparation. While complete consensus among participants from Europe, Asia and the Americas was not possible (indeed, there was some disagreement among the co-authors of this article), large areas of common ground were identified.

Since the presentation of the *Draft International Antitrust Code* to GATT in July 1993, the discussion about the necessity of an International Antitrust Code has continued. The last statements of this sort were the short version of the 25th *Report on European Competition Policy of the European Commission* from April 1996 and the Communication of the Commission of the European Communities to the Council of Ministers, *On the Way to an International Competition Law*.<sup>85</sup> The European Commission declares itself in favor of a multilateral agreement on minimal standards, a binding obligation on positive comitas gentium and a modern dispute settlement procedure.<sup>86</sup> This position is based on the report of a group of experts<sup>87</sup> – convoked by the European Commission – in which two members of the International Antitrust Code Working Group took part (Ulrich Immenga and E.-U. Petersmann). Although the political comments on the realization of a binding International Antitrust Code are rather cautious, they are also optimistic. With the coming into force of the Plurilateral World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Protection (TRIPs Agreement), the WTO system contains for the first time detailed antitrust rules applicable to private enterprises.<sup>88</sup> The Ministerial Conference of the WTO, held in December 1996 in Singapore, created a Committee on Competition whose task will be to study the feasibility of a WTO competition code. This shows that the adoption of a binding international antitrust law is possible and is on the international agenda.

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85. *On the Way to an International Competition Law*, KOM 284 fin. (June 18, 1996).

86. Number 230 of the Competition Report; Communication, at 4.

87. Communication 359 fin. (July 12, 1995).

88. Art. 40 of TRIPs on anti-competitive practices in IP-licenses.