Per se Legality of Vertical Restraints: Contested in America -- Not Debated in Germany: Search for Reasons and Comparison

Rainer F. Hildebrandt
PER SE LEGALITY OF VERTICAL RESTRAINTS:
CONTESTED IN AMERICA -- NOT DEBATED IN GERMANY
SEARCH FOR REASONS AND COMPARISON

by

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A Thesis Submitted to the Graduate Faculty
of the University of Georgia in Partial Fulfillment
of the
Requirements for the Degree

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# Table of Contents

I. Introduction ............................................. 1
   A. Scope of the Study .................................. 3
   B. Objective and Method of the Study ................. 5

II. American and German Antitrust Law -- an Overview with Special Regard to Vertical Restraints .... 6
   A. Development of the American Antitrust Law with Special Regard to Vertical Restraints ..... 6
      1. Development of Standards ....................... 7
      2. The Vertical/Horizontal Distinction ........... 8
      3. Rule of Reason Analysis and Economic Theory ........................................... 9
   B. Other Laws Affecting Vertical Restraints ........ 10
      1. Federal Trade Commission Act .................. 10
      2. Sec. 2 Sherman Act ................................ 11
      3. Sec. 2 Clayton as Amended by the Robinson-Patman Act .................................. 11
      4. Other Laws ......................................... 11
C. Development of the German Antitrust Law

1. Concept of the GWB
   a) Enforcement Principles
   b) Distinction Relating to Conduct
   c) Horizontal/Vertical Distinction

2. Focus of Enforcement in the Area Vertical Restraints

D. The Impact of the Legal Method on Antitrust Enforcement

E. Alternatives for Antitrust Enforcement

1. Antitrust Enforcement in America

2. Antitrust Enforcement in Germany

F. Policy and Goals of the American Antitrust Law

1. Approach of the Chicago School

2. Treatment of Vertical Restraints under the Chicago School's Theory

3. Criticism of the Chicago School's Approach

4. Approach of the New Coalition

5. Treatment of Vertical Restraints According to the New Coalition

G. Policy and Goals of the GWB

1. Alternative Approaches Discussed in Germany
   a. Concept of Perfect Competition
   b. Workability Concept
   c. Group Competition Concept
2. Concept of the Practical Freedom of Competition .................................................. 36

III. Resale Price Maintenance ................................................................. 40
   A. Treatment of Resale Price Maintenance under American Antitrust Law .............. 41
      1. Some Lower Court's Interpretations of the Per Se Rule .................................. 44
      2. The Colgate Doctrine .................................................................................. 46
         a) The Economic Impact of Colgate ......................................................... 46
         b) The Problem of Limiting Colgate's Impact ........................................... 47
         c) Colgate's Adoption to "Real World Business" ........................................ 49
   B. Resale Price Maintenance under the GWB ................................................. 50
      1. The Key Norm -- § 15 GWB ................................................................... 51
      2. Closing the Loopholes ............................................................................ 53
         a) § 25(2) GWB ....................................................................................... 53
            (1) Enforcement of § 25(2) GWB ....................................................... 54
            (2) Case Architektenkammer .............................................................. 55
            (3) Case Uhren Krämer v. Seiko ......................................................... 55
         b) § 26(1) GWB ....................................................................................... 57
   C. The Approach of the GWB and the American Dispute ................................. 58
      1. The Economic Arguments ....................................................................... 59
         a) The Chicago School's Approach .......................................................... 59
         b) The View of the New Coalition .......................................................... 60
2. Economic Arguments with Regard to Resale Price Maintenance
   a) Market Transparency Argument
   b) Ease of Market Entry
   c) Protection of the Small and Middle Size Businessmen
   d) Free Rider Argument

3. Evaluation of the Economic Arguments

4. Effects not Included in the Efficiency Analysis

5. Legal Method Argument

IV. An Example

A. Business Electronics Corporation v. Sharp Electronics Corporation

1. The Decision of the Majority

2. The Weighing of the Evidence

3. The Dissenting Opinion
   a) The Suggested Approach of the Dissenting Opinion
   b) The Economic Arguments of the Dissent
      (1) The Dissent's Joint Action Argument
      (2) The Dissent's Boycott Argument
      (3) The Dissent's "Horizontal" Classification

4. Comment
B. Business Electronics and the View of the GWB

1. § 15 GWB
2. § 25(2) GWB
3. § 26(1) GWB

C. The Advantage of the GWB Approach

D. Conclusion Chapter Three and Four

V. Vertical Nonprice Restraints

A. Vertical Nonprice Restraints under American Antitrust Law

1. Exclusive Dealing Arrangements

2. Analysis of Vertical Restraints under the Rule of Reason

3. Tying Arrangements

   a) Move Towards a Rule of Reason
   b) Comparison with the GWB's Treatment of Tie-Ins

4. Other Vertical Nonprice Restraints

B. Vertical Nonprice Restraints under the GWB

1. § 18 GWB
   a) Scope of § 18 GWB
   b) § 18(1)(a)
   c) § 18(1)(b) GWB
   d) § 18(1)(c) GWB

2. Criticism of § 18 GWB
   a) Heavy Burden of Proof
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) Difficult Balancing of Conflicting Interests</td>
<td>111</td>
</tr>
<tr>
<td>3. Consequences for § 18 GWB as Enforcement Tool</td>
<td>112</td>
</tr>
<tr>
<td>4. Other Safeguards for Competition Available under the GWB</td>
<td>113</td>
</tr>
<tr>
<td>5. §§ 20, 21 GWB</td>
<td>114</td>
</tr>
<tr>
<td>6. Strategic Conduct of &quot;Powerful&quot; Firms</td>
<td>115</td>
</tr>
<tr>
<td>a) § 22 GWB</td>
<td>116</td>
</tr>
<tr>
<td>(1) Defining &quot;Abuse&quot;</td>
<td>118</td>
</tr>
<tr>
<td>(2) Meto-Handpreisauszeichner</td>
<td>119</td>
</tr>
<tr>
<td>(3) Effem-Tierfertignahrung</td>
<td>120</td>
</tr>
<tr>
<td>b) § 26(1) GWB</td>
<td>122</td>
</tr>
<tr>
<td>c) § 26(1) GWB and the Use of Economic Theory</td>
<td>123</td>
</tr>
<tr>
<td>d) § 26(2) GWB</td>
<td>124</td>
</tr>
<tr>
<td>e) § 26(2) GWB and the Use of Economic Theory</td>
<td>125</td>
</tr>
<tr>
<td>f) § 37a(3) GWB</td>
<td>126</td>
</tr>
<tr>
<td>7. Giving Vague Terms a Meaning</td>
<td>127</td>
</tr>
<tr>
<td>a) Development of Rules</td>
<td>128</td>
</tr>
<tr>
<td>b) Accepted Defenses</td>
<td>130</td>
</tr>
<tr>
<td>c) Shifting the Burden of Proof</td>
<td>131</td>
</tr>
<tr>
<td>d) The Balacing Process By the Courts</td>
<td>131</td>
</tr>
<tr>
<td>e) Giving Vague Terms a Meaning</td>
<td>133</td>
</tr>
</tbody>
</table>
VI. SUMMARY

A. Results of the Research and Comparison

1. Suggestion to Solve the Dilemma

2. The Approach of the GWB -- Favoring the
   "Rule of Law" and Pursuing a Multi-
   Valued Goal

   a) Treatment of Vertical Restraints
      under the GWB
   b) The GWB's Approach to Conduct of
      "Powerful" Firms

3. The Approach of the American Antitrust Law
   -- Broad-Ranging Standards and Uncer-
   tainty About the Goals

   a) Vertical Restraints under American
      Antitrust Law
   b) A Look into the Future

B. What is the "Right" Approach?

VII. CONCLUSION

A. Per Se Legality of Vertical Restraints?

B. The Colgate Doctrine -- Obstacle to Antitrust
   Enforcement

ENDNOTES
I. Introduction

A look at the American and German antitrust scenario reveals significant differences:

In America the approach towards antitrust, especially the appropriate treatment of vertical restraints such as resale price maintenance, exclusive dealing, and tying arrangements, is hotly contested. A "battle for the soul of antitrust" has started. The outcome of this "battle" will decide which goals will govern American antitrust law and which analysis will be applied in determining the reasonableness of vertical restraints. Both issues are of crucial importance for the future role of antitrust law, especially with regard to application to vertical restraints.

The "contestants" in this struggle for the "right" approach are the Chicago School on the one side and their opponents of the New Coalition on the other. The Chicago School reduces the possible number of antitrust goals to the single goal of maximizing consumer welfare measured by means of efficiency. In contrast, the New Coalition asserts that antitrust policy pursues a multi-valued goal.
Similar to the discrepancy in defining the goals of antitrust, the proper analysis for evaluating the competitive impact of vertical restraints is also contested. The Chicago School applies neoclassical economic theory to scrutinize the antitrust implications of vertical restraints. According to this theory vertical restraints are considered to be efficiency creating. Consequently, the Chicago School alleges that in this area antitrust law should not interfere. The New Coalition rejects the application of neoclassical economic theory as insufficient to adequately evaluate vertical restraints and promotes its multi-value orientated approach.

This debate is not merely academic, but has gained considerable influence on American antitrust enforcement. The Chicago School's approach is reflected in the administration's antitrust policy under President Reagan and has gained considerable influence on the reasoning of the courts.

The result of this battle is confusion, and its victim is American antitrust law. More precisely, the predictability and reliability required by the "rule of law" is no longer existing in the area of vertical restraints.

The German Law against Restrictions of Competition (GWB), on the other hand, favors the rule of law ("Rechts sicherheit") by promoting reliability and predictability. Interestingly, the GWB does not promote debate like the American antitrust law. Like American antitrust law the GWB
demands policy decisions and the application of economic theory; however, the Chicago School's approach has not gained perceivable influence on the German antitrust scene. Rather, according to the public policy of the GWB, the application of neoclassical economic theory is deemed to be inappropriate to cope with market imperfections. Moreover, the GWB clearly states that it pursues a multi-valued goal of antitrust policy.

The purpose of this study is to compare the GWB's approach towards vertical restraints with the contending theories of the Chicago School and the New Coalition. This comparison might be of special interest because the GWB borrowed much of its substance from the American antitrust law, and both the GWB and American antitrust law are based on the assumption that competition should control the market.

Because of these similarities the discovery of discrepancies between the GWB's approach and the American theories could reveal points for further inquiry and may unveil weaknesses of either theory.

A. Scope of of the Study

The approach towards vertical restraints depends heavily on the outcome of the "battle for the soul of antitrust". Therefore, to make the implications of the dispute more comprehensible, this study necessarily has to
refer to the basics of antitrust policy such as legislative history and political underpinnings.

The present confusion in American antitrust law was enabled by broad and vague statutes which allowed both scholars and courts to give the antitrust law such a wide interpretation. Moreover, the legal system, its method, its procedure, and its enforcement contribute to this confusion. Accordingly, the legal system should take the responsibility for leading the way out of this dilemma.

Hence the differences between American antitrust enforcement and the German approach towards antitrust law mainly rest in policy and method of the respective legal system this study attempts to provide a short but instructive description of policy and methods of the American and German antitrust laws in chapter two.

The second chapter addresses also the underlying values of American and German antitrust laws and compares the concepts chosen to protect these values.

Based on these foundations, chapter three evaluates resale price maintenance. Economic and policy arguments surrounding resale price maintenance are scrutinized, and the approach of American antitrust law is compared with the solution of the GWB.

In chapter four, the Supreme Court's judgment in Business Electronics Corp. v. Sharp Electronics Corp. is analyzed according to the GWB perspective.
The fifth chapter deals with other, nonprice vertical restraints. The approach of the GWB and its policy considerations with regard to these restraints is described and compared with the approach of the American antitrust law.

The last two chapters summarize, conclude, and suggest improvements for the American antitrust law.

B. Objective and Method of the Study

The study attempts to give the reader a description of both the American and German antitrust law in the area of vertical restraints. It is the objective of this study to explain the approach towards vertical restraints and the function of economic theory of both the American and German antitrust law. According to this objective this study does not provide in-depth discussion of a multitude of restraints. Rather, this study focuses on underlying ideas and policies of antitrust law in the area of vertical restraints. The approach of the German and American antitrust law will be illustrated by addressing the most important vertical restraints. Additionally, the analysis of several cases intends to make the reader more familiar with the reasoning of the German courts.
II. American and German Antitrust Law -- an Overview with Special Regard to Vertical Restraints

An analysis of the American and German approach towards vertical restraints would be incomplete without a look at the historical development. Neither the approach of American antitrust law which can look back on one hundred years of experience and even older common law precedents nor the approach of the "young" German antitrust law which celebrates its 30th anniversary can be understood without reference to legislative history and development.

A. Development of the American Antitrust Law with Special Regard to Vertical Restraints

The Sherman Act of 1890 and the Clayton Act of 1914 were the first federal antitrust laws enacted in the United States, codifying "the rules of the common law". The common law rules against restraints of trade were deemed insufficient to deal with the demands of an increasingly industrialized nation. The Sherman and the Clayton Act were intended to challenge the power of the trusts that were formed to impair competition, exploit workers, defraud investors, and threaten liberty.
The basic norm against restraints of trade is Section 1 Sherman Act. Section 1 Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade ....". A literal reading of the statutory language would constitute that every restraint violates Sec. 1 Sherman Act. In early decisions the courts indeed interpreted Sec. 1 Sherman Act literally. However, the judiciary realized soon that this literal application would outlaw benign business behavior, and applied in subsequent decisions a more sophisticated means of interpreting antitrust law. Accordingly, United States v. Addyston Pipe & Steel Co. held that only unreasonable restraints constitute a violation of the antitrust law.

1. Development of Standards

Another important step was the development of standards to distinguish between conduct constituting a "per se" violation of the antitrust law -- thus condemned without further inquiry into possible justifications -- and conduct which is subject to more lenient "rule of reason" scrutiny.

However, the courts in determining of what conduct was a per se antitrust violation were inconsistent. In early decisions the courts referred to common law rules, such as "restraints on alienation". In more recent decisions the inflexibility of these rules was recognized. Therefore, in
Sylvania\textsuperscript{43} a more practicable approach towards vertical restraints was established, considering business needs and economic theory. At present, a trend towards a very reluctant application of per se rules in the area of vertical restraints is perceivable. Accordingly, the burden of proof to establish a per se violation of the antitrust is prohibitively high.\textsuperscript{44}

2. The Vertical/Horizontal Distinction

The American antitrust law generally distinguishes between horizontal\textsuperscript{45} and vertical restraints.\textsuperscript{46} Horizontal restraints on competition are held illegal per se.\textsuperscript{47}

Since the 1977 landmark case Sylvania\textsuperscript{48} vertical restraints are -- except of resale price maintenance\textsuperscript{49} and certain tying arrangements\textsuperscript{50} -- subject to rule of reason scrutiny. The court reasoned in Sylvania that the rule of reason is the proper standard by which to evaluate vertical restraints. Only a rule of reason analysis enables the courts to weigh procompetitive effects on interbrand competition against anticompetitive effects on intrabrand competition. The Sylvania court held that a decrease in intrabrand competition may be outweighed by an increase in interbrand competition.\textsuperscript{51} In Sylvania, economic analysis of the effects of the particular restraint replaced the mere reliance on the traditional common law rule of restraints on alienation the court had established in United States v. Arnold Schwinn & Co.\textsuperscript{52}
3. Rule of Reason Analysis and Economic Theory

The continuing trend of employing economic theory is reflected in decisions upholding vertical restraints because of their economic benefits. Reliance on economic theory was fostered by the economic theory of the Chicago School and is increasingly becoming the pole star of judicial reasoning. This development might change the application of the antitrust law on vertical restraints drastically. Significantly, an increasing number of decisions of lower courts feels uncomfortable with the per se rule and statements of the Department of Justice indicate that the per se rule for resale price maintenance should be abolished. Even of greater importance is the trend to analyse vertical restraints by application of the neoclassical economic theory of the Chicago School. According to this rationale, the value of intrabrand competition would be ignored, and, briefly, vertical restraints would be no longer of antitrust concern. This theory faces opposition from a coalition of scholars who assert that the Chicago School's approach is biased, single sided and improper. If this opposing view should prevail vertical restraints would not be erased from the landmap of antitrust law.

At present, this area of antitrust law is hotly debated and it is not clear which approach will prevail.

In conclusion, American antitrust law in the area of vertical restraints is unclear. The outcome of any case
case depends heavily upon which of the theories the majority of the deciding judges prefers.  

B. Other Laws Affecting Vertical Restraints

Unlike the German antitrust law which is contained in one code the American antitrust law is contained in several statutes. The relevant provisions which might apply in the context of vertical restraints are:

1. Federal Trade Commission Act

Another significant development in the history of American antitrust enforcement was the enactment of the Federal Trade Commission Act. Under Sec. 5 of the FTC Act, the Federal Trade Commission can prosecute violations of the Sherman Act as "unfair methods of competition." Although the FTC has no specific jurisdiction to enforce the Sherman Act, Sec. 5 of the FTC Act gives the FTC a broader authority to challenge antitrust violations as unfair competition unbound by the limitations of the Sherman Act. This study focuses on the Sherman and Clayton Act. What constitutes a violation of Sec. 5 FTC Act will not be discussed. However, like under the Clayton and Sherman Acts the central question under the FTC Act is what conduct is justified under the antitrust law.
2. Sec. 2 Sherman Act

Strategic market conduct and even unilateral conduct may be challenged under Sec. 2 Sherman Act if this conduct constitutes monopolization or an attempt to monopolize.62

3. Sec. 2 Clayton as Amended by the Robinson-Patman Act

Under the Robinson-Patman Act price discrimination is prohibited. The goals of the Robinson-Patman Act are twofold: "One is the suppression of discrimination as an anticompetitive practice; the other, the protection of small individual firms from price disadvantages in their transactions in the market."63 Scholars point out that "these two purposes, in practice, have no necessary correlation."64 Unlike the German statute against price discrimination the Robinson-Patman Act does not distinguish between the size of the firm employing price discrimination.65

4. Other Laws

The foregoing freedom the American antitrust law leaves to the sellers or franchisors was deemed unsufficient to adequately protect the partner in certain relationships. Thus, so-called "dealer termination" or "franchise" laws were enacted in several states.66 Furthermore, some state laws directly deal with subject matter in the area of vertical restraints.67 These laws may overlap with antitrust law and may provide better protection than antitrust law.68 However, a discussion of these laws is beyond the scope of
this study. But it is interesting to note that state laws attempt to cure shortcomings of the Federal antitrust statutes.

C. Development of the German Antitrust Law

The German antitrust law has no common law tradition to look back on. In 1897, about the time the first decisions under the Sherman Act rigidly prohibited restrictive agreements,69 the Reichsgericht70 held that a cartel did not constitute a violation of existing law. In the wake of this decision Germany became the "classic land of the cartels." This era of cartels reached its summit during World War II. At that time German industry was heavily cartelized. After WW II German industry was decartelized by the Allies under decartelization statutes.

In 1957 the Law against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen (GWB))71 was passed. Although the GWB adopted much from American antitrust law, the underlying economic policy was mainly influenced by the scholars of the Freiburg School who promoted an ordoliberal approach.72

The GWB embraces all kinds of restraints and was amended four times, the last time in 1980. The amendments were partly a reaction of the courts' interpretation of the 1957 draft which required curative legislative action.73 Thus, the BWG follows a civil law concept. Both the statute and
its amendments primarily reflect the development of the German antitrust law. However, it is also necessary to look at the reasoning of the courts thus the dynamic and breadth of the statutory scope requires judicial interpretation. The GWB contains "general clauses", "vague terms", and some "indefinite legal concepts" which are subject to interpretation by the courts. Nevertheless, the interpretation of these clauses, terms, and concepts by the decisionmaker is normatively directed. The discretion of the courts is limited by established rules of interpretation and has to comply with and foster the basic policy of the GWB. Therefore there is no place for a rule of reason in the GWB, since the rule of reason would leave too much room for discretionary or political decisions to the courts.

The American debate surrounding the "soul of antitrust" and the Chicago School's approach are closely watched by German scholars and antitrust enforcers. However, for at least two reasons the Chicago School's economic theory has had no perceivable impact on German antitrust law. First, the courts cannot alter the law that dramatically without legislative action. Second, legislative action was not taken and is not to expected. Thus, the Chicago School's approach is considered contrary to German antitrust policy.

Interestingly, both the policy of the GWB and the enforcement attitude of the Federal Cartel Authority resembles the American antitrust enforcement in the 1960's and
1970's. The lenient enforcement attitude of the 1980's, however, was not adopted by the GWB.

1. Concept of the GWB

The standards of antitrust enforcement are laid down in the statutes of the GWB. The GWB consists of over 100 articles, about the first third of which are substantive rules containing detailed provisions regarding to competitive conduct.

a) Enforcement Principles

The GWB provides two enforcement principles: prohibition and abuse control. Sometimes typically prohibited conduct may be allowed under a specific exemption norm. It is to note that unilateral conduct such as refusal to sell and discrimination may be prohibited as abusive and/or discriminatory.

b) Distinction Relating to Conduct

The GWB distinguishes between cartel agreements, other agreements, abuse control, and merger control. Cartel agreements are "agreements which pursue a `common purpose". Cartel agreements are subject to the prohibition principle and void. "Other agreements" are agreements which impose a restriction on one of the parties in a contractual relationship. These "other agreements" are subdivided in (1) resale price maintenance, (2) "normal" other
agreements\textsuperscript{91} (imposing nonprice restrictions), and (3) licensing agreements.\textsuperscript{92}

While resale price maintenance is prohibited,\textsuperscript{93} other agreements, such as exclusive dealing arrangements and tying are presumably legal and subject to abuse control.\textsuperscript{94} The latter agreements, however, will be considered abusive if they constitute an attempt to compel a customer to adhere to a pricing scheme.\textsuperscript{95}

c) Horizontal/Vertical Distinction

The GWB does not explicitly distinguish between horizontal and vertical restraints.\textsuperscript{96} Nevertheless, in almost all cases the vertical/horizontal distinction of the GWB will be the same as under American antitrust law:\textsuperscript{97} A "common purpose" arrangement (which is a per se illegal cartel -- unless exempted) will generally exist in agreements or conspiracies among enterprises on the same level of distribution. This resembles the American per se rule against horizontal restraints.\textsuperscript{98}

An arrangement involving an imposed restraint (which is a presumed legal "other agreement" -- except for resale price maintenance) will generally exist in agreements among enterprises on different levels of distribution. This categorization resembles the American concept of vertical restraints.\textsuperscript{99}
2. Focus of Enforcement in the Area Vertical Restraints

In Germany, the enforcement activity in the area of vertical restraints concentrates on resale price maintenance and abusive and discriminatory conduct of "powerful" firms. Because -- according to the clear language of § 15 GWB -- an explicit agreement on resale price maintenance in direct violation of the GWB will be hardly employed by a businessmen. Therefore, the Federal Cartel Authority focuses especially on attempts to circumvent § 15 GWB, for example by establishing untrue agency relationships or by using economic means to coerce (or lure) customers to adhere to a certain pricing scheme.

With regard to the abuse control of other agreements under § 18 GWB, the Federal Cartel Authorities' enforcement effort is slight. Reason for this lack of effort include the complicated statutory setting of § 18 GWB and the fact that the Federal Cartel Authority obviously regards the threat to competition by powerful firms more dangerous. Accordingly, the Federal Cartel Authority concentrates on the abuse control provisions of §§ 22 and 26 GWB rather than on § 18 GWB when challenging vertical nonprice restraints.

Nonetheless, this reluctance to enforce § 18 GWB is outweighed by increased efforts to control abusive or discriminatory conduct of market dominating firms or firms which are able to create a dependency relationship.
D. The Impact of the Legal Method on Antitrust Enforcement

The significant criticism of American antitrust law as opposed to the general acceptance of German antitrust law is due to the legal method by which the law is applied as well as material law itself. As Maxeiner points out the problems of American antitrust law are largely problems of legal method. For example, the dramatic shift in American antitrust policy was possible without legislative action. Thus, the vague and broad language of American antitrust law leaves a farreaching discretion to the courts.

The vagueness and ambiguity of American antitrust law does not satisfy the necessity to have predictable rules on which businessmen can base their decisions. Interestingly, the concern that this ambiguity might deter beneficial and procompetitive conduct instead of promoting free market competition and the fact that ambiguity itself is deemed unsatisfactory are reasons of the success of the simplistic approach of the Chicago School. This approach gives a feeling of security, strengthening the notion that courts will make "right" decisions if they rely on a "rational, scientific" theory rather than struggle with difficult economic concepts and public policy notions.

For example, in Business Electronics, the Supreme Court refused to consider the facts of the case and instead concluded on the basis of economic theory. In Business Electronics Hartwell, one of two Sharp dealers in the
Houston area complained about his competitor's (Business Electronics) prices and threatened Sharp that he would terminate his relationship with Sharp if Sharp would not terminate Business Electronics, the only competing dealer in the Houston area. The Court reasoned that the challenged conduct might have promoted consumer service and prevented free riding and, therefore, did not violate the antitrust law. However, the initial issue that should have been asked, whether there was better service probable and whether a free riding problem existed, were not considered.

Thus, the theory replaced the facts. Although an "easy to use" theory promotes predictability, the polymorphity and subtility of the law are disregarded by a simplistic approach.

E. Alternatives for Antitrust Enforcement

To solve the existing dilemma, either the material law must be amended or the procedural rules and enforcement policy should change. A minimum reform would be to provide the courts with a list of values to be protected under the law. Providing a ranking of these values and establishing evidentiary standards would greatly contribute to clarity and predictability. Another solution would be to limit the possibilities to challenge antitrust violations both in the time and in the enforcer dimension. An even more drastic solution would be to transfer antitrust
cases to specialized decision makers who are equipped to employ an adequate and thorough antitrust analysis.\textsuperscript{116} These decisionmakers would be able to employ a more sophisticated and multivalued antitrust analysis.

1. Antitrust Enforcement in America

At present, in America a violation of the antitrust law may be challenged by federal agencies,\textsuperscript{117} individuals,\textsuperscript{118} and states as "parens patriae" for their citizens.\textsuperscript{119} A jury may have to decide the facts of the case. The decision is made by an unspecialized judge dependent on the submitted information.\textsuperscript{120} Antitrust litigation is lengthy and costly. Only some few cases will be heard by the Supreme Court. This procedure tends to create inconsistent rulings among the courts and leads to makes the courts susceptible to applying "easy to use methods".

2. Antitrust Enforcement in Germany

Under the GWB -- with a few exceptions\textsuperscript{121} -- enforcement of the antitrust law is carried out by the Federal Cartel Authority. The Federal Cartel Authority is staffed with highly qualified professionals, both lawyers and economists. The GWB is the basis for antitrust enforcement; changes in the political landscape do not have a considerable impact on the enforcement policy. Consistency is favored. If an appeal against a decision of the Federal Cartel Authority is filed, a specialized Cartel Senate at the Court of Appeals for West
Berlin\textsuperscript{122} will decide the case.\textsuperscript{123} Final review is vested in a Cartel Senate of the Supreme Court.

This concentration and specialization of decision makers contributes to consistency and predictability and thus enhances the rule of law.

Moreover, antitrust proceedings in Germany are fundamentally different from the proceeding in the United States. Jury trials are unknown and pre-trial discovery procedures do not exist under the GWB. The judge controls the trial, preventing prohibitive litigation costs. Also, the rule that the losing party has to pay court costs, the costs of witness' and expert's testimony, and the winner's attorney fees contributes to prevent lengthy and costly antitrust proceedings.\textsuperscript{124}

The proceeding of the trial and the taking of proof is controlled by the judge, both parties "offer" their witnesses for the proof a certain fact, the judge decides which witness's testimony is necessary to evaluate the conduct and then decides which witness he wants to hear. The judge is responsible for questioning the witness, and the parties may ask additional questions.\textsuperscript{125}

F. Policy and Goals of the American Antitrust Law

The most important question regarding antitrust enforcement is how to define what goals should govern application of the law. Because of the importance of this issue, the goals pursued by the antitrust law are clearly defined.
However, under present law the search for an answer to this question is daunting. The current discussion in America is highly controversial. The vigorous debate reaches back to vocabulary used in war scenario,126 during revolutions,127 and to describe football games.128

The decision which opinion will prevail is of crucial importance to application of antitrust law both in the area of horizontal and of vertical restraints. The latter restraints would be treated very favorably -- because of their positive effects on interbrand competition129 -- if the approach of the Chicago School should prevail. According to the view of the Chicago School vertical restraints would be only of antitrust concern if they have horizontal effects.

The conflicting views of the Chicago School and the New Coalition do not reflect a scholastic dispute held in remote ivory towers but have immediate impact on to day for day application of the antitrust law. The vagueness of the language of American antitrust law leaves broad discretion to the courts and enables the courts to follow either view. Thus, the outcome of a case does not only depend on the submitted facts but also on the measuring stick which the court applies. This controversy has already lead to remarkable confusion which is highly unsatisfying for all participants. As a result, the rule of the law, which should guide businessmen and courts in their decisions is abandoned. The attempt to solve this confusion has created several new
approaches, tests, and filters intend to help determine what conduct should be condemned by antitrust law. However, there are no indications that the facial problems of American antitrust law will be solved in the near future.

Therefore, it is necessary to explain both the "goals of antitrust" according to the Chicago school and the "goals of antitrust" according to the New Coalition. Although it seems too broad-ranging an analysis to extend the inquiry to the core arguments of the conflicting theories if one is merely interested in the outcome of an exclusive dealing or price fixing case, a description of the general views is necessary since these views are mirrored in the treatment of every vertical restraint.

1. Approach of the Chicago School

The approach of the Chicago school is based on neoclassical price theory and assumes rational behavior of both sellers and buyers. According to the assumptions that firms have the tendency to be efficient, that competition is self-maintaining, and that the exploitation of market imperfections -- if there should be any -- will be prevented because of the possibility of new market entrants, the Chicago school asserts that the economy should be free from governmental interference.

Proponents of the Chicago school's antitrust analysis narrow the goals of antitrust law down to a
single question: whether a certain conduct is efficiency creating.\textsuperscript{138}

The language of the antitrust statutes, their legislative histories, the major structural features of antitrust law, and considerations of the scope, nature, consistency, and ease of administration of the law all indicate that the law should be guided solely by the criterion of consumer welfare.

Moreover, the definition of consumer welfare is understood as social welfare and neglects income distribution effects by stating that "the shift in income distribution does not lessen total wealth\textsuperscript{139} and thus "should be completely excluded from the determination of the antitrust legality of the activity."\textsuperscript{140}

The Chicago School assumes that "[b]usiness efficiency necessarily benefits consumers by lowering the costs of goods and services or by increasing the value of the product or services offered."\textsuperscript{141}

Consumer welfare is measured by the criterion of economic efficiency:\textsuperscript{142} Economic efficiency is comprised of allocative\textsuperscript{143} and productive efficiency.\textsuperscript{144} According to the Chicago School, the latter is mainly determined by economies of scale and transaction-cost efficiencies.\textsuperscript{145}

Other goals are not accepted, a multiple-goal antitrust law is expressly rejected.\textsuperscript{146}
2. Treatment of Vertical Restraints under the Chicago School's Theory

Although the arguments surrounding various vertical restraints will be discussed later, a general statement of the Chicago School's treatment of vertical restraints illuminates the basic setting. Based on the abovementioned efficiency arguments combined with the assumptions that businessmen behave rationally and market imperfections will be corrected by the market, treatment of vertical restraints becomes simple. Vertical restraints are no longer a subject of antitrust concern because they are assumed to be efficiency enhancing. The Chicago School imputes that every businessman who employs a restraint wants to enhance efficiency because attempts to create market imperfections or achieve monopoly power are unrealistic, "unless, of course, they are irrationally willing to trade profits for position".

Consequently, the Chicago School takes the position that "vertical price fixing, vertical market division, and, indeed all vertical restraints are beneficial to consumers and should for that reason be completely lawful."

3. Criticism of the Chicago School's Approach

Opponents of the Chicago School's approach assert that antitrust law pursues a multi-valued goal. They accuse the Chicago School of ignoring the basic values of antitrust law, ignoring the legislative history, displacing the
process of proper legal analysis, and subserving of law to ideology.\textsuperscript{[151]}

Furthermore, they allege that the Chicago School theory is based on irrational premises,\textsuperscript{[152]} is underinclusive, and is utterly artificial and oversimplifying.\textsuperscript{[153]}

The New Coalition is particularly concerned with the influence the Chicago School's theory has gained on the reasoning of the courts.\textsuperscript{[154]}

They recognize the problem of leaving discretion to the courts in enabling judges who favor neoclassical economic theory to repeal antitrust law.\textsuperscript{[155]} They do agree,\textsuperscript{[156]} however, with Chicago scholars that legislation should be left to Congress and promote legislative action to clarify the goals of antitrust law. Accordingly, the New Coalition favors practical rules for the administration of antitrust law, such as the proposal of the "Freedom of the Vertical Price Fixing Act of 1987".\textsuperscript{[157]}

Regarding the role of economic theory in the application of antitrust law, the New Coalition disagrees in two essential points with the Chicago School's approach. First, they reject the plain economic theory of the Chicago School as a leading principle. Second, they subscribe to economic theory the task of assisting the courts' reasoning, rather than sacrificing antitrust law to economic theory.\textsuperscript{[158]} Accordingly, the New Coalition argues that antitrust law should be more concerned with process than outcome\textsuperscript{[159]} and
supports the view that the law should define the goals of antitrust.\textsuperscript{160}

For example, it makes a difference whether economic theory is used to overcome a static reasoning such as in Schwinn\textsuperscript{161} by showing that, in the absence of other negative effects, certain vertical restraints may have procompetitive effects and sound business justifications. Nonetheless, economic theory gains a different quality if used to allow vertical restraints without scrutiny of procompetitive and other side effects.

4. Approach of the New Coalition

The New Coalition is not limited to criticising the Chicago School. Rather, the New Coalition promotes its own approach to antitrust law, centering on the goals of antitrust. The New Coalition contends that Congress pursued a multivalued goal in enacting antitrust law.\textsuperscript{162} Those scholars argue that Congress was not even cognizant of the Chicago School's efficiency concept at the time the Sherman and Clayton Act were adopted.\textsuperscript{163} They allege that legislative history indicates that multiple goals were pursued by Congress.\textsuperscript{164} The New Coalition refers to the historical background of antitrust law\textsuperscript{165} to conclude that the accumulation of economic power was a concern of the drafters of antitrust law. According to the New Coalition, antitrust law was created in an atmosphere of deep suspicion of the accumulation of economic power.\textsuperscript{166} Therefore, they assert
that Congress had more in mind than establishing neoclassical price theory when enacting the Sherman Act. Moreover, the New Coalition refers to substantial case law that subscribes to a multivalued goal of antitrust. They point out that Congress acquiesced to these decisions, making no effort to reverse the rulings of the courts.

To ensure that the courts adhere to legislative intent and to cure the present uncertainty, the New Coalition advocates four distinct goals of antitrust. The purpose of proscribing these goals is to limit judicial discretion according to the legislative intent. The four goals are "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as a market governor".  

5. Treatment of Vertical Restraints According to the New Coalition

It is not possible to give a description of "the" treatment of vertical restraints under the New Coalition's approach. The New Coalition consists of numerous scholars who are united in their attempt to oppose the erosion of antitrust law by the Chicago School. Thus, they may arrive at different outcomes upon applying their united goals to certain vertical restraints. Nevertheless, they do agree that, in scrutinizing the lawfulness of vertical restraints, several values must be weighed. Values such as freedom of
the competitive process, maintenance of a viable market structure, limiting economic power, benefit for the consumer are universally included in their antitrust analysis. According to the New Coalition intrabrand competition has a value of its own.

G. Policy and Goals of the GWB

For a lawyer familiar with civil law systems the shift in American antitrust enforcement is astounding. Although the GWB is not ignorant of economic arguments, the role of economic theory is significantly different. In Germany, consideration of policy and economic arguments in evaluating restrictive conduct is limited by statutory language and by the objectives of the GWB. Under the German conception of antitrust law, the most important step in approaching a restraint is identifying the impact of that restraint on values protected by the GWB. This evaluation has been made by the lawmaker, the decisionmaker must accept this decision and follow the statutory determination. If the statute employs vague or ambiguous terms, these terms have to be interpreted according to the goals of the law.

Protection of competition is the primary goal of the GWB. However, the term "competition" is not defined in the GWB. Therefore, the interpretation of the term competition is crucial, and the evaluation of restrictive conduct differs according to the values subsumed under the term
competition. For example, the statement that the GWB protects competition but not competitors might be misleading if one does not know that according to the GWB's notion of competition the freedom of competitors' action is essential.

The GWB has embraced a free market orientation which was influenced by the neoliberalism of the ORDO, or Freiburg School. The scholars of the Freiburg School favor the competitive system because they consider it more efficient, but, perhaps still more important, because they believe it more democratic. They criticize purely economic perspectives that separate economic well-being from the issue of freedom. They reject a centrally administered economy because they consider the concentration of power to be inconsistent with democratic principles. The neoliberals reject a laissez-faire economy for related but different reasons. They criticize laissez-faire positions, both classical and more recent ones, for overlooking the problems of limitation and control of private economic power.

The framers of the GWB recognized that "optimal competition" cannot be defined so as to deal effectively with every kind of restrictive conduct. Hence, the GWB adopted the parameters of economic theory designed to optimize the competitive concepts pursued by the GWB. The GWB also adopted legal principles.

The GWB does not merely rely on economic theory but also pursues legal, economic, and social policy functions. The legal policy function protects personal freedom to make and negotiate contracts. The economic policy
function is aimed at preserving an open and free market place, for example, by combatting economic concentration. The social policy function serves to distribute both income and wealth, in part by softening undue differences in economic power.175

According to its civil law heritage, the GWB attempts to avoid employing vague standards such as the terms "consumer welfare" and "economic efficiency" which may be used to justify every restraint.176 Further, the GWB recognizes "market performance" as only one of several policy goals. Economic efficiency takes second place to freedom of action.177 Mere reliance on "market performance" is considered to be to "single sided".178 Scholars point out that evaluation of market performance depends on whether short or long term analysis is applied.179 The GWB recognizes the danger that an existing "imperfect" market structure might be replaced an even "more imperfect" market structure, "better performing" in the short run while having a pernicious effect in the long run.180 "Antidote is also poison."181

Therefore, to assure "freedom of competition" the GWB relies mainly on "market conduct" and "market structure."182 GWB's policy is to protect overall freedom of competition by ensuring open markets with a multitude of "free" market participants and competition on different levels of distribution.183 Consequently, the GWB emphasizes the value of intrabrand competition.184
1. Alternative Approaches Discussed in Germany

The appropriate approach towards vertical restraint was discussed before, during, and after the enactment of the GWB. Often, arguments were borrowed from the Chicago School. Some argued that restraints in single contractual relationships cannot impair the freedom of competition. Other contentions include that vertical restraints have a procompetitive effect enhancing the competitive edge of some businessmen and stimulating overall competition and that interbrand competition should be the main concern of antitrust law.  

To illuminate the underlying economic theory of the GWB, it is helpful to discuss for what reasons the GWB choose the present conceptions and why it rejected other approaches. Of special interest is that theoretical concepts embraced by the Chicago School were rejected by the GWB.

a. Concept of Perfect Competition

The perfect competition concept, the economic model of neoclassic theory, is based on the notion of perfect performing markets with unhindered competition on all levels of distribution, between all market participants. Under this model, all vertical restraints are suspect, because they restrict freedom of individual market participants, thereby tainting the "perfection". Consequently, restraints are have to be considered per se illegal.
Although this concept had some influence on the GWB, it is not accepted as leading concept in its application. The German legal community has recognized that the underlying assumptions of neoclassical theory, such as perfect and immediate information of all market participants, fixed demand structures of consumers, and immediate reaction on change, are inadequate in practice.\textsuperscript{187} The drafters of the GWB, although influenced by the neoclassic theory of perfect competition, did not choose this theory as leading principle of the GWB because it is based on irreal assumptions and therefore leads to results which do not comport with reality.

Practical experience with plain economic models highly dependant on assumptions resulted in suspicion towards economic theory. Therefore, the so called "second best choice" was made. Thee GWB's drafters recognized that every economic theory has shortcomings and that no theory was suited to become the pole star of the Act's application. Hence, economic theory is merely used to provide ideas and guidance.

b. Workability Concept

Based on the treatises of J.A. Schumpeter\textsuperscript{188} and J.M. Clark,\textsuperscript{189} the dynamic elements of competition were more focused on by the GWB. The German scholar E. Kantzenbach,\textsuperscript{190} who influenced the 1965 amendment of the GWB, adopted the workability theory. Kantzenbach's workability concept attributed to competition not only the exercise of business
behavior, but also social values such as limitation and control of economic power, promotion of technological progress, and increased allocative efficiency. According to this theory the border where procompetitive conduct becomes anticompetitive is determined by market structure, market conduct, and market performance tests. However, workability concepts were not sufficient to define the parameters for applying the GWB. The workability concept cannot solve the conflict between market performance (efficiency) and market structure (freedom of the markets) -- the so called "Dilemma These". Another shortcoming of the workability concept is the inability to harmonize static efficiency criteria with dynamic market functions. Moreover, it is not possible to determine how long competition can be considered as "workable", and it is not possible to compare future effects on competition with and without restraint.

A multitude of economic effects cannot be contained within the limited scope of a workability concept dependent from assumptions. The multivalent impact of vertical restraints makes a workability analysis especially difficult. As long as no obvious abuse occurs, competition can be considered workable. The workability concept does not provide rules for a comprehensive evaluation to determine pro- or anticompetitive effects. Thus no optimal market condition is defined under the workability concept. Arguments alleging procompetitive effects, such as transactions cost economics, increased interbrand competition, ease of
market entry of smaller competitors, better service and quality, and other efficiency arguments, are in opposition to anticompetitive impacts such as loss of freedom, market foreclosure effects, shift of income and economic power, lessened consumer choice, decrease in price competition, and other adverse impacts on consumers or market structure.\textsuperscript{198}

Exact conclusions cannot be drawn. Therefore, any result might be justified.\textsuperscript{199} Thus, the ambiguity and vagueness of the workability concept preclude its use as a sound basis for a clear and predictable statute. Hence the GWB does not follow the workability concept.\textsuperscript{200}

c. Group Competition Concept

Parallel to the increased use of vertical restraints and expansion of the "franchise idea," German scholars developed the group competition concept. This theory is mainly influenced by the Chicago School.\textsuperscript{201} Therefore the proponents of this concept are described as the "German branch of the Chicago School."\textsuperscript{202}

The group competition concept favors replacing the competition among a multitude of small market participants\textsuperscript{203} with integrated distribution channels using uniform marketing strategies.\textsuperscript{204} The arguments supporting this conception are the same as the Chicago School uses to support their view that interbrand competition should be the main concern of antitrust. Therefore, the arguments are well-known to someone familiar with the inter-/intrabrand dichotomy of
American antitrust law. Efficiency arguments (allocative and productive efficiency, transaction costs economics, and enhanced interbrand competition) are the central points of theoretical concern.

However, proponents of the group competition concept must restrain themselves on criticizing the current policy of the GWB. The concept of group competition does not comport with the economic policy of the GWB. The GWB prefers the competitive freedom of a multitude of individuals to efficiency advantages which, according to the workability theory, might be created through limiting individuals' freedom.

GWB policy is to maintain free competition among all market participants. The replacement of intrabrand competition with leadership by the manufacturer would lead to central planning. Due to concentration, collusion, and other market imperfections, the sovereignty of the consumer could be replaced by dictatorship by the group leader. The consumer's choice would be reduced to either accepting the product of a group or not. Moreover, the group competition concept conflicts with democratic principles laid down in the Constitution.

Therefore, the group competition concept is rejected and stamped as "ideological war against antitrust ... supported by industrie's interests".
2. Concept of the Practical Freedom of Competition

At present, the policy of the GWB and its interpretation by the courts and the Federal Cartel Authority is best described as "theory of the practical freedom of competition". This theory is based on the work of A. Smith as set forth by the theory of the Austrian School (L. von Mises, F.A. von Hayek) and adopted in Germany by E. Hoppmann.

The practical freedom theory interprets competition as an interactive process through which the individual market participants are able to exercise their economic freedom. This free competition notion is based on an absence of coercion in the market place. This theory refers to competition as an open and evolutionary process which allows the individuals to use their creative potential while taking chances in a competitive environment. Market conduct and market structure are of primary concern; market performance comes second.

Three reasons support the view that the practical freedom of competition theory is best suited to describe the public policy of the GWB.
First, legislative history and the intent of the lawmakers complies with this theory.
Second, the practical freedom theory complies with the statutory, constitutional and civil law principles. The GWB protects competition as a legal principle to ensure freedom and equality of all subjects. This value is also recognized
by the Constitution. The GWB relies on the assumption that democratic principles and a high degree of freedom also lead to good market performance. The principle task of the GWB is to limit the individual's freedom to enter restrictive covenants when this freedom endangers the overall freedom. The GWB recognizes that the freedom to conclude contracts -- which is a prerequisite for free competition -- can only considered to be a "freedom" as long markets are not distorted. In a competitive environment, however, the competitive pressure contributes to preserve the freedom to enter contracts free from coercion. Third, GWB policy of concentrating on restrictions of the individuals' freedom to compete makes the GWB practicable. This limitation of the statutory scope makes it possible for courts to concentrate on relevant parameters rather than attempting to sort out the numerous facts connected in an enormous multitude of interdependencies.

The theory of practical freedom of competition focuses on several dimensions of competitive freedom. These are (1) freedom of the exchange process (exchangeability of goods, cross elasticity), (2) freedom to use competitive parameters, (3) freedom of consumer's choice, (4) openness of the markets, and (5) freedom to design a distribution system. Evaluation of a restraint's impact on freedom of the market and of freedom of choice remaining, determines whether a vertical restraint is undue. With regard to some restraints, the statutory norm contains an abstract and anticipated
evaluation of the restraint (for example the prohibition of resale price maintenance and does not allow further consideration). Most of the vertical restraints, however, are subject to limited judicial discretion. This discretion, however, is limited because the courts have to follow the intention of the applicable norm in the light of the goals of the GWB.

As mentioned earlier, the GWB does not pursue the "pure" theory of the practical freedom of competition. The lawmakers included protection of small and middle-size businessmen, consumer protection, and certain economic policy goals (conjunctural, structural, and export policy) in the catalogue of values protected under the GWB. However, one should not assume that the GWB pursues a welfare approach or promotes "societal antitrust". Rather, the GWB's main concern is preventing impairment of freedom of competitive processes by economic power of other market participants.

Interestingly, under the theory of the practical freedom of competition most vertical restraints escape condemnation under the GWB. Only resale price maintenance is strictly prohibited. However, although the outcome the same as under the Chicago School's approach, the result is reached in a different way.

The Chicago School excuses vertical restraints because of their positive effects on interbrand competition and
believes that vertical restraints are only harmful to competition if they effect interbrand competition.\textsuperscript{222}

The GWB excuses vertical restraints because of their probable business justification. In clear contrast to the Chicago School's approach, the GWB protects "not only 'competition as an institution'" but also emphasizes the value of intrabrand competition thus the "individual members of business are also of concern ..."\textsuperscript{223}

Furthermore the GWB recognizes a danger to competition caused by an increasing coverage of the market with intrabrand restraints. An increased coverage constitutes an obstacle for new market entrants\textsuperscript{224} and might lead to increasingly inflexible markets. These developments might harm competitors, customers, and consumers, thereby leading to results which the GWB tries to prevent.\textsuperscript{225}
III. Resale Price Maintenance

The appropriate treatment of agreements restricting the buyer's freedom to set his prices in contracts which he concludes with third parties is probably the most hotly debated issue in the area of vertical restraints among America's legal scholars and courts.\textsuperscript{226} Although the Supreme Court consistently upheld the per se rule against vertical resale price maintenance,\textsuperscript{227} sometimes lower courts refused to follow Supreme Court precedent.\textsuperscript{228} Moreover, the Department of Justice, which is supposed to enforce antitrust law, refuses to fulfil its task. Rather, the Department of Justice supports the Chicago School's view that the per se rule against resale price maintenance should be abandoned.\textsuperscript{229}

At the moment, it is not foreseeable which line of reasoning of the courts will take and it is even doubtful whether the per se rule against resale price maintenance might survive if challenged before the Supreme Court. The influence of the Chicago School on the courts and administration is considerable and might lead to the replacement of the per se rule against resale price maintenance.
The majority of Congress, on the other hand, supports a more conservative approach towards antitrust.\textsuperscript{230} Through the enactment of new legislation proscribing the courts how to decide certain antitrust issues, Congress may reverse recent judicial and administrative developments. For example, the enactment of H.R. 585,\textsuperscript{231} the "Vertical Price-Fixing Act of 1987" would contribute to solving the present confusion and establish clear standards in the area of vertical price restraints.

In contrast, the per se rule\textsuperscript{232} against resale price maintenance as codified in § 15 GWB\textsuperscript{233} declaring void all restrictions of the buyer's freedom "to determine prices or terms of business in contracts ... with third parties" is not questioned by German scholars and is one of the most vigorously enforced provisions of the GWB.

A. Treatment of Resale Price Maintenance under American Antitrust Law

In Dr. Miles Medical Co. v. John D. Park & Sons\textsuperscript{234} the Supreme Court established the per se rule against resale price maintenance, not permitting any excuse or justification for such restraints. The Court addressed the injurious effect of price fixing on public interest\textsuperscript{235} and upheld the freedom of the buyer to set his prices.\textsuperscript{236} The Court stated that, after the seller had "sold its products at prices satisfactory to itself, the public is entitled to whatever
advantage may be derived from competition in the subsequent traffic."\textsuperscript{237}

The per se rule was soon opposed by small wholesalers and retailers who feared for their profit margins and for their existence. Their lobbying effort, which was supported by the economic environment of the Great Depression in the 1930's, was successful and, under the so called "Fair Trade" laws,\textsuperscript{238} resale price maintenance agreements were exempted from Sec. 1 Sherman Act condemnation. However, the unsatisfying experience\textsuperscript{239} with the "Fair Trade" laws increasingly led to their limitation and finally to their repeal in 1975.\textsuperscript{240}

\textbf{Dr. Miles} was reaffirmed in subsequent decisions,\textsuperscript{241} and the scope of per se condemnation under Sec. 1 Sherman Act\textsuperscript{242} was extended to vertical maximum price fixing arrangements.\textsuperscript{243} One of the most clear statements condemning price restraints is contained in \textit{United States v. Socony-Vacuum Oil Co.}\textsuperscript{244}

The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price politics. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry in their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

At present, however, the per se rule against resale price maintenance is weakened and challenged. The Supreme Court is increasingly reluctant to assume a per se violation of the
antitrust law. Based on the premise that "[a]ll vertical restraints, ..., even those that result in substantial pro-competitive benefits, may have some effects on price" the scope of per se condemnation is narrowed.

Furthermore, American antitrust law requires proof of concerted action as a prerequisite to challenging resale price maintenance under Sec. 1 of the Sherman Act. The Court stated in *Fisher v. City of Berkeley* that "[e]ven where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement." Although the Court held in *Sylvania* that "economic effects" rather than "formalistic line drawing" should determine the treatment of a restraint, the "conspiracy requirement" allows substantial conduct which may have the same effect as resale price maintenance. Furthermore, the Court raised the evidentiary standards for proof of the facts necessary to establish a price fixing agreement or a conspiracy on a level which can be considered prohibitive. As a result, the advantage of the per se rule, its easy applicability and reliability is invalidated through inpracticable standards. Under the present position of the Supreme Court there is hardly any chance for a plaintiff to prevail when alleging a price fixing conspiracy unless he can proof an explicit agreement to fix prices.
1. Some Lower Court's Interpretations of the Per Se Rule

Some lower courts, however, have refused to follow the Supreme Court's per se rule and pursued a more lenient approach towards resale price maintenance. For example, In Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc. a seller enforced a policy of territorial restrictions by price maintenance restraints. The First Circuit interpreted the statement in Sylvania that "departures from the rule of reason standard must be based on demonstrable economic effect rather than ... formalistic line drawing" in a way that illustrates the vagueness and broad discretion under a rule of reason analysis in comparison to a per se standard. The Court held that the price restraint was merely ancillary, accordingly, approached the "ancillary price restraint" under a rule of reason analysis. The Court stated that it was "unable to conceive of how the resale price restrictions used to enforce the assigned territories in the present case can possibly have a greater anticompetitive effect than a pure policy of territorial restrictions" and consequently upheld the price restraint. However, if one follows this line of argumentation every vertical price restraint could be subject to rule of reason scrutiny, because, arguably, every price restraint is less restrictive than vertical integration which is basically allowed. Under this rationale, nothing would be left of the policy behind the implementation of per se rules, i.e. establishing clear and practicable standards.
and enabling the courts to condemn restraints without "elaborate inquiry as to the precise harm ... caused [by the restraints] or the business excuse for their use."\(^{258}\)

In *Business Electronics Corp. v. Sharp Electronics Corp.*\(^{259}\) the Supreme Court stated that distinguishing between "naked" and "ancillary" as a means of classifying vertical restraints is not appropriate because this would lead to "perverse economic consequences ... to avoid per se invalidity only through attachment to an express contractual obligation."\(^{260}\)

The per se rule against resale price maintenance was even further invalidated by the Ninth Circuit in *49er Chevrolet, Inc. v. General Motors Corp.*\(^{261}\) where the Court rejected application of the per se rule to an alleged vertical price-fixing agreement and flatly stated "the principle that allegations of vertical price-fixing are generally evaluated under the 'rule of reason' rather than [being] considered to be per se antitrust violations."\(^{262}\) However, the cited principle was "discovered" by the Ninth Circuit, ignoring the repeatedly affirmed per se rule and the Supreme Court's holding in *Monsanto*.\(^{263}\) *Monsanto* was decided only two years before *49er Chevrolet* and, apparently the Ninth Circuit wanted to promote its own approach towards resale price maintenance.

These decisions illuminate the state of confusion prevailing in the area of vertical restraints under American antitrust law. Ambiguous and vague terms, broad discretion
left to the courts, unpractical evidentiary standards, and insecurity about the role of economic theory led to inconsistent ruling and indicate the need for legislative action.

2. The Colgate Doctrine

The present struggle for the right approach towards resale price maintenance is even more astonishing if one considers that the Colgate doctrine gives sellers a powerful tool to coerce their customer to adhere to their pricing scheme.

a) The Economic Impact of Colgate

As Henry J. Hyde points out "[i]n today's name brand economics in which many manufacturers pre-sell and differentiate their products through national advertising, the loss of supplies will almost certainly mean lost profits and possibly the loss of the entire business." Therefore, the threat to terminate a price cutter will have its impact on the price cutter's pricing behavior. Another way to establish a stable pricing scheme is to terminate price cutters in favor of dealers which adhere to the suggested pricing scheme. This firm policy, especially when it is announced in advance and vigorously enforced, will lead to stable and higher prices. Discounters will often not start to carry the products of the offending manufacturer, because they will face termination and loss of "investment" in taking the products of this manufacturer into their
program. On the other hand, high price stores will be attracted by this policy, they can rely on the manufacturers' termination of "price cutters" upon complaint and protection from price competition.

Therefore, the initiative to terminate a price cutter frequently comes from the dealers who often use their position to induce the manufacturer to impose an "enforced" pricing scheme.

In conclusion, the Colgate rationale that only formal restraints constitute an agreement and, hence, are per se illegal resale price maintenance, is a formalism which contradicts Sylvania's reasoning that the "economic effect" should be decisive. The fact that economic pressure of powerful firms is as stringent and effective as a contractual obligation is ignored by Colgate.

b) The Problem of Limiting Colgate's Impact

Under the Colgate doctrine, the problem becomes drawing a practicable and appropriate borderline between unilateral and bilateral conduct. Courts recognized that harmful conspiracies may escape antitrust liability. Accordingly, the scope of Colgate was limited. In United States v. Parke Davis & Co. the so-called "plus factor" was developed and every conduct which exceeded the announcement of policy and withdrawal of trade was held to constitute an invalid resale price maintenance agreement. In Parke Davis the Court limited the scope of Colgate so far
that almost every dealer termination put the terminating manufacturer into jeopardy of a treble damage suit.

Only conduct "of such Doric simplicity as to be somewhat rare in this day of complex business enterprise" was held able to escape condemnation under antitrust law. The problem, however, was that, on the one hand, business conduct of "doric simplicity" hardly exists, while on the other hand, Colgate was upheld. Therefore, the antitrust law became trapped between simplicity and complexity. It is hardly logical to explicitly allow a business conduct (as Colgate does) and afterwards punish the businessmen who relies on the approved rule when this business conduct is applied in real world business. A look at the business world reveals that communication between seller and buyer is normal and desired business conduct and should not be deterred.

c) Colgate's Adoption to "Real World Business"

Courts realized this problem and broadened the allowed conduct under Colgate. In subsequent decisions, particularly in dealer termination cases, the courts changed their approach, amending plaintiff's standard of proof rather than abolishing the rule which does not fit into real world business.

However, the courts missed the opportunity to find a compromise between allowing legitimate business conduct and prohibiting too much anticompetitive conduct. Instead of establishing different levels of presumptive illegality, the
proof of a vertical conspiracy is almost impossible after Monsanto\textsuperscript{276} and Business Electronics.\textsuperscript{277} The plaintiff alleging a price conspiracy faces two obstacles. First, the proof of a conspiracy requires an evidentiary standard not known in other areas of the law.\textsuperscript{278} It is particularly difficult to meet this evidentiary burden. Hence, the amorphous question of whether the termination was the result of an illegal conspiracy or independent decision is further impeded, because the interests of manufacturer and dealer in establishing a certain pricing scheme often go hand in hand. Second, even if the plaintiff can submit convincing facts for at least a prima facie assumption, the Court might not consider the facts but, rather, might reject plaintiff's claim with the flat statement that a price fixing conspiracy is not probable. Thus, economic theory provides alternative reasons for conduct -- without considering whether these reasons have been submitted in the case before the court.\textsuperscript{279}

Therefore, if one pursues the notion that resale price maintenance violates antitrust law, one has to admit that, as long as the Colgate doctrine is not overruled, the achievement of the goals of Sec. 1 of the Sherman Act is hindered and restricted by Colgate. Under Colgate the borderline between "normal" business conduct and "conspiracy" is hardly definable with the predictability a statute imposing criminal sanctions requires. Moreover, the coalition of Colgate and economic theory is increasingly becoming an obstacle to antitrust enforcement.
B. Resale Price Maintenance under the GWB

Until the 1973 amendment of the GWB resale price maintenance for brand products was allowed. At the time of the abolition of resale price maintenance, about 174,000 articles were registered as being subject to resale price maintenance. At present only books, due to cultural political reasons, are exempted from the prohibition. The change in the law was motivated by the idea that resale price maintenance did not any longer fit in the economic environment of the 70's with strong and competitive retail outlets and more educated and flexible consumers. The intention of the lawmaker in amending § 15 GWB was to foster the goals of the GWB and to promote the freedom of competition. It was recognized that resale price maintenance is not in conformity with the GWB's policy of maintaining as much competition as possible through enabling every enterprise to use as much competitive parameters as possible. The GWB feared that resale price maintenance might lead to misallocations and shifting of wealth as result of centralizing the decision as to the most important parameter "price".

Indeed, the prohibition of resale price maintenance resulted in a perceivable reduction of consumer prices. Another expected result of the amendment was an increased concentration on the retail level. However, the "concentration wave" was not that massive, and the abolishment of
resale price maintenance was only one of several reasons for the increased concentration.\textsuperscript{287}

Interestingly the GWB pursues a different policy towards the per se rule than American antitrust law. Unlike the tendency of the American courts to reduce the application of per se rules, the GWB displays a tendency towards extending the reach of the per se rule. The key norm against resale price maintenance is safeguarded by other norms to prevent circumvention of the per se prohibited conduct. And vertical non-price restraints, which are likely to reach a result which resembles resale price maintenance, will also be prohibited. For example, selective distribution systems which intend to maintain a price level will be outlawed under the applicable provision dealing with selective distribution because § 15 GWB shadows the whole area of vertical restraints.\textsuperscript{288} In particular, the Colgate doctrine\textsuperscript{289} is clearly rejected by the GWB.

1. The Key Norm -- § 15 GWB

§ 15 GWB is the key norm of the GWB's prohibition of resale price maintenance. § 15 GWB provides that:\textsuperscript{290}

Agreements between enterprises with respect to goods or commercial services ... shall be null and void, insofar as they restrict a party to them in its freedom to determine prices or terms of business in contracts which it concludes with third parties in regard to the good supplied, other goods, or commercial services.
The primary and emphasized purpose of § 15 GWB is to protect freedom of contract and to protect third parties from restraints imposed by the seller. Indirectly, the freedom of competition as an institution is also protected. Another goal mentioned to gather support for the 1973 amendment was fighting inflation; however, this goal does not fit in the list of values protected by the GWB and is explainable only by the economic climate of that time.

§ 15 GWB protects the freedom to enter contracts against direct and indirect restrictions. Minimum and maximum price fixing and all other kinds of restrictions affecting prices violate § 15 GWB. Even "most favorable treatment-clauses" are considered to constitute an illegal attempt to circumvent § 15 GWB.

According to the underlying GWB policy -- maintaining the competitive process as a way of ensuring good performance rather than to relying on performance standards -- every price restriction is suspect under § 15 GWB. § 15 GWB intends to maintain competition on all levels of distribution and to foster the GWB policy of preserving as much freedom of competitive action as possible. Every restriction in the use of competitive parameters constitutes an obstacle to that goal.

According to the legal conception of the GWB, the interbrand/intrabrand discussion and workable competition arguments are preempted from consideration. The rigid treatment of resale price maintenance in comparison to other
restraints, which are more favorably treated although their economic effect might be the same, emphasizes the special value the GWB contributes to the individuals' freedom to freely set prices and conditions in its contracts with third parties. Both the democratic value of freedom of the individual and the fact that prices are the core of competition are reflected in § 15 GWB.298

2. Closing the Loopholes

Because of the clear and unambiguous language of § 15 GWB a direct violation of § 15 GWB will rarely occur.

However, the GWB suspects that businessmen are persistently lured into attempting to mitigate or circumvent the impact of § 15 GWB by construing new ways of distribution or using other means than contractual agreements to assure adherence to a certain pricing scheme. To foreclose other ways to reach the same or similar results as prohibited under § 15 GWB, additional provisions of the GWB safeguard § 15 GWB and close off other avenues which might be used to induce or to coerce distributors to follow a proposed pricing scheme.299

a) § 25(2) GWB

In § 25(2) GWB, the statute explicitly declares that "[e]nterprises ... shall not threaten or cause harm, or promise or grant advantages, to other enterprises for the purpose of inducing them to adopt conduct which, ... must
not be made the subject-matter of a contractual commitment.\textsuperscript{300} Threatening to refuse to deal, threatening to terminate a discounter if he does not follow a pricing scheme, threatening with any other economic disadvantages, or promising economic advantages, constitutes an illegal attempt to circumvent § 15 GWB.\textsuperscript{301} The fact that the "refusal to sell" is a commonly used strategy to circumvent the prohibition of resale price maintenance is illustrated in the OECD Report "Refusal to sell":\textsuperscript{302}

Experience has shown that refusal to sell is the most persuasive means employed by supplier to enforce prescribed resale prices if the buyer has not observed the prescribed prices. It is pointed out ... that a supplier may circumvent the legal prohibition of resale price maintenance (...) by withholding supplies from a distributor who is reselling his goods at a lower price than he thinks reasonable. He may also refuse to have business relations with a particular distributor because he has reason to believe that this distributor will sell his goods at reduced prices.

§ 25(2) GWB refers to the "real business world" and recognizes that the effect of explicit resale price maintenance might also be achieved by the means of reward or by applying pressure in assuring adherence to a certain pricing scheme.

(1) Enforcement of § 25(2) GWB

The Federal Cartel Authority closely supervises any business conduct which might be prone to influence the contractual freedom of buyers. Three examples illustrate how strict § 25(2) GWB is enforced.
(2) Case Architektenkammer

In Architektenkammer a professional organization of architects tried to establish that architects only charge fees at the upper end of the pricing scale. Architects who charged lower prices were threatened by the announcement of "legal consequences." The Bundesgerichtshof (BGH) decided that this threat was intended to influence architects to retreat from price competition and, accordingly upheld a cease and desist order of the Cartel Authority of Lower Saxony. Defenses were not accepted by the BGH.

(3) Case Uhren Krämer v. Seiko

Uhren Krämer v. Seiko has some similarities with Monsanto and Business Electronics and deals with conduct which is within the scope of the Colgate doctrine. Krämer, a distributor for watches and other jewelry ordered watches from Seiko. Seiko refused to fulfil this order, and Krämer sued for delivery. Krämer claimed that the refusal was motivated by Seiko's fear that Krämer would not adhere to Seiko's pricing scheme and that Seiko wanted to avoid trouble with other retailers that charged higher prices.

The Kammergericht (Courts of Appeals in Berlin) found that Seiko's refusal to sell was based on the price cutting of Krämer because Seiko had promised delivery if Krämer would adhere to Seiko's suggested retail prices. The combination of economic disadvantage, "non-delivery" in the case of price cutting, and the economic advantage of
"delivery" by adherence to the suggested pricing scheme resulted in an attempt to restrict Krämer's freedom to set his prices. Therefore, Seiko's conduct violated § 25(2) GWB.

Although in this case Seiko would have been free not to deal with Krämer at all, Seiko's attempt to influence price behavior was the fact which triggered the application of § 25(2) GWB.

One might argue that Seiko made only the mistake of unveiling its reason for non-delivery. If Seiko had not delivered but had not attempted to influence Krämer's pricing behavior, Seiko would not have violated § 25(2) GWB. The GWB recognizes that a seller is generally free to choose his customers. Although some price related conduct may escape condemnation because of this GWB stance, most harmful conduct is within the reach of the GWB. In most cases, a seller who is not interested in loosing a customer will attempt to give at least a "hint" that the customer's pricing behavior might lead to termination. If subsequently the dealer is actually terminated, the court has to inquire into the motivation for termination (or non-delivery). Contrasted to the problems addressed in Monsanto and Business Electronics, evaluation of the motivation does not create more problems than determining intent in other cases. Like in every other case the court, i.e. the deciding judges, will have to consider the factual setting and must analyze and weigh the evidence. As seen in Uhren Krämer v. Seiko, the fact that a seller promises delivery to a retailer if
certain prices will be charged strongly indicates that § 25(2) GWB has been violated.

b) § 26(1) GWB

§ 26(1) GWB opposes another way to circumventing the per se rule against resale price maintenance. Furthermore, the per se prohibition of boycotts in the meaning of § 26(1) GWB also illuminates the value which the GWB contributes to the freedom of third entities to competing without being unfairly hindered by other enterprises. The GWB does not only prohibit any attempt of an enterprise to inducing another enterprise to adopting conduct which is prohibited by the GWB -- particularly resale price maintenance -- but also condemns arrangements involving three parties when one party tries "to incite another enterprise ... to refuse to sell or purchase with intent to unfairly harm certain enterprises". The economic importance of secondary boycotts is documented in the OECD Report "Refusal to Sell":

Cases are becoming increasingly frequent of traditional dealers and specialized shops threatening to discontinue the distribution of the supplier's product if he delivers to discounters, chainstores, department stores or other non-traditional retailers. With this policy the traditional dealers tend to hinder the appearance or development of new forms of distribution which are frequently more efficient from the productivity point of view than the more conservative forms. The former operate largely on the basis of lower labour costs and prices achieved through self-service and other rationalization methods.
The so-called "secondary boycott" constitutes in most cases a violation of § 26(1) GWB. The mere attempt of the inducing firm to hindering a third firm is suspect to the GWB. Therefore, the inducing firm has to prove that its "boycott initiative" is justified. It is not sufficient of showing that the "boycott initiative" was not price motivated.

C. The Approach of the GWB and the American Dispute

The GWB decided to apply a strict per se rule against resale price maintenance. Moreover, the GWB pursues a policy of extending the scope of per se condemnation to other conduct which is relevant to prices. According to the policy of the GWB, freedom of action is focused on, while efficiency arguments are of secondary concern. Another argument against resale price maintenance typical of the GWB's approach is the assertion that it is arguably more democratic to leave the pricing decision on the dealer level.

Although resale price maintenance is prohibited under American antitrust law, the American approach towards price related conduct is more lenient than the German and courts are increasingly likely to allow price related conduct to escape condemnation. In America, courts are increasingly relying on the economic theory of the Chicago School which holds that price relevant conduct and resale price maintenance are aimed at achieving efficiency and promoting
consumer welfare and are not intended to raise prices without efficiency gain.\textsuperscript{315}

1. The Economic Arguments

The discussion among American courts and scholars reflects again the controversial standpoints of the Chicago School and the New Coalition.

a) The Chicago School's Approach

Scholars of the Chicago School\textsuperscript{316} argue that resale price maintenance increases distributive efficiency.\textsuperscript{317} Although the Chicago School recognizes that the competition between dealers is restricted, they conclude that the per se rule is inappropriate. Thus they might suppress beneficial effects, such as presale services. According to the Chicago School, firms employing vertical restraints are attempting to overcome market imperfections, such as the "free rider" problem, rather than to exploit consumers. The Chicago School alleges that the consumer benefits despite higher price, because the additional sales services work in favor of consumers. According to the Chicago School the price increase is matched by additional services. The argument that resale price maintenance may constitute an exercise of market power is rejected because, according to the Chicago School, the exercise of market power is unlikely. The Chicago School disregards newer economic acknowledgments\textsuperscript{318} and empirical studies,\textsuperscript{319} and asserts that, based on
neoclassical economic theory -- as well as several assumptions with regard to market behavior and rationality of market participants -- anticompetitive effects are not likely. Under the Chicago School's analysis, intrabrand competition has no specific virtue and is only considered in the context of possible effects on interbrand competition, such as the facilitation of cartelization. However, the Chicago School believes that cartelization is not probable; hence foreclosure effects are neglected and, in the absence of entry barriers, new market entrants maintain the competitive pressure. Other effects on competition besides the efficiency argument are not considered.

b) The View of the New Coalition

The members of the New Coalition do not believe in this benign effect and, therefore, favor antitrust law as a means of controlling the businessmen. The New Coalition casts doubt about the seller's motivation and addresses the problems of market power and entry barriers. They assert that resale price maintenance may be used to shift income from consumer to sellers, to take advantage of market imperfections, to cement market power, to raise entry barriers, and to guise a dealer cartel. According to this view resale price maintenance makes the market less competitive and contribute to seller's wealth rather than consumer's benefit.

The critics concentrate more on possible harmful effects of resale price maintenance, such as higher prices and the
fact that resale price maintenance has the same effect as a dealer cartel.\textsuperscript{323} Also, the New Coalition emphasizes the value of intrabrand competition, pointing out that vertical resale price maintenance may have substantial effects on interbrand competition\textsuperscript{324} by facilitating cartelization or enabling so called conscious parallelism.\textsuperscript{325} Another argument which is also emphasized by the German GWB is the decision to support freedom of the individual according to the free and democratic system which establishes the basic values of the business environment. Therefore, the GWB sees no need to amend its approach as long as economic theory does not show that convincing reasons (in light of the GWB's policy) which urge the lawmaker to consider a different approach.

2. Economic Arguments with Regard to Resale Price Maintenance

An analysis of the economic arguments in favor of a more lenient approach towards resale price maintenance illustrates the problems of how to determine the economic effects of resale price maintenance. Furthermore the analysis could help to answer the question whether -- from an purely economic standpoint -- the per se rule should be abandoned. The next question will be -- assuming that economic arguments support the view that the per se rule against resale price maintenance should be abolished -- whether other
non-economic arguments are convincing enough to uphold the per se condemnation.

a) Market Transparency Argument

It is alleged that uniform prices increase market transparency and, therefore, benefit competition and the consumer by reducing information costs.\(^{326}\)

However, the argument that the consumer benefits because he does not have to shop around for the "best price" can be easily rejected because it is the consumer's choice whether he wants to buy at the next best dealer or whether to evaluate the market.\(^{327}\) For advertising purposes it is sufficient to quote a price range or a suggested retail price because this price would be almost the same price as the fixed price. Only advertising with maximum prices might justify a different treatment.\(^{328}\)

One must take into consideration that resale price maintenance leads to higher prices so that the average consumer has to pay more for the product.\(^{329}\) Therefore, it cannot be said that the consumer is better off by saving information costs (if any) when he has to pay more but can be sure that he has to pay the same (higher) price at every outlet. Moreover, the information cost benefit is opposed by increased control costs to the manufacturer.

Another anticompetitive effect of "enhanced transparency" is that interbrand competition might be negatively affected. Interestingly, a result which is supported by
economic theory -- that market transparency contributes to "perfect competition" -- was ignored by the "real business world" which is operating in an imperfect environment. For example, so called "open price systems" led to higher prices instead of fostering price competition.330

Economic theory describes several situations where in imperfect markets, such as oligopolies resale price maintenance may harm interbrand competition and lead to higher prices and increased price inflexibility:331 1)A manufacturer cartel could be more easily established; thus, the discipline of the cartel members could be better controlled and the cartel would not be disturbed by price cutters; 2)So-called "price signaling" would be facilitated. Generally, anticompetitive behavior in oligopolistic markets would be eased. Price leadership332 and conscious parallelism could be exercised without being disturbed by intrabrand competition.

The Chicago School's theory asserts that these effects are not probable. However, their view is based on some idealistic assumptions, such as absence of market power and entry barriers.333

b) Ease of Market Entry

Some economists argue that resale price maintenance may facilitate market entry of a new producer if the new market entrant can guarantee his dealers a safe profit margin. The dealer will be encouraged to strengthen his efforts to sell
the product because his profit is "guaranteed" and not endangered by price cutters (or free riders). On the other hand, the danger exists that dealers who are not interested in selling at low prices will concentrate their sales efforts on products with high profit margins. The customer, therefore, will be offered the high margin product instead of a perhaps better and/or cheaper product which is not that profitable for the dealer.

Moreover, a question remains as to how long a new market entrant should be allowed to use resale price maintenance. Furthermore, to the extent that the products of new market entrants are not exposed to intrabrand price competition, the overall competition will be distorted.

Another argument is that it is not necessary to sacrifice the dealer's freedom to set prices because the new market entrant can choose other ways to win retailers for his product, such as territorial restraints.

c) Protection of the Small and Middle Size Businessmen

The "protection of small and middle-size businessmen" argument was used during the "Fair Trade law movement" in America and is permanently raised by German dealer associations. However, after the experience with "Fair Trade" laws the "protection" argument is not very popular in America anymore. Also, the GWB did not accept that resale price maintenance is necessary to protect small and middle size businessmen. The GWB decided to protect the competitive
process with free price competition, even if this competition leads to the elimination of some smaller, less efficient dealers. Economists argue that, otherwise, the consumer would have to support inefficient dealers with higher prices. Furthermore, resale price maintenance does not necessarily protect smaller and mid-size dealers because bigger chain stores have developed their own brands (so called "dealer brands") which allowed them to avoid resale price maintenance. While these bigger dealers were able to pursue their own price policy, smaller dealers were forced to charge the prescribed price and were dependent on the price policy of their supplier. A similar effect is created by resale price maintenance on the manufacturer level. Bigger manufacturers can use their market power in combination with resale price maintenance to suppress smaller competitors.

d) Free Rider Argument

The argumentation of the Chicago School supporting resale price maintenance concentrates on the so called "free rider" argument. Hence, according to the Chicago School the only reason for a manufacturer to use vertical restraints is the strive for efficiency; every restraint must have an economic justification. With regard to resale price maintenance, the free rider argument is preeminent. Other efficiency justifications of the Chicago School, such as
transaction costs economics,\textsuperscript{343} are not that important in the area of price restrictions.

Chicago scholars assert that resale price maintenance serves the consumer by enhancing consumer services. The consumer is insured of getting the information and services he wants. The "free ride" which "price cutters" could take on other, service providing dealers would be prevented.\textsuperscript{344} Likewise, other investments, e.g. advertising efforts would be protected from unfair free riding. Moreover, the Chicago School alleges that vertical restraints, especially resale price maintenance, may improve product quality and safety.

The Chicago School rejects arguments that less intrabrand competition may lead to supra-competitive prices and may also lessen interbrand competition with its economic theory. That economic theory is based on the following assumptions: (1) markets are perfectly competitive and manufacturers are not able to create or to take advantage of market imperfections, and unable to escape the competitive pressure of markets; the only reason manufacturers introduce resale price maintenance is to replace price competition with service competition, not to lessen overall competition;\textsuperscript{345} (2) because the manufacturer's interest is to sell higher quantities, he will not raise his prices in excess of the service costs because otherwise the consumer would switch to substitutes; (4) the threat of new market entrants helps to
maintain the competitive pressure which prevents the manufacturers from overcharging.

However, the free rider argument has its shortcomings. On the one hand, it is not guaranteed that consumer services will improve when price competition is restrained. Especially fringe dealers may tend to cheat on the quality of service. On the other hand merely focusing on the "free ride" notion may lead to a "reversed free ride" problem. This problem arises when the consumer does not want the services but nevertheless has to pay for them. It should also be recognized that the service argument applies only for products which need pre-sale service but that restraints are often applied to all kinds of products.

Additionally a free ride might be not probable for another reason. The reputation of a brand name must be transferable from the "service providing dealer" to the "price cutter". Otherwise a free ride is not probable.

The free ride argumentation is opposed by convincing arguments. It is pointed out that the efficiency argument of the Chicago School focusing on the free rider problem ignores another, much more probable efficiency. Resale price maintenance would prevent to pass the efficiencies of more efficient dealers on to the consumers. Moreover the dealer's incentive to gain efficiency by reducing its transaction costs or achieving transaction cost economics by enabling the efficient dealers to sell more at lower prices may be reduced by fixed prices. These dealers are prevented from
using the most important parameter "price" for competitive means.

Furthermore, there is no guarantee that the higher profit margin will be passed on to the consumer in the form of higher quality and better services. Rather, the higher profit margin may be used to raise entry barriers if, for example, the additional profit is invested in advertising and other measures which create preferences for the product. Establishing product preferences might decrease price elasticity for the product and result in further price increases, \(^{348}\) so called "rent seeking". \(^{349}\) Because of rent seeking, the consumer might be "coerced" to buy a product which was pushed into the market and has established its market position by strategic marketing of a powerful firm, without regard for better quality or lower prices. The consumer is not "better off" if he has to buy a heavily advertised product at a higher price. The lawmaker of the GWB stated: \(^{350}\)

Abandoning price competition enables enterprises which are willing to employ resale price maintenance to refer to surrogate forms of competition such as product differentiation and competition in the service dimension, leading to luxury packaging, increased advertising etc., which are not always appreciated by the customer. These and similar measures of competition often contradict the principle of economic reasonableness and are not sufficient to grant manufacturers and dealers the right to introduce resale price maintenance.

Likewise, improved product quality and safety are not necessarily be accomplished by resale price maintenance.
If, for example, the manufacturer can rely on the sales efforts of his outlets, he may increase advertisement efforts instead of improving product quality. In this case, the manufacturer may have little incentive to improve his products.

Higher prices are not an effect that is considered to indicate good market performance and are hardly likely to increase consumer welfare (in the sense that the buyer pays less for a product). Moreover, the argument that higher prices or supracompetitive prices are not likely because new market entrants will be attracted is not convincing.

Several arguments support the view that the price under resale price maintenance -- even when considering the additional services -- will be higher than the average price without resale price maintenance. First, the price which is fixed by the manufacturer is orientated in the cost structure of the average or less than average dealer. Therefore, the fixed price does not reflect the efficiency advantage of the above average dealers.\textsuperscript{351} Second, the manufacturer does not know how much the services cost the dealer and, accordingly, the higher price is not necessarily outweighed by better services. Again, the cost advantage of more efficient dealers is disregarded.\textsuperscript{352} Third, fixed prices are, in general, less flexible in responding to price changes. Therefore, the consumer profits later from the competitive pressure on the market.\textsuperscript{353}
Furthermore, "perfect competition" exists only as a model ("all other things being equal"), and in "real" markets every enterprise has a certain freedom to lower or raise its prices without attracting new market entrants even if marginal entry barriers exist. Moreover, economic analysis of the function and importance of entry barriers has not reached a stage where accurate predictions are possible of what factors constitute entry barriers and of what obstacles they pose for new market entrants.

The Chicago School's approach to entry barriers is a major shortcoming in that school's theory. The Chicago School ignores market realities and fails to properly address the problems of market imperfection, such as externalities and strategic market conduct. Furthermore, the Chicago School ignores the differences between short and long term performance.

3. Evaluation of the Economic Arguments

As the foregoing discussion exposes every economic argument can be opposed by a counterargument. Certain effects may be the result of an ascertained cause; but, the effects must not necessarily occur.

Nonetheless, arguments favoring freedom of price competition are better suited than other theories thus far explaining real world business. Moreover, price competition is the core of competition, and substitutes for price competition cannot prevent a certain loss of competitiveness.
First, quality and service competition is not as measurable as price competition and is often used to hide price competition. Second, price is the only parameter which can be quickly and easily adapted to market changes. Third, experience teaches us that resale price maintenance generally leads to higher prices, not fully compensated for by additional services. Fourth, the power to set prices is shifted from dealers to manufacturers, taking an essential freedom from the dealer. Restricting this freedom could result in restricted dealers bearing the risk of running a business with the freedom of an agent. This fourth argument has been neglected by the Chicago School, but it must be considered if one does not want to sacrifice multivalued legal reasoning to plain economic theory.

Moreover, one should consider that manufacturers are not helpless "victims" of "free riders". Under both the American and German legal system the seller is free to impose contractual obligations proscribing pre and post sales services, adequate presentation, and qualification of salespersons. The manufacturer is also free to employ a selective distribution system to ensure adequate presentation of its products.

4. Effects not Included in the Efficiency Analysis

Furthermore, non-efficiency related and non-economic effects of resale price maintenance oppose the implementation of a more lenient approach towards resale price
maintenance. Both the freedom of the dealer to set his prices and the freedom of the buyer to choose between price competing outlets are values which comply with the goal to maintain a decentralized economic order with a multitude of independent businessmen. The freedom of the individual dealer to strive for business by offering a competitive price is an important part of democracy. Both dealers' and customers' freedom can be restricted by powerful manufacturers that have the power to withdraw their product from price competition, enabling them to impair the freedom of competition. Freedom of competition, however, is a basic value of the political order of both the American and German democratic systems.

5. Legal Method Argument

The per se rule in German antitrust law is also supported for legal policy reasons. As the approach of § 15 GWB shows, the GWB left the responsibility to decide about this important issue with the legislature. The Federal Cartel Authority and the German courts accept this decision and vigorously enforce it. Economic considerations do not come into play, and no discretion is left to the courts.\(^\text{362}\) The German business community has accepted the statutory regulation and abides it. The advantages of this strict rule are that predictability prevails, costly and lengthy litigation is prevented, and the rule of law is promoted.\(^\text{363}\) As long as there is no obvious need to abandon the present state of the
law the lawmaker should resist tendencies to substitute a reliable and predictable rule with a more ambiguous and vague rule. And even if economic theory could prove that beneficial conduct is more than occasionally suppressed, the law should not be changed drastically. For example, case groups, such as an rule of reason in the case of maximum price fixing, could be developed. Moreover, the per se rule could be softened by a rule of reason with presumptive illegality. The seller would have the burden of proof because the seller should best know why he employed the restraint.

Another way to create predictability is illustrated by the GWB choice with regard to cartels: § 1 GWB declares cartels void, but under certain circumstances a cartel may be validated. Sometimes, an approval by the Federal Cartel Authority is required. In extraordinary circumstances, a cartel may be authorized by the Secretary of the Ministry of Commerce. This procedure contributes to maintaining predictability and avoiding litigation. Thus, specialized decisionmakers, who are familiar with economic theory and the specific markets, and not courts or juries have to struggle with economic theory in the first place.
IV. An Example

Recent American case law presents a paradigm of the differences between the approaches under the present American antitrust law and the GWB.

After Monsanto\textsuperscript{364} the Supreme Court had, amidst the dispute over the appropriate approach towards resale price maintenance, the chance to clarify its position. But, instead of establishing clear standards, Business Electronics\textsuperscript{365} became another example to illustrate the problems faced by American antitrust law.

The Courts reasoning reveals the impracticable standards of Colgate.\textsuperscript{366} Both the majority and the dissenting opinion reflect insecurity and confusion surrounding establishing a violation of antitrust law and properly using economic theory. Additionally, it appears that the justices of the Supreme Court attribute different meanings to certain terms. Hence the confusion surrounding interpretation and use of terminology.

Moreover, this decision presents some deeper concern with regard to antitrust litigation and jury trial.
A. Business Electronics Corporation v. Sharp Electronics Corporation

After Matsushita,367 were the court found on the basis economic theory that a predatory pricing scheme was not reasonable,368 Business Electronics369 indicates that application of neoclassical economic theory will also become increasingly important in the area of vertical restraints.

In Business Electronics the Court indicated again its reluctance to apply per se rules in the area of vertical restraints and relied on Sylvania's holding "that departure from the rule of reason standard must be based on demonstrable economic effect rather than ... upon formalistic line drawing"370 to narrow the scope of the per se rule. Furthermore, the Supreme Court reemphasized that interbrand competition is the main purpose of antitrust law.371

1. The Decision of the Majority

The Majority found that, according to the standards of Monsanto,372 a price fixing agreement between Sharp and Hartwell could not be established. Furthermore, the court addressed the question whether a per se rule or a rule of reason is the appropriate standard.

2. The Weighing of the Evidence

The most interesting part of Business Electronics was the analysis the Court used in finding that no price fixing
conspiracy between Sharp and Hartwell could be proven. Instead of addressing the evidentiary problems of proofing a conspiracy as done in *Monsanto*, the Court applied an economic analysis. However, this analysis did not include consideration of the facts of the case at hand, such as the simple question of whether the terminating manufacturer could give any business reasons other than that he did not want to risk termination by the customer. Instead of inquiring into the actual case, the Court described the free rider problem and listed the procompetitive effects of higher prices according to economic theory. The Court found that, based on economic theory, anticompetitive effect are not likely. The main issue, however, whether there was an agreement or a conspiracy between Hartwell and Sharp to maintain a certain price level was not addressed explicitly.

Instead of considering the facts of the case both the Fifth Circuit and the Supreme Court applied neoclassical theory and held that "[a] quite plausible purpose of the vertical restriction here was to enable Hartwell to provide better services under its sales franchise agreement" and reasoned "[t]here is no merit to petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer because of its price cutting that prophylaxis against resale price maintenance warrants the District Court's per se rule."
Interestingly, the Supreme Court addressed the additional problem of sparking lawsuits of terminated dealers who might convince a jury that their termination was the result of cutting rather than service cutting.\(^3\) However, this concern should not obstruct the role of the jury. It is the task of the jury to evaluate the facts of a case, and a court should not take decisions away from the jury.\(^4\) The Court admitted that the jury might be exposed to the "highly plausible claim that its real motivation was to terminate a price cutter"\(^5\) (as a matter of fact) but then continued that this explanation is not probable. Instead of giving the case to a jury, the Supreme Court unveiled the "real motivation" and concluded that "manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by 'free riding' on the services provided by other dealers"\(^6\) (as a matter of economic theory).

Thus, the Supreme Court replaced the "common sense" element (which a jury is supposed to contribute in a trial) with economic reasoning. In addition to replacing the jury with economic theory, the Court also disregarded the facts. The Court did not even investigate the reasons of Business Electronic's termination. The Court simply assumed -- based on its belief in the "free rider" argument -- that Sharp wanted to assure better services. The Court did also not inquire into whether the termination was caused by Hartwell's superior bargaining power.\(^7\) The court ignored
Sharp's inability to submit evidence that its termination was based on legitimate nonprice-related reasons, such as insufficient service of Business Electronics. Furthermore, the court assumed that a procompetitive effect of eliminating price competition was "quite plausible". Based on the foregoing rationale the Court anew replaced facts with economic theory.

3. The Dissenting Opinion

As the dissent points out in Business Electronics, the facts of the case made a price fixing conspiracy most obvious.

The termination of Business Electronics was initiated by the ultimatum of Hartwell. The dissent criticizes that, although Sharp terminated Business Electronics because of his discounting practices, no inference of an implied price agreement was drawn. Not even a prima facie assumption of price fixing conspiracy was drawn.

The basic criticism of the dissent is that the majority failed to address the real problem presented by the case. "More importantly, if instead of speculating about irrelevant vertical nonprice restraints, we focus on the precise character of the agreement before us, we can readily identify its anticompetitive nature." Another concern of the dissent is that the majority did not "attach any weight to the value of intrabrand competition". And the dissent accuses the majority of
misinterpreting Sylvania\textsuperscript{385} since Sylvania "held that a
demonstrable benefit to interbrand competition will outweigh
the harm to intrabrand competition",\textsuperscript{386} while Sylvania did
not imply "that the elimination of intrabrand competition
could be justified as reasonable without any evidence of a
purpose to improve interbrand competition."\textsuperscript{387} The dissent
points out that in Sylvania the procompetitive effects on
interbrand competition were based on the assumption that a
manufacturer is interested in structuring its distribution
efficiently. However, in Business Electronics\textsuperscript{388} the ter-
mination of Business Electronics was initiated by a dealer
"who care[s] less about the general efficiency of a
product's promotion than [its] own profit margins".\textsuperscript{389} The
dissent concludes with the statement that the majority
opinion "is inconsistent with the legislative judgment that
underlies the Sherman Act itself";\textsuperscript{390} i.e., that the
relevant market "is worthy of legal protection",\textsuperscript{391} and that
the "value of competition" includes "all elements of a bar-
gain".\textsuperscript{392}

a) The Suggested Approach of the Dissenting Opinion

As the majority acknowledges, the dissent presents "a
more complex analytic structure"\textsuperscript{393} The first sentence of
the dissent addresses the crucial shortcoming of the
majority: the assumption that the case "concerns the
legality of a `vertical nonprice restraint'."\textsuperscript{394}
The dissent's argument focuses on the difference between "naked" and "ancillary" restraint. The dissent relies on Judge Taft's holding in *United States v. Addyston Pipe & Steel Co.* for its proposition that naked restraints, as opposed to ancillary restraints, have the sole objective of restraining competition. The Court in *Addyston* held that a restraint cannot have a lawful purpose when its "sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

The dissent in *Business Electronics* is misinterpreted by the majority to the extent that it is not "ancillarity" which leads to the more favorable rule of reason approach. One can interpret the dissent's "naked/ancillary" dichotomy in two ways. The majority understood the "naked" and "ancillary" distinction as meaning "alone" or "in the context of other covenants," and cited Bork for the proposition that "vertical arrangements are ancillary to the transaction of supplying and purchasing".

The majority made the mistake of assuming that the restraint in question was a nonprice restraint, and, accordingly treated the restraint under a distorted rule of reason scrutiny. However, if one looks closer at the dissent, the distinction between "naked" and "ancillary" refers to the purpose of the restraint. The dissent argues that in *Business Electronics*, the mode of analysis should be determined by the characterization of the restraint. Therefore, a price
restraint would not escape per se condemnation only because another nonprice restraint is attached. A closer look at the restraint would penetrate any disguise and make a proper treatment of the restraint possible.

Therefore, the dissent asks a question the majority failed to address: what was the reason for the termination? The dissent admits that the termination may have been based on two reasons: 1) Sharp could have terminated Business Electronics for the reasons the majority imputed, i.e., to terminate a price cutter to prevent free riding; or 2) Sharp could simply have been coerced by Hartwell’s ultimatum.

In the latter case, however, the restraint is exactly the type of conduct which was condemned by Judge Taft: avoiding price competition in order to charge higher prices. A result which, if it would achieved by the means of cartel, boycott, etc., would be clearly outlawed.

b) The Economic Arguments of the Dissent

The dissent in Business Electronics looks at the facts of the case in evaluating the conspiracy between Sharp and Hartwell. The dissent does not rely on a single sided theory but scrutinizes the fact of the case.

(1) The Dissent's Joint Action Argument

Because, under American antitrust law joint action has to be established to condemn a conduct, the dissent concentrates on the joint action issue. Therefore, the dissent
in *Business Electronics* attempts to properly distinguish between unilateral and joint action.

To establish joint action the dissent points out that, from an economic point of view, it is important to distinguish whether the incentive to employ a restraint came from the manufacturer, who is interested in establishing an efficient distribution system for his products, or from a dealer who is more interested in his profit margin than an overall efficient distribution system. The dissent argues that it is inconsistent of the majority to support its view with efficiency arguments based on the attempt of a manufacturer to introduce an efficient distribution system, when the factual setting of the case indicates otherwise. Hartwell created incentive for the termination and was is speculative to assume that Sharp terminated Business Electronics voluntarily for the sake of its distribution system. Clearly, if Sharp wanted to promote efficiency, he could have terminated Business Electronics earlier. Sharp knew that Business Electronics was a price cutter. Nevertheless, Sharp continued to do business with Business Electronics. Obviously not the efficiency notion but the ultimatum of Hartwell induced Sharp's termination. This important argument is not recognized by the majority in *Business Electronics*. The dissent addresses specifically this point and concentrates "on the precise character of the agreement," identifying its anticompetitive nature. The dissent raises the crucial question of whether elimination of price competition or
other legitimate business reasons for the termination existed. The dissenting justices concluded that, "given the jury's finding and the evidence in this record," protecting Hartwell from price competition was the sole function of the agreement in question. The dissent argued that the agreement, therefore, "fits squarely within the category of 'naked restraints of trade with no purpose except stifling of competition'."401

Interestingly, the dissent concentrated more qualifying the restraint as "naked" rather than addressing the "joint action issue". The dissent had its problems with the standards of the Colgate doctrine,402 which requires, besides proof that a manufacturer terminates a dealer for his pricing behavior, proof of a conspiracy. The dissent pursued the notion that, most probably, a "naked" price restraint which cannot be justified by the imposing manufacturer constitutes a price fixing arrangement. However, the same effect could have been reached if Sharp had pursued its own high price policy in systematically terminating price cutters. Therefore, difficult problems in proving the "real motivation" exist.

(2) The Dissent's Boycott Argument

Upon further analysis, it becomes apparent that the dissent in Business Electronics made the same mistake as the majority in confusing economic effects and established standards. The dissent correctly reasoned that, if there had
been more than one competing dealer, the effect of Business Electronic's termination might be the same as if there had been a conspiracy between these dealers which would have constituted an illegal boycott:⁴⁰³

Indeed, since the economic consequences of Hartwell's ultimatum to respondent [Sharp] are identical to those that would result from a comparable ultimatum by two of three dealers in a market - and since a two-party price fixing agreement is just as unlawful as a three-party price fixing agreement - it is appropriate to employ the term 'boycott' to characterize this agreement.

However, this reasoning confuses effects and established standards. Under American antitrust law, a boycott requires a conspiracy on one level of distribution. Although the effects may be the same a two level 'boycott' does not constitute a boycott under American antitrust law. Otherwise, if one merely concentrates on the effect, the reverse argument can be made to abandon other rules, such as allowing conspiracy among dealers, because the effect is arguably the same as if the manufacturer had imposed vertical restraints.⁴⁰⁴ The 'boycott' argument of the Business Electronics dissent could be rebutted according to the same rationale the dissent used to support the 'boycott' argument. The effect of Business Electronics termination could be as easily be the result of a clearly illegal boycott as the result of clearly legal unilateral conduct. The dissent itself recognizes that "[a]ny attempt to define the boundaries of per se illegality by the number of parties to
different agreements with the same anticompetitive consequences can only breed uncertainty in the law and confusion for the businessman.\textsuperscript{405} Therefore, an effect orientated confuses established standards.\textsuperscript{406} The rule of law would suffer.

(3) The Dissent's "Horizontal" Classification

Another argument of the dissent in Business Electronics indicates the problems which arise when it is considered necessary to establish formalistic requirements. These problems are highlighted by the dissent's argument that the restraint in question should have been classified as horizontal. The dissent relied on Cernuto Inc. v. United Cabinet Co.\textsuperscript{407} where the Third Circuit focused on the exclusionary effect on the dealer level and concluded that, because the effect was on the interdealer level, the fact that a manufacturer terminated its dealer constituted a horizontal restraint. Although this argument is not without logical merit it must be rejected for legal reason. Abandoning the horizontal/vertical dichotomy would abrogate one of the last predictable rules left in the area of vertical restraints in American antitrust law. Since almost every vertical restraint has its horizontal implications, another vague and discretionary concept would, according to the dissent's rationale, replace predictable standards.
4. Comment

The dissent employs a more sophisticated approach by considering the facts of the case instead of replacing facts through theory as done by the majority. Although the dissent gives strong and convincing arguments toward establishing a price fixing conspiracy the dissent is bound by the limitations of antitrust law. At present, American antitrust law, does not proscribe means of adequately dealing with the described conduct. Unfortunately, instead of pointing out this problem, the dissent committed in Business Electronics the same mistake as the majority. The dissent focused on the effects of the conduct, attempting to squeeze the conduct into a per se category. Arguments founded on the effect of conduct, can support virtually any view.

Business Electronics illustrates the problem faced by American antitrust law faces: current legal reasoning is stuck with single sided economic theory and artificial borders between per se illegal conduct and conduct which is subject to rule of reason scrutiny.

A way to solve the dilemma would be to concentrate on quality rather than on the effect of a conduct. The dissenting opinion in Business Electronics suggested an approach concentrating on the quality of conduct. Furthermore, the Business Electronics dissent asked the question central to goals of the antitrust: whether a conduct has redeeming virtues or whether the sole purpose of the conduct is the suppression of competition.
However, under existing antitrust law -- particularly the evidentiary requirements to establishing conspiracy and the Colgate doctrine's criticism of anticompetitive strategies as long as they remain unilateral -- much clearly anticompetitive conduct may escape condemnation.

B. Business Electronics and the View of the GWB

In analyzing Business Electronics under the GWB, the differences between the conceptions of the GWB and American antitrust law become clear. Business Electronics could have been challenged under several provisions of the GWB.

1. § 15 GWB

Sharp and Hartwell could have concluded an explicit or tacit agreement to restrict Hartwell's freedom to determine prices in violation of § 15 GWB. Although it is logical to conclude that Hartwell will adhere more closely to Sharp's pricing scheme than Business Electronics, the case does not provide enough facts to assume that an agreement was reached with regard to Hartwell's pricing behavior. Under § 15 GWB, German courts would face the same difficulties as the Supreme Court in attempting to classify the conduct as a price fixing conspiracy.

However, another "safeguard" provision might vitiate the conduct of Sharp and Hartwell, since the GWB is not restricted by the "joint action requirement" and, therefore,
incorporates a different understanding of the term "boycott" than American antitrust law.

2. § 25(2) GWB

To avoid the abovementioned difficulties, the GWB employs specific safeguards with regard to behavior the GWB is intended to condemn. Therefore, other typical strategies, which are not in the scope of § 15 GWB but are nevertheless suited to influence pricing decisions, are addressed in § 25(2) GWB.410 Sharp would have violated § 25(2) GWB if it had conditioned the termination upon Business Electronic's pricing behavior or tried to threaten Business Electronics. However, the facts did not indicate that Sharp contacted Business Electronic's before termination. Therefore, § 25(2) GWB leaves a loophole for firms which that terminate price cutters "without comment". However, although this proceeding is not probable,411 this conduct can be challenged as soon as an effort to establish a certain price level is revealed.

3. § 26(1) GWB

§ 26(1) GWB addresses the typical situation given in Business Electronics. Under § 26(1) GWB enterprises may not, with the intent of unfairly harming another enterprise, incite another enterprise to refuse to sell. Inciting other enterprise is presumably unfair. Therefore, Hartwell would have to justify his threat to terminate his contract with
Sharp. Because the GWB does not accept Business Electronic's price cutting as a defense, Hartwell would have to show other justifications for his ultimatum. According to the high value of price competition under the GWB, a justification will be only accepted in extreme situations.\footnote{412} Hartwell would have to show that he was in a kind of "self defense" situation.\footnote{413} The attempt to achieve a "naked restraint", however, would never escape condemnation.

Accordingly, under the GWB -- if a judge would have reached the same conclusion as the district court's jury did -- there is no question that the termination of Business Electronics would have been outlawed under 26 I GWB.

C. The Advantage of the GWB Approach

Particularly in cases like Business Electronics the GWB is less lenient in allowing anticompetitive conduct to escape condemnation. The GWB is not restricted by the notions of "naked" and "ancillary" or by the "horizontal/vertical dichotomy." Also, the GWB does not distinguish between "unilateral" and "joint action". Arguably, the GWB approach is more pragmatic than the American approach since the GWB addresses anticompetitive conduct without limiting the possibilities of challenging this conduct through imposing artificial distinctions. As soon an the attempt is made to impose price restrictions, harmful conduct (as identified by the lawmaker) triggers the application of the GWB. Moreover,
so-called ersatz strategies are recognized and condemned by the GWB.

As the success of the GWB in this area of the law shows, the GWB has arguably chosen an approach which is fairly well suited to coping with the realities of the marketplace. The effectiveness of the GWB in dealing with market realities sharply contrasts the insufficiencies of American antitrust law.

D. Conclusion Chapter Three and Four

The GWB's rigid approach towards resale price maintenance should be preferred to current American principles for several reasons: The freedom to set prices is one of the last freedoms left to the buyer of a product or a franchisee. Especially in franchise agreements vertical restraints are extremely limiting to the freedom of the contracting parties. Allowing resale price maintenance would constitute a further step toward abolishing intrabrand competition. If freedom to set prices is diminished, almost no commercial freedom is left to the sole proprietor. Quality and service competition are inferior to price competition.\textsuperscript{414}

Moreover, the freedom of the single businessman to strive for business by using one of his most convincing arguments, a competitive price, would be endangered. This denial of competitive means of lone operators would eschew competitive
tension and viable markets. Furthermore, an ambiguous efficiency argument used by rule of reason scrutiny would create uncertainty. This uncertainty is not outweighed by the probability of deterring procompetitive resale price maintenance.

As shown in Monsanto and Business Electronics the Colgate doctrine is mainly responsible for the confusion in the area of vertical restraints. Several factors support abolishing the Colgate doctrine. There are two primary concerns that urge a reversal of Colgate. First, enterprises use pressure to coerce other enterprises to adhere to a certain pricing scheme, indicating that these enterprises possess market power. Second, the existence of market dominating firms indicates market imperfections.

To cope with these imperfections and to protect smaller enterprises from their negative effects, the GWB favors maintaining a viable market structure as a means of ensuring "freedom of competition;" the grim alternative is to allow market dominating firms to take of their superior bargaining position.
V. Vertical Nonprice Restraints

Both German and American antitrust law recognize that vertical nonprice restraints may pursue legitimate business purposes and therefore treat them more favorably than horizontal restraints. Similarly strategic market conduct affecting vertical relationships is generally allowed. Horizontal restraints are considered to be more harmful to competition because they directly limit the competition between competing firms (interbrand competition) on either the manufacturer or dealer level. Horizontal restraints are suspect because they presumably have no other purpose than to suppress competition.

Vertical restraints, however, primarily limit competition within a distribution chain (intrabrand competition) and only indirectly effect interbrand competition. It is acknowledged that vertical restraints often reflect the interest of a manufacturer in designing his distribution system and to effectively marketing his products. It is recognized that the manufacturer, who is generally free not to sell his products at all, has a legitimate interest in ensuring that his products are sold in accordance with his marketing scheme, that the good will of his products is
protected, that his products' reputation is enhanced, that
the purchaser of his products get sufficient pre- and after
sale services, etc. Another argument in favor of vertical
restraints is the principle that the freedom to enter con-
tracts and to agree on contractual terms is a democratic
value. However, this freedom reaches its limits when other,
prevailing values, such as the goals incorporated in an-
titrust law are endangered.

Another notion with regard to vertical restraints,
which is emphasized under the American antitrust law is the
argument that restriction of intrabrand competition is not
that harmful to consumers as long as the manufacturers ex-
pose their products to interbrand competition.

It is not the purpose of this thesis to give an in-
depth evaluation of all the different vertical restraint,
but rather to analyse the underlying policy and the role of
economic theory of both the German and the American an-
titrust law. Therefore in this chapter, only the most impor-
tant restraints and some instructive cases will be analyzed
to illustrate the approach the respective law takes.

A. Vertical Nonprice Restraints under American Antitrust Law

The American antitrust law in the area of nonprice ver-
tical restraints, such as territorial and consumer restric-
tions, exclusive dealing, and tying arrangements had ex-
perienced drastic changes in its treatment by the courts.
Since the 1977 landmark case, *Sylvania*, which revolutionized the antitrust landscape, most vertical restraints are subject to rule of reason scrutiny.

Another important factor which is heavily influencing the approach towards vertical relationships is the Colgate doctrine. The Colgate doctrine generally allows self-imposed restrictions by a seller and preempts other unilateral conduct from condemnation under the antitrust law.

Under American antitrust law, several provisions may apply to vertical nonprice restrictions and other strategic business conduct which is aimed at hindering competition.

Most of the "typical" vertical restraints are covered by Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act. Sec. 1 of the Sherman Act's broad language generally prohibits "every contract, ... or conspiracy in restraint of trade.", Sec. 3 of the Clayton Act addresses more specifically exclusive dealing and tying arrangements by providing that

\[
\text{[i]t shall be unlawful ... to lease or make a sale ... on the condition ... that the lessee or purchaser thereof shall not use or deal in goods ... of a competitor ... of the seller, where the effect of such lease, sale ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce.}
\]

Though Sec. 3 of the Clayton Act covers only restraints which involve commodities, other restraints of the kind described in Sec. 3 of the Clayton Act but involving
services or licenses are governed by Sec. 1 and 2 of the Sherman Act. However, despite of the different statutory language the treatment of vertical restraints is basically the same under both provisions.\textsuperscript{433}

1. Exclusive Dealing Arrangements

The leading case for exclusive dealing\textsuperscript{434} is Standard Oil of California, Inc. v. United States\textsuperscript{435} (Standard Stations) where the Court held that Sec. 3 of the Clayton Act is violated "whenever competition has been foreclosed in a substantial share of the market".\textsuperscript{436} The "substantial share of the market" was determined through a "quantitative substantiality rule", the impact on competition was measured by Standard Station's market share. Efficiency effects and actual foreclosure impact were not considered.\textsuperscript{437} Because the "quantitative substantiality rule" outlawed many reasonable exclusive dealing arrangements, the Supreme Court mitigated the impact of Standard Stations\textsuperscript{438} and applied a less rigid analysis in Tampa Elec. Co. v. Nashville Coal Co.\textsuperscript{439} to determine the foreclosure impact of a 20 year requirement contract for coal. In employing a "qualitative substantiality analysis" the courts were able to treat exclusive dealing arrangements more favorably under a rule of reason approach.\textsuperscript{440}
2. Analysis of Vertical Restraints under the Rule of Reason

Under the rule or reason approach the courts focused on analysing vertical restraints on the inter-/intrabrand dichotomy and asked whether it is likely that a restraint has a "permanent effect" on interbrand competition and whether the "redeeming virtues" of the restraint outweigh the negative impact on intrabrand competition. Although the rationale of Sylvania⁴⁴¹ required consideration of both criteria the second criteria tends to be increasingly ignored by the courts.⁴⁴² As shown in Business Electronics,⁴⁴³ courts which rely on the premises of the Chicago School theory are willing to impute the "redeeming virtue" by assuming that a "rational businessman" employs a restraint to create efficiency. On the other hand the threat of a "permanent effect" on interbrand competition is not taken seriously because the flat statement "[c]artels are neither easy to form nor easy to maintain"⁴⁴⁴ replaces thorough scrutiny. Also the fact that markets are operating imperfectly and therefore anticompetitive effects may occur in concentrated or otherwise imperfect markets long before the cartelization question arises is not addressed by the courts which are relying on the assumptions of the economic model of the Chicago School.⁴⁴⁵

Because the rule of reason approach enables the courts to "adopt any standard of reasonableness they see fit and quote any prior opinions for any purpose",⁴⁴⁶ several attempts have been made to give the courts "guidelines" for
their rule of reason analysis and to reduce the courts discretion.447 However, when the suggested "guidelines" reflect the view of the Chicago School, they rely on neoclassical economic theory and assert that efficiency arguments and effects on price and output are appropriate measuring sticks448 rather than considering market effects.

The dispute about the proper application of the rule of reason is not decided yet and will be subject to further discussion among American scholars and courts. The arguments which are raised by the contrasting views are rooted in the different perception of the goals of antitrust.449

Unlike the American antitrust law the GWB does not contain a rule or reason and, although, the evaluation of a vertical restraint requires a comprehensive analysis of the economic effect of the restraint in question, the analysis is much more directed (best described as: "normatively directed analysis")450 and more limited in its scope than its American counterpart.451

3. Tying Arrangements

Tying arrangements452 experienced a special treatment under American antitrust law. After the initial rule of reason approach,453 the Supreme Court moved towards a per se type standard454 and in Northern Pacific Ry. Co. v. United States455 expressly established a per se standard. The Court condemned tie-ins because of their leverage effect which
foreclosed competitors from the market and restrained free competition in the market of the tied product.

However, the rigorous per se rule barred economic advantages of packaging the sales of products. Particularly in the area of franchise agreements the harsh per se rule did not comply with business needs. Therefore, the impact of the per se rule was mitigated by manipulating the interpretation of the separate product requirement. Instead of analyzing the agreement under a rule of reason standard the court addressed the question whether a multitude of products packaged in a franchise agreement may be considered as one product. If the "single product defense" is raised, the court has to investigate in circumstances and business justifications of the tie. Various standards have been developed by the courts and the agreement is actually analyzed by rule of reason to avoid the application of the per se rule against tying. Furthermore a tying arrangement may be defended with "good will" and "quality" defenses if no other reasonable way to protect good will and quality is given. Also, a "new or infant business defense" is accepted by the courts.

a) Move Towards a Rule of Reason

The increasing impact of economic analysis on the application of per se rules against tying is reflected in the recent decision Jefferson Parish Hosp. Dist. No. 2 v. Hyde where a hospital packaged acute-care treatment and
anesthesiology services. The hospital alleged cost efficiencies and improved services and the court upheld the arrangement. The reasons given for this treatment of the "tie-in" illustrate the need to clarify the standards. The majority of the judges upheld the per se rule and concluded that there were two products but then denied that the hospital - although attracting 30% of the district's patients - had enough market power to trigger the application of the per se rule. The remaining judges favored a rule or reason approach and reasoned that only one product was involved.

Thus, it is to conclude that the treatment of tying arrangements is subject to vague and difficult standards. The per se rule against tying is mitigated by that many exemptions and artificial interpretation so that a tying analysis resembles more an rule of reason approach than application of a per se standard.

b) Comparison with the GWB's Treatment of Tie-Ins

Interestingly, the GWB's approach towards tying considers most of the arguments raised under American antitrust law. First, as general rule, GWB allows tying as long as the tie involves products which are related "by their nature or the custom of trade". Second, even tie-ins of non related products are not generally prohibited. Third, limiting this rule, a tie of non-related products of a "powerful" enterprise is considered prima facie abusive and the firm has to provide a business justification for the tie. The
necessity for the tie has to be more convincing if the tie might adversely affects the market. Hence the conduct of "powerful" enterprises generally has a strong impact on markets the requirements to justify a restraint are heavy. Therefore, a tie of a powerful firm will only escape condemnation if there is no other reasonable and less restrictive way to protect the businessmen's good will.464

4. Other Vertical Nonprice Restraints

Like exclusive dealing arrangements other vertical restraints are subject to rule of reason scrutiny. However, as mentioned before the rule of reason requires a broad ranging inquiry into all circumstances of the market and allows, especially when no "guideline" for this inquiry is provided, justification of almost every restraint. Under American antitrust law abound defenses are recognized, such as newcomer defense, failing company defense, orderly marketing defense, attracting new distributors defense, and the free rider defense. However, these defenses are also recognized under the GWB. More important in the evaluation of vertical restraint is that American antitrust law does not consider the protection of intrabrand competition is not regarded as the main purpose of antitrust law.465 But, most important is the fact that the evidentiary burden which the plaintiff has to bear is very heavy. If a plaintiff wants to prove an unreasonable effect he might have to overcome the economic assumptions of the court. As shown in Business
Electronics the court might be preoccupied with the notion that a conduct is reasonable rather than questionable. Another economic question raised in evaluating vertical restraints is the consideration of entry barriers. If the court does not realize the problem of entry barriers the court will conclude that the "qualitative impact" on the market does not exist hence new market entrants are readily available to enter the market and punish anticompetitive conduct.

B. Vertical Nonprice Restraints under the GWB

With the exception of resale price maintenance other "vertical" restraints are basically permitted under the GWB. Only if "powerful" firms are involved is the GWB less lenient. The lawmaker recognized in drafting the GWB that the question whether other restraints have pro- or anticompetitive effects cannot be answered in advance by the legislative authority. However, to avoid too much discretion the GWB does not have a broad general rule (such as the rule of reason) which has to be interpreted by the courts. The GWB defines certain types of conduct which might unduly restrict competition and indicates more or less specific points which should be analyzed. Moreover, the GWB employs legal presumptions to ease the burden of proof and applies to certain kind of conduct of powerful firms standards which resemble a modified per se rule under the American
antitrust laws, i.e. presumptive illegality which has to be rebutted with an accepted defense.\textsuperscript{472} However, as will be shown later, the GWB has its problems with the attempt to describe the prerequisites of its applicability as accurately as possible without loosing too much of its practicability and without leaving too much anticompetitive conduct unchallenged.

To solve this problem the lawmaker of the GWB chose to establish two "levels" of control according to the "market power"\textsuperscript{473} of the firm which is using the restraint.

All vertical restraints are subject to abuse control by the Federal Cartel Authority under § 18 GWB. The size of the firms employing the restraint is not considered. However, due to complicated statutory language and heavy evidentiary requirements, the abuse control under § 18 GWB is a weak weapon to challenge the increasing coverage of the market with restrictive agreements.\textsuperscript{474}

The unsatisfying statutory setting of § 18 GWB, however, is no reason for major concern because basically the same conduct which may be subject to abuse control under § 18 GWB can be challenged under §§ 22, 26 and 37a GWB. These provisions are more rigid with vertical restraints, partly because of their assumption that certain conduct is presumptively illegal. The only shortcoming of these provisions in comparison to § 18 GWB is the fact that they apply only to "qualifying enterprises", i.e. enterprises
which are market dominating or which are able to create a dependency relationship.475

In particular, since in the GWB's amendments of 1973 and 1980 where the scope of § 26 GWB was broadened, § 26 GWB became a efficient tool to outlaw business conduct of "powerful" firms. The GWB is particularly concerned with strategic market conduct of "powerful" firms. According to the GWB's perception, these firms are because of their superior position in the market able to impair competition. Therefore, the Federal Cartel Authority focuses on §§ 22 and 26 GWB476 rather than on § 18 GWB. For example the most wellknown tying case477 was challenged as a violation of § 22(4) GWB and one of the most controversial exclusive dealing cases478 was challenged as violation of § 26(2) GWB. Both cases were dealing with subject matter "typical" for § 18 GWB.

However, although § 18 GWB itself was never in the focus of enforcement activities, a closer look at the intention of § 18 GWB is of interest because the values protected under § 18 GWB are the same values which have to be taken into consideration when a vertical restraint is challenged under a another provision of the GWB. Moreover these values are recognized as leading principles which have to be considered if other ambiguous terms in other areas of the law have to be filled out.479
1. § 18 GWB

§ 18 GWB is covers all restrictions which effect the freedom to choose one's contracting partner. The use of a restraint may be prohibited if it unduly restricts competition. § 18 GWB covers both direct and indirect, legal and factual restraints and does not explicitly distinguish between intrabrand and interbrand competition.

The development of § 18 GWB unveils significant changes with regard to the values protected under the GWB and the approach towards vertical restraints. In the GWB of 1957, § 18 GWB was designed to protect the competitive freedom of the "individuals as part of the competition" and the "competition as institution". The Federal Cartel Authority had to prove that both the freedom of the "individuals as part of the competition" and the freedom of competition were unduly restricted. This burden of proof was hard to meet and only one relevant case was decided under the 1957 version of § 18 GWB. The criticism with regard to this evidentiary burden of § 18 GWB led to the 1965 amendment. Since 1965 it has been possible to challenge a restraint when either the "individuals as a group" or the "competition as institution" is unduly restricted by the restraint.

However, § 18 GWB was still deemed to be insufficient to adequately protect the market and in 1973 the protection of the "individual in its individual freedom" was added to the values protected under § 18 GWB. The following reason
was given to support the explicit inclusion of the individual's freedom within the scope of § 18 GWB:

The restricted partners have at least to be protected by § 18 GWB when their freedom to compete is restricted and when at the same time numerous enterprises are similarly bound. In this case the competition on the market is endangered.

The lawmaker of the GWB recognized that the freedom of competition and competitors cannot be viewed separately and that protection of both contributes to the maintenance of competition.

a) Scope of § 18 GWB

To evaluate whether a restraint is abusive under § 18 GWB, a two step inquiry is applied. First, the restraint must fall into the scope of restraints covered by § 18 GWB. Four types of restraints are enumerated in § 18 GWB:

1) Restrictions on the freedom to use the supplied goods, other goods or commercial services.

2) Restrictions as to the purchase of other goods or commercial services from, or their sale to third parties.

3) Restrictions as to the sale of the supplied goods to third parties.

4) Tying arrangements.

The courts interpreted this first test very broadly. Therefore, hardly any restraint imposed in a contract will not qualify for further scrutiny. Not only "typical" restraints such as territorial and customer restraints,
tying and all kinds of exclusive dealing arrangements, but also other restraints, such as location clauses and profit passover arrangements are within the scope of § 18 GWB.

Though § 18 GWB embraces also economic restraints, such as monetary advantages or disadvantages. A qualifying restriction, for example, might be caused by a rebate based on the quantity purchased throughout a year. The prospective rebate constitutes an economic incentive not to buy from other suppliers.

However, the fact that a restraint falls within the scope of § 18 GWB does not say anything about its antitrust implication. The broad scope used in defining the types of restraints covered by § 18 GWB is intended only to provide as much control over restraints as possible. If a restraint is within the scope of § 18 GWB, the Federal Cartel Authority is authorized to scrutinize the restraint further under the second step of § 18 GWB analysis. The second step focuses on the impact the restraint has on competition and competitors.

Under this second step a restraint may be considered abusive if either one of three values protected under § 18 GWB is endangered. The thresholds enacted by § 18 GWB indicate that § 18 GWB is primarily concerned with foreclosure effects and the danger that a market structure might get cemented through the widespread use of restraints.
b) § 18(1)(a)

A restraint may be declared void if due to the restraint a "significant number of enterprises in relation to competition in the market are similarly bound and unfairly restricted in their freedom of competition". This requirement is aimed at protecting the enterprises on the market as a collective. The collective protection applies to all enterprises which are bound by similar restraints. The restraint must not be imposed by a single firm. Hence it is sufficient if a certain restraint is widely used. § 18(1)(a) GWB recognizes that a certain restraint must be applied to a significant number of enterprises. Otherwise, competition is not unfairly restricted because in the latter case the market offers enough alternatives to the competing market participants. The size of the firm employing the restraint is not of significance. The widespread use is the factor triggering the application of § 18 GWB.

It is noteworthy that § 18 GWB does not threaten small firms which are innocently using a restraint. The Federal Cartel Authority would prohibit the restraint at no cost for the firm and no individual lawsuits could be filed. Therefore, as a side effect, the limitation of the enforcement authority to the Federal Cartel Authority protects smaller firms which are often not able to evaluate whether the complicated threshold requirements of § 18 GWB are met.
c) § 18(1)(b) GWB

The second alternative which might lead to action under § 18 GWB has the objective of protecting third parties if "by such agreements market entry ... is unfairly restricted". The GWB does not require concentrated markets to conclude that there might be an unfair restriction of market entry. Primary concern is that the widespread use of a restraint cements existing market structures and therefore may have considerable foreclosure effects.

d) § 18(1)(c) GWB

The third alternative of § 18 GWB is directly aimed at protecting the freedom of the markets and applies if "by the extent of such restrictions competition in the market for these or other goods or commercial services is substantially impaired".

In most of the cases in which § 18(1)(c) GWB may apply, at least one or both of the former test are also met. There is no clear demarcation line between the three alternatives. The Federal Cartel Authority may base its order on either one, two or on all three effects. According to § 18 GWB the freedom of competition needs, as a prerequisite, both the freedom of the market participants [§ 18(1)(a)] and free market entry [§ 18(1)(b) GWB].
2. Criticism of § 18 GWB

As mentioned before, § 18 GWB is rarely used to challenge vertical restraints. Since 1958 only a few injunctions have been issued under § 18 GWB. Although this reluctance of the cartel authority reaches "the result which even agrees with the contemporary perception of competition theory"[in the United States], as a scholar alleges, the underlying policies and reasons are quite different.

a) Heavy Burden of Proof

§ 18 GWB will only apply when both a quantitative and qualitative threshold are met. The quantitative requirement is minimal. Hence, all restraints which are perceivable may be subject to abuse control. But again the absence of de minimis rules intends merely to authorize the Federal Cartel Authority to scrutinize a restraint under § 18 GWB and does not say anything about the antitrust implication of the restraint. On the other hand, neither does § 18 GWB provide quantitative standards defining "substantial". The "flexibility advantage" that no quantitative threshold was established to consider a restraint to be "prima facie" unfairly restricting competition brings with it the disadvantage that every restraint has to be completely analyzed.

A comprehensive analysis requires consideration of market structure and evaluation of the (future) impact of the restraint in a specific product market. Accordingly, the
Federal Cartel Authority bears a heavy burden of proof, and the accused firms have a wide range of possibilities to challenge the accuracy of the Federal Cartel's Office analysis. Furthermore, the analysis under § 18 GWB requires that not only the conflicting interest of merely two contracting parties have to be taken into consideration but that the conflicting interests of groups of buyers and sellers have to be balanced. Because the interests on both the buyer and seller levels are conflicting it is difficult to define when a widespread distribution method tends to unfairly hinder competition.\textsuperscript{497}

Because of these difficulties of proving that a restraint has an unduly competition-restricting effect, the Federal Cartel Authority avoided challenging restraints under § 18 GWB whenever it was possible to attack the restraint under another provision of the GWB.

In only one case will the use of a vertical restraint be considered to be abusive without further analysis. The judgment of § 15 GWB (prohibition of resale price maintenance)\textsuperscript{498} is guiding the analysis under § 18 GWB. Therefore, exclusive dealing/selective distribution systems which are primarily aimed at establishing a certain price level will be considered abusive because it would contradict the legislative intent of maintaining price competition. In particular, the design of selective distribution systems which exclude certain types of "discounters" simply because of
their pricing behavior (in the absence of other justifications) would constitute a violation of § 18 GWB.499

b) Difficult Balancing of Conflicting Interests

Another obstacle to enforcement of § 18 GWB was the tendency of the courts to overemphasize the individual freedom to employ a vertical restraint rather than to focus on the anticompetitive effects on the competition as institution. 500 The courts accepted almost every justification for the restraint, such as adequateness, good will protection, or fair risk distribution 501 and gave these justification more weight than market structure concerns.

This approach is reason for criticism. It is argued that "competition as institution" and "competitive freedom of the individual" are not contrary. It is pointed out that "competition as institution" can only be protected if the markets are kept open and the freedom of all market participants is protected.502

It is pointed out that for example in the most important case of exclusive dealing arrangements and tying arrangements (which have the similar effects), the threat to "competition as institution" is the foreclosure of the market. Accordingly abuse control has to concentrate on the goal of keeping the markets open. But this goal can only be achieved if the third parties are able to use their competitive freedom. Hence, the third parties are not able to use their competitive freedom when they are foreclosed from
competition. The remedy in this case is to ensure the freedom of the individuals by enabling them to enter the market without being unduly hindered by foreclosed markets.

3. Consequences for § 18 GWB as Enforcement Tool

Because of these problems § 18 GWB failed to provide an effective basis for challenging restraints which were employed by smaller firms and which did not qualify for §§ 22, 26 GWB. It follows that not the use of economic theory but the unsatisfactory statutory setting of § 18 GWB led to the increase of exclusive dealing arrangements which are now widespread in the car, gasoline and beer distribution.

This "failure" of § 18 GWB is fortunately not crucial. Most of the restraints which have anticompetitive potential because they may constitute the attempt to transfer market power and impair competition are imposed by "powerful" enterprises because otherwise the buyers would oppose these restraints. For example, exclusive dealing arrangements which impose an undue burden on the buyer or tying arrangements which are designed to exploit the position of one product indicate market imperfections would not be accepted as long as no market imperfections exist. But as soon as a "powerful" enterprise are involved, the GWB provides "better tools" to challenge their market conduct.

The "better tools" are §§ 22 and 26 GWB which are aimed at challenging anticompetitive conduct of "powerful" firms. The enforcement of the latter provisions is easier because
they provide some presumptions which must be rebutted. §§ 22 and 26 GWB require that only the interests of two parties must be weighed against each other rather than considering interests of a whole market.

But not only the law itself provides a better guideline. Because of increased enforcement activities, the courts developed case law which additionally provides more reliable guidelines for the enforcement. For example courts assume that certain conduct of powerful firms is a prima facie violation of either § 22(4) GWB or § 26(2) GWB (or both). As the comparison with § 18 GWB shows particularly, the allocation of the burden of proof is the deciding factor which contributes to the effectiveness of §§ 22(4) and 26(2) GWB.

4. Other Safeguards for Competition Available under the GWB

As indicated before the "failure" of § 18 GWB does not lead to per se legality of all vertical restraints though the GWB restricts the competitive freedom of certain "powerful" enterprises for the sake of the overall freedom of competition. Vertical restraints and strategic market conduct employed by these enterprises may be challenged more easily than under § 18 GWB. These limitations of the competitive freedom of these enterprises are the price these enterprises have to pay for becoming "market dominating". A divestiture is not possible under the GWB. Although the American antitrust law goes so far as to
provide divestiture measures\textsuperscript{505} it does not provide special means to cope with unilateral strategic market conduct of market dominating firms as long as these firms do not attempt to monopolize. In contrast to the \textit{Colgate} doctrine\textsuperscript{506} the GWB addresses also unilateral strategic market conduct, such as refusal to sell and exploitation.\textsuperscript{507} The underlying concern of the GWB is that powerful firms are able to distort the competitive process\textsuperscript{508} which may result in adverse effects on market structure and - at least in the long run - may result in poor performance, too.\textsuperscript{509}

5. §§ 20, 21 GWB

§§ 20, 21 GWB provide special rules for licensing agreements. Licensing agreements, i.e. agreements dealing with patents, certain designs, plant and seed varieties, and know how, may only contain restraints which are not exceeding the scope of the protected right. The intent of § 20 GWB is to prevent that the owner of a protected right uses this right as device to abuse his exclusive position.\textsuperscript{510} But the most often used restrictions with regard to type, extent, quantity, territory, and period of a protected right are according to the legal presumption of § 20(1) GWB not exceeding the scope of the protected right and therefore legal. Furthermore, § 20(2) GWB exempts also technically necessary restraints, resale price maintenance, grant back clauses, covenants not to challenge the protected right, and division of markets outside Germany from application of § 20 GWB.
However, in the latter case the stricter regulation of Art. 85(1) of the EEC Treaty may apply.\textsuperscript{511}

The detailed regulation of § 20 GWB applies an infringement test (similar to the American "scope of patent" doctrine). The economic decision to allow fargoing freedom in the area of certain licensing agreements was made by the legislature, the courts do not have to refer to economic theory. The decision of the lawmaker is based on patent philosophy. A discussion of this philosophy, however, is beyond the scope of this study.\textsuperscript{512}

6. Strategic Conduct of "Powerful" Firms

With regard to strategic market conduct, the GWB has a different perception of economic theory than the Chicago School. The Chicago School asserts that unilateral conduct does not lead to anticompetitive effects because enterprises cannot impair markets and obtain supra-competitive profits. According to the Chicago School which plays down the effect of entry barriers the threat of attracting new enterprises prevents enterprises from collecting supra-competitive profits. Furthermore, the Chicago School does not believe that a "rational" businessmenn would willingly attempt to impair competition because the businessmen attempts to achieve efficiencies rather than to distort competition. The GWB, however, does not believe that competition is self maintaining and, therefore, recognizes the notion that businessmen are primarily interested in raising their
profits and thus tend to avoid the competitive pressure by employing strategic market conduct. In particular the GWB tries to prevent that "powerful" firms from using their superior bargaining power and preeminent market position to take advantage of market imperfections, to cement and foster market distortions, and to collect supra-competitive profits.

The GWB is concerned that "efficient" firms will use their efficiency gain to drive other firms out of the market rather than to attempt to achieve better performance so the GWB imputes that firms are willing to trade efficiency for position.513

Because of these differences a comparison of the approach towards strategic conduct might be of special interest and could reveal points for further discussion.

a) § 22 GWB

The GWB is particularly suspicious with regard to restraints caused by circumstance. Therefore the Federal Cartel Authority "may prohibit abusive practices of market dominating enterprises".514 A legal assumption for market domination is given in § 22 (1) and (2) GWB and a rebuttable presumption is provided in § 22 (3) GWB. The pivotal and most difficult point in the application of § 22(4) GWB is the determination of abuse. The GWB does not define abuse, but it lists some practices which are considered to be abusive.515 Market dominating enterprises may not impair the
competitive possibilities of other enterprises. They are not allowed all of "the competitive possibilities of other enterprises" if they cannot submit facts justifying their behavior. They are also not allowed to agree on contract terms which were made possible because of the extraordinary market position of the contracting firm. They even may be subject to price control. Furthermore, these firms are not allowed to discriminate without factual justification.

Unlike the Robinson-Patman Act the GWB does not have a general discrimination provision. Under § 22(4) GWB only market dominating firms are considered to be so "dangerous" that they may not discriminate without justification. But, more farreaching than the Robinson-Patman Act, the GWB condemns all kind of discrimination, not only price discrimination. Since 1973 also dependency creating firms may not discriminate.

Moreover, the problem of so called "demand side power", i.e. big department or chain stores which are able to press their suppliers to granting them better conditions than the average buyer was recognized in the late 60's and led to the amendment of §§ 22(4) and 26(2) GWB. Since 1980 § 22(4) GWB explicitly enumerates that the use of superior bargaining power on the demand side is as abusive as strategic market conduct on the supply side. The GWG reveals the interesting policy notion that using superior bargaining power on both buyer and seller level considered to be able to impair markets and, therefore, suspicious.
(1) Defining "Abuse"

The indefinite term "abuse" which the lawmaker choose to describe the prohibited conduct under § 22(4) GWB is ambiguous and requires interpretation by the courts. It is the task of the courts to determine in a case by case application whether in a specific situation, given the circumstances of a certain product market, the restraint in question is abusive or not. However, this analysis is not as broad as a rule of reason analysis under American antitrust law, but rather is a normatively directed balancing procedure. The courts are required to apply a comprehensive analysis which is guided by the values of the GWB, i.e. to protect and maintain the freedom of competition and to keep the markets open. In this analysis, the courts have to evaluate the competitive implications of the restraint and balance them with the interests of the imposing enterprise.

The way German courts approach a case and the arguments they use to analyze the competitive impact and validity of a restraint can be best explained by the leading tying case Meto Handpreisauszeichner (Meto) which established some general rules on how to approach vertical restraints and tying arrangements.

The second case which will be explained more thoroughly is Effem. Effem deals with a discounting practice and illustrates the GWB's concern about hindrance strategies which might be employed by market dominating firms.
(2) Meto-Handpreisauszeichner

In Meto\textsuperscript{524} a manufacturer of small labeling machines conditioned its sale of the machines to the purchase of labels used with the machines. The court found a market dominating position because Meto controlled between 89 and 93 percent of the market for small labeling machines in 1967.\textsuperscript{525} Moreover the court concluded that the use of the restrictive practices, such as refusal to sell to users which did not purchase the labels and the denial of repair services indicated that Meto was not exposed to significant competition though Meto's conduct showed that it did not have to behave toward its customers like an enterprise which is exposed to significant competition.

The conditioning of the purchase of the labels to the sale of the labeling machine was held abusive for several reasons: Both the purchasers on the market for labeling machines and the manufacturers of labels were unduly restricted in their freedom to do business. The buyers of the labeling machines were forced to purchase excessively priced labels and third enterprises were foreclosed from the market for labels.

The attempt of Meto to ensure additional earnings and to strengthen its market position constituted an abuse. A quality defense and the argument that technical requirements made the tie-in necessary were heard but rejected by the court.
To determine what behavior constitutes "abuse" the Court referred to the principles of competitive market behavior. The Court held that all inherent tendencies of firms with market power to use this power to endanger effectiveness of competition, to obstruct the striving for better performance, and to prevent optimal supply to consumers have to be suppressed. The Court reasoned that first of all the market has to be kept open for new entrants.\textsuperscript{526}

(3) Effem-Tierfertignahrung

Another instructive case which reveals the policy of the GWB is Effem. Besides some clear statements with regard to the policy goals of the GWB this case furthermore reveals that all provisions of the GWB are designed to promote the same goal and that conduct which falls within the scope of § 18 GWB also might be attacked as abuse under § 22 GWB and at the same time constitutes a discrimination under § 26 GWB.

Effem, a German subsidiary of the United States firm Mars, Inc., granted its customers a yearly rebate. The rebate was not computed on the basis of the separate orders but on the purchase of pet food throughout the year. The court found that Effem had a market dominating position. The "paramount market position in relation to its customers"\textsuperscript{527} which allowed Effem to set prices and conditions was established through Effem's 70 percent market share, its substantial advertising efforts, and its strong brand name.
which was considered to be of special importance due to the brand loyalty of pet food purchasers.

The abuse of Effem's positions was seen in the effect of this yearly rebate which lured customers by economic advantages and thus enhanced Effem's position in the market. The use of the discount system hindered actual and prospective competitors and no justification complying with the goals of the GWB could be offered by Effem, such as cost justification.

In Effem the court interpreted § 22(4)(2) GWB as a burden on market dominating firms to avoid conduct which is not rooted in the performance of the contract but is aimed at restricting the competitive chances of its competitors.

The court reasoned that a rebate which is computed on long term basis has no relation to the single order, such as rebate for bigger orders, but is aimed at giving a customer a reward for constantly ordering from one seller. This rebate was not justified by cost savings but rather intended to foreclose other competitors by binding the customer by the means of this rebate.

In Effem the Court also addressed the question whether the additional burden of market dominating firms is discriminatory and volative of Art. 3 of the Basic Law. The Court stated that market dominating firms have special duties to its customers and competitors which are going beyond the general rules of conduct in the business. The Court concluded that the fact that these firms may not
employ conduct which is allowed other by firms as their constitutionally guaranteed freedom to decide with whom and under what conditions to deal does not violate Art. 3 of the Basic Law. The law imposed a restriction on market dominating firms which is justified by the prevailing goal to maintain an open and competitive market which itself contributes to democracy.

b) § 26(1) GWB

Besides the purpose of opposing ways to circumvent the prohibition of resale price maintenance, the per se prohibition of boycotts embraces also boycotts aimed at reaching results which may be subject to vertical restrictions. § 26(1) GWB shows the value the GWB contributes to the freedom of enterprises to compete without being unfairly harmed by third enterprises. Therefore GWB condemns arrangements involving three parties when one party tries "to incite another enterprise ... to refuse to sell or purchase with intent to unfairly harm certain enterprises". The economic importance of so-called secondary boycotts is documented in the OECD Report "Refusal to Sell":

Cases are becoming increasingly frequent of traditional dealers and specialized shops threatening to discontinue the distribution of the supplier's product if he delivers to discounters, chainstores, department stores or other non-traditional retailers. With this policy the traditional dealers tend to hinder the appearance or development of new forms of distribution which are frequently more efficient from the productivity point of view than the more conservative forms. The
former operate largely on the basis of lower labour costs and prices achieved through self-service and other rationalization methods.

In most of the cases the secondary boycott will constitute a violation of § 26(1) GWB. Hence, the mere attempt to influence the freedom of another firm contradicts the goals of the GWB to keep market open and prevent market distortions.

c) § 26(1) GWB and the Use of Economic Theory

The role of economic theory is small and limited by the statutory setting of § 26(1) GWB. The policy decision of § 26(1) GWB refers to the freedom of the market participants. Because a boycott restricts this freedom, a boycott presumably violates the policy decision codified in § 26(1) GWB. The use of economic theory is limited and focuses only on the question of whether the firm inducing the restraint has an accepted justification which outweighs the interference with the competitive process. However, the kind of defenses which might justify the attempt to induce a boycott are predetermined by § 26(1) GWB. Since the boycott affects the freedom of "victim firm" to deal with the induced firm substantially, the firm attempting to induce the boycott faces a difficult burden in defending their "attack" on one of the basic goals of the GWB. The inducing will have to show that the firm which is the supposed victim of the
boycott was behaving illegally and that the boycott is the
only available and least restrictive response.\textsuperscript{533}

d) § 26(2) GWB

The GWB's concern of coping with the threat to competition caused by market dominating enterprises can be perceived from the fact that the general abuse provision of § 22(4) GWB was amended and that the statutory scope of § 26(2)(2) GWB was broadened. Under § 26(2) GWB, all kinds of strategic market conduct which has probable effects on market behavior and market structure; such as refusal to sell, discrimination, exclusive dealing arrangements, and tying arrangements may be challenged.

§ 26(2) GWB prohibits market dominating firms\textsuperscript{534} and firms "insofar as suppliers or purchasers of certain types of goods or commercial services depend on them"\textsuperscript{535} from unfairly hindering another enterprise in business activities or from treating similar enterprises differently. Two facts indicate, how serious the lawmaker of the GWB took the threat of "powerful" firms: First, § 26(2)(2) GWB, the "dependency" provision was added in 1973 (before 1973 only the conduct of market dominating firms could be challenged under § 26(2) GWB). Courts know different categories of cases were a dependency relationship may exist. For example, dependency can be based (1) on assortment, (2) on supply relationship, (3) on shortages, and (4) dependence on a particular enterprise.\textsuperscript{536} Especially the first category, the
dependence on a certain article, is focused on. For example, in the famous Rossignol case, the German Supreme Court held that the manufacturer of Rossignol skies due to the well-known skies occupied a dependency creating position in the market. Accordingly, the BGH held that Rossignol was obliged to supply a sporting goods store with its skies. The dependency requirement was held to be given although Rossignol had only a market share of 8 percent. Therefore, especially the "dependency" notion of § 26(2) GWB is a strong device to limit the exercise of "superior bargaining power."

Second, § 26(2) GWB is one the few provisions of the GWB which directly protects the market participant as an individual and not just indirectly as a participant in the competitive process. One of the most important features of § 26(2) GWB is that it enables individual enterprises to invoke their rights protected by § 26 GWB.

e) § 26(2) GWB and the Use of Economic Theory

The courts have to apply economic theory in considering several questions: first, to establish market power or a dependency relationship; second, in determining whether a conduct is hindrance or discriminatory; third, in evaluating whether the conduct is "unfair" hindrance or discrimination "without justification."

(1) Market dominance is defined in the statute itself. A dependency relationship has to be evaluated in case by case
analysis and requires the courts to investigate into the specific markets involved.

(2) Hindrance is given when one enterprise manoeuvres another enterprise in a disadvantageous position. The "unfairness" of the hindrance is determined by "weighing the interests of the two parties in the light of the procompetitive goals of the statute." The more market power the hindering party possesses, the greater is need to protect the hindered party.

According to the legislative language a "discrimination without justification" is prohibited. The discriminating firm has to offer a justification for its discrimination. The courts are required to analyze the justification offered for the restraint (in this analysis the courts will employ the same consideration as in defining "abuse", infra)

f) § 37a(3) GWB

§ 37a(3) GWB is another provision which was added to the GWB in 1973. Although § 37a(3) GWB has insofar little practical relevance this provision highlights very clearly the purpose of the GWB and its different approach towards restraints even when they are unilaterally imposed.

§ 37a(3) states:

The cartel authority may also prohibit an enterprise which, as a result of its superior market power in relation to its small and medium-sized competitors, is able to influence market conditions substantially from adopting conduct that directly or indirectly unfairly hinders such competitors and is likely to impair competition permanently.
§ 37(a)(3) GWB This provision does not intend to provide "social protection" to small businessmen. However, § 37a(3) GWB clearly states that the protection of small and middle-size competitors and the prevention of market concentration are goals of the GWB. Enterprises which are not able to cope with unfair conduct of their bigger competitors such as exclusive dealing shall be protected against being driven out of business. However, like §§ 22(4) and 26(2) GWB it is also necessary to give a meaning to the vague term "unfairly hinder" used in § 37(a) GWB to describe unwanted conduct.

7. Giving Vague Terms a Meaning

The question whether a conduct constitutes an abuse under § 22(4) GWB or will be considered to be unfair hindrance or discrimination in the meaning of § 26(2) GWB is the most difficult problem in applying §§ 22(4) and 26(2) GWB. However, the question of whether certain strategies are benigm or harmful to competition can be answered differently depending on the applied theory and the time horizon. Unlike American antitrust law where conflicting theories directly influence the reasoning of the courts, under the GWB the courts are limited in their analysis. For example, under the GWB intrabrand competition cannot be ignored and efficiency arguments are considered second place. This explains why the GWB remained almost static while the American antitrust law changed drastically.
The GWB choose a compromise between flexibility and the rule of law. The GWB proscribes the values and the policy of its approach towards certain behavior, such as strategic market conduct and the courts pursue their analysis in compliance with the proscribed goals. Therefore the scope of the courts analysis is limited by the legal provisions.

Möschel concludes "goal conflicts can arise between the economic plausibility of particular rules and the necessity of their justiciability and predictability. The German application of cartel law has always been intellectually conscious that it can attempt to commit, as it were, only the lesser evil." \(^545\)

Whenever a case involving §§ 22(4); 26(2) GWB comes before the court, the following phrase will serve as reference for the further reasoning of the court: an evaluation of the conduct in question makes it necessary "to balance the conflicting interests in the light of the goal of the GWB to protect the freedom of competition." \(^546\)

a) Development of Rules

However, as long as no prima facie case is established, it is very difficult to predict under which circumstances a certain conduct and/or restraints will be condemned as constituting unfair hindrance or discrimination.

This analysis requires interpretation and application of economic theory by the courts. This analysis is particularly difficult because the provisions of the GWB
dealing with strategic market conduct do not intend to deter or prohibit efficient or otherwise justified market behavior. Möschel states that this "would be a perversion of competition law."\textsuperscript{547}

However, the role of economic evidence is different than under American antitrust law. When economic arguments come into play to assist the courts in evaluating the questionable conduct, the courts focus on the restrictions of the specific case rather than applying a broad ranging rule of reason scrutiny. The evaluation is normatively directed and the GWB proscribes that the interest of the individual in maintaining its freedom of action is preeminent.\textsuperscript{548}

Although not codified, the courts developed according to the values protected under the GWB some general rules which are guiding the analysis of the courts.

First, as a rule of thumb, the GWB reduces the freedom to employ strategic market conduct inversely proportionately to the market power of the employing firm.\textsuperscript{549} Likewise, the more restrictive the conduct, the better must be the justification for its application.

Second, every restraint which is aimed at achieving conduct prohibited under the GWB will be automatically considered to be unjustified. For example, the legislative intent of § 15 GWB influences the reasoning in the area of strategic conduct as soon as effects on prices are probable.\textsuperscript{550}

Third, the courts will ask whether the same effect can be achieved with less restrictive means.
Furthermore it is noteworthy that a general efficiency defense alleging procompetitive effects is not accepted by the GWB and even if this defense were held admissible it could not overcome market structure concerns.\textsuperscript{551}

b) Accepted Defenses

To evaluate the business justification, the courts ask whether there is an objective reason in the specific business relationship. The proffered justifications may not conflict with the goals of the GWB and have to be balanced against each other in the light of the goals and purposes of the GWB.\textsuperscript{552}

The courts are willing to accept legitimate interest of the parties employing the restraint and are particularly favorable to restraints which are imposed to enhance the ability of a firm to compete.\textsuperscript{553} It is acknowledged that firms are generally free to design their distribution system and that they are free to impose qualitative requirements such as qualified sales-personal, adequate presentation, repair services, and pre- and after sales services. On the other hand, the GWB condemns every attempt to exclude certain dealer forms, such as discounters or department stores from delivery when these stores are able to comply with the qualitative requirements.\textsuperscript{554} Particularly, selective distribution arrangements are subject to scrutiny whether these arrangements involve an attempt to unduly suppress
competition or to circumvent the prohibition of resale price maintenance. 555

c) Shifting the Burden of Proof

But, as the discussion in America shows, the argument that a restraint may enhance the ability to compete can always be raised.

In this case the question of which party bears the burden of proof becomes crucial. Hence the GWB is suspicious with restraints caused by circumstance (because of the market power) in the area of §§ 22(4) and 26(2) GWB the GWB uses means of legal presumptions or prima facie violations to ease the plaintiffs burden of proof. The defendant, who should know for what reasons he employed a certain conduct has to submit business justifications that his conduct is objectively justified556 (Gerber uses the term "material justification" to describe the kind of justification accepted under the GWB). 557

However, in evaluating the proffered justification the courts again refer to the statement which is guiding every analysis: "The interests of the two parties have to be weighed in the light of the pro-competitive goals of the statute". 558

d) The Balancing Process by the Courts

Although this analysis is not as broad as under American antitrust law, the court's discretion is
considerable. The courts will refer to the goal of the GWB to maintaining the freedom of the individuals in their decision to participate in the competitive process. The question of how much economic freedom of the individual remains under the influence of market imperfections and whether an adverse effect on the openness of the markets occurs will be analyzed. However, the courts still have to balance the interest between the firm which is employing the restraint with the restriction imposed on the other firm.

Some examples might illustrate the reasoning of the courts and show how economic theory is applied and which defenses are accepted by the courts:

Courts decided that it is unfair of a manufacturer not to provide original spare parts to a repair shop to protect its own repair business. However, it was accepted that a manufacturer has not the duty to provide spare parts to an independent repair shop if this repair shop deals with competing products or if its repairs are not satisfactory.

In a recent benchmark case, VW dealers challenged an exclusive dealing arrangement which allowed them to use for their repairs exclusively VW spare parts which were supplied by VW. VW defended its restraint with the argument that only parts provided by VW could meet the VW quality standards and that the protection of VW's good will required that restraint. The dealers argued that at least so called "identical parts", i.e. parts which are manufactured by the same
manufacturers which produce for VW should be excepted from the restrictive covenant. The lower court relied on the "less restrictive means" argument and held that the restraint was abusive and thus these identical parts may be used by the VW dealers if they inform their customers that no "original VW part" will be used. The German Supreme Court reversed and decided that the quality defense should prevail.

This decision was heavily criticized and it is recognized that this case reached the limit of admissible defenses.

e) Giving Vague Terms a Meaning

Although the GWB provides differentiated and detailed rules the courts face problems to interpret indefinite statutory terms, such as the "abuse" and "unfair discrimination." Therefore, the courts categorized some cases as prima facie abusive (i.e. tie-ins of market dominating firms or certain discounting practices). However, as long as no prima facie case is given, the courts have to evaluate the proffered justification and to balance it by considering the interests of the involved parties and the impact on competition. This evaluation raises extraordinary demarcation problems. Hence, the GWB does not intend to prohibit efficient or legitimate conduct. Again, the courts created means of guiding the analysis. For example, courts will consider whether a conduct is conform to the concept of "competition
based on performance. If the party which is employing a "suspect" conduct defends the conduct with the justification that it is aimed to achieve efficiency (e.g. when designing a new distribution system) and promote competition, rather than to reduce the competitive opportunities, the conduct may be justified. However, as Schmidt points out, the term "competition based on performance" is no advance in achieving predictability. Especially in "difficult" cases, where demarcation problems exist, the reference to terms which are almost as vague as the terms they are supposed to explain does not contribute to adequately evaluate the questionable conduct. However, although the courts have the tendency to rely on "terms" or "definitions" the analysis of the justification will, in the end, include "a weighing or balancing of the interests of the parties involved in light of the goals and purposes of the statute."
VI. SUMMARY

A. Results of the Research and Comparison

Vertical restraints are restricting the competitive freedom of market participants. A retailer might have to buy his whole supply from one manufacturer or his freedom to set prices might be restricted. However, in most of the cases these restrictions imposed in contractual relationships may contribute to the enhancement of overall competition or may have sound business justifications. Furthermore, the seller's freedom in designing an effective marketing scheme and imposing restrictive covenants is an essential part of free market competition.

On the other hand, vertical restraints and, likewise, strategic market conduct might not only limit the individual's competitive freedom but also stifle overall competition. If most retailers are bound by exclusive dealing arrangements a new market entrant will face problems to find retail outlets for his product. If prices are fixed a retailer is prevented from using the parameter price as means to strive for business.
Due to this complexity, extreme difficult demarcation problems exist. The difficulty of drawing a borderline which meets the requirements of adequately protecting competition without suppressing beneficial business conduct is reason for dispute among economists and legal scholars. Economic theory contributes theoretical analysis, based on theoretical models, which -- although often conflicting -- are intrinsically plausible. Legal scholars face the problem of implementing the perceptions of economic theory into the law and legal reasoning and of maintaining sufficient flexibility without completely abandoning the "rule of law". Moreover, the legal analysis is not limited to economic considerations, but incorporates also noneconomic arguments.

To enact practicable antitrust laws which guide the approach towards vertical restraints, basic determinations must be made. These determinations reflect policy and method decisions and are influenced anew by economic theory. For example, the decision to reward treble damages is at first sight a policy decision to punish anticompetitive behavior. However, this decision may have the economic effect that businessmen, especially when the state of the law is somewhat unclear, are deterred from employing procompetitive conduct because of being afraid to trigger antitrust suits.

1. Suggestion to Solve the Dilemma

To make antitrust law "work" the following determinations should be made: First, the goals of antitrust must be
defined. In particular, the question of whether noneconomic goals should be included in antitrust analysis must be answered. Second, an economic theory which complies with the goals of antitrust law must be selected and its role for the application of antitrust law must be clarified. Third, the role of the courts viz a viz the legislative authority must be clarified. Fourth, efficient enforcement must be guaranteed to transform the legal perception into action without deterring benign conduct. Fifth, the law must provide manageable standards for its application which are compatible with the amorphous area of vertical restraints.

2. The Approach of the GWB -- Favoring the "Rule of Law" and Pursuing a Multi-Valued Goal

The German antitrust law choose -- according to its civil law concept -- an approach which establishes the policy decision of the lawmaker and leaves little discretion to the courts. The GWB pursues a multivalued goal. It has legal, economic, and social functions. The legal function protects the two components of freedom of contracts: freedom to enter contracts and freedom to agree on contract terms. However, the GWB recognizes that this freedom requires equal bargaining power because otherwise this freedom becomes the freedom of the party with superior bargaining power to coerce the party with inferior bargaining power to accept restrictive covenants. The GWB's concern with regard to "powerful" firms is especially reflected in §§ 22(4), 26(2),
and 37(a) GWB which subjugate conduct of certain "powerful" firms special treatment. The economic policy function is aimed at maintaining a free and viable market place. In the area of vertical restraints the GWB particularly opposes market foreclosure effects. According to the GWB's concept a free market place consists of freedom of inter- and intrabrands competition, so-called "Allstufenwettbewerb" (all level competition). The social policy function is intended to distribute income and wealth. Prevention of economic power is another societal goal of the GWB.

According to these goals the GWB's approach towards vertical restraints is not limited to economic arguments. The freedom of the market participants is of special concern. Furthermore, in order to contribute to democracy the GWB opposes the creation or exploitation of undue differences in economic power. The lawmaker of the GWB recognized that no theoretical model of economic theory could provide adequate guidance for the GWB's application. The suggested workability and group competition concepts lacked adequate comprehension of static/dynamic effects or were suspect because they were too vague. Neoclassical theory as leading principle was rejected because it did not fit into the real business world. The GWB mistrusts the notion that competition maintains itself. Therefore, the GWB has adopted a concept which is best described as a "concept of the practical freedom of competition". The "concept of the practical freedom of competition" is perceivable from different norms
and the legislative history of the GWB. However, it is not the courts which apply these concepts, rather they follow in their reasoning the direction given by the GWB ("normatively directed discretion").

Unlike the American antitrust law the GWB's enforcement is mainly vested in the hands of the Federal Cartel Authority. Only in particular cases individuals may invoke the antitrust laws. Another interesting feature of the GWB is that it establishes different standards according to the firms' market power.

a) Treatment of Vertical Restraints under the GWB

Vertical restraints undergo the following treatment:

(1) Resale price maintenance is per se illegal under § 15 GWB. The GWB adopted the per se rule to foster intrabrand competition and to leave the decision about the core parameter of competitive behavior on the dealer level. Furthermore the prohibition of resale price maintenance promotes freedom of action, which is a major goal of the GWB. The prohibition of resale price maintenance is strictly enforced and safeguarded by other norms of the GWB. Particularly every attempt to threaten a dealer to coerce him to adhere to a certain pricing scheme is prohibited.

(2) Other vertical nonprice restraints are basically allowed under § 18 GWB. However, it is to note that this favorable treatment partly rests in the complicated statutory language of § 18 GWB rather than on economic theory.
b) The GWB's Approach to Conduct of "Powerful" Firms

Both unilateral and bilateral conduct of market dominating firms and firms which are able to create a dependency relationship is prohibited when it is considered abusive, an unfair hindrance, or unfair discrimination. This three terms overlap and according to the GWB's concept of competition conduct is more likely to fall into one of these three categories the more the conduct affects competition.

§ 26(2) GWB is an especially effective means of challenging to challenge unilateral market conduct. Under § 26(2) GWB a firm might be forced to sell. Interestingly, the rigid standard of § 26(2) GWB is explained with a view to the prohibition of resale price maintenance. § 26(2) GWB is used to challenge selective distribution systems which are employed as a means of achieving and maintaining certain price levels. The enforcement of § 26(2) GWB is eased by legal presumptions and, moreover, § 26(2) GWB is one of the few provisions which might be invoked by the individual.

3. The Approach of the American Antitrust Law -- Broad-Ranging Standards and Uncertainty About the Goals

The American antitrust law follows a common law concept. Accordingly, the statutory language of the Sherman and Clayton Acts leaves broad discretion to the courts. This discretion led to inconsistent, changing, and sometimes chaotic judicial reasoning. At present, the goals of antitrust law and the role of economic theory are hotly
debated. The New Coalition counters the assertion of the Chicago School that "economic efficiency" and "consumer welfare" are the only goals of antitrust with the argument that both legislative history and judicial reasoning support a different view. According to the New Coalition American antitrust law pursues four goals: "(1)dispersion of economic power, (2)freedom and opportunity to compete on the merits, (3) satisfaction of the consumers, and (4) protection of the competitive process as a market governor". The outcome of this debate will have an crucial impact in the area of vertical restraints. Should the view of the Chicago School prevail, antitrust law in the area of vertical restraints would be very simple: vertical restraints would be generally per se legal. Should the New Coalition's view prevail, antitrust law in the area of vertical restraints would have the task to protect the values which are promoted by the New Coalition and the role of economic theory would be less dominant.

a) Vertical Restraints under American Antitrust Law

At present, the American antitrust law treats vertical restraints as follows: (1) Agreements to fix prices are per se illegal. However, unlike the GWB, American antitrust law allows considerable ersatz strategies. Only agreements or conspiracies may be challenged under Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act. Unilateral conduct
which is aimed at producing adherence to a certain pricing scheme escapes antitrust condemnation.

Furthermore, in reliance on neoclassical theory, the Supreme Court raised in Monsanto\textsuperscript{576} and Business Electronics\textsuperscript{577} the burden of proof prohibitively. Besides resale price maintenance, only tying arrangements are considered to be per se illegal. However, in recent decisions\textsuperscript{578} the per se illegality of tying arrangements was softened and actually "about the only thing left of the per se rule against tying is the label".\textsuperscript{579}

(2) Vertical nonprice restraints are, since Sylvania,\textsuperscript{580} subject to rule of reason scrutiny. The Court in Sylvania held that less intrabrand competition may be compensated through an increase in interbrand competition.\textsuperscript{581}

(3) As mentioned before, unilateral conduct, no matter how anticompetitive its intent and effect cannot be challenged under the American antitrust law, unless this conduct constitutes an attempt to monopolize. The Colgate doctrine\textsuperscript{582} is persistently upheld by the courts.

b) A Look into the Future

It is significant that among American scholars and courts considerable efforts are made to move towards a per se legality of vertical restraints as promoted by the Chicago School. However, until now the Supreme Court has upheld the per se rule against resale price maintenance. At present, it is not to foresee which development American
antitrust law in general and the law of vertical restraints in particular will experience.

B. What is the "Right" Approach?

If one judges the law according to its perception by courts, scholars, and the public the GWB would be the better law. However, the perception the GWB achieves is only an indicator of its acceptance which indirectly allows conclusions about its quality. Whether the GWB pursues the "right" approach to antitrust is a different question. Interestingly, the GWB itself does not pursue the "best choice." The GWB recognizes that antitrust law due to its complexity and because of the tension between economic theory and the "rule of law" necessarily needs to be a compromise. The GWB prefers maintenance of viable market structure and the competitive process. Accordingly, resale price maintenance is considered to be an obstacle to the GWB's goals. Although sometimes some efficient conduct might be outlawed, the overall success of the GWB is remarkably high. Moreover, the multi-valued approach of the GWB, which is sometimes called the "economic constitution" contributes in promoting the democratic values of the "overall system".

For the same reasons, one cannot judge whether American antitrust law is "right" or "wrong". However, it is possible to conclude that American antitrust law faces a methodological and enforcement problem. Both problems could be solved
if the "rule of law" would be promoted by clarifying legislative action. In this way, American antitrust law could profit from the GWB's conception.
VII. CONCLUSION

A. Per Se Legality of Vertical Restraints?

The notion of declaring vertical restraints to be per se legal should for several reasons be opposed: (1) Antitrust law is determined to pursue other goals than merely the maximization of "consumer welfare". Besides the problem of giving the vague term "consumer welfare" a meaning complying with the requirements of the "rule of law," the assertion that antitrust is not concerned with other goals has to be rejected. Antitrust law is both in Germany and America a part of the democratic system. Accordingly, the democratic value of maintaining a viable market structure which allows the individual businessmen to freely participate in the competitive process has to be protected. This notion is expressed in the statement of Senator Sherman:

If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.
(2) Economic theory should support legal reasoning rather than replacing it. Economic theory cannot claim to offer the "right" solution for antitrust law. As the discussion surrounding the Chicago School's theory shows, economic theory can only offer probable explanations but is not capable in providing "guaranteed results". For example, the Chicago School's theory is based on neoclassical price theory which makes assumptions which do not exist in the real business world, such as perfectly competitive market structure, rationality of the market participants, and absence of externalities. According to its model, the Chicago School denies the existence of entry barriers.

Actually, entry barriers may constitute substantial hindrance for new market entrants. Strategic responses to new market entrants, entry risks, and cost advantages of the established firms are only few examples. The arguments in favor of per se illegality are single sidedly highlighting the positive effects of vertical restraints. In fact, every argument can be opposed by a counter-argument. The discussion clearly shows that the efficiency argument becomes a device which can be used to justify every restraint. Furthermore, as a look at real world business reveals, market participants do not always behave rationally, especially the consumer's horizon is restricted by persuasive advertising and personal preferences. Likewise, it is merely speculation to assume that businessmen behave perfectly
rationally and are only striving for efficiency. Accordingly, the assumption that competition is self maintaining is "belief" rather than "fact".587

(3) The rejection of a "single goal" antitrust and the rejection of Chicago School economic theory consequently leads to the argument that intrabrand competition should have a value of its own.

(4) In particular, the notion that resale price maintenance should be per se legal has to be rejected. The freedom to set his prices is often one of the last decisions left to the retailer. Taking this freedom would make the markets less competitive and lead to higher prices. It is more than questionable whether the price increase is outweighed by more interbrand competition and whether the price increase is fully shifted to the consumer by providing him more services.

For the foregoing reasons, the "per se legality notion" as promoted by the Chicago School is not a practical alternative for either German or American antitrust law. Two of the most important goals of antitrust law -- protecting democratic values and maintenance of a viable market structure -- are unprotected under the Chicago School's approach.

The fundamental policy differences between the Chicago School and the German (and EEC) approach are expressed in the 1986 Report on Competition Policy of the European Commission.588
The Member States of the European Community share a common commitment to individual rights, to democratic values and to free institutions. It is those rights, values and institutions at the European and national levels that provide necessary checks and balances in our political systems. Effective competition provides a set of similar checks and balances in the market economy system. It preserves the freedom and right of initiative of the individual economic operator and it fosters the spirit of enterprise. It creates an environment within which European industry can grow and develop in the most efficient manner and at the same time take account of social goals. Competition policy should ensure that abusive use of market power by a few does not undermine the rights of the many; it should prevent artificial distortions and enable the market to stimulate European enterprise to innovate and to remain competitive on a global scale.

This report supports the philosophy that antitrust law should maintain a competitive structure as a means to achieve efficient outcome. If there should be a conflict or doubt, market structure concerns should come first, efficiency second.

B. The Colgate Doctrine -- Obstacle to Antitrust Enforcement

The Colgate doctrine⁵⁸⁹ should be abolished and no enterprise should be allowed to use any pressure to coerce other enterprises to adhere to a certain pricing scheme. With regard to Colgate, American antitrust law overemphasizes the freedom of contract viz a viz the freedom of competition. Unilateral conduct may be harmful to competition and may be used as a device to reach results which are
otherwise prohibited by antitrust law. Firms which are able to use their superior power to distort the competitive process should be subject to more rigid scrutiny.\textsuperscript{590} The freedom "not to sell" should be limited and -- in some cases -- replaced by the "right to buy."\textsuperscript{591} Even if this approach seems to be "undemocratic" on first sight, it can be supported by convincing arguments. The existence of market dominating firms indicates market imperfections. To cope with these imperfections and to protect smaller enterprises from negative effects of market imperfections, the GWB chooses the arguably more "democratic" way of ensuring "freedom of competition."

The control of strategic market conduct of market dominant firms is a means which contributes to mitigate market imperfections. This is a goal which should be also supported by American antitrust law.

2. The most important provisions of American antitrust law relating to vertical restraints are Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2 (1982) and Section 3 of the Clayton Act (15 U.S.C. § 14 (1982). Sec. 1 Sherman Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal ... ". Sec. 2 Sherman Act prohibits monopolization, attempts to monopolize, and combinations or conspiracies to monopolize any part of trade or commerce. Sec 3. Clayton Act addresses exclusive dealing arrangements by outlawing to "lease or make a sale or contract for sale of ... commodities ... on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the ... commodities of a competitor or competitors of the seller or lessor where the effect ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce." This provisions are hereinafter referred to as antitrust law or American antitrust law.

3. A violation of the antitrust laws is only given when a restraint is unreasonable. The unreasonableness of an agreement may be established by the application of a per se rule. Under the rule of reason the reasonableness of a restraint on trade is determined by weighing all the factors of the case with special regard on the competitive effects of the restraint in question. See Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911); Chicago Board of Trade v. United States, 246 U.S. 213 (1918); Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
4. The Chicago School was known in the past largely within the concept of monetarism (Milton Friedman et al.). During the 70's the Chicago School has developed an economic approach to antitrust policy which is supported by a group of economists and lawyers (Bork, Posner, Easterbrook, Stigler, Scalia, Demsetz et al.). This approach considerably influenced the United States antitrust policy. The "new" economic approach favors free market competition without governmental influence (Stigler: "survival of the fittest"). Due to the Chicago School the possible number of antitrust goals should be reduced to the maximization of the consumer welfare as the only goal of antitrust policy. See also J. B. RITTALER & I. SCHMIDT, DIE CHICAGO SCHOOL OF ANTITRUST ANALYSIS (1986), at 105-14 [hereinafter RITTALER & SCHMIDT].

5. The opponents of the Chicago School, the "other side" is a group of scholars which strongly oppose the neoclassical, non-interventional view of the Chicago School. Although they have in details different views, they agree that antitrust pursues more goals than an merely efficiency goal. The group of these scholars will be hereinafter named New Coalition according to Fox, Soul of Antitrust, supra note 1, at 917. Good examples of the "antitrust alternative" which is promoted by the New Coalition are contained in a collection of papers which were presented at the Airlie House Conference, see Fox & Pitofsky, The Antitrust Alternative (papers presented at the Airlie House Conference published in 62 N.Y.U.L.REV. 931 (1987)).

6. See note 4 supra.

7. The New Coalition asserts that American antitrust law pursues the following goals: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as a market governor. For further discussion see notes 162-68 and accompanying text.

8. See notes 134-49 and accompanying text.


10. See notes 150-158 and accompanying text.
11. To the authors knowledge no vertical restraint was challenged during the last two years by the antitrust division.


13. Legal scholars who have either developed the Chicago School approach or are known as supporters of this approach are appellate court judges (e.g. Bork, Easterbrook, Posner, Scalia et al.). Decisions are increasing where neoclassic economic theory replaces analysis of the facts. See, e.g. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 U.S. 1348 (1986); Business Electronics Corp. v. Sharp Electronics Corp., U.S. 108 S. Ct. 1515 (1988).

14. See BLACK'S LAW DICTIONARY 692 (5th Ed. 1983); where the "rule of law" is described as:
   A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. The rule of law, sometimes called "the supremacy of law" provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.

15. For examples of inconsistent ruling of the courts see notes 254-263 and 452-461 and accompanying text. See also the Supreme Court's decision in Business Electronics notes 367-409.


18. RITTALER & SCHMIDT, supra note 4 (stating that the Chicago School's theory is a "giant on feet of clay"); id., at 112.

19. See notes 209-225 and accompanying text.

20. See MAXEINER, supra note 17, at 1-4, 116-22.

21. Fox, Soul of Antitrust, supra note 1, at 917.


24. The GWB was effective Jan. 1, 1958.

25. It is to note that the German antitrust law follows a civil law system. Therefore, the statute itself and the motivation of the lawmaker which led to its enactment and its amendments directly reflect the policy consideration of the German antitrust law. Policy decisions are not made by the courts. Furthermore, the interpretation of antitrust law is restricted by the statutory language and the legislative intent. See note 59 infra.


29. See e.g. Mitchel v. Reynolds, 1 P.Williams 181, 24 Eng.Rep. 347 (K.B. 1711)(in this case a covenant not to com-
upheld by the court as an 'ancillary restraint'; the court recognized that the restraint in question was justified. This case gave birth to the 'rule of reason' ancillary restraints). However, 300 years earlier in the Dyer's Case a similar covenant was held void because it was against the common law; Y.B. 2 Hen. V 5, pl. 26 (1415).

30. For an overview of the history of the antitrust laws see H. THORELLI, THE FEDERAL ANTITRUST POLICY-ORIGINATION OF AN AMERICAN TRADITION (1954).

31. See e.g. E. GELLHORN, ANTITRUST LAW AND ECONOMICS, 3rd. Ed. (1986), at 17. Gellhorn gives the example of the Standard Oil Trust. The attorneys of Standard Oil Company created the trust as a legal innovation from the theory of stockholders' voting trusts. Trusts were formed to control a number of major industries, such as fuel oil, sugar, cotton, lead, and whiskey. The label 'trust' was also used to describe suspect business combinations. Id., at 17 note 1.

32. See GELLHORN, supra note 31, at 17-19.


34. Id.

35. See GELLHORN, supra note 31, at 25.

36. See e.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).


38. 85 F. 271 (6th Cir. 1898)(Judge Taft's decision in Addyston Pipe set the course for further reasoning under the Sherman Act. Judge Taft gave examples of restraints he held defendable because their reasonableness).

United States, 356 U.S. 1 (1958); National Society of Prof.
Maricopa County Medical Society, 457 U.S. 332 (1982); NCAA
v. Board of Regents 468 U.S. 85 (1984); FTC. v. Indiana
Federation of Dentists, 106 U.S. 2009 (1986). In Northern
Pac. Ry, the Supreme Court explained the per se rule:
"[T]here are certain agreements or practices which because
of their pernicious effect on competition and lack of any
redeeming virtue are conclusively presumed to be un-
reasonableness and therefore illegal without elaborate in-
quiries as to the precise harm they have caused or the busi-
ness excuse for their use." Id., at 5.

40. See, e.g., Board of Trade of the City of Chicago v.
United States, 246 U.S. 231 (1918). Justice Brandeis
described the rule of reason approach in Chicago Board of
Trade:
The true test of legality is whether the restraint
imposed is such as merely regulates and perhaps
thereby promotes competition or whether it is such
as may suppress or even destroy competition. To
determine that question the court must ordinarily
consider the facts peculiar to the business to
which the restraint is applied; its condition
before and after the restraint was imposed, the
nature of the restraint and its effect, actual or
probable. The history of the restraint, the evil
believed to exist, the reason for adopting the
particular remedy, the purpose or end sought to be
obtained, are all relevant factors.

Id., at 238. For an attempt to interpret the rule of reason
of the Chicago Board of Trade court, see P. CARSTENSEN, THE
CONTENT OF THE HOLLOW CORE OF ANTITRUST: THE CHICAGO BOARD
OF TRADE CASE AND THE MEANING OF THE "RULE OF REASON" IN
RESTRAIN OF TRADE ANALYSIS, published by Institute for
Legal Studies, University of Wisconsin (1987).

41. See e.g. United States v. Arnold, Schwinn & Co., 388
U.S. 365 (1967).

42. Id.

36 (1977)(Sylvania overruled United States v. Arnold,
Schwinn & Co., 388 U.S. 365 (1967) and thus put an end to
the "Schwinn decade." The Sylvania court held that vertical
restraints constitute no longer a per se violation of the
antitrust laws and are generally subject to rule of reason scrutiny). Id., at 38.


47. Supra note 45.


49. See, e.g., Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

50. However, in the area of tying arrangements some uncertainties exist. See ABA MONOGRAPH NO. 8, VERTICAL RESTRICTIONS UPON BUYERS LIMITING PURCHASES OF GOODS FROM OTHERS (1982). See Jefferson Parish Hospital District No. 2 v. Hyde, 104 S.Ct. 1551 (1984) (Jefferson Parish indicates that tying arrangements will not be challenged as per se violation of the antitrust law when the seller of the tying product has market power. In Jefferson Parish the Court held that 30% market share was not sufficient to condemn a tie between hospital care and anesthesiological services as per se violation of Sec. 1 Sherman Act).

51. 433 U.S. 36 (1977)(abound literature is dealing with Sylvania, for a list of publications, see 49 Antitrust Law Journal 1639 (1980)).
52. 388 U.S. 365 (1967).


55. See, e.g., 49er Chevrolet v. General Motors Corp., 803 F.2d 1463 (9th Cir. 1986); Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978). For further discussion, see notes 254-263 and accompanying text.

56. The Department of Justice filed in Monsanto an amicus curiae brief arguing that the per se rule against resale price maintenance is inappropriate.

57. Professor Ponsoldt remarks that Chicago Scholars promote their view that "antitrust laws should be applied only in a manner that increases economic efficiency. But, utilizing a creatively deceptive transformation, [they have] defined 'efficiency' in neoclassical economic terms to mean maximization of aggregate social wealth without regard for the distribution of that wealth or its political consequences." Flynn & Ponsoldt, Legal Reasoning, at 1126-27 note 6 (referring to Ponsoldt, On the docket: Robert Bork, Wall St. J., Sept. 24, 1987 at 27 (letter).

58. See Fox, Antitrust, Economics, and Bias, 2 ANTITRUST 6 (1988), at 7 ("the formulation of the economic question may be crucial to the legal outcome in antitrust adjudication").

59. German cartel law is stated in a comprehensive statute and seeks to attain a specific norm. A decision is found through subsumption of a particular situation under a given norm. Although ambiguous language has to be interpreted by the courts the interpretation of the law is limited by certain principles of interpretation, such as policy and intent of the law, wording of the law, and history of the law. The interpretation is never allowed to go beyond the law. For a description of method how to interpret a statutory norm, see
K. LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT (5th Ed. 1983). German cartel law favors consistency and employs centralized and specialized decision makers. See MAXEINER, supra note 17, at 5. But, also, under the German statutory system it is possible that a violation of antitrust law constitutes a violation of the Law against Unfair Competition or other laws. See V. EMMERICH, KARTELLRECHT (1982), at 211.


64. Id.


66. See, e.g., Asbill, Starling; Recurring Themes in Franchise Termination Litigation, 7 Franchise Law Journal 1 (1988), at 23 note 2 (citing several state statutes).

67. See, e.g., the proposal for Georgia S. Bill No. 177 (1987). "Gasoline Marketing Retail Sales: Prohibitions" (this legislature would have prevented oil companies from opening retail gas stations; the bill responds to the coercive practices of vertically integrated oil companies against their retailers to achieve vertical integration). However, after the proposed bill had passed both houses of the Georgia legislature it was vetoed by Governor Harris on March 20, 1987.

68. See L.B. SCHWARTZ, J.J. FLYNN, H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (1983), at 15 and 793. See also Baxter, The Viability of the Vertical Restraints
Doctrine, 75 Cal. Law. Rev. 933 (1987), at 949 (Baxter
states that "the attorneys general of the several states
have behayed, in all too many instances, as political oppor-
tunists, rushing in to supply incoherent and damaging state
law doctrines, with the associated populist rhetoric, where
federal law has been rationalized.").

69. See e.g. United States v. Trans-Missouri Freight Ass'n,
166 U.S. 290 (1897)(in this early interpretation of the
Sherman Act the Court condemned according to the statutory
language of Sec. 1 Sherman Act every restraint of trade
without exception as violation of Sec. 1 Sherman Act). But
see Hopkins v. United States, 171 U.S. 578 (1898)(this case
was a retreat from the rigid position of Trans-Missouri
Freight Ass'n. The Court held that only 'direct' or 'im-
mediate' restraints were condemned under Sec. 1 Sherman Act)

70. 38 RGZ 155 (Reichsgericht = German Supreme Court before
SCHRICKER, & W. FIKENTSCHER, GERMAN INDUSTRIAL PROPERTY,
COPYRIGHT AND ANTITRUST LAWS (published by the Max Planck
Inst. for Foreign and Internat. Patent, Copyright and Com-
petition Law, Munich in IIC Studies, Volume 6, 161
(1983)[hereinafter Fikentscher, Introduction].

71. Gesetz gegen Wettbewerbsbeschränkungen (in der Fassung
der Bekanntmachung vom 24. September 1980), BGB1. I at 1761
(1980)[hereinafter GWB]. The GWB was effective 1.1.1958.

72. See notes 172-184 and accompanying text.

73. EMMERICH, supra note 59, at 22-23.

74. Möschel, Use of Economic Evidence in Antitrust Litiga-
tion in the Federal Republik of Germany, 32 Antitrust Bul-
letin 523 (1987), at 524 [hereinafter Möschel, Economic
Evidence].

75. See Möschel, Economic Evidence, supra note 74, at 536.

76. See supra note 59.

77. See Fikentscher, Introduction, supra note 70, at 164;
Möschel, Economic Evidence, supra note 74, at 524.
78. See Fox, Soul of Antitrust, supra note 1, at 917.

79. Every major recently published German treatise dealing with restraints of competition under the GWB discusses the Chicago School's economic approach. See e.g., M. GANAL, DIE HANDELSRECHTLICHE UND KARTELLRECHTLICHE BEURTEILUNG VON AGENTURSYSTEMEN (1986); M. MARTINEK, FRANCHISING (1987); I. SCHMIDT, WETTBEWERBSPOLITIK UND KARTELLRECHT, (2nd Ed. 1987); O. TYLLACK, WETTBEWERB UND BEHINDERUNG: EINE RECHTSVERGLEICHENDE STUDIE ZUR BEURTEILUNG VON INDIVIDUAL- UND WETTBEWERBSBEHINDERUNGEN NACH DEUTSCHEM UND AMERIKANISCHEM RECHT (1984); V. BEHR, DER FRANCHISEVERTRAG: EINE UNTERSUCHUNG ZUM RECHT DER USA MIT VERGLEICHENDEN HINWEISEN ZUM DEUTSCHEN RECHT (1976); Markt, Stand und Entwick lungstendenzen des US-Antitrustrechts aus der Sicht eines deutschen Kartellrechtsanwenders, FIW Schriftenreihe 201 (1988); Toepke, Antitrustsprüchpraxis 1985/86, FIW Schrif tenreihe 175 (1987); for a German treatise analyzing the Chicago School's economic theory see J.B. RITTALER & I. SCHMIDT, DIE CHICAGO SCHOOL OF ANTITRUST ANALYSIS (1986).

80. See RITTALER & SCHMIDT, supra note 79, at 122. For example, the Vertical Restraints Guidelines have been analyzed by German scholars whether they could be of interest with regard to the sometimes cumbersome and difficult application of § 18 GWB. However, although the idea of establishing quantitative thresholds was considered positively the underlying ideas of the Chicago School, especially the fact that intrabrand competition was ignored, were rejected as appropriate standard for the GWB's application. See Junius & König, Die Richtlinien des US-Justizministeriums zu vertikalen Wettbewerbsbeschränkungen, Recht der Internationalen Wirtschaft, 364-67 (1985), at 367; Schmidt & Kirschner, Darstellung und wettbewerbspolitische Würdigung der U.S. Vertical Restraints Guidelines, Wirtschaft und Wettbewerb (Int.) 781-91 (1985), Kapp, Die neuen Vertical Restraints Guidelines der Antitrust Division des U.S. Department of Justice: Vertikalbindungen auf dem Weg zur per se-Legalität, Recht der Internationalen Wirtschaft, 677 -84 (1985), at 679, 683-84. For a harsh rejection of the Chicago School's approach see Fezer, Aspekte einer Rechtskritik an der Economic Analysis of Law und am Property Rights Approach, 41 JURISTENZEITUNG 817 (1986) (Fezer alleges that economic theory does not comply with the law. Fezer states, for example, that social effects and other goals, for example protection of the environment are neglected by economic theory). Id., at 822-24.

81. See Braun, supra note 17, at 362.
82. Compare, for example, the Merger and Vertical Restraints Guidelines of the Department of Justice (supra note ...) with the 1977 and 1980 amendments of the GWB.

83. For further information about the GWB and English translations of the GWB see generally R. MUELLER, M. HEIDENHAIN & H. SCHNEIDER, GERMAN ANTITRUST LAW (3rd Ed. 1984). See also F. BEIER, G. SCHRICKER, & W. FIKENTSCHER, supra note 17. For articles dealing with the treatment of vertical restraints and strategic market conduct written in English by German scholars or scholars who are familiar with the German law see Gerber, supra note 65; Möschel, Economic Evidence, supra note 74; Schmidt, Different Approaches and Problems in Dealing with Control of Market Power: A Comparison of German, European, and U.S. Policy Towards Market-Dominating Enterprises, 28 ANTITRUST BULL. 417 (1983).

84. Cartels, for example, are prohibited under § 1 GWB. No rule of reason excuses a prohibited cartel. But §§ 2 - 8 GWB provide specific exemptions for certain cartels, such as export cartels, crisis cartels, cartels for rationalization, specialization cartels, rebate cartels, import cartels, and cartels in the public interest. However, the prerequisites for the application of an exemption norm are laid down in the specific norm.

85. Legally effective cartels agreements are prohibited by § 1 GWB. To enable the Cartel Authorities to challenging so-called 'tacit' or 'gentlemen agreements' -- which are not legally effective -- the GWB was amended by § 25 GWB. § 25(1) GWB states that this conduct is similarly prohibited.

86. This are all agreements which are not 'cartel agreements', most of these agreements are vertical. § 15 GWB prohibits resale price maintenance; § 18 GWB deals with (mostly vertical) restraints which are imposed in a contractual relationship; § 20 GWB deals with restraints which are used in connection with protected rights, such as patents.

87. The GWB addresses in §§ 22, 26, 37 GWB abusive conduct of firms. Sometimes these firms have to be market dominating (§ 22 GWB). Sometimes these firms have to be either market dominating or have to have that a strong position in relation to their customers that a relation of economic dependency exists (§§ 26, 37 GWB). Furthermore, § 25 GWB prohibits every conduct which is aimed to compel other enterprises to de facto acceptance of contracts forbidden by
the GWB, e.g. resale price maintenance (therefore, § 25 GWB prohibits conduct which would be considered legal under the 'Colgate doctrine' in American antitrust law).

88. GWB § 24.

89. § 1 GWB (exemptions from § 1 GWB are enumerated in §§ 2-8 GWB).

90. § 15 GWB.

91. § 18 GWB.

92. §§ 20; 21 GWB.

93. § 15 GWB.


95. See GANAL, supra note 79, at 284-326. See also J. KURTENBACH, DIE BEURTEILUNG VON BEZUGS-UND ALLEINVERTRIEBSBINDUNGEN IN FRANCHISE VERTRÄGEN NACH § 18 GWB UND ART. 85 EWG-V. (1986).

96. The GWB distinguishes between agreements pursuing a common purpose and restrictive agreements which are imposed in a contractual relationship. It is contested what 'common purpose' means and a lot has been written about this term. However, for the purpose of this study it is sufficient to clarify that 'common purpose' is not given when in a contractual relationship both parties 'profit' from their contract, e.g. sale of goods or services.

97. Therefore, some scholars in Germany support the view that the GWB has to be interpreted as to take an "functional" (based on the level(s) of the arrangement) rather than a "legal" approach (based on the legal quality of the underlying agreement), e.g. E. Steindorff, Gesetzeszweck und gemeinsamer Zweck des § 1 GWB, 1977 Betriebsberater (BB) 569 (1977).


100. For a description of the term "powerful" firm see note .

101. The German Supreme Court held that true agency relationships may escape condemnation under § 15 GWB. See WwW/E BGH 2238 (EH-Partner Vertrag).

102. § 25(2) GWB. See notes 300-309 and accompanying text.

103. See Möschel, Economic Evidence, supra note 74, at 533. See also notes 492-504 and accompanying text.

104. See notes 513-543 and accompanying text.

105. Barbier, Bewährtes Instrument mit Schönheitsfehlern, Süddeutsche Zeitung of July 28, 1982, at 4. (Editorial in the "Süddeutsche Zeitung" (one of the leading German newspapers) when the twenty-fifth anniversary of the GWB was reason for comment).

106. See MAXEINER, supra note 17, at 2 et seq.

107. See Braun, supra note 17, at 368. MAXEINER, supra note 17, at 116.

108. This argument is focused on in Flynn & Ponsoldt, Legal Reasoning, supra note 54.

110. For a discussion of Business Electronics, see notes 367-409 and accompanying text.


112. This problem is addressed in MAXEINER, supra note 17, at 116-22. See also Braun, supra note 17, at 368.

113. Flynn & Ponsoldt, Legal Reasoning, supra note 54, at 1151.

114. Unlike American antitrust law the provisions of the GWB are directed against conduct with effect for the future. The GWB can only prohibit present conduct and conduct which might have effects in the future. For example the use of vertical restraints can be prohibited if harm for the market structure is to expect. Past-directed legal consequences are not available under the GWB. This difference has a strong impact on the application, effectiveness and enforcement policy of the antitrust laws. When under the GWB a practice involving a policy decision is considered to be harmful the worst which can happen is that the party which employs the practice has to abandon the practice. Private claims are under the GWB generally not available. However, some important exceptions exist (§§ 26, 35 GWB). Under the GWB approach, the businessmen has not to face the consequences of possible criminal sanctions or (treble) damage suits when he enters a restrictive agreement. Particularly the fear of treble damage suits combined with extremely high costs of the lawsuit which might deter businessmen from using procompetitive restraints is not known under the GWB. Moreover, the GWB formulates prohibition norms very clearly, comparable to the per se rules in the American antitrust law, these norms provide businessmen and courts with clear and unambiguous guidelines. Although these provisions might outlaw some harmless or procompetitive conduct the enhanced rule of law justifies this approach.
The American antitrust law, however, knows mainly past-directed legal consequences such as civil damages and criminal sanctions. See MAXEINER, supra note 17.

115. The way how the antitrust laws are enforced and who may invoke a violation of the antitrust laws determines which role they play for the protection of a free market place. The best law remains useless if it is not enforced. Under the GWB basically the Federal Cartel Authority is authorized to challenge antitrust violations, only a few provision allow the individual to challenge restraints (e.g. §§ 26(2), 35 GWB). The Federal Cartel Authority surveys the market and market developments and will act if a certain conduct or the widespread use of a restraint constitutes a threat for free market competition. The Federal Cartel Authority is equipped with experts and the necessary information to screen harmful conduct out. This concentration of enforcement authority contributes in avoiding that courts (if the addressee of a "cease and desist order" challenges this order before court) have to deal with cases which are not representing harm for competition. On the other hand the antitrust enforcement relies on the quality and willingness of the enforcement agency. However, if one accepts minor shortcomings, it is to acknowledge that the Federal Cartel Authority fulfills its duty in protecting free market competition. See Möschel, Economic Evidence, supra note 74, at 550. A second feature which contributes in avoiding inconsistent ruling of the courts and thus enhances predictability and reliability of the law is the fact that the decisionmaker in the German system is highly specialized. Furthermore, lower courts generally adhere to the ruling of the superior courts. Moreover, almost every "bigger" antitrust case might be appealed to the highest court in Germany, the Bundesgerichtshof (German Supreme Court), which itself has several panels (chambers) of judges. One of these panels is specialized in dealing with antitrust cases. This procedure contributes enhancing the "rule of law."

116. See e.g., Ponsoldt, The Unreasonableness of Coerced Cooperation: a Comment upon the NCAA Decision's Rejection of the Chicago School, 31 ANTITRUST BULL. 1003 (1986), at 1045-52 [hereinafter Ponsoldt, NCAA].

117. Sec. 5 FTC ACT, see notes 60, 61 and accompanying text.

118. Sec. 4 of the Clayton Act gives private parties the right to sue antitrust violators for treble damages, plus attorneys fees.

120. See MAXEINER, supra note 17, at 4-8.

121. See e.g. §§ 26, 35 GWB which enable individuals to challenging discriminatory conduct. See also notes 534-538 and accompanying text.

122. The Court of Appeals for West Berlin is named Kamergericht (KG).

123. An appeal can be filed to the court when an administrate appeal procedure with the Federal Cartel Authority did not help.

124. Braun, supra note 17 points out that "'Fishing expeditions' and unmeritorious antitrust suits would be curtailed if the courts generally awarded attorney's fees to defendants who prevail in the lawsuit." Id. at 367.

125. Braun alleges that "[I]f American judges would assert greater control over civil antitrust proceedings generally (as well as over other forms of civil litigation), and particularly if the scope of pre-trial discovery were limited to areas of inquiry determined in advance by the judge instead of by the lawyers, the time and expense of pre-trial proceedings might be significantly reduced." Braun, supra note 17, at 366-67. See generally MAXEINER, supra note 17. See also Langbein, The German Advantage in Civil Procedure, 52 U.CHI.L.REV. 823 (1985).

126. Fox, Soul of Antitrust, supra note 1, describes the scenario as a "battle", id., at 917.

127. The headline of the National Law Journal used the word "counterrevolution" to describe the present discussion regarding the proper application of the antitrust laws. See Headline of the National Law Journal on May 4, 1987: "Steam May Be Building for a Counterrevolution in Antitrust", Nat'l L.J., May 4, 1987, at 1. For the background
of this headline see Fox & Pitofsky, The Antitrust Alternative, 62 N.Y.U.L. REV. 931, at 932.

128. In an article dealing with the Supreme Court's rejection of the Chicago school in the NCAA case Professor Ponsoldt stated: "The Supreme Court has dealt the Chicago school its most solid body block since Jay Bringswanger's days." See Ponsoldt, NCAA, supra note 116, at 1044.

129. This argument was emphasized in Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).


131. See, for example, Change in Administration, Change in Antitrust? Interview with Dean Robert Pitofsky, published in 2 ANTITRUST 24 (1988).

132. It is to note that neither the Chicago School nor the New Coalition represent a single view in detail, but that under the label "Chicago School" and "New Coalition" the prevailing view of the majority of the proponents of the respective view is addressed. For a list of Chicago scholars see note ///. A good overview of the antitrust alternative promoted by the New Coalition see e.g. The Antitrust Alternative (papers presented at the Airlie House Conference published in 62 N.Y.U.L.REV.(1987).

133. For examples, see notes 147-149; 168 and accompanying text.


135. The argument that consumers might be "irrational and manipulable" is not accepted by the Chicago School: "the Chicago theorist rejects this assumption as inconsistent with the price theory". Posner, Chicago School, supra note
134. at 930. Consequently the Chicago School asserts that "[t]he rational consumer will pay for advertisement ... only to the extent that advertising reduces his costs of search. The services provided by advertising are therefore real services." Id. However, if one looks at advertisements most often the information provided is not suited and not intended to reduce costs of search but rather to create preferences between similar or identical products. If according to the Chicago School assumption this advertising will not be honored by the consumers billions of dollars in advertising expenses would be wasted. However, if the Chicago School's assumption that manufacturer behave rational is correct, the theory of the Chicago School must be either wrong with respect to consumers or manufacturers.

136. See Baxter, supra note 68, at 948. However, also the Chicago School recognizes the problem of facilitating car- telization, but accepts it only for extraordinary cir- cumstances. See also the Court's reasoning in Business Electronics (infra notes 367-409 and accompanying text).


139. BORK, supra note 138, at 111.

140. Id.

141. BORK, supra note 138, at 7. This argument, however, is based on the assumption that consumers automatically participate in an increase of business efficiency. The consumer will only benefit from an efficiency increase if competition forces the buyer to pass the increase on to the consumers. Under the Chicago School theory the competitive pressure is maintained through the threat of new markets entrants which are able to enter the market in the absence of entry bar- riers (the absence of entry barriers is another assumption of the Chicago School theory). But see RITTLER & SCHMIDT, supra note 4 (opposing this assumptions as simplistic, unrealistic and single sided). See also Ponsoldt, Enrichment, supra note 111.
142. Bork states: "Productive efficiency, like allocative efficiency, is a normative concept and is defined in terms of consumer welfare. Since a free market system assumes that consumers define their own welfare, it follows that productive efficiency consists in offering everything whether products or services, that consumers are willing to pay for." BORK, supra note 138, at 104.

143. Allocative efficiency is defined by the Chicago School as "the placement of resources in the economy, a question of whether resources are employed in tasks where consumers value their output most." BORK, supra note 138, at 91. Applying neoclassical price theory the Chico School reaches the result marginal costs will equal the market price. Id., at 93.

144. Productive efficiency is defined by the Chicago School as "the effective use of resources by particular firms." BORK, supra note 138, at 91.

145. See RITTALER & SCHMIDT, supra note 4, at 48.

146. Bork notices that a multiple-goal antitrust law might be attracting, but he argues that the exclusive orientation on consumer welfare is superior:
   [A] consumer welfare goal is superior in that it
   (1) gives fair warning,
   (2) places intensely political and legislative decisions in Congress instead of the courts,
   (3) maintains the integrity of the legislative process,
   (4) requires real rather than unreal economic distinctions, and
   (5) avoids arbitrary or anticonsumer rules.
   A multiple-goal approach can achieve none of these things.
   BORK, supra note 138, at 81. For arguments questioning the superiority of a consumer welfare goal see notes 150-167 and accompanying text. It is to note that the German Law against Restraints of Competition pursues a multiple-goal approach without being exposed to complaints by either manufacturers or consumers. Moreover it is to remark that Congress had a multiple-goal approach in mind when enacting antitrust law. The history of American antitrust law shows that American Congress enacted the antitrust provisions of the Sherman Act in 1890 as reaction to the trusts. See H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955). See e.g., Brown Shoes Co. v. United States, 370 U.S. 294 (1962), Justice Warren argued that Congress' concern was also the accumulation of power. Id. The discussion which goals should govern the American
antitrust policy has not ended yet. See Hovenkamp, Distribu-
tive Justice and the Antitrust Laws, 51 GEO. WASH. L. REV. 1
(1982); Schwartz, "Justice" and Other Non Economic Goals of

147. See, Williamson, Assessing Vertical Market Restric-
tions: Antitrust Ramifications of the Transaction Cost Ap-


149. BORK, supra note 138, at 297.

150. Fox, Soul of Antitrust, supra note 1, at 919.

151. Flynn & Ponsoldt, supra note 54, at 1133-34.

152. See Hovenkamp, Antitrust Policy After Chicago, 84
Mich.L.Rev. 213 (1985)(criticizing the Chicago School's ef-
ficiency approach pointing out that the theory is too static
in comparing the extreme hypotheticals of purely competitive
and monopolized markets). RITTALER & SCHMIDT, supra note 4,
at 57-72 are attacking the Chicago School theory for the
same reasons. They argue that the Chicago School failed to
implement newer research in the area of the oligopoly theory
and with regard to the interdependencies of the size of a
firm and its profits. Id.

153. Flynn & Ponsoldt, supra note 54, at 1133-34.

154. Flynn & Ponsoldt, supra note 54, at 1131. Citing the
Supreme Courts decision in Matsushita Elec. Indus. v. Zenith
Radio Corp., 475 U.S. 574 (1986) as example that neoclassi-
cal theory leads to the result that facts of actual disputes
are substituted by the assumptions of the model (and though
the reality is replaced by artificial assumptions). It is
argued that the Supreme Court "ignored the facts of the
antitrust dispute, the goals of antitrust policy, the
separate functions of judge and jury, and the role of sum-
mary judgment in Matsushita", id. at 1131 n. 21. See also
Business Electronics Corp. v. Sharp Electronics Corp.,

155. Flynn & Ponsoldt, supra note 54, at 1136.
156. However, although the contesting views agree in this point they pursue different goals. Chicago scholars want to implement their views into the law. The New Coalition wants to use legislation to oppose the Chicago School's theory.

157. See Ponsoldt, The Enrichment of Sellers as a Justification for Vertical Restraints: A Response to Chicago's Swif- 
Fox, Soul of Antitrust, supra note 1, at 920.

158. For the view that economic theory should support rather than lead antitrust reasoning and that noneconomic arguments should also be considered see L. A. SULLIVAN, ANTITRUST (1977), at 1-13.

159. See Adams & Brock, Antitrust and Efficiency: A Comment, 62 N.Y.U.L.Rev. 1116 (1987)(The article deals primarily with the appropriate treatment of mergers and acquisitions. Nevertheless, the underlying policies of antitrust are also valid for vertical restraints). Adams and Brock argue that purpose of antitrust is "to preserve not only individual freedom, but also more importantly, a free system", id. at 1116. The argument addresses the freedom of the individual and the freedom of the system. According to the view of Adams & Brock freedom of both is pursued by the antitrust laws. This argument seems to reflect more properly the purpose of the antitrust laws than the statement that antitrust laws are designed to protect competition, not competitors. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n. 14 (1980); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). Otherwise it could inferred from the latter statement that competition could exist without competitors. Compare Flynn & Ponsoldt, Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, 62 N.Y.U.L.Rev. 1125. "The competitive process, not 'competition', is the key concept in the analysis. Id., note 87. Interestingly the GWB pursues a similar approach towards the value of protecting competition and competitors by favoring the competitive process which, however, is dependent from a competitive structure, i.e. a multitude of businessmen which are striving for business. See, e.g., Fikentscher, Introduction, supra note 70, at 168.

160. See Fox, Antitrust, Economic, and Bias, supra note 58, at 10.

162. See notes 147-168 and accompanying text.


164. See Flynn & Ponsoldt, Legal Reasoning, supra note 54, at 1137.

165. For description of the historic development of the Sherman and Clayton Acts see THORELLI, supra note 30.

166. See, e.g. the dissent of Justice William O. Douglas in United Steel Co. v. Columbia Steel Co., 334 U.S. 495, 534 (1948). "Size ... should ... be jealously watched. In final analysis, size ... is the measure of the power of a handful men over our economy. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist." Id. at 536.


168. Professor Flynn, for example, supports a rule of reason approach towards resale price maintenance but Professor Ponsoldt testified in favor of H.R. 585, the Freedom from Vertical Price Fixing Act". Ponsoldt, Enrichment, supra note 111, at 1170.

169. See MAXEINER, supra note 17, at 116.

170. MARTINEK, supra note 79, at 468.

171. See SCHMIDT, supra note 79.

172. See Braun, supra note 17, at 360. See generally W. MÖSCHEL, RECHT DER WETTBEWERBSBESCHRANKUNGEN (1983).

173. MAXEINER, supra note 17, at 7. Maxeiner points out that R. Bork's criticism of American antitrust applies to the GWB as well. Maxeiner questions why the antitrust laws are
judged so differently in Germany and America although the same criticism applies. Id., at 7 note 17.


175. Id.


177. See Möschel, Economic Evidence, supra note 74, at 525.

178. SCHMIDT, supra note 79, at 81-84.

179. This problem is reflected in the discussion of the workability competition concept. See notes 188-200 and accompanying text.

180. SCHMIDT, supra note 79, at 11.

181. See MARTINEK, supra note 79, at 504.

182. RITTALER & SCHMIDT, supra note 4, at 104-14.


184. See MÖSCHEL, WETTBEWERBSBESCHRÄNKUNGEN, supra note 172, at 3 et seq.

185. The different views are listed in MARTINEK, supra note 79, at 468 et seq.

186. In 1968 A. Schüßler was the last scholar who concluded on the basis of neoclassical theory that all vertical restraints should be per se illegal. See Schüßler, 19 ORDO 171 (1968).

187. See F. RITTNER, WIRTSCHAFTSRECHT (1979), at 279.


193. See MARTINEK, supra note 79, at 475.

194. For example if an restraint actually increases output and decreases the prices this does not necessarily mean that the restraint was benign. It might be possible that without the restraint the output might have been even higher at lower prices.

195. See MÖSCHEL, WETTBEWERBSBESCHRÄNKUNGEN, supra note 172, at 44. See also Fox, Antitrust, Economics, and Bias, 2 ANTIMONopoly 6 (1988), at 6-10.

196. MARTINEK, supra note 79, at 477.

197. Id.

199. This is one of the criticism of the New Coalition, see Fox, Antitrust, Economics, and Bias, supra note 58, at 7.

200. See Martinek, supra note 79, at 482-84.


203. See B. Tietz, supra note 201, at 12 and 101.

204. Benisch, supra note 201, at 96.


206. Id.

207. Grosseketteler warns that economic experience shows that generally allowing cooperation leads to more market imperfections rather than improving markets. Grosseketteler, supra note 198, at 339. For further examples illustrating the dynamic of concentration processes see G. Wöhe, Allgemeine Betriebswirtschaftslehre (1985), at 316 et seq.


212. See E. HOPPMANN, WETTBEWERB ALS AUFGABE (1968), at 61 et seq.

213. MARTINEK, supra note 79, at 499.

214. Id., at 500.

215. See MÖSCHEL, WETTBEWERBSBESCHRÄNKUNGEN, supra note 172, at 49.

216. F. RITTNER, WIRTSCHAFTSRECHT, supra note 187, at 281.


218. MARTINEK, supra note 79, at 502.

219. Id., at 503.

220. Id., at 504.

221. MÖSCHEL, WETTBEWERBSBESCHRÄNKUNGEN, supra note 79, at 17 (addressing the oligopoly problem).


223. Fikentscher, Introduction, supra note 70, at 163.

224. The problem of entry barriers and market foreclosure is recognized by the GWB. See notes 468-543 and accompanying text.

225. See SCHMIDT, supra note 79.
226. See, e.g. Easterbrook, supra note 130, Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 27 J.L. & Econ. 363 (1985). For further information, see also the articles in 30 ANTITRUST BULL.


228. See notes 254-263 and accompanying text.

229. See note 55 supra.

230. For example, the Vertical Restraints Guidelines have been criticized by a majority of the House Judiciary Committee as "designed to influence courts in private cases to which the Division is not a party" in an area "where it has unmistakably shown its intention not to enforce the law for the past four years."., 48 BNA ATRR 1006 (June 13, 1985).


232. Although the GWB does not know the rule of reason and the per se rule, it is slightly incorrect to say that § 15 GWB establishes a "per se rule". A more accurate description of the GWB's approach is that the prohibition principle applied to resale price maintenance has an identical effect to the per se rule under American antitrust law.

233. § 15 GWB provides in full:
Agreements between enterprises with respect to goods or commercial services relating to markets located within the area of application of this Act shall be null and void, insofar as they restrict a party to them in its freedom to determine prices or terms of business in contracts which it concludes with third parties in regard to the goods supplied, other goods, or commercial services.
234. 220 U.S. 373 (1911).

235. 220 U.S. 373, at 408-09.

236. Id.

237. Id.


239. See Baxter, supra note 68, at 934-35.

240. See SCHWARTZ, FLYNN & FIRST, supra note 68, at 588-95.


244. 310 U.S. 150, note 59 (1939).


246. _____ U.S. _____; 108 S.Ct. 1515 (1988), at ...

247. Unilateral action can only be challenged as an attempt to monopolize under Sec. 2 Sherman Act. Under the GWB
unilateral conduct not within the scope of Sec. 2 Sherman Act may lead to antitrust liability.


249. Id. See also Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 110 (3rd Cir. 1980). The Court clearly stated: "Unilateral action, no matter what its motivation, cannot violate § 1." Id.


251. Id.

252. See notes 264-279 and accompanying text.


254. 572 F.2d 883 (1st Cir.), cert. denied, 439 U.S. 833 (1978) ("the entire thrust of the GTE Sylvania opinion is that departures from the rule of reason standard must be based on demonstrable economic effects rather than formalistic line drawing"). Id. at 885.

255. 433 U.S. 36, 57.

256. Id.

257. 572 F.2d 883, 885.


261. 803 F. 2d. 1463 (9th. Cir 1986). See Ponsoldt, Enrichment, supra note 111, at 1167.

262. 803 F.2d 1463, 1468.

263. 465 U.S. 752.

264. United States v. Colgate Co., 250 U.S. 300 (1919). The Court stated in Colgate: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader of manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Id., at 307.


266. For example, the investment might reflect an effort to build up goodwill for new products, to acquaint sales personnel with new products, or to advertise these products. Furthermore, opportunity costs exist because these efforts could have been spent on another product. Moreover, the dealer itself might lose goodwill when its customer's expectations of getting certain products from this dealer are disappointed. For example, when a customer who bought a certain brand of stereo equipment from a dealer now wants to upgrade his stereo system with equipment of the same brand. The situation gets even worse if a dealer needs to offer his customers a line of supply parts for the equipment sold, such as peripheral equipment for computers.


268. See GELLHORN, supra note 31, at 311.


275. See, e.g., Silberman, supra note 274, at 33. But see Hyde, supra note 265, at 33.

276. 465 U.S. 752.


278. The standard established in Monsanto was that a terminated dealer had to introduce "evidence that tends to exclude the possibility that manufacturer and nonterminated distributors were acting independently", 465 U.S. 752, 764. See also dissent of J. Stevens in Business Electronics, _____ U.S. _____; 108 S.Ct. 1515 (1988), at 1534.

279. See e.g. _____ U.S. _____; 108 S.Ct. 1515 (1988).


281. See Article, Vor dem endgültigen 'Aus' für die Preisbindung, Tagesspiegel (Berlin); June 13, 1973.

282. § 16 GWB. The exemption for books is based on policy reasons, e.g. to ensure that bookstores are not merely concentrating on 'top sellers' and to protect smaller bookstores against price competition from discounters. Insofar the educational goal prevails over the freedom of competition.


285. STRAUB, supra note 284, at 9. The Federal Cartel Authority reported that especially the prices of refrigerators, electrical equipment, winter sporting goods, and cosmetic articles were lowered considerably. Bundestags-Drucksache 7/2250, IV.

286. See GANAL, supra note 79, at 73 et seq.


288. Möschel, Economic Evidence, supra note 74, at 540.


290. § 15 GWB (fully cited supra note 233).

291. EMMERICH, supra note 59, at 100.

292. See Bundestagsdrucksache II/1158, Anlage 1.

293. For example, so-called calculation clauses are prohibited under § 15 GWB.

294. A "most favorable treatment-clause" says that a supplier has to give a dealer the same conditions which he grants to another, more favorably treated, dealer. This clause imposes economic restrictions on the freedom to set prices and thus does not comply with § 15 GWB. See 80 BGHZ 43, 1981 JuS 772.

295. See GANAL, supra note 79, at 107 (citing several decisions of the BGH supporting this view).

297. See Belke, supra note 296, at 244.

298. See MÖSCHEL, WETTBEWERBSBESCHRÄNKUNGEN, supra note 172, at 237.

299. GWB § 25.

300. § 25 (2) GWB.

301. § 25 (2) GWB provides:
Enterprises or associations of enterprises shall not threaten or cause harm, or promise or grant advantages, to other enterprises for the purpose of inducing them to adopt conduct which, under this Act or a decision issued thereunder by the cartel authority, must not be made the subject-matter of a contractual commitment.


304. Id., at 1478-79.


306. The GWB does not know a general discrimination prohibition. But see § 26 (2) GWB. See also notes 534-543 and accompanying text.


310. See notes 529-533 and accompanying text.
311. § 25(2) GWB. For further discussion, see notes 303-309 and accompanying text.

312. § 26 (1) GWB.

313. See OECD Report, supra note 302, at 22. See also SCHMIDT, supra note 79, at 119.

314. Unlike the American antitrust laws the term "boycott" as used in the context of § 26(1) GWB does not require that firms on either the manufacturer level or the dealer level conspire. In the meaning of § 26(1) GWB the term boycott means that one party incites another party not to deal with a third party, the question whether inciting and incited party are on the same or on different levels of distribution is not of importance. This is explainable before the background of the differences in the legal systems. The GWB pursues the policy to define an arguably harmful conduct - no matter if the questionable conduct is horizontal or vertical. The quality of the conduct is decisive. Under the American antitrust laws, however, the question horizontal or vertical is of crucial importance. This might explain why sometimes the courts have problems to adequately address anticompetitive conduct. See MARTINEK, supra note 79, at 523 (Martinek alleges that the horizontal/vertical classification under the American antitrust laws contributes to the susceptibility of the law towards political changes). Id. See

315. For an explanation of the Chicago School's definition of consumer welfare, see notes 139-145 and accompanying text.

316. See supra notes 134-49 and accompanying text.


318. See RITTALER & SCHMIDT, supra note 4, at 88 et seq.

320. See notes 134-146 and accompanying text.

321. See Ponsoldt, Enrichment, supra note 111, at 1168.

322. Id., at 1167.

323. RITTALER & SCHMIDT, supra note 4, at 89.

324. Id. But see BORK, supra note 138, at 294. "It is not certain that resale price maintenance is never actually used for the purpose of policing a manufacturer cartel, but it appears reasonably certain that such use will be so rare and the ease of detection so great that this objection should not stand in the way of the legality of truly vertical restraints". Id.

325. See RITTALER & SCHMIDT, supra note 4, at 89.

326. See I. SCHMIDT, WETTBEWERBSTHEORIE UND WETTBEWERBSPOLITIK, 6. KAP. III 2 b (1981). See also Baxter, supra note 68, at 946 (informational advertising reduces consumers' shopping costs).


328. See Flynn & Ponsoldt, Legal Reasoning,, supra note 54.

329. See Ponsoldt, Enrichment, supra note 111, at 1167.

330. SCHMIDT, supra note 79, at 192, 217 et seq.


332. Id.

333. RITTALER & SCHMIDT, supra note 4, at 105-114. See also notes 134-146 and accompanying text.

335. For a discussion of the free rider problem, see notes 342-361 and accompanying text.

336. See STRAUB, supra note 284, at 10-19.

337. See Baxter, supra note 68, at 935. SCHWARTZ, FLYNN & FIRST, supra note 68, at 590 et seq.

338. Only when bigger stores employ "price strategies" (especially systematically "sales below costs") to drive smaller competitors out of business § 37(a) GWB will apply. Although § 37(a) GWB is aimed to protecting smaller and mid-size competitors it does not intend to protect inefficient businessmen from free market competition. EMMERICH, supra note 59, at 227.

339. See EMMERICH, supra note 59, at 227.

340. STRAUB, supra note 284, at 8-19.

341. See STRAUB, supra note 284, at 8.

342. But see RITTALER & SCHMIDT, supra note 4, at 105-13.

343. See note 147 and accompanying text.

344. Justice Holmes called price cutters "knaves", in his dissent in Dr. Miles: "I cannot believe that in the long run the public will profit by permitting this court to cut reasonable prices for some ulterior service of their own, and thus to impair if not destroy, the production and sale of articles which is assumed to be desirable that the public should be able to get", 220 U.S. at 411-12. But see Schmidt, supra note 79, at 71. Schmidt alleges that nonprice competition such as quality and service competition is generally inferior to price competition and often used to avoid price competition. Id. at 71.

345. See, e.g., R. BORK, supra note 138, at 289 et seq.; Easterbrook, supra note 130, at 13-14 ("No manufacturer
wants to have less competition among its dealers for the sake of less competition. The reduction in dealers' rivalry in the price dimension is just the tool the manufacturer uses to induce greater competition in the service dimension.

346. Interestingly, this argument is used by supporters of the economic theory arguing in favor of a more generous treatment of tying arrangements, who argue that a tying arrangement may be justified by the possibility of dealers cheating on quality.

347. See Comanor, supra note 319.

348. See Mueller, Das Antitrustrecht der USA am Scheidewege, 1986 Wirtschaft und Wettbewerb 533 (1986) (Mueller points out that bigger firms such as Coca Cola, General Motors, Gerber, Gillette, Hershey, IBM, Kodak, and Polaroid charge higher prices than their smaller competitors. Under the assumption of the Chicago School that a big firm is efficient because of economies of scale the effectiveness should result in lower prices. However, according to Mueller these firms have higher rentability because they are not more efficient but they may charge higher prices due to their advertising efforts and reputation). Id. at 543.

349. Mueller, supra note 348, at 547.

350. See Begründung der Bundesdregierung, at 1183.

351. See STRAUB, supra note 284, at 10-18.

352. Id.

353. Id.

354. See Fox, Antitrust, Economic, and Bias, supra note 58, at 7.

356. Id.

357. See RITTALER & SCHMIDT, supra note 4, at 89 and 105 et seq.

358. See RITTALER & SCHMIDT, supra note 4, at 105-113.

359. SCHMIDT, supra note 79, at 86.

360. For the discussion whether economic theory can replace legal reasoning, see 583-591 and accompanying text.

361. See EMMERICH, supra note 59, 295 et seq.

362. See MöscheI, Economic Evidence, supra note 74, at 532.

363. See Ponsoldt, Enrichment, supra note 111, at 1170.


368. The Matsushita Court relied on economic theory and reasoned that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not exist." 106 S.Ct. 1348.


373. Id.


375. Id., at 1517.

376. Id., at 1517.

377. Id., at 1521.

378. See Ponsoldt, Enrichment, supra note 111.


380. Id., at 1520-23.

381. Especially the effects of mighty buyers coercing their suppliers into using restrictive practices might be extremely harmful to competition. A powerful "chain store," for example, might be able to cut off smaller local businessmen from a supply of certain goods. The Chicago school, however, contends that interbrand competition will prevent harm to the market. Although interbrand competition might mitigate the effects of some of these practices, they may be still dangerous for competition, especially when dealers are dependent on certain manufacturers, such as "brand leader". For a more detailed analysis see notes 264-275 and accompanying text. For the treatment of such practices under German law see notes 280-314 and 513-543 and accompanying text.


383. Id., at 1530.

384. Id., at 1532.


387. Id.


389. Id., at 1536.

390. Id., at 1536.

391. Id., at 1535.

392. Id., at 1535.

393. Id., at 1522.

394. Id., at 1525.

395. 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

396. Id.

397. Id. at 282-83.


404. Actually, this argument is touted by proponents of the view that resale price maintenance should be legal. See Liebeler, Intrabrand Cartels' Under GTE Sylvania, 30 UCLA L.Rev. 1 (1982) (arguing that intrabrand cartels among distributors should be per se legal).


406. The dissent in Business Electronic itself addresses this problem in challenging the majority's application of economic theory. In attacking the majority's holding that the restraint is justified "as ancillary to a quite plausible purpose ... to enable Hartwell to provide better services under the sale franchise agreement" the dissent recognizes correctly that the total reliance on economic theory and focusing on plausible purposes could "also be sufficient to trump the per se rule in all other price-fixing cases that arguably permit cartel members to 'provide better services'". Id., at 1536.

407. 595 F.2d 164 (3d Cir. 1979).


410. For a more detailed description of § 25 (2) GWB see notes 300-309 and accompanying text.

411. See notes 300-309 and accompanying text.
412. See EMMERICH, supra note 59, at 195.

413. Id.

414. See SCHMIDT, supra note 79, at 86-91.


418. See, e.g., MARTINEK, supra note 79; SCHMIDT, supra note 79, at 121; E. GELLHORN, supra note 31, at 278 et seq.

419. An effect on interbrand competition is, for example, the possibility that cartelization may be facilitated.

420. See, e.g., E. GELLHORN, supra note 31, at 278-80; L. SCHWARTZ, J. FLYNN & H. FIRST, supra note 68, at 585-90, 629 et seq.; see also ABA MONOGRAPH NO. 8, supra note ..."
427. See notes 264-279 and accompanying text.


433. See ABA MONOGRAPH NO. 8, supra note ..., at 84-97.

434. In an exclusive dealing arrangement normally a buyer agrees to deal exclusively with the products of one seller.


436. Id.


438. 337 U.S. 293 (1940).


444. Id., at 1521.

445. See notes 134-49 and accompanying text.

446. See CARSTENSEN, supra note 40, at 86.


448. See, e.g. Easterbrook, supra note 447.

449. See the analysis of the discussion about the role of antitrust in chapter two (notes 126-68 and accompanying text) and see the arguments raised in the context of resale price maintenance in chapter four (notes 316-25 and accompanying text).

450. Möschel, Economic Evidence, supra note 74, at 533.

451. For a description of the analysis under GWB standards see supra notes 25 and 59.

452. A tie inn is given when the sale of one product is conditioned on the purchase of another, separate product. Tying arrangements is considered to be per se illegal. However the per se rule was weakened by admitting several defenses. See ABA ANTITRUST SECTION, MONOGRAPH NO. 8, VERTICAL RESTRICTIONS UPON BUYERS LIMITING PURCHASES OF GOODS FROM OTHERS (1982), at 1-15. See Jefferson Parish Hospital Distric No. 2 v. Hyde, 104 S.Ct. 1551 (1984).


456. See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (Fortner I); United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) (Fortner II) (in Fortner II a tie-in was held to be legitimate in the absence of market power). See also Kenny & Klein, The Economics of Block Booking, J.L. & Econ. 497 (1983).

457. See e.g., Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980) (in Principe the court held that a modern franchisor offers its franchisee a complete method of doing business and therefore a franchise system is one product), but see Siegel v. Chicken Delight, Inc., 448 F. 2d 43 (9th Cir 1971) (in Siegel the "single product defense" was not accepted; however, in Principe the court stated that [F]ranchising has come a long way since the decision in Chicken Delight." 331 F.2d 303,309). Compare § 18(1) Alt.4 GWB.

458. For an overview, see ABA MONOGRAPH NO.8, supra note 452.


462. § 18(1) Alt.4 GWB.

463. The GWB prohibits under § 18 GWB only tie-ins which involve products "not related to the subject matter of the agreements by their nature or the customs of the trade". Accordingly all other tie-ins are allowed by the GWB.

464. See e.g., WuW/E OLG 995 (1969), "Meto-Handpreisauszeichner".


467. According to the Chicago School's theory the problem of entry barriers is not a serious one. But see Ordover & Wall, A Practical Guide to the Economics of New Entry, 2 ANTITRUST 12 (1988).

468. The GWB does not explicitly distinguish between horizontal and vertical restraints. This has the advantage of allowing the GWB to more easily concentrate on the "quality of the conduct" rather than distinguishing between a vertical/horizontal restraint. However, the "other restraints" of the GWB are basically restraints which are imposed in a vertical relationship. Therefore, one could say that the difference between the American and German antitrust law is more a question of terminology than practical difference. But see Martinek, supra note 79, at 523.

469. See Möschel, Economic Evidence, supra note 74, at 533; Emmerich, supra note 59, at 112-31.

470. See Immenga & Mestmäcker, supra note 94, at 512.

471. See, e.g., the legal presumptions of § 22 (1);(2);(3) GWB. See generally T. Braun, Marktbeherrschungsvermutung und die Amtsuntersuchungspflicht des Bundeskartellamtes.

472. See notes 547-569 and accompanying text.

473. The term "market power" embraces the position of the firm into the market. A "powerful" firm may have either dominant market power in the meaning of § 22 GWB or may be able to create a dependency relationship in the meaning of § 26 GWB.

474. See Möschel, supra note 74, at 534. Emmerich, supra note 59, at 112 et seq.

475. § 26(2)(2) GWB proscribes: "Sentence 1 [unjustified discrimination by market dominating enterprises] shall also apply to enterprises and associations of enterprises, insofar as suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with
other enterprises do not exist." This 'dependency provision' was added in the 1973 amendment of the GWB and has since been cause for sweeping interpretation by the courts. See EMMERICH at 199.

476. See IMMENGA & MESTMÄCKER, supra note 94, at 515.


479. For example, in the area of contractual relationships, § 138 BGB prohibits agreements which are against "good morals". The indefinite term "good morals" has to be interpreted in the light of other standards of the law, such as principles of the GWB. Therefore the principle contained in § 18 GWB which states that the competitive freedom of the individual has a value will be considered in interpreting § 138 BGB. For example, in accordance with this value judgment, the German Supreme Court held that long term beer supply contracts in excess of 15 years are generally against the "good morals" and therefore void (only under exceptional circumstances a 20 year supply contract may be justified). See IMMENGA & MESTMÄCKER, supra note 94, at 557-60.

480. See Fikentscher, Introduction, supra note 70, at 165.

481. Id.

482. See IMMENGA & MESTMÄCKER, supra note 94, at 514.


484. A location clause limits the number of outlets from which a dealer can sell.

485. A profit passover arrangement requires one dealer to reimburse other dealers for sales made in their territories.

486. GWB § 18(1)(a).
487. See WuW/E OLG 964. (This theory is called "Bündeltheorie").

488. Kapp, supra note 80, at 683.

489. GWB § 18(1)(b).


491. GWB § 18(1)(c).

492. Möschel reports in his article that until 1986 only four injunctive decisions were issued on the basis of § 18 GWB, Möschel, Economic Evidence, supra note 74, at 533.

493. See Möschel, Economic Evidence, supra note 74, at 534 (Möschel refers to the article of Easterbrook, Vertical Arrangement and the Rule of Reason, 53 ANTITRUST LAW JOURNAL 135).

494. Möschel, Economic Evidence, supra note 74, at 534.

495. See Fikentscher, Introduction, supra note 70, at 163-64 (as a rule of thumb one can assume that perceptivity requires at least 5 percent market coverage).

496. J. KURTENBACH, supra note 95, at 65.

497. IMMENGA & MESTMÄCKER, supra note 94, at 542.

498. See GALAN, supra note 79, at 98-99. Furthermore, the judgment of § 15 GWB is reflected in the evaluation of strategic market conduct. Especially refusals to supply are closely analyzed whether they constitute an evasion of § 15 GWB. As Möschel points out "such a strict and formal set of considerations which take into account little of wider economics is explainable only against the prohibition of resale price maintenance. Evasion of that prohibition by the technique of a selective sales system is supposed to be prevented." Möschel, Economic Evidence, supra note 74, at 540.

499. IMMENGA & MESTMÄCKER, supra note 94, at 542.

501. See, e.g., WuW/E BGH 1498; J. KURTENBACH, supra note 95, at 70-72.

502. See E. HOPPMANN, WETTBEWERB ALS AUFGABE at 61 et seq. (1968); IMMENGA & MESTMÄCKER, supra note 94, at 515.

503. See IMMENGA & MESTMÄCKER, supra note 94, at 554.

504. Supra note 100.


506. United States v. Colgate Co., 250 U.S. 300 (1919). Especially because of this effect of the Colgate doctrine is challenged by this study. Moreover, due to diverging interests of manufacturers and dealers, it can make a difference whether a restraint is imposed by the manufacturer or results in conspiracy among dealers. See Anderson, Vertical Agreements Under Section 1 of the Sherman Act: Results in Search of Reasons, 37 U.FLA.L.REV 905 (1985)(distinguishing between "supplier-initiated-scenario" and "distributor-initiated-scenario" and stating that the Colgate doctrine should only apply in the former case). See also Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct. 1464 (1984); Business Electronics Corp. v. Sharp Electronics Corp., _____ U.S. ______; 108 S.Ct. 1515 (1988).


509. SCHMIDT, supra note 79, at 123.

510. See EMMERICH, supra note 59, at 131 et seq.

(1985) (explaining the treatment of patent licensing under Art. 85(1) of the EEC Treaty with special regard to the group exemption for patent licensing agreements).

512. For further information see Emmrich & Mestmäcker, supra note 94, at 574 et seq.

513. See notes 134-49 and accompanying text.

514. GWB § 22(5). Definitions of market dominating enterprises are contained in § 22(1);(2) GWB; and a presumption for market domination is given in § 22(3) GWB. § 22(4) GWB points out some particular examples of abusive practices.

515. § 22(4) GWB.

516. § 22(4)(1) GWB.

517. Id.

518. § 22(4)(2) GWB.

519. GWB § 22(4)(3). Discrimination may be also challenged under § 26 (2). In the case that a market dominating firm discriminates the discrimination constitutes also an abuse under § 22 (4) GWB. In the latter case both provisions may apply.

520. See Gerber, supra note 65, at 241.

521. § 26 (2)(2) GWB.

522. See Möschel, Economic Evidence, supra note 74, at 536.

523. Consistent ruling of the courts; compare 38 BGHZ 90, at 102; 52 BGHZ 65; 56 BGHZ 327, at 336; 78 BGHZ 190, at 196; 81 BGHZ 322, at 331; 82 BGHZ 238. (Some of these decision are also published in 1976 JuS 398 (1976) and in 1977 JuS 124 (1977)).
524. See WuW/E OLG 995 (1969), "Meto-Handpreisauszeichner".

525. The court determined the relevant product market by questioning which labeling machines could fulfill the same purpose and defined the market for mobile labeling machines as the relevant product market thus eliminating other not mobile labeling devices. WuW/E OLG 995, supra note 524.


527. § 22(1)(2) GWB.

528. Art. 3 GG.

529. § 26 (1) GWB.

530. See OECD Report, supra note 302, at 22. See also SCHMIDT, supra note 79, at 119.

531. Unlike the American antitrust laws the term "boycott" as used in the context of § 26 (1) GWB does not require that firms on either the manufacturer level or the dealer level conspire. In the meaning of § 26 (1) GWB the term boycott means that one party incites another party not to deal with a third party, the question whether inciting and incited party are on the same or on different levels of distribution is not of importance. This is explainable before the background of the differences in the legal systems. The GWB pursues the policy to define an arguably harmful conduct - no matter if the questionable conduct is horizontal or vertical. The quality of the conduct is decisive. Under the American antitrust laws, however, the question horizontal or vertical is of crucial importance. This might explain why sometimes the courts have problems to adequately address anticompetitive conduct. See MARTINEK, supra note 79, at 523 (Martinek alleges that the horizontal/vertical classification under the American antitrust laws contributes to the susceptibility of the law towards political changes). Id., at 523.

532. See SCHMIDT, supra note 59, at 119-21.

533. See IMMENGA & MESTMÄCKER, supra note 94, at 1033.
534. § 26(2) GWB refers to § 22 GWB with regard of how to define 'market dominating firm'.

535. § 26 (2) GWB. See Gerber, supra note 65, at 256.

536. See EMMERICH, supra note 59, at 199-200.


538. § 35 GWB.

539. § 26 GWB refers to the presumptions of § 22 GWB.

540. Gerber, supra note 65, at 264.

541. EMMERICH, supra note 59, at 212.

542. EMMERICH, supra note 59, at 225.

543. Id.

544. See Möschel, Economic Evidence, supra note 74, at 531.

545. See MAXEINER, supra note 17, at 2-6; Möschel, Economic Evidence, supra note 74, at 546. Möschel asserts that "[l]ooked at as one institutional arrangement among others, the success record of German antitrust law seems altogether remarkably high." Id.

546. J. KURTENBACH, supra note 95, at 65.

547. Möschel, Economic Evidence, supra note 74, at 536.

548. See Möschel, Economic Evidence, supra note 74, at 524.
549. SCHMIDT, supra note 79, at 121.

550. EMMERICH, supra note 59, at 101.

551. The goals of the GWB demand that more than mere efficiency considerations are made, a performance approach does not satisfy the GWB goals of maintaining a competitive structure on all levels of distribution. It is also recognized that an efficiency approach could conflict with democratic principles thus profit maximizing enterprises -- especially when they are allowed to merge without restrictions -- may tend to suppress individual freedom for the sake of their profits. Fezer, supra note 80, at 821-24. Compare SCHMIDT, supra note 79, at 105 et seq., "with every restriction of competition some of the control mechanism decreases" id. at 105; "competition is not self maintaining", id. at 109; "enterprises will try to avoid the pressure of competition by employing anticompetitive strategies ... markets tend to destroy themselves ... therefore the freedom of enterprises must be limited by the government and abusive use must be prevented" id. at 108 (translated by author of this study).

552. WuW/BGH 1393, at 1395 "Rossignol".

553. Gerber, supra note 65, at 267.

554. See, e.g., WuW/E BGEH 1995 (Modellbauartikel III); WuW/E BGH 1885 (Adidas); WuW/E BGH 1814 (Allkauf-Saba); WuW/E OLG 3508 (Allkauf-Saba II).

555. IMMENGA & MESTMÄCKER, supra note 94, at 507.

556. Möschel, Économique Evidence, supra note 74, at 539.

557. See Gerber, supra note 65.

558. Gerber, supra note 65, at 264.

559. BGH, LM § 26 GWB Nr. 22; WuW/E BGH 1891.

560. BGH, LM § 26 GWB Nr. 24.
561. OLG Düsseldorf, WuW/E OLG 2163, at 2364.


564. BGHZ 81, 322 (1982).

565. See, e.g., KURTENBACH, supra note 94, at 64 et seq.

566. Gerber, supra note 65, at 555.

567. SCHMIDT, supra note 79, at 248.

568. SCHMIDT, supra note 79, at 248-50.

569. WuW/E BGH 1393, 1395 (Rossignol).

570. Rule of law is hereby used in the meaning of reliability and predictability of judicial reasoning. For a more detailed description of the term "rule of law" see note ... supra.

571. Fikentscher, Introduction, supra note 70, at 168.

572. See GANAL, supra note 79, at 107.

573. See MARTINEK, supra note 79, at 498-504.

574. See, e.g., Fox, Equilibrium, supra note 167, at 1182.

575. See, e.g., Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).


579. See, e.g., E. GELLHORN, supra note 31, at 327 (citing another scholar).


581. Id.

582. 250 U.S. 300 (1919). See also notes 264-79 and accompanying text.

583. See C.D. EDWARDS, BIG BUSINESS AND THE POLICY OF COMPETITION (1956). "Thus competition is valued for its own sake, as the economic equivalent of political democracy, and also as a necessary aid in preserving that democracy by averting dangerous extension of the power of private organizations." Id., at 4.

584. 21 Cong. Rec. 2456 (1890) (Senator Sherman).

585. See SULLIVAN, supra note 158, at 1-13 (supporting the view that antitrust law should also consider noneconomic arguments).

586. See Fox, Antitrust, Economic, and Bias, supra note 58, at 6-10.

587. See RITTALER & SCHMIDT, supra note 4, at 112 ("the Chicago School is a giant with feet of clay"); Ponsoldt, Enrichment, supra note 111, at 1169 ("the Emperor has no clothes" and "Alice-in-Wonderland economics").

588. COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY (Brussels, 1986), at 11.

589. 250 S. 300 (1919).
This behavior must not necessarily establish an illegal attempt to monopolize under sec. 2 Sherman Act.

See Andersen, The Antitrust Consequences of Manufacturer-Suggested Retail Prices -- The Case for Presumptive Illegality, 54 WASH.L.REV. 763 (1979). Anderson argues that "it is not unthinkable to impose a duty to deal with all buyers who meet some threshold of responsibility. Other countries have recognized such duties and there is no overpowering evidence that consumer welfare has suffered." Id., at 790. See also V. MUND, THE RIGHT TO BUY -- AND ITS DENIAL TO SMALL BUSINESS, S. DOC. NO. 32, 85th CONGRESS, 1st Sess. (1957).