

Merger Development and Policy
in West Germany since 1958*

by

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This paper is circulated for discussion purposes only and its contents should be considered preliminary.

1 Introduction

West Germany's recovery and growth to a position of economic leadership over most other industrialised nations appears to have been achieved without the aid of widespread merger activity, at least up to the late nineteen-sixties. Although the official statistics understate the true number of mergers in the period, there is no evidence of significant merger waves in the fifties and sixties comparable with US and UK experience. However, Germany did share with almost all developed market economies the experience of a merger wave : between 1969 and 1971, when there was a distinct surge in the level of merger activity. Thereafter, German experience diverged once again from that of most other countries, with a continuing rapid growth of mergers throughout the 1970's.

This latter development has given rise to considerable public concern, as recently shown in the second main report of the German Monopolies Commission (MK).^{1/} Dealing with the merger problem is likely to loom large in the fourth amendment to German competition law now under discussion. This paper analyses the rate of merger activity since legislation was first enacted in 1958, and examines some qualitative changes in it that have taken place. The development of competition law and its impact over the period are also reviewed. The analysis reveals a number of questions requiring future research, if policy is to be given a firm scientific foundation.

2 The Merger Mechanism

In Germany relatively few legal mergers occur, where the partners are

^{1/} Monopolkommission : Hauptgutachten II, Nomos Verlagsgesellschaft, Baden-Baden, 1978.

formally integrated and one or both loses its separate identity. But for every legal merger in the 1970's there have been around seven or eight economic mergers in which the effective control of one company passes to another via the acquisition of a significant ownership interest.^{1/} The controlling interest may sometimes be built up in stages. Even where it reaches 100 per cent a legal merger does not invariably follow, the two firms otherwise continuing to operate as separate legal entities. In comparison with the UK and US, merger activity takes place further from the centre of public attention, and takeover raids are rare.

The main reasons why German merger activity should take this form are to be found in two features of the institutional framework. One is the relatively low dependence of German companies of the equity market for finance. The other is an apparently permissive stance of German competition policy in practice towards cartels and interfirm co-operation.

The principal types of private sector German company are Aktiengesellschaften (AG) and Gesellschaften mit beschränkter Haftung (GmbH), both of which enjoy limited liability status; Kommanditgesellschaften (KG) which have unlimited liability but enjoy certain tax and borrowing advantages (amended in 1977); and the mixed form GmbH and Co KG, in which the party with full liability takes on the legal persona of GmbH, thus effectively avoiding unlimited liability. AG companies are on average much the largest, with assets of DM 23m in 1969, as against DM 0.5m for the GmbH type, although the latter do include some large concerns, among them the subsidiaries of multinational companies such as Unilever and Phillips.

^{1/} See also section 3.

But GmbH companies predominate numerically, totalling 168,423 in 1977, compared with only 2,149 companies AG. Moreover, while the number of GmbH companies has increased more than two-and-a-half times over the last decade, the number of AG's has declined by about seven per cent.^{1/}

GmbH companies are subject to only minimal information disclosure requirements, but only AG's can seek stock market quotations. The development of their relative numbers over the last ten years suggests that in the German context the former advantage is much preferred to the latter. The relative unimportance of having direct access to the stock market is confirmed by the fact that less than a quarter of AG companies are actually quoted (469 out of 2,177 in 1976). Moreover, the importance of the stock market as a direct source of funds seems to be not only small but declining. Thus the number of quoted companies has fallen by around a quarter since the mid 1960's, and the ratio of equity to total capital in quoted companies from around 30 to nearer 25 per cent.

The relative unimportance of the stock market is balanced by the fact that German banks play a very more active role than their UK and US counterparts, both in providing finance for industry and in the direction of corporate affairs.^{2/} It is to be expected that the influence of the banks extends to merger activity.

The main features of German competition policy are outlined in section 7. For the present we simply note that the co-ordination of activities following economic mergers in Germany would almost certainly contravene the antitrust laws of

^{1/} Source: Statistisches Jahrbuch, Federal Statistics Office, Wiesbaden.

^{2/} See

the USA, and also competition policy in the UK.

3 The Incidence of Mergers 1958-1977

Official merger statistics are compiled by The Federal Cartel Office (B Kart A) and the Federal Statistics Office (SB). The former records mergers notified under section 23 of the 1957 Act against Restraint of Competition (GWB). For this purpose a merger is where a 25%, 50% and/or majority of voting capital is acquired, and where a market share of at least 20% is reached or exceeded. The SB series dates from 1951 but includes only legal mergers. During the period 1970;76 these represented less than 12% of mergers notified under §23 GWB.

Although the B Kart A series is imprecise as to when effective control has changed hands, it is the only authoritative index of merger activity for West Germany. Table 1 and figure 1 show the number of mergers in each year from 1958 to 1977, overall and for the industrial sector. Both the overall and the industrial series suggest exponential growth. However the numbers must be interpreted with caution. In particular, the pre- and post-1973 statistics are not strictly comparable. Before the B Kart A itself had to identify when notifiable mergers had occurred and request information. As a result the pre-1973 statistics are incomplete, and the proportion of all §23 mergers they include may have varied. In the view of B Kart A officials there was a significant increase in B Kart A reporting activity after 1967, when serious discussions on introducing merger controls began. From 1974 (when merger control was first introduced) the onus to report merger activity was shifted to the companies, so that except for illegal non-disclosure the series is complete.

Nevertheless it is clear that there has been a very significant rise in merger activity over the twenty year period. Although the absolute level of

Table 1

Jahr	Kapitalgesellschaften AG's (einschl. KG's a A) + GmbH		Neugründungen (+ Umwandlungen)		Abgänge		Abgänge durch Liqui- dation u. Konkurs		Anzahl dev nach §23 GWB angezeigten Fusionen		Jahr
	Anzahl (Bestand am 31.12)	Kapital (Mill.DM)	Anzahl	Kapital (Mill.DM)	Anzahl	Kapital (Mill.DM)	Anzahl	Kapital	Gesamt	davon Ind- ustrielle Bereich	
1958	35,931	36,499	2,695	670	1,907	1,011	703	38	15	14	1958
59									15	14	59
60	37,762	43,955	3,460	770	2,388	1,968	716	42	22	21	60
61	41,173	50,903	3,545	675	1,410	479	821	112	26	24	61
62									38	33	62
63	49,394	61,093	4,646	684	1,597	551	1,027	83	29	23	63
64	52,816	65,612	5,321	619	1,881	608	1,158	96	36	25	64
65	56,580	72,369	5,800	770	2,030	604	1,266	112	50	46	65
66	60,444	77,917	6,199	816	2,3	655	1,491	202	43	38	66
67	64,734	82,735	6,970	900	2,660	701	1,595	173	65	50	67
68									65	58	68
69	76,018	94,180	9,220	1,203	2,886	1,211	1,486	141	168	117	69
70	82,450	99,526	10,428	3,025	3,998	5,839	1,710	326	305	222	70
71	90,778	108,660	12,582	1,947	4,374	2,734	1,934	215	220	141	71
72	102,961	117,017	17,038	2,645	4,957	3,828	2,085	248	269	158	72
73	114,323	126,051	16,507	2,182	5,811	3,449	2,507	317	243	145	73
74	124,466	135,654	15,589	1,720	6,244	1,783	3,149	430	318	185	74
75	135,571	145,457	18,066	1,755	7,763	2,661	3,178	599	448	244	75
76	149,410	152,588	20,758	1,525	7,789	2,593	3,242	485	453	229	76
77	170,612	162,857							554	267	77

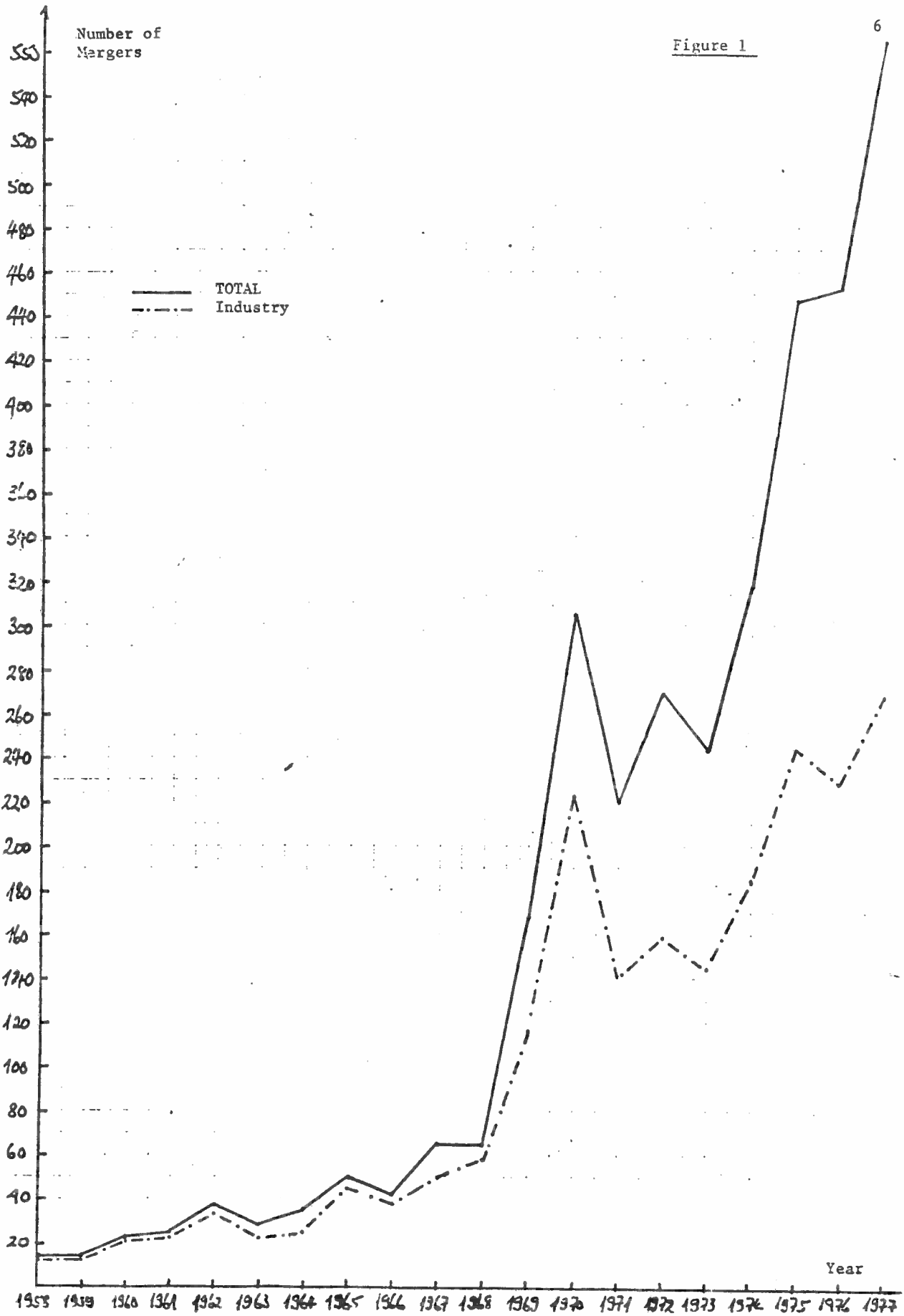


Figure 2

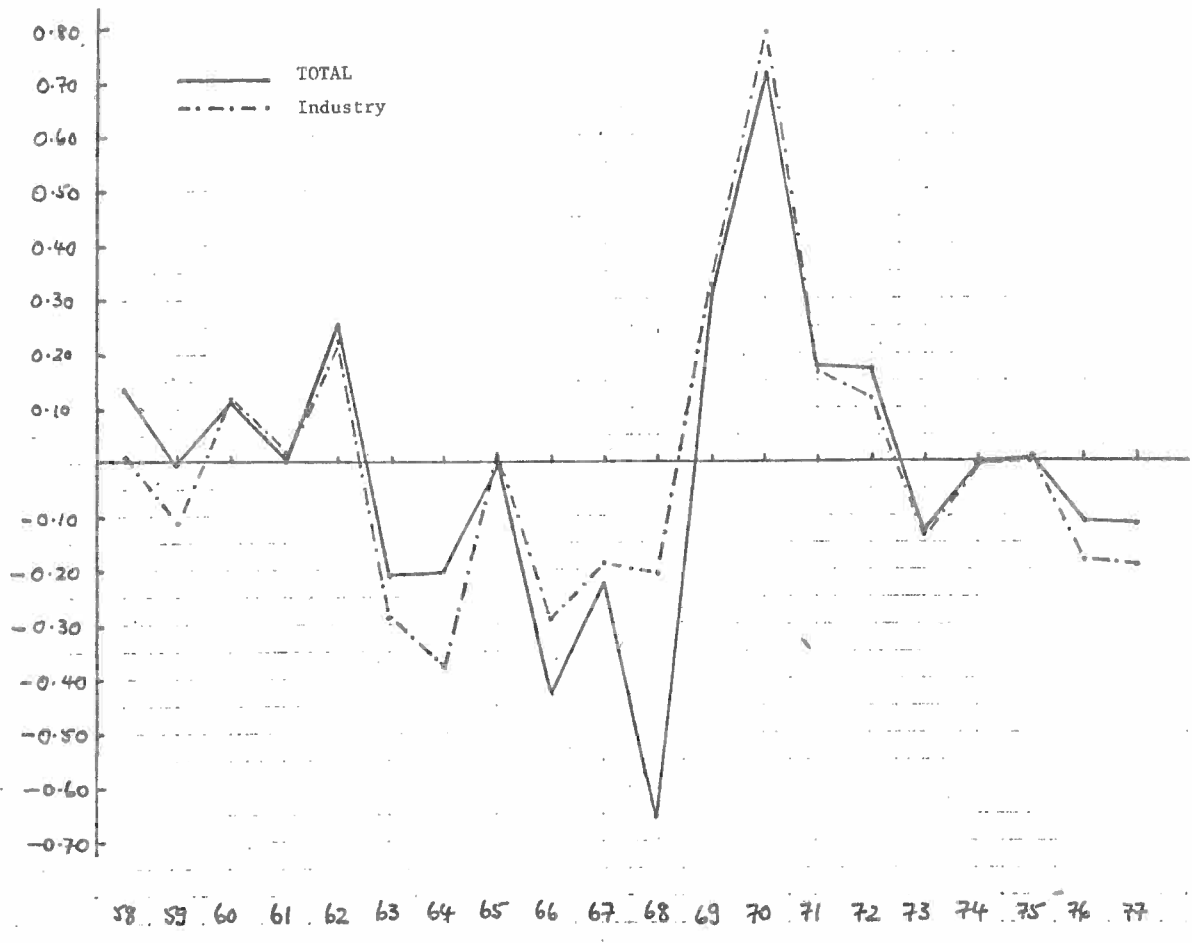
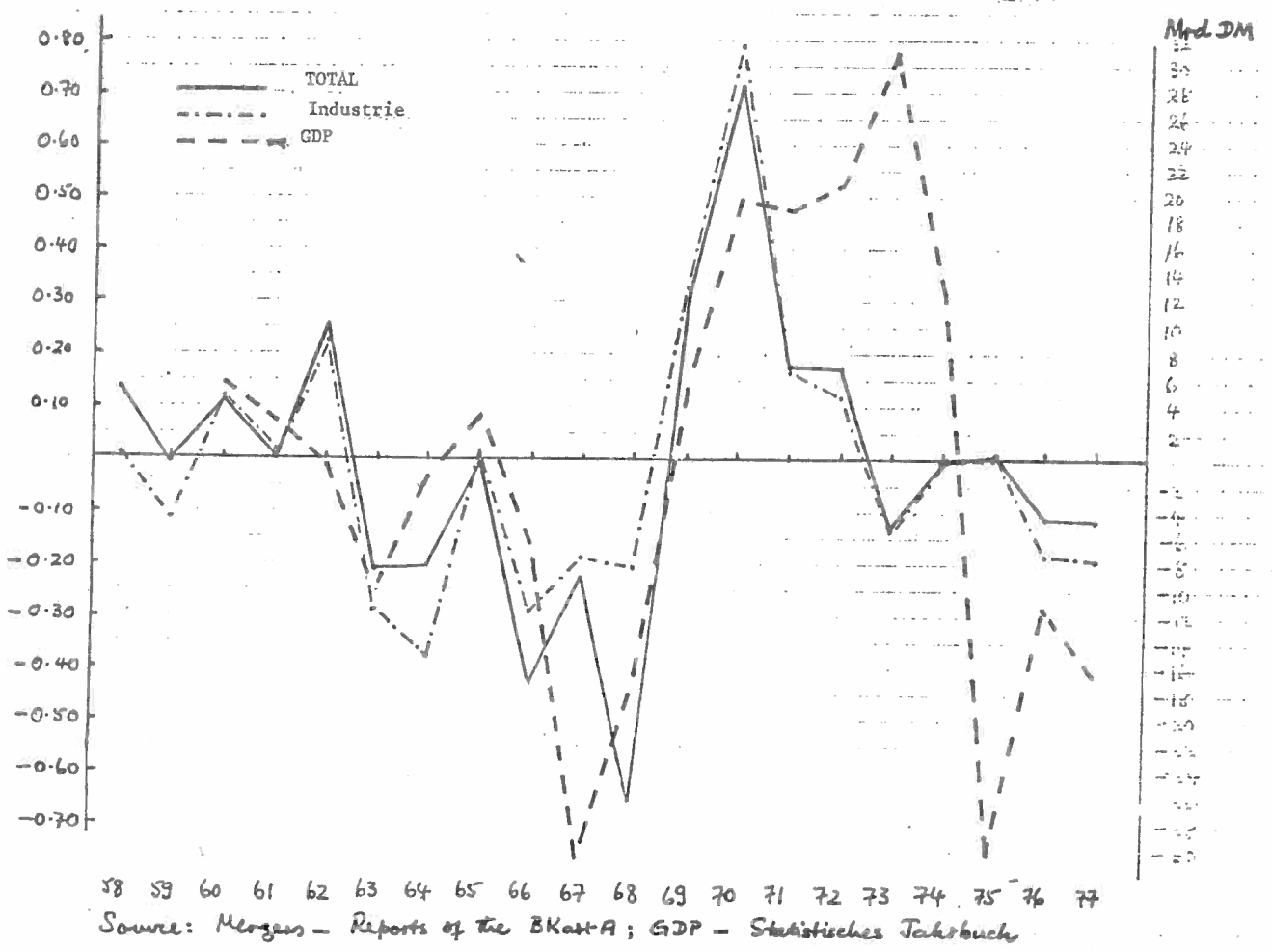
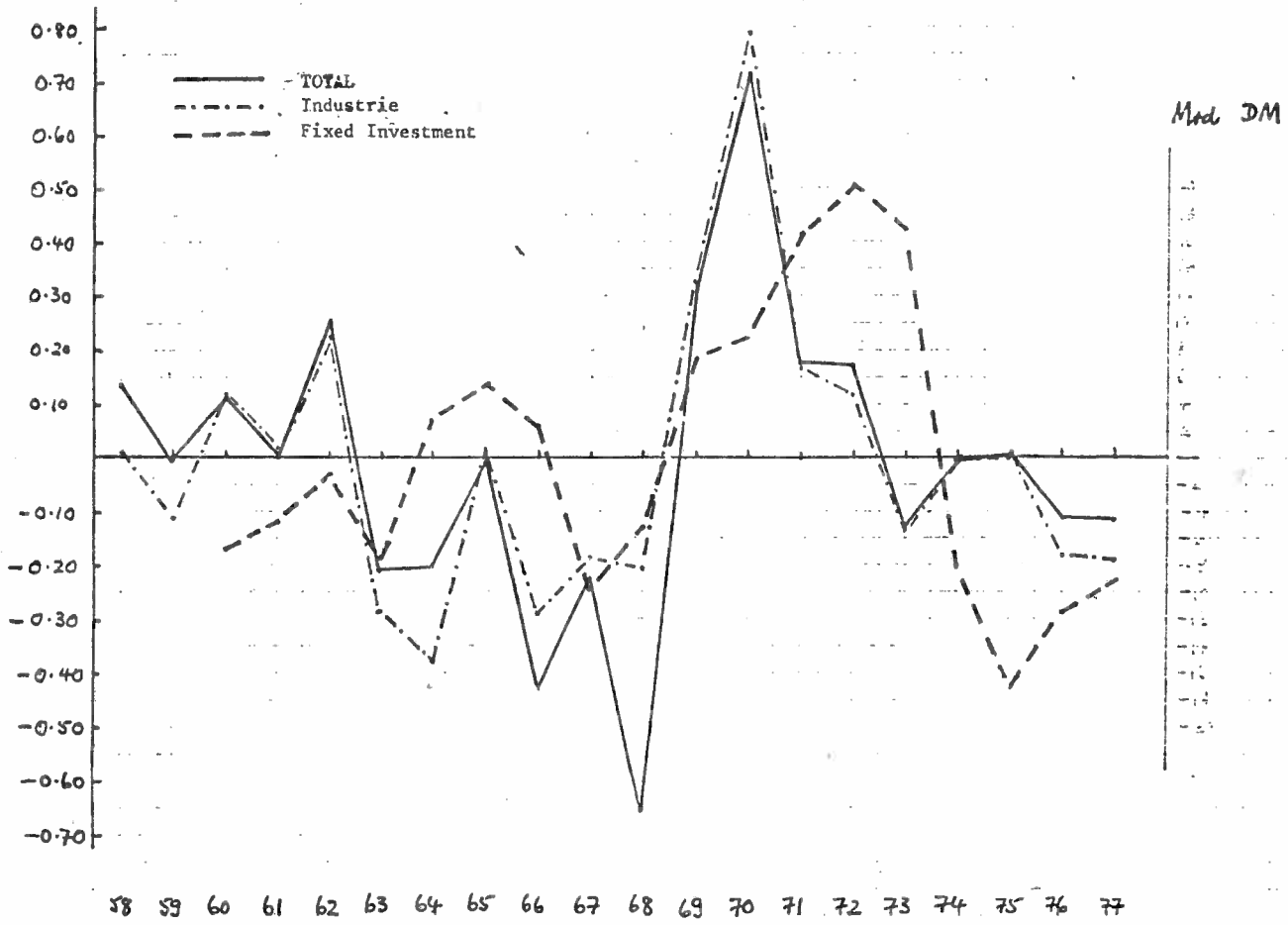


FIG. 3



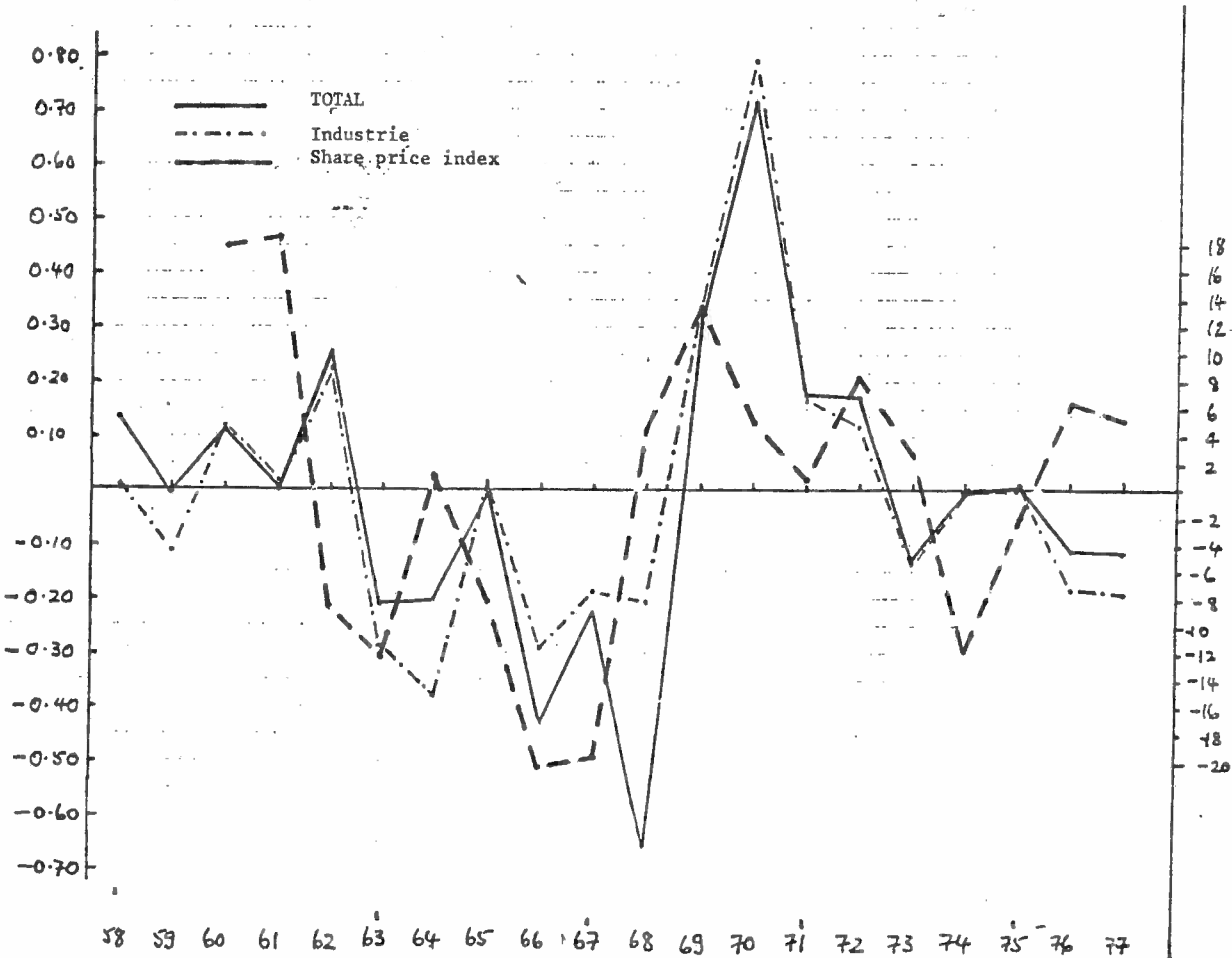
Source: Mergens - Reports of the BKart-A; GDP - Statistisches Jahrbuch

FIG. 4



Source: Mergers - Reports of the BKA; Investment - Statistisches Jahrbuch

Fig. 5



Source: Mergers - Reports of the BKA; Share Price - Statistisches Jahrbuch

merger activity in the early years is probably much understated, the statistics show a fourfold increase between 1957 and 1968. There followed a distinct merger wave between 1969 and 1971. The wave is seen more clearly when we consider annual deviations from the trend increase in the number of mergers (figure 2).^{1/} Although the dimensions of this wave may have been exaggerated by increased reporting activity on the part of the B Kart A, its existence cannot be due simply to this. For increased reporting would explain only the initial increase and not the subsequent fall in the number of mergers. Moreover, the surge in merger activity in Germany was more or less contemporaneous with merger booms in the USA, Britain and elsewhere, which is suggestive of common underlying causal factors prompting mergers rather than of vagaries in statistical reporting. After a comparative lull in merger activity for two years, came a further explosive growth after 1973, which, paradoxically, was the year in which legal control was enacted. By 1977 the total number of mergers had reached almost twice the previous 1970 peak, and in this case we know that the post 1973 figures are reliable.

However, this somewhat overstates the growth of merger activity in some ways, since there has been a relative increase in the number of small mergers, because of the presence of a size threshold in the 1973 merger law.^{2/} In view of this, some would no doubt argue that the economic significance of the most recent merger wave is exaggerated. Without question a series recording the value of assets or turnover involved, if available, would be informative, but it is by no means unambiguous that such a series will be superior in capturing the impact of

1/ The values plotted in figure 2 are annual residuals from the regressions:

$$N_T = 2.3644e^{0.202t} \quad (r = .9763)$$

for all mergers, and

$$N_I = 2.4150e^{0.1684t} \quad (r = .9653)$$

for industrial mergers.

2/ See Section 7.

mergers on competition, since the combination of smaller firms in smaller markets can have just as serious effects as between large firms in large markets. That is, whether a simple merger count or an assets series best capture the impact of mergers depends not just on the absolute size of the merging firms, but on size relative to the market. Moreover, by the systematic acquisition of small firms in series, a market leader can achieve much the same effect as by a single large acquisition.^{1/} The whole question of how the disappearance of firms of different size affects competition in practice remains largely unresearched, especially in Germany.

Whether the present German merger rate can go on increasing, either in line with the past trend or on some lower growth path is open to speculation. Assuming the motive to merge persists, this is a matter of whether there are binding constraints in the system, frustrating merger desires. In particular, an upper bound on the rate of merger could be set either when the capacity of the system to undertake the process is reached (as the available time of management and of legal and financial intermediaries becomes fully committed) or when the stock of potentially acquirable firms is depleted. In fact, neither constraint seems likely to become binding at least in the near future. Despite the extraordinary increase in the 1970's, the level of merger activity reached in Germany is not disproportionate by international standards. In Britain, for example, over 43 per cent of quoted companies were taken over between 1957 and 1969, at a peak rate of one per working day in 1968, and this, of course, takes no account of mergers affecting the more numerous unquoted company sector.^{2/} Moreover, to put the level of merger activity into national perspective, mergers in the §23 GWB sense amounted to only approximately 13% of the number of voluntary and involuntary liquidations over the period 1970-1976 (Table 2). At the same time the astonishing increase in the rate of

^{1/} Two striking examples of large firms making acquisitions in series are Veba and Rheinisch-Westfälisches Elektrizitätswerk AG, with 47 and 45 acquisitions respectively over four years. See E.Kantzenbach, "Effectivere Fusionskontrolle", Wirtschaftswoche, Nr.32, 4.8.78.

^{2/} D.A.Kuehn, Mergers and the Theory of the Firm, Macmillan, 1975.

formation of new companies (Table 1 column 3) suggests an expanding rather than declining supply of potentially acquirable new firms.^{1/} In 1976 there were over 45 times as many births of new companies as there were §23-type mergers. Thus, it seems that there is little to stop the merger rate increasing, as long as the motive to merge is sustained.

4 Merger Intensity and the Level of Economic Activity

Analysis of the relationship between the rate of merger activity and the state of the German economy must be tentative, on account of the shortcomings in merger statistics. Such analysis is useful, however, not merely on account of what it reveals about the connection between mergers and the movement of the economy, but also because, if any systematic relationship emerges, the merger statistics themselves take on more credibility.

The explosive growth shown in the merger series is of course not matched in other series such as GDP, gross fixed investment and the share price index. To facilitate comparison we therefore compare annual deviations from trend in all cases.^{2/} This procedure should in any case help to bring out any cyclical patterns in the data more clearly.

1/ Although it is likely that a significant proportion of new GmbH companies represents subsidiaries of AG companies who find it attractive to expand in this way for reasons of information disclosure and tax advantage. Such companies would not generally be available for takeover.

2/ Trends were fitted as follows:

Mergers:	see preceding section:
GDP:	$Y = 400.0693 + 23.5547t, \quad r = .9904$
Investment:	$Y = 94,393.92 + 3599.25t, \quad r = .8714$
Share Index:	$Y = 89.0588 + 0.5201t, \quad r = .2278$

Similar conclusions to those drawn below emerge if linear trends are fitted to the sub-periods 1958-1968 and 1968-77.

The annual deviations from trend in mergers, compared with GDP, investment and share prices, are plotted in figures 3-5. A quite definite association is apparent in all cases, and in particular the end-1960's boom is quite evident in each of the series. Closer inspection, however, suggests a change in the relationship between mergers and the other indicators occurring in 1970/71. Up to that point mergers move more or less in step with GDP and investment, and seem to lag share prices by one period. Thereafter it is mergers which lead, giving rise to a suggestion of contrary motion in the last three to four years. Thus, in particular, the 1970 peak level of mergers was not sustained or increased through the boom years up to 1973, when both GDP and investment remained high in relation to trend. Rather, as we have seen, the merger rate first fell back and then remained steady for two years, before resuming its rapid post-1973 rise.

The change in the phasing of the relationship also occurs in the case of shareprices, but to a less marked degree. Overall, it is to movements in the share price index that merger activity seems to correspond most closely. This is in line with the evidence for the US and UK.^{1/} It is, however, slightly surprising at first sight since, as we have seen, the stock market in Germany plays a comparatively minor role in merger activity. What this could suggest is that even in the US and Britain the link between share prices and merger activity arises less because of the direct part played by shareprices in merger deals, than because the underlying sentiment which accompanies bull markets is also that which favours mergers.

Coming at precisely the point from which the merger rate began to accelerate, the shift in the relationship between mergers and economic indicators may be important for policy purposes, and further investigation is clearly warranted.

^{1/} See in particular R.L.Nelson Merger Movements in American Industry 1865-1956, Princeton 1959, and L.Hannah, "Mergers in British Manufacturing Industries 1880-1918", Oxford Economic Papers, 1974.

One hypothesis to be tested would be that the earlier, relatively low-level merger activity was that of an economy at a stage of development in which the need for structural change was perceived as modest, so that the volume of mergers quietly followed the level of general activity. The later phase, on this view, might then be seen as one where the need for more thorough-going structural adjustment was needed. The fact that merger activity was rising especially sharply as the economy went into the mid 1970's recession might be taken as preliminary support for this view and, as we shall see in sections 5 and 6, the recent pattern of vertical and diversifying mergers shows at least superficial signs of structural response in industries particularly affected by adverse economic conditions. However, an alternative hypothesis would be that, whereas in the sixties priorities of national recovery and development were still uppermost in mergers, as in other aspects of economic life, the seventies merger wave represents a kind of corporate "affluence effect" as, with rising incomes generally, management began to pursue non-cost-minimising, non-efficiency-oriented types of objective associated with corporate growth.

5 The Industrial Composition of Merger Activity

Analysis of German merger activity by industry is also impeded by an inconsistency in the statistical series. Up to 1971 mergers were classified by principal product taking the effect of the merger into account, whereas from 1972 the classification was by reference to the acquiring firm only. Once again, however, it is possible to draw some inferences from the data, despite its limitations.

Over the twenty year period 1958-1977 there has been an increase in the proportion of mergers taking place outside the industrial sector. This tendency is apparent both before and after the 1972 change in the basis of the statistics. The ratio of industrial to total mergers in the periods 1958-68, 1969-72 and 1973-77 was 85.6%, 66.3% and 53.1% respectively. For the period 1958-77 as a whole,

industrial mergers averaged 60.7%. but in the final year the proportion was as low as 48.1%. However, this tendency is exaggerated in the statistics, due to the introduction in 1972 of the category "multi-sector firms",^{1/} which is included in the non-industrial sector. This was designed to accommodate mergers where the acquiring firm was widely diversified, and would of course include, and might even consist primarily of, firms heavily diversified amongst industrial, as well as non-industrial sectors. The number of mergers in this category rose rapidly to 78 in 1975 (17.4% of the total in that year) then stabilising at around this level. If these mergers are deleted from the analysis, we then find that the ratio of industrial to (the adjusted) total mergers in the periods 1958-68, 1969-72 and 1973-77 becomes 85.6%, 67.2% and 63.1% respectively: a much less significant decrease.

Within the industrial sector, mergers have been heavily concentrated in a small number of industries. Thus between 1958 and 1977 around 45% were accounted for by only four industries, and approaching 80% by ten (Table 4). Moreover, the identity of the most merger-intensive industries has changed very little. In descending order of merger incidence the top six industries for the period as a whole are chemical products; electrical engineering; machine tools; iron and steel; mineral oil products; and food processing. With one exception all appeared in the top six in both the merger wave of 1969-72 and the period of rapid merger growth from 1973-77 (Table 4). The exception is mineral oil products, which ranked only thirteenth during the merger wave but rose to top place in the league table for 1973-77.

Three sectors dominated non-industrial merger activity, the multi-sector

^{1/} Mehrere Wirtschaftsbereiche.

Table 2 Gesamtzahl der dem Bundeskartellamt nach §23 GWB angezeigten Unternehmenszusammenschlüsse nach industriellen Wirtschaftsbereichen.* 1/

Branchen-Kennzahl	Warengruppe	1958-1977	1958-1968	1969-1972	1973-1977
11	Bergbauliche Erzeugnisse	56	11	27	18
205	Mineralölerzeugnisse	173	6	14	153
220	Stein und Erden	101	10	23	68
23	Eisen und Stahl	176	8	44	124
232/6	NE-Metalle und -Metallhalbzeug	95	15	34	46
	Giessereierzeugnisse	6	1	0	5
238	Erzeugnisse der Ziehereien und Kaltwalzwerke	11	1	7	3
24	Stahlbauerzeugnisse	49	4	18	27
242	Maschinenbauerzeugnisse	199	33	81	85
244,8	Landfahrzeuge	103	35	34	34
246	Wasserfahrzeuge	2	1	0	1
244,8	Luftfahrzeuge	21	4	13	4
250	Elektrotechnische Erzeugnisse	232	52	88	92
252/4	Feinmechanische und optische Erzeugnisse, Uhren	23	12	4	7
256	Eisen-, Blech- und Metallwaren	49	17	17	15
258	Musikinstrumente, Spielwaren, Turn- und Sportgeräte, bearbeitete Edelsteine	9	2	2	5
200	Chemische Erzeugnisse	310	55	112	143
2425/ 25071	Büromaschinen; EDV	11	-	-	11
224	Feinkeramische Erzeugnisse	28	10	4	14
227	Glas und Glaswaren	44	12	8	24
260/1	Schnittholz, Sperrholz und sonstiges bearbeitetes Holz	1	1	0	0
260/1	Holzwaren	2	0	1	1
26	Holzschliff, Zellstoff, Papier und Pappe	47	8	10	29
4/5/8	Papier- und Pappwaren	18	8	1	9
	Druckereierzeugnisse, Lichtpaus- und verwandte Waren	8	1	6	1
210	Kunststofferzeugnisse	18	5	10	3
215	Gummi- und Asbestwaren	28	9	7	12
270	Leder	0	0	0	0
271/2	Lederwaren und Schuhe	4	1	2	1
275	Textilien	33	7	11	15
276	Bekleidung	4	1	3	0
R28/9	Ernährungsindustrie	139	14	40	85
R28/9	Tabakwaren	42	8	15	19
3	Bauwirtschaft	18	0	2	16
	Insgesamt	2,054	346	638	1,070

* bis 1971 nach dem überwiegend betroffenen Wirtschaftsbereich
ab 1972 nach dem erwerbenden Wirtschaftsbereich
ab 1972 Branche Büromaschinen EDV ausgewiesen

1/ Quelle: Tätigkeitsberichte des Bundeskartellamtes

Table 3

Branchen- kennzahl	Warengruppe	1958-1977	1958-1968	1969-1972	1973-1977
4	Handel u. Handelshilfsgewerbe	179	11	19	149
	Handwerk				
	Genossenschaften	0	0	0	0
	Kulturelle Leistungen	59	3	11	45
	Filmwirtschaft	6	4	0	2
R70/1	Sonstige Dienstleistungen	17	1	1	15
0	Land- und Forstwirtschaft, Garten- und Weinbau, Fischerei und Jagd	13	5	7	1
5	Verkehrswirtschaft	55	12	11	32
60	Kreditinstitute	438	5	199	234
61	Versicherungen	63	1	19	43
	Versorgungswirtschaft	166	16	44	106
	Mehrere Wirtschaftsbereiche	332	-	13	319
	insgesamt	1,328	58	324	946

Table 4

INDUSTRY	1969-72		1973-1977		1958-1977				
	Rank	No. of Mergers	% of Total	Rank	No. of Mergers	% of Total	Rank	No. of Mergers	% of Total
Chemical Products	1	112	17.6	2	143	13.4	1	310	15.1
Electrical Engineering	2	88	13.8	4	92	8.6	2	232	11.3
Machine Tools	3	81	12.7	5	85	7.9	3	199	9.7
Iron and Steel	4	44	6.9	3	124	11.6	4	176	8.6
Mineral Oil Products	(13)	(14)	(2.2)	1	153	14.3	5	176	8.6
Food Processing	5	40	6.3	5	85	7.9	6	139	6.7
Non-Ferrous Metals and semi-finished metals	6	34	5.3	(8)	(46)	(4.3)	(9)	(95)	(4.6)
Total	-	638	100.0	-	1070	100.0	-	2054	100.0
Combined share:									
Top 4 industries	-	325	50.9	-	512	47.9	-	917	44.6
Top 6 industries	-	399	62.5	-	682	63.7	-	1,232	60.0
Top 10 industries	-	501	78.5	-	859	80.3	-	1,587	77.3

Source: Derived from table 2

firm category apart. Again in descending order of merger incidence, these were credit institutions; commerce and commercial services; and public utilities (Table 3).

In both the industrial and non-industrial sectors the majority of mergers were horizontal, i.e. between firms in the same industrial category. Where non-horizontal mergers occurred this was primarily within rather than across the broad industrial vs non-industrial groupings (Table 5). However the detailed statistics, especially for later years, reveal some tendency for credit institutions to make acquisitions in the construction, food processing and to a lesser extent the textile industries. Similarly, in the industrial sector, the mineral oil product industry shows an outstanding tendency towards forward vertical integration into commercial activities, 100 out of 165 mergers in this industry over the period 1970-1977 being of this type. To a much less extent the iron and steel industry was also involved in this kind of activity, followed at some distance by vehicles, electrical goods, and chemicals. While a thoroughgoing analysis of the industrial pattern of merger activity is beyond the scope of the present paper, these diversifying tendencies are clearly comprehensible in the light of the effects on different industries of adverse economic conditions in the 1970's.

Table 5

Sector	Proportion of All Mergers which were	
	(a) Horizontal	(b) Within own sector
Industrial (1)	47.6%	69.6%
Non-Industrial	57.3%	81.9%

6 Merger Activity by Type of Merger

Detailed statistics on the incidence of vertical, conglomerate and horizontal mergers are available only since 1970. They are summarised in Table 6. Horizontal mergers remain the largest single category overall and, as we have seen, in both the industrial and non-industrial sectors. However, the proportion of all mergers which are horizontal has declined from three-quarters or more to two-thirds or less during the 1970's.

The proportion of conglomerate mergers, between firms with neither horizontal nor vertical links pre-merger, shows an initial decline from 1970/71 levels but has since tended to oscillate. The lack of any significant relative increase in the incidence of conglomerate mergers is at first sight surprising, in view of the sharp increase after 1972 of mergers initiated by multi-sector firms that we saw in the last section. For it might be presumed that these mergers would be predominantly of the conglomerate type. However, to reconcile the evidence we must infer otherwise: that though the acquiring firms were already conglomerates, in many cases the acquired firms stood in some horizontal or vertical relationship to one or other of the acquiring firm's activities before the merger.

The number of vertical mergers increased more than five-fold between 1970 and 1977 in absolute terms and more than doubled relative to mergers as a whole. These increases came mainly in two large steps in 1974 and 1976. In the previous section we saw that the industrial pattern of vertical-integrating mergers between the industrial and non-industrial sectors was rather suggestive of a defensive response to adverse circumstances. It is therefore not surprising that the main increases in vertical mergers should be seen to occur in the wake of the oil crisis in 1973 and the deepest year of recession, 1975.

Table 6 Horizontal, Vertical and Conglomerate Mergers 1970-77

	Horizontal		Vertical		Conglomerate		Total
	No.	(%)	No.	(%)	No.	(%)	
1970	217	(74.6)	27	(9.3)	47	(16.2)	291
1971	167	(76.3)	19	(8.7)	33	(15.1)	219
1972	218	(81.6)	21	(7.9)	28	(10.5)	267
1973	196	(81.0)	19	(7.9)	28	(11.6)	242
1974	235	(73.9)	50	(15.7)	33	(10.4)	318
1975	336	(75.0)	53	(11.8)	59	(13.2)	448
1976	283	(62.5)	113	(24.9)	57	(12.6)	453
1977	367	(66.2)	122	(22.0)	65	(11.7)	554
1970- 1977	2,091	(72.3)	424	(15.2)	350	(12.5)	2,793

Source : Report on the Activities of the Federal Cartel Office.

7. The Development of Competition Policy in the Federal Republic

The first departure in modern times from a laissez-faire competition policy in Germany was a 1923 decree dealing with cartels. While technically forbidding abuses in this area, the decree remained largely ineffective. After the war, a 1947 Allied ordinance prohibited cartels and monopolisation (subject to various escape clauses) and became the forerunner of the 1957 Act against Restraint of Competition (GWB). This Act, amended in 1966, 1973 and 1976 forms the basis of current policy, and established the Federal Cartel Office (B Kart A) the body responsible for implementing the legislation. Later, an independent Monopolies Commission (MK) was established under the 1973 amendment, primarily to keep the operation of the policy under review.

The main targets of the legislation are cartels (restrictive agreements) and cartel-like arrangements; the abuse of market-dominant positions held by firms; and, since 1973, mergers. In 1973 resale price maintenance was also prohibited (with minor exceptions) although recommended prices are still allowed. Separate legislation was enacted in 1977, primarily to protect the consumer from unfair terms of contract. To this end the law sought to protect the weaker side in a transaction against market power, and to ensure a reasonable balance of interests.

In the cartel area, the legislation disallows all contracts or agreements between firms, "insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services". There are, however, a fairly large number of exceptions, falling into two main categories. The first includes agreements relating to service arrangements, rebates, rationalisation, standardisation, specialisation and external trade. These must be notified to the B Kart A and can continue in force (usually for no more than three years) if within three months it raises no objection. The second group, including agreements about patents, samples, industrial secrets and others,

are closely regulated and require specific exemption from the B Kart A. Details of exempted agreements are kept in the Cartel Register. Price fixing and the enforcement of sales conditions by suppliers are forbidden, except for the sale of books and magazines.

Occupancy of a market-dominant position is not illegal per se, but abuse of such a position (as defined by legislation) is prohibited. The 1973 amendment introduced a number of specific criteria for determining where market dominance exists, relating to both market structure and the conduct of enterprises. Market dominance is presumed if one firm controls a third of the market (unless its turnover is less than DM 250m); three firms control 50%; or five firms control two-thirds. Financial resources and cartelisation may also be considered in determining the existence of market dominance, and since 1973 barriers to entry have also been a permitted criterion, though in practice only barriers related to financial resources have tended to be considered. "Abuse" is not defined by the Act. This is left open to the interpretation of the B Kart A, in the light of the overall purpose of the Act on the one hand to maintain freedom of competition, while on the other hand to promote the development of individual enterprises.

Proposals to bring mergers within the scope of the legislation failed in 1947 and 1957, and merger control took effect only from 1st January 1974. Under the present legislation a merger is defined as the purchase of either a firm's assets, or of 25%, 50% and/or a majority of the voting shares. From 1973 a two-tier notification system has been in force. Where two (or more) parties have a turnover of at least DM 1,000m, advance clearance from the B Kart A is required. Notification without advance clearance is required where the merger would result in a market share of 20 per cent or more, or where one party has a 20 per cent share in another market, or where the merger partners together employ 10,000 people or

have annual turnover of at least DM 500m, unless one has less than DM 50m turnover. Where merger cases are notified the B Kart A is required to establish whether a market-dominant position is created or strengthened, and is empowered to prohibit the merger unless satisfied by the parties that competition will nonetheless be promoted in the relevant markets.

The provisions of the legislation apply mainly to manufacturing industry and mining. Certain areas (Ausnahmebereiche) are explicitly excluded from its scope. These include banking, insurance, transport authorities, energy and public utilities. The 1976 Amendment brought newspaper mergers within the scope of the Act.

As the principal enforcement agency, the B Kart A has rather wide investigative powers, with authority to search premises, seize relevant documents and hear evidence from witnesses. It also makes decisions operating as a quasi-court and imposes fines for infringements. The principal remedy available to the B Kart A is to make prohibitions, whether of cartel arrangements, the abuse of market dominance, or mergers. (Private individuals can also initiate civil proceedings for damages). However, certain positive measures to encourage competition via countervailing power have recently been introduced. Thus the 1973 amendment authorised measures to facilitate cooperation between small and medium sized businesses, and a working group to consult with firms on this issue was set up by the B Kart A in 1976. There are no powers to break up companies. Appeals against B Kart A decisions lie to the courts, and in the case of mergers there is an additional right of appeal to the Economics Minister, on grounds of advantages to the economy in general or an overriding interest to the public.

The Monopolies Commission is an independent, five-member advisory body.

It is required to evaluate the prevailing degree of economic concentration and its foreseeable development in the light of economic policy, in particular competition policy. In this connection it is required to indicate any amendment to the provisions of the 1957 Act which it considers necessary. The second of two very lengthy MK bi-annual reports was published towards the end of 1978. The Commission may also be called on for specific advice (Sondergutachten) in the case of merger appeals to the Economics Minister.

8. Competition Policy Impact and Current Development

Existing German competition law appears strict. It is firmly embedded in and backed by law, and its coverage is potentially wide. By comparison with the UK and most other countries, the investigative powers of the B Kart A are very great. Responsibility for investigation, decision-making and imposing penalties is all concentrated on a single body, the B Kart A, and this arguably reduces delays and avoids any dissipation of the power of the legislation, as compared with the situation in other countries where responsibility is divided.

Yet there are signs that the legislation has not had the impact that might have been expected. On the cartel side there are many exemptions, as we have seen. Moreover the 1957 GWB apparently did not stimulate German merger activity in the late 1950's and early 1960's in the way that, for example, the 1956 Restrictive Practices Act is widely believed to have done in Britain, mergers substituting for the inter-firm agreements that had been abandoned. In this connection, the very low proportion of legal mergers in Germany is significant, and tends to confirm the laxity of cartel control in practice, since one effect of legal merger is presumably to put all forms of co-ordination within the merged entity unambiguously outside the scope of GWB. Thus, judged by the

observed responses of firms in these respects, the real constraints on their freedom to co-ordinate their behaviour by inter-firm agreement do not seem strong.

So far as monopoly and merger control is concerned, the problematical aspect of the legislation is establishing market dominance and defining its abuse. The legislation has proved quite ineffective to deal with oligopoly or "complex monopoly" situations. For, although abuse of collective market dominance is prohibited, the courts have ruled that there must be no competition within the group. Yet in practice it is often with the more pervasive, oligopolistic market dominance that competition policy has to deal. As is widely recognised, such dominance can have serious anti-competitive effects even when not all forms of competition are absent. More generally, a recent B Kart A suggestion to abandon the whole concept of market dominance in order to make merger control effective reflects adversely on its use elsewhere in competition policy.

Although merger control is relatively recent, it is already evident that the size thresholds for exemption in the 1973 rules are too high. Nearly half of the total number of mergers since the controls were introduced have escaped. Of these 90% fall under the "Anschlußklausel" under § 24(8) GWB where one, usually the acquired, firm has less than DM 50m turnover. As a reference point, the £5m gross assets criterion available in UK merger control translates into a maximum combined turnover of only DM35-40m for the merging firms together.^{1/}

Tighter merger controls featured prominently in Government proposals for a fourth amendment to the basic competition law submitted to the Bundesrat in May 1978, which covered many aspects of the law. Both recommendations concerning

^{1/} The calculation assumes that turnover is roughly double the value of assets. This figure is based on a sample of over 80 large UK companies, and is probably an over-estimate for equivalent, more capital-intensive German firms. £1 = DM3.7.

mergers implemented recommendations made by the MK in its first, 1976 report.^{1/} The first would have reduced the size threshold below which a merger cannot be prohibited or reversed from DM 50m, to as little as DM 2m where the acquirer has DM 1,000m turnover. Thus in both the MK report and the government proposals it was recognised that competition can be threatened not only by giant mergers (Elfantenhochzeiten).

The second proposal to amend merger controls was to introduce additional criteria for establishing market dominance in merger cases. In its 1976 report, the MK considered the 1973 criteria adequate for horizontal merger cases, for which they were designed, but insufficient for vertical and conglomerate mergers. The proposed, additional criteria would presume market dominance where there was a combination of several market dominant positions or of market dominance with greater absolute firm size; or creation of mammoth enterprises with over DM 10,000m turnover; or the threatening of intermediate-sized markets by large firms.

The proposals met with opposition in the Bundesrat and at the time of writing are being revised. Meanwhile, in response to the MK report, the B Kart A had in 1977 suggested an alternative reform. This would entirely separate merger control from the question of market dominance, while introducing a single criterion on the American pattern of a "deterioration in competitive conditions", which it was felt would be quicker and easier to demonstrate. In its second, 1978 report the MK was divided, two members expressing a preference for the B Kart A suggestion and three adhering to the original MK line and supporting the Government proposals. There was, however, unanimity that some tightening of merger law is required. Precisely what form this will eventually take has yet to be seen.

^{1/} Monopolkommission: Hauptgutachten I, "Mehr Wettbewerb ist möglich, Nomos Verlagsgesellschaft, Baden-Baden, 1976.

8. Overview and Conclusions

While the quality of the statistical record vitiates firm conclusions, it seems that the major reorganisation of corporate ownership and control that occurred through mergers in the nineteen-fifties and sixties in other countries, notably the USA and UK, may now be taking place in Germany a decade or so later. As in most other European countries, but unlike the USA, German mergers have tended to be horizontal, though vertical mergers have increased recently. There has been an increase in the proportion of mergers taking place outside the industrial area but, throughout the last two decades, mergers have been highly concentrated in a few merger-intensive industries, notably chemical products (together with mineral oil products), electrical engineering, machine tools and iron and steel. As another influential source (the MK) has observed, the most merger-intensive industries are among those in which seller concentration has increased most sharply over the period.^{1/}

As the evidence of significant community benefits from mergers elsewhere is scant,^{2/} the present concern in Germany over the recent rapid growth in mergers is appropriate. Moreover if, as appears to be the case, corporate restructuring has not yet proceeded far, the opportunity to achieve a significant policy impact (utilising experience from other countries) remains large: in the case of Germany, the horse may not yet have bolted.

The existing law to protect competition looks strict, by international

^{1/} Monopolkommission, Hauptgutachten II.

^{2/} So, for example, the surveys of the US evidence by Hogarty, T.F. ("Profits from Mergers : The Evidence of Fifty Years", St. John's Law Review, Special Edition 44 Spring 1970) and Muller, D.C. (The Effects of Conglomerate Mergers : A Survey of the Empirical Evidence, IIM dp/77-38, May 1977) and two recent UK studies by Cowling, K.G. et al (Mergers and Economic Performance, MacMillan 1979) and Meeks, G. (Disappointing Marriage, University of Cambridge Department of Economics, Occasional Paper 51, 1977).

standards, but appears to have had less impact in practice than the strong formal measures suggest. Some tightening of merger controls looks certain in the forthcoming amendment to the competition law, in particular to prevent its widespread avoidance by resort to mergers below the present, high size-threshold for immunity from control. But it is not clear how far the amendment will go towards a fundamental redesign of the scope and approach of competition policy, especially concerning its ineffectiveness in dealing with oligopolistic interaction, and the problematical concept of "market dominance". Nor is it clear at this stage whether there will be a more thorough-going review of the case for a revised merger-control strategy.

The need for such a review is evident both from the arguments of this paper and from the results of an associated, empirical analysis of the economic causes and effects of a sample of German mergers which took place between 1964 and 1974. These findings are reported in detail elsewhere.^{1/} In brief, the results of the statistical tests are in line with the evidence from other countries and do not suggest significant community gains. They appear to rule out both the pursuit of scale economies and efforts to improve the risk-bearing capacity of the productive system as merger motives, and revealed no statistically significant changes in the performance of merging firms as captured in the levels and growth of profits, sales, assets and employment. On the other hand, two possible indications of positive social purpose in mergers are discernible in the present analysis. One is that the most merger-intensive industries (chemicals (together with mineral oil products), electrical engineering, machine tools and iron and steel) could all be described as areas which have been unusually subject to technological disturbance and/or substantial demand shifts. As such, they are

^{1/} J.R.Cable, J.P.R.Palfrey and J.W.Runge "Economic Determinants and Effects of Mergers in West Germany", Warwick Economic Research Paper No.151, and IIM dp 79/

areas in which the need for structural adaptation to changed conditions might be thought both unusually great and socially desirable. Secondly, as was observed in sections 5 and 6, the recent increase in vertical mergers may perhaps be interpreted as logical reactions to adverse conditions following the 1973 oil crisis and 1975 recession. But clearly these aspects require further examination before firm policy conclusions can be drawn.

These questions are just two of a longer list of matters requiring further examination before scientifically-based policy conclusions can be reached, and highlighted by the present analysis. This list in full includes:

1. the nature and cause of the structural shift which occurred in merger activity around 1970/71;
2. the underlying logic (if any) in the (unchanging) industrial composition of mergers over the whole period and the changing breakdown by type of merger (horizontal, vertical and conglomerate);
3. the quantitative impact of mergers, alongside internal growth and corporate births and deaths (from other causes) on seller concentration in individual markets and on overall concentration among the largest firms in the German economy;
4. as an offshoot of (3), the effects on competitive structure of the acquisition of small and medium as opposed to large firms, and in particular of firms below the size-threshold laid down in the 1973 amendment and subsequent proposals;

5. the significance of conglomerate mergers in the German context, where a defence on grounds of beneficial effects on capital transfer (see below) may not be available;
6. intra-firm effects of merger activity (as opposed to effects on observable performance measures like profit, growth etc);
and
7. the effect of mergers on dynamic performance, in particular innovation.

Examination of items (1) and (2) should permit the elimination of one or other of the hypotheses advanced in section 4, in which mergers are viewed alternatively as national, adaptive responses to technological and trading imperatives for change in industrial structure, or as the playing-out of managerial strategies for growth, etc. This goes to the very heart of the public policy issue concerning mergers, namely whether the structural adaptation mergers represent operates for the general good or only to the benefit of particular interest groups. (3) is a question which has received considerable attention in the literature for the USA and UK (where estimates of the contribution of mergers centre on 50 per cent ^{1/}), but so far as the present author is aware, remains largely unresearched in Germany. (4) is especially topical in Germany because of the existing loophole in competition law, but is of general interest in that most countries formally or informally apply a threshold in their antitrust policies towards merger. With respect to (5) although conglomerate mergers are presently few in Germany, their relative numbers may increase in the future, as they recently have in Britain. ^{2/} Systematic benefits from (appropriately organised) conglomerate organisations, primarily in the US,

^{1/} For a review of relevant studies see K.G.Cowling, P.Stoneman, J.S.Cubbin, J.R.Cable, S.Domberger and P.Dutton, Mergers and Economic Performance, Oxford University Press (forthcoming, 1979) ch.1.

^{2/} See Cowling et al, (op cit).

1/
 have been claimed by Williamson insofar as the internalisation of capital transfer amongst activities eliminates certain failures of the external capital market, not least arising from informational imperfections. In the case of Germany such benefits would not arise to the extent that the provision of corporate finance through the banks provided an alternative solution to these problems. Item (6) would include questions concerning the internal organisation of the firm; the geographical location of (especially head-office) activities within it; and the locus of decision-making at different hierarchical levels. The associated policy issues concern regional policy and worker participation, as well as direct efficiency considerations. Finally, the link (if any) between mergers and innovation (7) overlaps with (1) and (2) and with (6) because it is concerned both with whether mergers are required in the course of implementing technical advances, and with whether mergers tend to create or destroy corporate environments conducive to technical discovery.

Precisely how the exploration of these issues would qualify the underlying presumptions about mergers which are appropriate for public policy remains to be seen. At present there appears to be very little that could be put forward against an outright merger ban, or some similar strong policy, if one proceeds from the assumption that unless more than compensated for by efficiency gains - and perhaps even then - the social and political consequences of increased economic power should be avoided. Meanwhile there is a strong case for the greater disclosure of information relating to mergers. The information published by the cartel office is now very detailed, though an assets or turnover series would be a valuable addition. The real problem lies with the information disclosure rules governing German companies. As is widely recognised, it is extraordinarily difficult to obtain the information necessary to evaluate the performance of German companies, whether involved in mergers or not. Measures to increase the public accountability

1/ O.E.Williamson, Markets and Hierarchies, The Free Press, 1975.

of firms, especially GmbH companies, would serve many social purposes, as well as permitting a more definitive assessment of the origins and social purposes of mergers.