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ANTITRUST SANCTIONS AND REMEDIES: A COMPARATIVE STUDY OF GERMAN AND JAPANESE LAW

John O. Haley*

I. INTRODUCTION

A perceived failure of enforcement was a major theme in discussion of antitrust policy in both the Federal Republic of Germany and Japan during the 1970's. German critics charged that antitrust violations were increasingly being viewed as a Kavaliersdelikt, a peccadillo, not deserving much more than a slap on the wrist. In Japan, on the other hand, the 1947 antitrust statute, one of the most stringent in the world on its face, seemed in its enforcement to be little more than a moribund vestige of Occupation reforms. Such concerns led to proposals and ultimately legislative action to reinforce the available sanctions of both the German

* Associate Dean and Professor, University of Washington School of Law. The author owes a debt of appreciation to the Alexander von Humboldt Foundation for its support of the research on the enforcement of German antitrust law in 1981 at the Institute for Economic Law, Labor, and Social Insurance Law of the Albert-Ludwigs University in Freiburg im Breisgau. A special debt is owed to Professor Dr. Fritz Rittner and Klaus Blemer for their assistance on German law, and to Professor Akira Shohda of Keio University, and Hiroshi Iyori and Hideto Ishida of the Japanese Fair Trade Commission, on the Japanese side. They helped to ferret out many errors in earlier drafts. The author is solely responsible for those that remain.

1. An article by Professor Jürgen Baumann and Gunther Arzt in 1970 was one of the first academic expressions of concern with the issue of whether antitrust violations had become in effect minor, excusable offenses and therefore harsher sanctions were necessary. Baumann & Arzt, Kartellrecht und allgemeines strafrecht, 134 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSREcht (ZHR) 24 (1970). The authors argued for the imposition of criminal penalties for most antitrust violations. This article was the catalyst for intense academic and political debate. The issue was a principal theme in the 49th Conference of German Jurists in 1972. For the proceedings of the conference, see generally VERHANDLUNGEN DES 49 DEUTSCHEN JURISTENTAGES (1972). For the views expressed at the Conference by Professor Klaus Tiedemann, one of the panelists and principal proponents of criminalization of German antitrust law, see K. TIEDEMANN. WELCHE STRAFRECHTLICHE MITTEL EMPFEHLEN SICH FÜR EINE WIRKSAME BEKÄMPPUNG DER WIRTSCHAFTSKRIMINALITÄT? (1972). See also Kartte & von Portius, Kriminalisierung des Kartellrechts, 1975 BETRIEBSSBERATOR [BB] 1169, 1169 n.1. The Federal Minister of Justice responded as noted infra note 16, by appointing a special commission to study the issue of criminal sanctions for antitrust violations in the context of criminal law reforms to prevent various economic offenses.


With respect to remedies and sanctions the 1980 GWB amendments and the 1977 Japanese amendments were remarkably similar, the legislation in both countries including provisions relating to statutory surcharges to prevent offenders from profiting from illegal cartels, even after payment of fines, and increasing tenfold the maximum statutory fines. The amendments and the discussion that preceded them, especially in the Federal Republic, brought into clearer view not only the role of penalties in coercing compliance with substantive legal standards, but also the limits of law as defined by the available penalties. Examination of the sanctions and remedies of German and Japanese antitrust law thus yields insights beyond the issue of antitrust enforcement. It highlights features of the German and Japanese legal systems that are often obscured by focus on substantive law and raises fundamental questions as to the nature and role of sanctions in any legal order.

The legal systems of the Federal Republic and Japan have much in common. The basic institutions and concepts of German civil, criminal, and administrative law provided the principal models for Japan’s legal reforms during the late nineteenth and early twentieth centuries. Contemporary legislation and doctrinal changes in the Federal Republic also continue to influence Japanese legal developments. Despite the American origins of Japanese antitrust legislation, which was drafted by Americans and imposed during the Occupation on a less than enthusiastic Japanese
government, the influence of German law and practice on Japanese antitrust law, at least since 1953, has been profound. The 1952 government draft of the German GWB, for example, provided the basis for the most important changes in the Japanese Antimonopoly and Fair Trade Law in 1953: the inclusion of recession (fukyō) and rationalization (gōrika) cartels. Perhaps more important, the Japanese statute is enforced within procedural contexts—both administrative and criminal—patterned after German law. As a result, today Japanese antitrust law can be understood accurately only when read in terms of German rather than American practice.

Both the German and Japanese antitrust statutes set forth an impressive array of penalties and sanctions against antitrust violations. They include administrative fines, private damage actions, and, in the case of Japan, criminal penalties. In practice, however, few have been effective as deterrents. As discussed below, the reasons for this relate in part to limitations inherent to individual types of penalties, but certain basic features of both legal systems also contribute. Compensating at least in part for the weakness of formal sanctions, however, is the deterrent effect of adverse publicity.

The principal formal sanctions under both statutes are administrative fines, of which the most significant is an administratively determined surcharge to recapture the proceeds of illegal conduct, which resulted from recent amendments to both the GWB and the Antimonopoly and Fair Trade Law. The Japanese statute provides for criminal penalties, al-

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6. Japanese antitrust legislation dates from the enactment in 1947 of the Antimonopoly and Fair Trade Law as part of the Allied Occupation efforts to promote the "economic democratization" of Japan. The statute was subsequently amended in 1949 to eliminate features considered even by Occupation authorities as either too stringent or unworkable. As the Occupation ended in May 1952, the Japanese government almost immediately moved toward amendment to weaken the statute further. The result was the 1953 amendments, which left the basic features of the law intact but added several critical exemptions for recession (fukyō) and rationalization (gōrika) cartels and a system of authorized resale price maintenance. Although the amendments themselves did not significantly impair an effective antitrust policy, they signalled the beginning of a decade of weak enforcement. For a concise account in Japanese, see I. A. Shōda, Dōkusei kinshi hō (Antimonopoly law) 4 (2d ed. 1980); more detailed description is provided in Kösei torihiki inkai, Dōkusei kinshi seisaku niunenshi (Twenty-year history of antimonopoly policy) (1968) [hereinafter cited as Twenty-Year History] and the companion volume, Kösei torihiki inkai, Dōkusei kinshi seisaku sanjūnenshi (Thirty-year history of antimonopoly policy) (1977). For discussion in English of the background and controversy over Occupation antitrust policies, see generally T. A. Bisson, Zaibatsu Dissolution in Japan (1954); E. Hadley, Antitrust in Japan (1970); and K. Yamamura, Economic Policy in Postwar Japan (1967).


8. See H. Iyori & A. Uesugi, supra note 4, at 15.
though, to anticipate subsequent discussion, there has been only one significant criminal prosecution. German law differs in not subjecting antitrust violations to criminal sanctions. Rather, antitrust violations are treated as *Ordnungswidrigkeiten*, administrative or regulatory offenses. As such they are subject to administrative fine proceedings but not criminal actions. Finally, both statutes provide for civil (nontreble) damage actions. Judicial construction of the GWB and difficulties of proof in both German and Japanese law have diminished (in the Federal Republic) or essentially eliminated (in Japan) the efficacy of damage actions as a deterrent.

The concept of an equity power to fashion nonstatutory remedies in order to provide effective relief is alien to both German and Japanese notions of judicial and administrative power. The traditional view in the Federal Republic is that all remedies and sanctions must have specific statutory basis. Consequently, the antitrust enforcement authorities in the Federal Republic are restricted to the limited remedial powers—prohibition orders—and sanctions delineated in the GWB. In Japan, the general language in the Japanese Antimonopoly and Fair Trade Law, based on American concepts, empowers the Japanese enforcement authorities “to take any other measures necessary to eliminate acts in violation” of various prohibitions, but does not give the authorities the breadth of remedial power that a corresponding grant of equity power would give an American administrative agency.

Nor do courts or administrative agencies in the Federal Republic or Japan have general contempt power. In the case of the Federal Republic there is an apparent but little used analog, but not in Japan. A violation of a court or administrative order may be subject by statute in specific instances to criminal penalty, but, as explained in detail below, this presents a variety of special obstacles. Consequently, the Federal Republic and Japan share a common weakness in antitrust enforcement—the lack of effective legal sanctions—with a common result: an administrative il-

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9. Criminal procedure scholar John Langbein uses the term “petty infractions” for *Ordnungswidrigkeiten*. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439, 451 (1974). Because such offenses are not necessarily minor and the procedures for levying fines are administrative, not criminal, the translations “administrative” or “regulatory” offenses seem preferable. The standard Japanese translation is *chitsujo ihan* (offense against public order), construing the term *Ordnung* as “public order” rather than “regulation.” The English term the author has adopted conveys more accurately the sense of the term if not its literal meaning.

10. See *GRUNDE GESetz* [GG] art. 103(2) (W. Ger.).


12. *ZIVILPROZEBORDNUNG* [ZPO] § 890 (W. Ger.) provides for a maximum fine of 500,000 DM (approximately $250,000 at prevailing rates) and imprisonment for six months for violations of court orders. It is made applicable to administrative orders under *VERWALTUNGSGERICHTSORDNUNG* [VwGO] § 167 (W. Ger.).
legal proceeds surcharge has become the most effective statutory sanction, while adverse publicity is the most effective actual deterrent.

II. CRIMINAL VS. ADMINISTRATIVE PENALTIES

On the face of the German and Japanese antitrust statutes, the most salient difference in sanctions between the two is that German law uses administrative fines instead of criminal sanctions. This difference is of little significance in practice, however, because of the dearth of criminal actions in Japan, as discussed in detail below. The debate over the criminalization of German antitrust law illustrates the special limitations imposed by German criminal procedure on the use of criminal sanctions to enforce regulatory measures. The Japanese experience, however, points to more general hurdles to their effective use at least in the antitrust context.

A. German Law

No violation of the GWB is punishable as a criminal offense. Instead, the GWB lists a series of particular violations deemed regulatory infractions, or *Ordnungswidrigkeiten*, subject to fines levied pursuant to the Law on Regulatory Offenses (OWiG). The introduction of criminal sanctions, however, has long been an issue. The "Josten draft," which provided the basis for the government's 1952 bill that resulted in the GWB as enacted in 1957, relied principally on criminal sanctions. More recently, a special commission appointed in 1972 by the Federal Ministry of Justice recommended that horizontal price-fixing and other agree-
ments or concerted action violative of sections 1 and 25(1) of the GWB be treated as criminal offenses. This recommendation was never adopted. The lack of criminal penalties reflects, however, not only the apparent wishes of the government—particularly the Federal Ministry of Economics, which rejected the special commission recommendation—but also most antitrust scholars, practitioners, and, perhaps most important, the antitrust enforcement authorities themselves. The opposition stems from several concerns.

Foremost are certain practical procedural advantages in applying administrative sanctions under the OWiG, or perhaps more accurately the disadvantages of resort to the criminal process under German law. Of central concern is the narrow discretion of the prosecutor in deciding whether or not to prosecute a particular case. Under what is termed the Legalitätssprinzip, or legality principle, in theory the procuracy must prosecute all persons who, after investigation, are found to have committed a criminal offense. As a further check on discretion, not only can prose-

1. Bundesrepublik Deutschland, Bundesministerium der Justiz, Tagungsberichte der Sachverständigenkommission zur Bekämpfung der Wirtschaftskriminalität (1972-76) [hereinafter cited as COMMISSION HEARINGS].


18. With the exception of some commission members themselves, no scholar or practitioner appearing before the commission fully supported the introduction of criminal sanctions. Compare submissions of commission members Tiedemann, Raisch, and Ulmer (10 COMMISSION HEARINGS, supra note 16) (supporting criminal sanctions) with submissions of Steindorff (8 id. app. 6) (opposing criminal penalties) and submissions of Cramer (10 id. app. 6) (same). The Vice-President of the Federal Cartel Office was equally unenthusiastic. See submissions of Gutzler, 8 id.; 10 id. app. 4. The current President of the Federal Cartel Office, Wolfgang Karte, is apparently no more supportive of the use of criminal sanctions. See, e.g., Karte & von Portius, supra note 1.

19. Strafprozeßordnung [StPO] §§ 152(2), 160, 170 (W. Ger.). For discussion in English of the limits of prosecutorial discretion in Germany, see Damaska, The Reality of Prosecutorial Discretion: Comments on a German Monograph, 29 AM. J. COMP. L. 119 (1981); Herrmann, The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 468 (1974); Jescheck, The Discretionary Powers of the Prosecuting Attorney in West Germany, 18 AM. J. COMP. L. 508 (1970); Langbein, supra note 9. See also Goldstein & Marcus, The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany, 87 YALE L.J. 240 (1977) (maintaining that prosecutors have discretionary power to prosecute); the response thereto, Langbein & Weinreb, Continental Criminal Procedure: “Myth” and Reality, 87 YALE L.J. 1549 (1978) (maintaining that German prosecutors exercise little prosecutorial discretion); and the rebuttal, Goldstein & Marcus, Comment on Continental Criminal Procedure, 87 YALE L.J. 1570 (1978). Much of the argument on both sides rests on speculation for lack of empirical data. However, a subsequent study conducted under the auspices of the Max-Planck-Institut für ausländisches und
ution be activated by private complaint, but also a right of petition by the victim exists for a court order requiring prosecution upon judicial finding of sufficient evidence. Despite some margin for what amounts to a discretionary decision by the prosecutor not to prosecute, in effect German law shifts such discretion from the state to private persons in cases where the evidence of guilt is sufficient for conviction. Nor does the career judiciary in Germany enjoy the flexibility and room for maneuver (i.e., discretion) of common law judges. The prosecutor files the charge and the court determines guilt, and neither has any significant discretion, except for sentencing if guilt is proven. As a result, the complainant rather than the prosecutor or the judge ultimately controls the imposition of criminal sanctions. One consequence is obvious: criminal law enforcement authorities are unable or less likely to select cases to prosecute based on policy considerations—ranging from their concern over the seriousness of the offense, the development of judicial construction of the law, or circumstances related to the commission of the offense or the offender. Questions of efficiency also arise. The prosecutor loses the freedom to decide how to allocate resources. If all cases must be prosecuted, prosecutorial efforts are necessarily more diffused than if concentration on particular cases were permitted. The problem is exacerbated by the...
fact that in 1979 there were only 3,328 procurators in the Federal Repub-

In contrast, under the so-called *Opportunitätsprinzip*, provided for in section 47 of the OWiG, administrative authorities exercise broad prosecutorial discretion over which violations are actually prosecuted. The advantages of such discretion account largely for the strong preference displayed by antitrust enforcement officials for noncriminal sanctions.27 Because of the economic issues involved, they argue, discretion over prosecution is essential to the development of sound antitrust policy.

A second consideration, however, is the difference in expertise involved. The German procuracy deals exclusively with criminal actions. In civil and administrative cases the government is represented by private counsel or qualified lawyers from a particular agency.28 Therefore, it is said, the procuracy necessarily lacks exposure to the problems and issues involved in economic regulation, especially those that underlie antitrust actions.29 This expertise is particularly critical at the investigative stage of a case, which for criminal offenses is left largely to the police.30

Also raised in objection to criminal penalties is the greater delay involved in criminal cases as compared to proceedings under the OWiG.31 At least one study gives some support for this assertion. Despite the extraordinary efficiency of the German criminal process,32 the investigation of most economic crimes appears to take at least as long as, if not longer than, an entire administrative proceeding under the GWB.33

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27. See, e.g., Karte & von Portius, supra note 1, and submissions by Gutzler, 8 COMMISSION HEARINGS, supra note 16, app. 7; 10 id. app. 4.
28. See T. WEIGEND, supra note 24, and the comments thereon by Damaska, supra note 19.
29. Although seldom expressed so baldly, the importance of expertise is apparent from the efforts to deal with the problem by proponents of criminal sanctions. See, e.g., submission by Klaus Tiedemann, 10 COMMISSION HEARINGS, supra note 16, app. 1, at 6.
30. On the role of the police in criminal investigations, see BLANKENBURG, supra note 19, at 291, 338.
31. See, e.g., submissions by Peter Cramer and Peter Ulmer in 10 COMMISSION HEARINGS, supra note 16, apps. 6 & 2. See also comments by Wolfgang Kartte before a seminar conducted by Professors Fritz Rittner and Klaus Tiedemann on “Antitrust Violations and Criminal Law” (Kartellrechtsverstöße und Strafrecht) in the Law Faculty of Freiburg University, Spring Semester 1975. Comments by Wolfgang Kartte of May 28, 1975, Dieter Lutz Reporter, in Seminar Records (provided to author by Professor Fritz Rittner).
32. In one of the best empirical studies in English on the German criminal process, Professor Gerhard Casper and Haus Zeisel determined that roughly one-half of all criminal trials last one-third of a day or less. Casper & Zeisel, Lay Judges in the German Criminal Courts, J. LEGAL STUD 135, 149–50 (1972).
Closely related to concerns over the adverse consequences of introducing the Legalitätsprinzip to antitrust enforcement are objections based on the necessary imprecision in any legal definition of illegal anticompetitive conduct. The limitations on prosecutorial discretion in German law grow out of and reinforce the view that norms enforced by criminal sanctions should be unambiguous and subject to uniform prosecution. In German constitutional terms, no act may be subject to a criminal penalty unless its illegality is described in clear and certain terms by statute before the act has been committed.\(^3\)\(^4\)\(^5\)\(^6\) German antitrust specialists argue that such concepts as “concerted conduct,” “restriction of competition for a common purpose,” “abuse of market power,” or “anticompetitive considerations” lack such certainty.\(^7\)\(^8\) The fear is also expressed that the courts would impose rigid definitions of these terms in order to meet these constitutional requirements\(^9\) and that judges would be reluctant to impose criminal sanctions.\(^10\)

Lurking in the background is a conceptual distinction between criminal offenses and infractions of regulatory statutes introduced at the turn of the century.\(^11\) Although not reflected in any statutory dichotomy until the postwar period, the notion that conduct violative of regulatory statutes or administrative regulations is by nature conceptually distinguishable from Criminal Code offenses provided the jurisprudential foundation in 1945 for introducing the concept Ordnungswidrigkeiten as a separate category of unlawfulness.\(^12\) Although today few German scholars fully accept the validity of the argument that there is an inherent conceptual difference in the nature of regulatory as opposed to criminal offenses, the distinction persists out of recognition that various features of the German criminal

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34. GG art. 103(2). See also WEIMAR CONSTITUTION art. 116 (Ger. 1919) (no longer in force).
35. See, e.g., Karte & von Portius, supra note 1, at 1170. See also Gutzler, 8 COMMISSION HEARINGS, supra note 16, app. 7, at 3.
36. See, e.g., Gutzler, 8 COMMISSION HEARINGS, supra note 16, app. 7, at 8.
38. The distinction was first explored in the now classic study by James Goldschmidt. J. GOLDSCHMIDT. DAS VERWALTUNGSSTRAFRECHT (1902). Erik Wolf, however, is considered its most persuasive and articulate conceptual explicator. Wolf, Die Stellung der Verwaltungsdelikte im Strafrechtssystem, in BEITRAGE ZUR STRAFRECHTSWISSENSCHAFT: FESTGABE FÜR REINHARD VON FRANK 516-88 (1930). Eberhard Schmidt is credited with giving life to these early works in postwar legislation. The most important postwar restatement of the validity of the dichotomy in the context of economic regulation is E. SCHMIDT, DAS NEUE WESTDEUTSCHE WIRTSCHAFTSSTRAFRECHT (1950). For a critical analysis, see K. TIEDEMANN, KARTELLRECHTSVERSTÖFE UND STRAFRECHT 99 (1976); K. TIEDEMANN, WETTBEWERB UND STRAFRECHT 117 (1976).
process, as discussed above, are inappropriate in dealing with particular types of unlawful conduct.

Although perhaps flawed as an exercise of conceptual jurisprudence, the traditional justification for the dichotomy does contain an important sociological insight. Apart from the penalties imposed, the procedures followed, or who initiates and controls the process, a criminal action can also be distinguished from both civil and administrative proceedings by the social stigma that attaches to the offender. Indeed, this may be the element that determines the efficacy of criminal sanctions. Neither the threat nor the imposition of the penalty itself has much effect if the offender is free from any stigma of having committed the offense or having been involved in a criminal proceeding. Consequently, before any conduct is deemed “criminal,” there should be social consensus on both sociological and ethical grounds that such stigma is justified. Otherwise, the process will be difficult to invoke, and a conviction will be difficult to sustain, by those who have discretion (complainants, prosecutors, or judges, or any combination thereof). To invoke the criminal process without consensus that the penalty suits the wrong committed will tend to erode the legitimacy of the criminal process and the capacity of the label “criminal” to carry any stigma.

Consensus is all the more necessary in a pluralistic society such as the Federal Republic where the discretion of the prosecutor and judge is narrowly prescribed and there is no trial by jury. The lack of any intervening discretionary check against prosecution forces the German legislator to consider with care the potential scope of any criminal proscription, as evidenced in German constitutional requirements. This need is all the greater if a significant portion of the community condones, if not encourages, the conduct in question. To the extent legislators are accountable to the public politically, they must be sensitive to community attitudes toward the wrongfulness of the conduct proscribed. The ultimate issue, therefore, is the extent to which society views the conduct or acts in question to be morally or socially reprehensible. As perceived in the traditional conceptual dichotomy between administrative and criminal offenses in Germany, there does or should exist a qualitative difference between criminal conduct and other unlawful behavior. This distinction is better defined, however, in terms of community values and attitudes rather than jurisprudential conceptualizations. Thus, the distinction is today stated in terms of the “ethical” content of the offense.40 One would be hard-pressed to find a better example than antitrust.

40. See Judgment of Nov. 4, 1957, Federal Sup. Ct., W. Ger., 11 Entscheidungen des Bundesgerichtshofs in Strafsachen [BGHSt] 263, 264 (1958); see also Langbein, supra note 19, at 453 (citing K. Peters, STRAFPROZES 31 (2d ed. 1966)). Langbein’s description of the differences between
The GWB as enacted reflected a series of political compromises. As a matter of political reality, the statute could not have been enacted with the criminal sanctions that had been provided in the original "Josten draft." As acknowledged in the official comments to the government's 1952 bill, which eliminated such criminal penalties: "In neither the German public nor concerned business circles . . . is there at this point in time a vital sense that contracts and business practices that restrict competition are improper and morally wrong." The official comments expressly left open, however, the possibility of a change in attitudes and the strengthening of sanctions in the future, and today no opponent of criminal sanctions for antitrust violations argues—at least openly—that anticompetitive conduct should be treated as a Kavaliersdelikt. Yet it is clear that even the most active supporters of strong antitrust enforcement have doubts about the appropriateness of criminal stigma for those who violate the GWB.42

Finally, doubts have been expressed on both the efficacy of criminal sanctions as a deterrent in antitrust enforcement as well as whether there is any need for additional sanctions.43 What is needed, it is argued, is to make existing sanctions more effective.44 The special commission had before it, for example, information on the success, or lack of it, of the American experience with criminal sanctions.45 Nonetheless, no attempt was made to resolve either doubt empirically.46

On one issue there has been little if any disagreement. The maximum fine originally fixed in the GWB of 100,000 DM (approximately 40,000 U.S. dollars at prevailing exchange rates) was much too low to have any meaningful deterrent effect. Consequently, the provisions of the 1980

*Ordnungswidrigkeiten* and criminal offenses is excellent. As he notes, the distinction "reflects the view that the essence of the criminal process is the moral condemnation attaching to its formal sanctions and its procedures." *Id.* (footnote omitted). As noted above, * supra* note 9, Langbein's use of the term " petty infractions" for *Ordnungswidrigkeiten* seems less appropriate than "administrative" or "regulatory" offenses since many, such as antitrust violations, are not minor or petty. Rather, as explained above, criminal sanctions in such cases are considered to be impractical out of procedural considerations or too harsh for lack of consensus as to the appropriateness of the criminal stigma.

41. *BUNDESREPUBLIK DEUTSCHLAND, BEGRÖNDUNG DES GESETZENTWURFES, 11 BT DRUCKSACHE 1158*, at 28.

42. In addition to works previously cited * supra* note 19, see F. RITTNER, *EINFÜHRUNG IN DAS WETTBEWERBSUND KARTELLRECHT* 305 (1981).


44. Gutzler, 8 COMMISSION HEARINGS, * supra* note 16, app. 7.

45. Steindorff, 8 COMMISSION HEARINGS, * supra* note 16, app. 6 (citing works by Packer, Elzinga, and Breit, and other American studies).

46. Professor Tiedemann offered the only concrete examples of the failure of sanctions to provide an effective deterrent. He simply details, however, a number of antitrust decisions to show that the fines were insignificant relative to the violation. Tiedemann, 10 COMMISSION HEARINGS, * supra* note 16, app. 1.
amendments on section 38(4) increased the limit tenfold to one million DM or treble any gain realized as a result of illegal conduct. This is the illegal proceeds surcharge that will be discussed below. The result was to raise the maximum fine to the original level provided in the government’s 1952 Bill.47 The principal factor taken into consideration in the amount actually levied is the size of the respondent enterprise.48

Note in addition that under German law criminal sanctions and administrative fines require the same evidentiary burden for conviction. For both, in the case of proceedings against natural persons, proof is necessary not only of individual responsibility but also of willful or negligent conduct in violating the law.49

B. Japanese Law

In the area of sanctions, the Japanese depart in significant respects from both German and American patterns. Not having adopted the strict controls of German law over prosecutorial discretion, the Japanese have not had to create a system of noncriminal and therefore discretionary administrative offenses.50 Not having a substitute for contempt, they forego the civil enforcement alternative of American practice and are left to rely on criminal sanctions. If criminal prosecution in any society, as we have noted in Germany, is an unwieldy tool for antitrust enforcement, in Japan it is even less useful. Japan is consequently left with an extraordinarily weak system of law enforcement.51

I. Criminal Penalties

The principal statutory sanctions against antitrust violations in Japan

47. For a brief description of the political decision by the government not to follow the Josten draft in all respects, especially to limit the maximum fine (and eliminate criminal sanctions), see MULLER-HENNEBERG, supra note 14, at 661 (portion written by Mayer-Wegelin). Unless a higher fine is expressly allowed by other statutes, the maximum administrative fine under the OWiG is 1000 DM (about $500 at prevailing exchange rates). OWiG § 17(1).
49. See Gutzler, 8 COMMISSION HEARINGS, supra note 16, app. 7, at 36.
50. It might be noted that in the 1940’s, Japan’s celebrated institutional and administrative law scholar, Tatsukichi Minobe, introduced the German distinction between administrative and criminal offenses. See, e.g., T. MINOBE, KEIZAI KÉHÔ NO KISO RIRON (The theoretical basis for economic criminal law) (1944). His observations made hardly a ripple, and have been almost totally ignored because the underlying need for the dichotomy, the legalitätsprinzip, was one of the few major elements of German law the Japanese did not borrow.
Antitrust Sanctions in Germany and Japan

are criminal penalties. Except for possible imprisonment, they are mild.\textsuperscript{52} The highest criminal fine permitted is five million yen (approximately 20,000 U.S. dollars at prevailing exchange rates) for private monopolization and unreasonable restraints of trade in violation of articles 3 and 8. Violations of the prohibitions against holding companies, unlawful shareholding, and interlocking directorships and officerships, as well as failure to file required reports, are subject to a maximum fine of two million yen (8,000 U.S. dollars). Failure to comply with an FTC order and conclusion of an illegal international agreement are subject to fines not to exceed three million yen (12,000 U.S. dollars). As to imprisonment, a maximum term of three years can be imposed for private monopolization and unreasonable restraints under article 3. Unlawful holding companies, shareholding violations, and unlawful interlocking directorates and officerships carry a maximum term of one year, and conclusion of an unlawful international agreement a maximum term of two years. Imprisonment cannot be imposed for failure to file a report.

The 1977 amendments increased the maximum amount of all fines in the statute to their current levels. Prior to the amendment they were one-tenth of the current amount. The maximum fine for illegal price-fixing, for example, was only 500,000 yen (approximately 2,000 U.S. dollars at prevailing exchange rates).

No criminal sanction is imposed for unfair business practices, despite inclusion for amendment of such penalty in the 1974 proposals by the Fair Trade Commission (FTC), the sole Japanese antitrust enforcement agency. This was the only major feature of the original FTC proposal not enacted in 1977. The significance of its deletion is evident in the Commission's reliance on the proscription against unfair business practices in articles 19, 8, and 6 as the principal mechanism to police antitrust violations other than the most blatant cases of horizontal price-fixing or output restrictions.

Unique to the Japanese system are the provisions giving the FTC the exclusive right to file criminal charges under the law,\textsuperscript{53} and giving the Tokyo High Court exclusive jurisdiction to try criminal antitrust actions.\textsuperscript{54} Criminal actions are thus initiated solely by the FTC. They are, however, subject not only to FTC discretion to prosecute, but also general prosecutorial discretion enjoyed by the Japanese procuracy.\textsuperscript{55} The critical feature of Japanese antitrust enforcement that reduces the deterrent effect of criminal sanctions, however, is not lack of severity but atrophy. In

\textsuperscript{52} Antimonopoly and Fair Trade Law arts. 87 to 91-2.
\textsuperscript{53} Id. art. 96.
\textsuperscript{54} Id. art. 85.
\textsuperscript{55} \textit{Kenjō sosho hô} (Code of criminal procedure) (Law No. 131, 1948) art. 248.
over thirty-five years only six criminal actions have been brought for anti-
trust violations, three of which were brought in 1949;\textsuperscript{56} Kōsei Torihiki I'inkai v. Ōkawa K.K.,\textsuperscript{57} Kōsei Torihiki I'inkai v. Yamaichi Shōken K.K.,\textsuperscript{58} Kōsei Torihiki I'inkai v. Nōrin Renraku Kyōgōkai,\textsuperscript{59} Kōsei Torihiki I'inkai v. Sanintochi K.K.,\textsuperscript{60} Kuni [Japan] v. Sekiyu Renmei,\textsuperscript{61} and Kuni [Japan] v. Idemitsu Kōsan K.K.\textsuperscript{62}

The Ōkawa case involved failure to obey an FTC order to dispose of
corporate stock. It was dismissed prior to trial in the general amnesty at
the end of the Occupation. The facts are not reported. The complete facts
of the Yamaichi Shōken case are also unreported. Not prosecuted at the
procurator’s discretion, it apparently involved alleged violations of the
restrictions on mergers and acquisitions of articles 15 and 16. The third
action against Nōrin Renraku Kyōgōkai concerned violations of the 1948
Trade Association Law\textsuperscript{63} (repealed in 1953). The nature of the violations
are not clear from the reported decision, but the association was found
guilty and fined 10,000 yen (approximately 40 U.S. dollars at prevailing
exchange rates). Two individual defendants were fined a mere 500 yen (2
U.S. dollars). The first prosecution after the end of the Occupation was a
1969 case against a real estate firm, Sanintochi K.K., for unfair advertis-
ing in selling lots in suburban Tokyo in violation of articles 90(3) and 95
of the Antimonopoly and Fair Trade Law as well as articles 4, 6 and 9(1)
of the Unfair Premiums and Misleading Representations Prevention
Law,\textsuperscript{64} which is also enforced by the FTC. The company was fined
200,000 yen (800 U.S. dollars) and an individual defendant was fined
100,000 yen (400 U.S. dollars) and sentenced to imprisonment for one
year, suspended with three years probation.\textsuperscript{65}

The most important criminal enforcement actions brought by the FTC
to date were the 1974 actions, involving price-fixing and output restric-
tions for domestic petroleum products. In 1974 the FTC filed criminal

\textsuperscript{56} The account of early criminal antitrust cases in Japan is based on Stephen F. Clayton, Crimi-
nal Prosecution of Antitrust Violations in Japan (1982) (unpublished seminar paper, University of
Washington) (copy on file with the \textit{Washington Law Review}).

\textsuperscript{57} (Tokyo High Ct., May 12, 1953), \textit{noted in TWENTY-YEAR HISTORY. supra} note 6, at 107.

\textsuperscript{58} Procuratorial decision not to prosecute, Dec. 28, 1952, \textit{noted in TWENTY-YEAR HISTORY. supra}
note 6, at 107.

\textsuperscript{59} 17 Shinketsushū 244 (Tokyo High Ct., Feb. 2, 1951).

\textsuperscript{60} 17 Shinketsushū 232 (Tokyo High Ct., Jan. 29, 1972).

\textsuperscript{61} 983 \textit{HANREI} JIHO 22 (Tokyo High Ct., Sept. 28, 1982). For comment and partial translation,
see Ramseyer, \textit{The Oil Cartel Criminal Cases: Translations and Postscript}. 15 \textit{LAW IN JAPAN} 57,
57-72 (1982) (15 \textit{LAW IN JAPAN} is a symposium on the Oil Cartel Cases).

\textsuperscript{62} 985 \textit{HANREI} JIHO 3 (Tokyo High Ct., Sept. 28, 1980). For comment and partial translation,
see Ramseyer, \textit{supra} note 61, at 66-75.

\textsuperscript{63} Jigyo dantai hō (Law No. 191, 1948, repealed by Law No. 259, 1953).

\textsuperscript{64} Futō keihinru oyobi futō hyōji bōshi hō (Law No. 134, 1962).

\textsuperscript{65} 17 Shinketsushū 232, 233.
charges against the Sekiyu Renmei (Petroleum Industry Federation) and two other defendants for output restrictions and the twelve Japanese oil companies and fourteen individuals for price-fixing. The prosecutions resulted in acquittals in the output restriction case for lack of criminal intent, but in convictions for price-fixing, making these cases the most important antitrust actions that have been brought in Japan. The corporate defendants were fined between 1.5 and 2.5 million yen, and the individual defendants were sentenced from ten to six months in prison, suspended with two years probation.

The Tokyo High Court decisions, handed down in September 1980, were promptly hailed as landmark cases. Never before had antitrust offenders in Japan been so severely punished. Moreover, in both cases the defendants' illegal activities had been carried out with the overt approval and supervision by the Ministry of International Trade and Industry (MITI) pursuant to special legislation to stabilize the supply of petroleum. Finding that the defendants in the output restriction case had acted as a result of close MITI supervision and guidance under an erroneous assumption that their conduct was lawful, the court held the defendants lacked the requisite criminal intent for conviction. In the price-fixing case the court found that MITI had acquiesced but not mandated the agreement to raise prices, hence the illegality of the arrangements resulted in convictions. Only the price-fixing case was appealed, and on

66. Idemitsu Kōsan K.K. and Nihon Sekiyu K.K. were fined 2.5 million yen (approximately $10,000). Taiyō Sekiyu K.K. was fined 1.5 million yen ($6,000), and the remaining nine companies were fined 2 million yen ($8,000). Ramseyer, supra note 61, at 66.

67. The individual defendants were all high-level managers. The heaviest sentences (10 months) were meted out to Jun'ichi Saitō, director and former head of Idemitsu's sales department, and Ichiyuki Okada, who had a similar position with Nihon Sekiyu. Ramseyer, supra note 61, at 66.

68. Few antitrust cases in Japan have produced as much commentary. See articles in Japanese cited in the bibliography to Symposium, 15 LAW IN JAPAN 99 app. A. (1982).


70. The decisions did not reflect a significant change in the law as to the effect of administrative guidance. Prior Commission decisions had consistently held that administrative guidance, even if itself lawful, did not provide an exemption from antitrust proscription. The "guidance cartels" of the 1960's and early 1970's were long recognized as the means used by MITI and major industries to evade the institution of Japan's antitrust law following the defeat of the 1958 amendments. See, e.g., T. NAKAMURA, THE POSTWAR JAPANESE ECONOMY 48 (1981). Nonetheless, their overt use had begun to endow them with a sort of de facto legitimacy, especially for foreign observers. See, e.g., W. PAPE, GYOSEISHIDO UND DAS ANTI-MONOPOL-GESETZ IN JAPAN (1980). The decision did, however, take many scholars by surprise in accepting mistake as to the law as an exculpatory excuse. See Itakura, Sekiyu yami karuterujiken keiji hanketsu no igi (Significance of the secret oil cartel criminal decision), 361 KÖSEI TORIKI 24 (1980). The court adopted an argument first put forth by Professor Hideo Fujiyuki, in Fujiyuki, Gyosei shidō to dokkin hō than no tsu (Administrative guidance and the crime of antimonopoly law violations), 566 JURISUTO 46 (1974).

71. Ramseyer, supra note 61, at 72.
February 24, 1984, the Second Petty Bench of the Supreme Court unanimously affirmed the High Court's judgment.\textsuperscript{72}

Despite the impact of the Oil Cartel cases, one can reasonably doubt whether criminal sanctions are likely to prove effective in Japan in the long run. The oil industry was an exceptionally apt target, particularly in the early 1970's. It did not enjoy the level of general support given to most manufacturing and service industries in Japan from labor or the public. Moreover, the actions were brought during a period of acute inflation for which rising oil prices were blamed. Although, as in the United States in the wake of the 1960 electrical equipment conspiracy cases,\textsuperscript{73} the Oil Cartel cases produced in Japan a heightened awareness of the criminality of antitrust violations and the potential for prosecution, such sensitivity will not necessarily endure. In the United States, as Elzinga and Breit note, the prediction that "antitrust would never be the same again" proved false.\textsuperscript{74} They echo in particularized terms the concern of German lawmakers over community consensus as to the criminality of antitrust violations in concluding that—

\begin{quote}
until judges and juries are convinced beyond a reasonable doubt that the well-dressed, wealthy, articulate pillar of the community facing them is in actuality the real instigator and director of a conspiracy to cut back production, rig prices, and rob consumers and taxpayers just as effectively as a common mugger or bank robber, it is unlikely that prison sentences often will be imposed for violation of the antitrust laws.\textsuperscript{75}
\end{quote}

If the criminal penalties are not a realistic deterrent to corporate immorality, as Elzinga and Breit conclude for the United States, there seems little chance for their efficacy in Japan.

The effective use of criminal sanctions to control corporate conduct in Japan is an impossible task. Criminal prosecutions engender severe political and intra-agency conflict as a result of the clientele relationship between each economic ministry and the industries within its jurisdiction. Resort to criminal actions is similarly precluded except in rare instances by the social density that results from the intricate personal ties that connect the leaders of Japanese business, politics, and bureaucracy.

Institutional limitations are also a factor. The members of the FTC are cabinet appointees and have since 1953 come exclusively from the ranks of government officials, especially the Ministry of Finance and its affili-

\footnotesize{\textsuperscript{72} Idemitsu Kosan v. Kami, __ Keishit __ (Sup. Ct., 2d P.B., February 24, 1984).


\textsuperscript{74} K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 32 (1976).

\textsuperscript{75} Id. at 43.}
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ated agencies. They are subject, therefore, to political pressures, and their monopoly of the right to file a criminal charge is exercised with great caution. In addition, the Japanese procuracy must also exercise its wide legal discretion to prosecute. There are less than 2,200 prosecutors in Japan, roughly half as many per capita as in the Federal Republic, to handle all criminal and administrative litigation. Winnowing cases by means of broad prosecutorial discretion is thus a necessity. Although the rate of convictions in criminal cases is 99.99 percent, the rate of prosecution averages only 67 percent. For statutory crimes the rate of prosecution is a mere 33 percent and less than 20 percent for crimes involving public officials. Similar discretion over sentencing is exercised by judges; less than 2 percent of all of those who are convicted are ever imprisoned. Judges regularly suspend over two-thirds of all jail sentences. The criminal justice system in Japan does not operate as a penalty-imposing process but a corrective one in which defendants are given the opportunity and incentive to repent, compensate the victims, and be absolved. As a consequence of each of these factors it is difficult to avoid the conclusion that were the FTC suddenly to initiate prosecutions on a regular basis, the most likely outcome would be a drastic change in the law itself, rather than success.

2. General Remedial Powers

Unlike the GWB, the Japanese antitrust statute provides for open ended remedial powers rather than fines as the primary enforcement mechanism. The Antimonopoly and Fair Trade Law expressly grants the FTC broad powers to order all corrective actions necessary to eliminate violations. These are contained in a cluster of provisions added by amendment in 1949 in relation to specific prohibitions. Article 7, for example, gives the Commission the authority to order a party in violation of the proscriptions against private monopolization and unreasonable restraints of trade in article 3 to cease, and desist the violation, to report corrective measures taken, to transfer part of a violating firm’s business, and to take “any other measures necessary to eliminate such acts in violation.” An innova-

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78. See supra note 26.
79. Haley, supra note 51, at 270.
82. Id. at 269–71.
tion of the 1977 amendments, article 8-4, gives the Commission power to order divestiture and other structural changes to deal with monopoly power. Article 20 contains a similar provision with respect to unfair business practices, and since 1977 the Commission has had the authority to delete clauses constituting an unfair business practice from contracts. Article 8-2 provides for similar measures to remedy violations by trade associations as well as authority to dissolve the offending association. Under article 17-2(1) companies and juridical persons in violation of the proscriptions against excessive or illegal intercorporate shareholding and illegal mergers may be required to file reports, dispose of any stock held in violation of the statute, transfer a part of the offending company’s business, and take other necessary measures to eliminate the violation. Article 17-2(2) gives the Commission similar power to correct illegal interlocking directorates and officerships, and article 18 permits the FTC to bring a civil action (in the Tokyo High Court) to have illegal holding companies or mergers declared null and void. These powers have been more restricted in practice, however, than they appear on the face of the statute.

First, the scope of FTC orders is narrow. Mandated remedial measures in a decision are considered legally binding only with respect to the violations set out in the facts of the decision. If the decision refers to an illegal price-fixing agreement concluded on March 31, 1985, and orders the respondents to eliminate that violation, it would not necessarily apply to an identical agreement concluded the next day on April 1, 1985. Thus the FTC has been forced to bring consecutive actions against the same respondents to eliminate what was in technical legal terms a series of separate agreements to fix prices but to the businessman simply a single price-fixing arrangement formally confirmed after each successive FTC decision.83

A second limitation is that without effective sanctions to enforce compliance, the FTC is left with little other than adverse publicity to insure its orders are followed. Apparently, the FTC has never attempted to impose a criminal fine for violation of an order. In addition to criminal fines, the statute provides for administrative fines for failure to comply with FTC decisions84 and court injunctions,85 but the amounts are fixed at levels that do not operate as a deterrent. Since 1977 the maximum fine under article 97 has been 500,000 yen (approximately 2,000 U.S. dollars

84. Antimonopoly and Fair Trade Law art. 97.
85. Id. art. 86.
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at prevailing rates), an increase from 50,000 yen (200 U.S. dollars). The maximum fine under article 98 is now 300,000 yen (1,200 U.S. dollars), an increase from 30,000 yen (120 U.S. dollars). Rarely if ever invoked, these provisions therefore do not offer an effective substitute for the contempt power. This failure of those who drafted the law to appreciate the underlying deficiency caused by the lack of contempt power in the Japanese legal system is best revealed in their provision for judicial injunctive relief.

3. Judicial Injunctive Relief

Clearly with American models in mind, the American drafters of the 1947 statute empowered the Tokyo High Court to issue, upon application by the FTC, a temporary injunction against acts suspected to be in violation of the law when found to be a matter of urgent necessity. Such a provision makes little technical sense in the Japanese legal system. Court injunctions are used in the United States in order to obtain the sanction of contempt for noncompliance with a judicial order. This sanction is not available for the enforcement of administrative orders. As in the United States, an order by the FTC itself is technically equally as effective as a court injunction, because an administrative order is as legally binding as a court order. Unlike the United States, in Japan there is no contempt power behind either type of order. Thus the essential function of a court injunction in the United States, which is to involve the contempt power sanction, does not apply in Japan.

Requiring the Commission to seek court action does have two advantages. First, it gives the respondent an opportunity to defend before a neutral forum. Second, resort to the court for injunctive relief enables the Commission to trigger adverse public response by publicizing its concern and that of the court over a particular violation. Thus as one might expect, its use has been infrequent, limited to major cases with substantial political impact—five cases involving the newspaper industry and the Yawata-Fuji Steel Merger Case. In construing the urgent necessity re-

86. *Id.* arts. 67, 86. Similar provisions are found in the Shōken torihiki hō (Securities transactions law) (Law No. 25, 1948) art. 187, and the Shōhin torihikisho hō (Commodity exchange law) (Law No. 239, 1950) art. 143.

87. *In re* K.K. Asahi Shim bunshā, 7 Shinketsushū 163 (Tokyo High Ct., April 6, 1955); *In re* Itōka, 7 Shinketsushū 181 (Tokyo High Ct., Dec. 23, 1955); *In re* K.K. Ōsaka Yomiuri Shim bunshā, 7 Shinketsushū 169 (Tokyo High Ct., Nov. 5, 1955); *In re* K.K. Hokkaidō Shim bunshā, 8 Shinketsushū 82 (Tokyo High Ct., July 11, 1958); *In re* K.K. Chūbu Yomiuri Shim bunshā, 22 Shinketsushū 301 (Tokyo High Ct., April 30, 1975).

88. *In re* Yawata Seitetsu K.K., petition for temporary injunction to block merger (filed by the FTC on May 7, 1969, and withdrawn on May 30, 1969).
quirement, the courts have held that it relates to a situation in which "fair competition is . . . extremely endangered and it would be impossible to eliminate the violation following normal procedures."89

III. ILLEGAL PROCEEDS SURCHARGES

A. German Law

Presumably the result of a compromise in lieu of a higher maximum fine, the GWB as enacted provided that in the case of willful violations the fine of 100,000 DM (approximately 4,000 U.S. dollars at prevailing exchange rates) could be increased by a surcharge equal to three times any "excess proceeds" (Mehrerlös) realized as a result of the violation.90 In cases of negligent violations the surcharge was double the amount of such illegal proceeds to be added to the maximum fine of 30,000 DM. The provision was patterned after section 6 of the OWiG (since 1968, section 17[4]).91 The 1973 amendments abolished the distinction between willful and negligent violations, setting a uniform treble surcharge and retaining the 100,000 DM maximum fine.92 GWB section 38(4) was revised further in 1980 to permit the authorities to calculate the amount realized from illegal conduct on the basis of estimates, and a new provision—section 37b—was added to provide for a similar treble levy on gains realized in cases of willful or negligent violations of prohibition orders against abuses of market power, generally under section 22(5) or specifically in the case of public utilities under section 103(b). In contrast to the illegal proceeds surcharge under section 38(4), which is levied in the context of an administrative fine proceeding subject to the procedural controls of sections 81 through 85 of the GWB and sections 38 through 47 of the OWiG, the surcharge under section 37b is determined in an ordinary administrative proceeding93 subject to the more lax procedures of sections 51 through 80 of the GWB.94

As a penalty the treble surcharge of illegal proceeds of the GWB has obvious if superficial similarity to treble damages under American anti-

89. In re Osaka Yomiuri Shimbunsha, 7 Shinketsushû 169 (Tokyo High Ct., Nov. 5, 1955).
90. GWB § 38(4); see also Mayer-Wegelin, Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen 662 (H. Müller & P. Giessler eds. 1st ed. 1958).
91. GWB §38(4).
93. F. Rittrup, supra note 42, at 312 (by implication).
trust laws, as several German commentators have observed. Because of the practical shortcomings of an administratively determined surcharge as opposed to damage actions, however, they do not share functional similarity as an effective sanction. The problem lies in the proof of the amount of illegal proceeds in Germany or damages in the United States. To meet the legal requirements of proof in either case is a difficult and extremely costly task. This effort in a private damage action is made by private attorneys where the costs are borne by their clients and the result is a diffusion of both the required legal manpower and at least the initial costs. Such diffusion of cost and effort is not possible for an administrative penalty. Instead public enforcement agencies, such as the Federal Cartel Office, already short of personnel, must assemble all necessary data—in the case of the Federal Republic, without the scope of discovery available even in private litigation in the United States. For this reason the Federal Cartel Office prefers a fixed fine with a high maximum without the attendant problems of proof to the more flexible and potentially higher surcharge. As Helmut Gutzler remarked to the special commission to study economic crimes, the Federal Cartel Office would have to have a computer and enormous data banks for the surcharge provisions to operate effectively.

The delineation of excess proceeds (Mehrerlöse) as construed by the courts is reasonably clear—the difference between revenues actually realized and the amounts that would have been earned had there been no violation. The courts pointedly note, it is a surcharge on illegal revenues, not "profits." As the appellate court for Berlin (the Kammergericht) stated in one of the first decisions on the surcharge, it is to be calculated, in the context of a horizontal restriction of output, by subtracting the market price from the cartel price. Such formulations, however, gloss over the central issues: how to construct the "market price" and

95. F. RITTNER, supra note 42, at 312. See also Werner, Rechtsfolgen bei Wettbewerbsverstößen im GWB, 1977/78, SCHWERPUNKTE DES KARTELLRECHTS 54.
96. The cost of both prosecuting and defending antitrust damage actions in the United States is well known. See, e.g., K. ELZINGA & W. BREIT, supra note 74, at 71.
97. On the scope of discovery under German and Japanese law, see HARADA, CIVIL DISCOVERY UNDER JAPANESE LAW, 16 LAW IN JAPAN 21 (1983).
98. Gutzler, 10 COMMISSION HEARINGS, supra note 16, app. 4, at 36.
102. Id.
103. Id.
how to prove how much was actually realized as a result of the violation. In this area any hopes for the kind of certainty customarily (if not constitutionally) required \(^\text{104} \) under German law in the case of administrative and criminal fines become illusory. One consequence is the permissive language added in 1980 to permit calculations based on estimates. \(^\text{105} \) There remains, however, unlike in Japan as discussed below, no fixed, legally required method for such calculation. \(^\text{106} \) Methods that have been used include price comparisons immediately before and during the effective term of a cartel \(^\text{107} \) and examination of the price levels of the same or similar products in comparable markets in an attempt to establish a hypothetical market price. \(^\text{108} \) No method is considered entirely satisfactory. \(^\text{109} \)

Finally, as a consequence of the problems associated with the illegal proceeds surcharge, the Federal Cartel Office has made use of the excess proceeds surcharge provision of GWB section 38(4) in relatively few instances. Between 1968 and 1977, out of 171 administrative fine proceedings, only twenty-six involved the surcharge. \(^\text{110} \) The amounts collected, however, have not been negligible. The surcharge reaped over 110 million DM (44 million U.S. dollars). \(^\text{111} \) It appears to be the most effective formal penalty under German antitrust law.

B. Japanese Law

In Japan, as in Germany, the surcharge has proved to be the most effective antitrust sanction. The most significant addition to the Japanese Antimonopoly and Fair Trade Law under the 1977 amendments was article 7-2, which enables the FTC to levy a similar surcharge (kachōkin) on the

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104. This point has been raised in Erlinghagen & Zippel, Der "Mehrerlös" als Grundlage der Bußgeldfestsetzung bei Kartellverstößen, 1974 DER BETRIEB [DB] 953, 954. But see E. GöHLER, GESETZ ÜBER ORDNUNGSWIDRIGKEITEN § 17, ¶ 4E, at 111 (4th ed. 1975) (dismissing such questions in the context of the similar provision of the OWiG).

105. There is a fair volume of literature on the subject of methods of calculating the excess proceeds surcharge. The most often cited is Albuschkat, Zur Problematik der Bestimmung des Mehrerlöses bei Kartellverstößen, 1976 WETTBEWERB IN RECHT UND PRAXIS 666. See also H. ALBACH. ALS-OB-KONZEP UND ZEITLICHER VORGLEICHSMARKT (1976); A.H. VON OERTZEN, Methodenprobleme bei der Bestimmung des Mehrerlöses nach § 38 Abs. 4 des Gesetzes gegen Wettbewerbsbeschränkungen (doctoral dissertation, Bonn University, 1974); Erlinghagen & Zippel, supra note 104; Gützler, 10 COMMISSION HEARINGS, supra note 16, app. 4, at 32.


109. Gützler, 10 COMMISSION HEARINGS, supra note 16, app. 4, at 34–35.

110. BUNDESKARTELLAMT [BKARTA], 1978 TÄTIGKEITBERICHT 45.

111. Id.
proceeds from an illegal restraint of trade. Until 1977 the statute contained no sanction against illegal cartels other than criminal penalties, minor administrative fines and damage actions, all of which were allowed to atrophy at least before the Oil Cartel cases. As a result, there has been little incentive to comply with the statute until the FTC brought an enforcement action. Even then, in many instances illegal activity could continue with relative impunity.

The Japanese surcharge, like the German counterpart on which it was modelled, is essentially a means to recover the economic gains from illegal cartels. It is levied against entrepreneurs or, under article 8-3, trade associations and their members, for price-fixing or output restrictions that increase the price for goods or services in violation of the prohibitions of article 3 and 8(1) against unreasonable restraints of trade, and of article 6 against conclusion of international agreements containing unreasonable restraints of trade.\footnote{112. The best general commentary on the illegal proceeds surcharge in Japanese law is found in A. Shōda. supra note 6, at 548. See also Motonaga, Kachōkin seido no genjō to dōkō (Current status and trends of the illegal proceeds surcharge system), 751 JURISUTO 43 (1981).}

Unlike German law, the statute supplemented by the cabinet order for its enforcement detail the method of computing the surcharge. The formula is complex. In articles 7-2(1) the statute provides that it is to be an amount equal to—

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\text{one-half of the amount arrived at by multiplying the turnover of such goods and services, computed in accordance with the method prescribed by cabinet order, for the period from the date on which the entrepreneur engaged in the business practice to the date on which the entrepreneur discontinued such practice (hereinafter referred to as "period of such practice") by three percent (by four percent for the manufacturing industry, by two percent for the retail businesses or by one percent for wholesale businesses); provided that in cases where the amount thus computed is below two hundred thousand yen, the Commission may not order payment of such surcharge.}
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The supplementary cabinet order sets out the method for calculating “turnovers” as the total price of goods delivered or services supplied for the period of the cartel agreement.\footnote{113. Seirei (Cabinet Order No. 317, 1977) arts. 4 & 5.} The result is a fixed if complex formula that gives Japanese law at least an appearance of certainty and fairness.

The 1977 amendments also provided in a new article 48-2 for a separate administrative proceeding to levy the surcharge. Consequently, like the Germans the Japanese now have a bifurcated set of enforcement procedures—one to determine the fact of a violation and to order remedial measures, with another to levy the excess proceeds surcharge. Unlike the
German administrative fine proceedings, however, the Japanese surcharge procedures are reasonably efficient and at least procedurally protective. Article 48-2 enables the FTC to calculate the surcharge and then to notify the respondent of the amount, the basis for its calculation, and the illegal activity on which it is based. The notice also includes the deadline for payment. The respondent does have the right to present its case and to submit evidence to prior notice of an FTC decision to issue a surcharge order. Only after the order is issued, however, does the respondent have a right to a hearing. The procedures for such a hearing are the same as those for adjudication of a contested decision on the violation and remedial measures.

A final procedural issue of interest is the language of article 7-2 apparently requiring the FTC to levy the surcharge whenever there has been an illegal price cartel or output cartel affecting price. The mandatory language of the statute is exceptional for any Japanese regulatory penalty and appears to remove any discretion on the part of the FTC over whether to initiate a surcharge proceeding. In practice it appears that the FTC has complied. The surcharge has been levied in all relevant cartel cases. Of the ten cases involving violation of article 3 or article 8(i)(i) decided in 1979, final surcharge orders were issued in all but three by the end of March 1981. A surcharge proceeding is premised, however, on an FTC finding of a relevant violation with a statute of limitations provision of three years after the violation ceased (or within one year after a formal decision). One of the most difficult issues in a surcharge proceeding is to determine the duration of the violation. Presumably, the party can contest the fact of the violation in the context of a hearing on the surcharge. The proviso to article 48-2 requires that where formal hearings on the violation have begun, no surcharge order be issued until after the proceedings are completed—i.e., a final decision is entered.

114. Antimonopoly and Fair Trade Law art. 48-2(1).
115. Id. art. 48-2(4).
116. Id. art. 48-2(5).
117. 1 A. SHÔDA, supra note 6, at 563. The FTC order in the case In re Rengō K.K., Shinketsushô (FTC Order of February 2, 1984) was the first surcharge order issued after full adjudicatory hearings. For discussion of this case, see Sawada, Kachōkin no nāfu o mezuru no saishô no shinketsu (First decision ordering payment of surcharge) 402 KÔSEI TORIHUKI 38 (1984).
118. 1 A. SHÔDA, supra note 6, at 550.
119. Id. at 558.
120. Id. at 563.
121. Antimonopoly and Fair Trade Law art. 7-2(5); 1 A. SHÔDA, supra note 6, at 557.
122. See 1 A. SHÔDA, supra note 6, at 563; H. IYORI & A. ÜESUGI, supra note 4, at 55. See also 2 A. SHÔDA, DOKUSEN KINSHI HÔ KENKYÛ (Antimonopoly law studies) 110 (1976) (anticipating the problem under the Diet bill).
123. 1 A. SHÔDA, supra note 6, at 563.
The need to include detailed provisions for collection of the surcharge exemplifies the fundamental weakness of civil enforcement in Japan, even when an administrative agency is involved. Article 64-2 provides first that if the respondent fails to pay by the designated deadline, it is to be sent a reminder (paragraph 1) and the Commission may collect an additional charge of 14.5 percent per annum (paragraph 2). Upon continued failure to pay, the Commission can avail itself of the collection powers of the National Tax Collection Law¹²⁴ (paragraph 4) and acquire a lien on the respondent’s property superior to all claims except for national and local taxes (paragraph 5).

As in the case of the illegal proceeds levy under the GWB, the Japanese surcharge has already generated a significant amount in fines. Between 1977 and March 1983 there were a total of thirty-two cases involving 662 respondents for a total of nearly 15 billion yen (60 million dollars).¹²⁵ For a statute in which only a few years previously the highest possible fine was $2000, the added enforcement value of the surcharge needs no further explanation.

IV. DAMAGE ACTIONS AND OTHER PRIVATE LAW SANCTIONS

A. German law

Three kinds of civil sanctions for antitrust violations are possible under the GWB.¹²⁶ Section 35 provides, first, for a private damage action, although without the trebled penalty of American law. Second, the section also permits private suits for injunctive relief. Finally, the invalidity or

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¹²⁶. The notion that private actions under the GWB operate as a sanction is not questioned in German literature. L. Linder, Privatklage und Schadensersatz im Kartellrecht: Eine vergleichende Untersuchung zum deutschen und amerikanischen Recht 24 (1980). There is also a vast literature on the use of civil remedies in German antitrust enforcement. Much of it tends to emphasize refined, if not rarified, issues of theory that go beyond the scope of this study and do not require elaboration here. But they do provide important insights. The most influential include: K. Mailander, Privatrechtliche Folgen unterlaubter Kartellpraxis (1964); H. Möller-Laube, Der private Rechtschutz gegen unzulässige Beschränkungen des Wettbewerbs und missbräuchliche Ausübung von Marktmacht im deutschen Kartellrecht (1980); K. Schmidt, Kartellverfahrensrecht—Kartellverwaltungsrecht—Bürgerliches Recht (1977); Mertens, Deliktsrecht und Sonderprivatrecht—Zur Rechtsfortbildung des deliktschen Schutzes von Vermögensinteressen, 178 Archiv für die civilistische Praxis [ArP] 227 (1978); Mestmäcker, Das Verhältnis des Rechts der Wettbewerbsbeschränkungen zum Privatrecht, 1968 DB 787; Mestmäcker, Über das Verhältnis des Rechts der Wettbewerbsbeschränkungen zum Privatrecht, 168 ArP 235 (1968).
nullity of contracts in violation of the GWB can be asserted both as a defense to a contract action as well as in a suit for a declaratory judgment. Nonetheless, civil sanctions are rarely used. Complete figures on the total number of all private suits brought under the GWB are apparently not available. Few cases are reported. The principal compilation of German antitrust decisions, by the periodical Wirtschaft und Wettbewerb (WuW), includes only seventy-four private actions alleging violations of the GWB between 1958 and 1978. Of these only thirty-two were brought under article 35, nineteen for injunctive relief, only eleven for damages. This compares to at least twenty-two private actions in which the validity of a contract was the principal issue. In six of these the issue was raised as a defense. The remedy sought in other cases was not reported. Presumably most also involved the validity of a contract or agreement. Whether or not the few cases reported reflect accurately a general dearth of civil actions, few if any observers consider private actions to provide at present a meaningful mechanism for antitrust enforcement.

Procedural or "process" barriers are not the major cause of the paucity of civil actions. Unlike Japan, access to the courts is not a problem in the Federal Republic. With one judge for every two lawyers, the disposition of both trials and appeals is remarkably swift. Of the first instance civil actions under the GWB reported in Wirtschaft und Wettbewerb, seventeen cases were decided less than two years but more than one year after the alleged violation occurred. In twenty-three the interval from the date of the violation to a decision was less than a year but more than six months. At least eight cases were tried within six months. No case took longer than four years from the date of the violation to try and several were decided within one month. Lack of discovery and the consequent difficulty in proving damages (as well as the violation) is a substantial hurdle, but it is difficult to say that this is any more serious than the costs to American litigants in prosecuting or defending an antitrust ac-

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127. None of the limitations on declaratory judgments found in American law apply to Germany. In practice, a judicial declaration (Feststellung) of legal relationships is one of the most common sort of judicial "relief" sought.

128. Based on author's review of the complete collection of cases in Wirtschaft und Wettbewerbentscheidungssammlung Landgerichte/Amtgerichte [WuW/E LG/AG] 109–457. Not included are cases in which a violation of the GWB was a subsidiary issue, particularly to alleged violations of European community antitrust regulation under art. 85 of the Treaty of Rome.


130. The date of the violation is unclear in many cases, but in only eight cases could it possibly have been longer than three years from the date of the decision.

131. See, e.g., Steindorff, supra note 43, app. 6, at 8.
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tion, or the difficulties imposed by American rules of evidence, with which, lacking jury trials, the Germans are fortunate not to have to cope. Unlike American and Japanese litigation (but like the United Kingdom and most other common law jurisdictions), however, the unsuccessful plaintiff as well as defendant becomes liable for all costs incurred by both sides, including attorneys' fees. Nor is the contingent fee permissible. Consequently, there is little incentive for the prospective plaintiffs to pursue a case they have any likelihood of losing and they must be able to finance the litigation from the start. The relative lack of success of most plaintiffs makes this a risky venture. Of the first instance cases surveyed less than half were successful. Moreover, when awarded, the amount of damages tends to be quite small.

The factor that seems best to explain the relative ineffectiveness of damage suits and injunctive relief as a sanction is their restriction to a limited class of violations. Section 35 is construed within the context of section 823(2) of the Civil Code (Bürgerliches Gesetzbuch, or BGB). Under this provision a claim for compensation for injury caused by violation of a statute depends upon whether the injured interests were intended to be violated. Each statute or statutory provision is thus subject to classification as a "protective statute" (Schutzgesetz) or "protective provision" (Schutzvorschrift) with the party or interest as the "protected object" (Schutzobjekt). Such classification requires a determination of legislative intent: whether the statute or provision "serves for the protection of the general public interest alone or is designed wholly or in part, for the protection of an individual interest from violation of the prescribed norm." In the case of the GWB the legislative intent was until recently thought to be clear. Most commentators agreed that only those provisions with an express prohibition (Verbot) or mandate (Gebot) had the "protective" purpose necessary for a damage action or injunctive relief under

132. On the costs of antitrust litigation in the United States, see supra note 96.
133. See, e.g., Baur, supra note 23, at 54, 55. On the comparative problems of evidence, see L. LINDER, supra note 126, at 134.
134. Baur, supra note 23, at 58, 59. For a German reaction to the cost of U.S. antitrust litigation, see Steindorff, supra note 43, app. 6, at 10.
135. See, e.g., F. RITTNER, supra note 42, at 310.
136. BGB § 823 provides:
(1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.
(2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.
137. See, e.g., Mertens, 3/2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 823, ¶ 140, at 1183 (P. Ulmer ed. 2d ed. 1980).
138. Id.
139. Id.
Subject to similar analysis are violations of administrative and court orders. Orders expressly prohibiting or mandating certain conduct give rise to both damage actions and injunctive relief under section 35 by those within the intended scope of protection. 141

This construction limits private suits under section 35 to violations of sections 14, 25, and 26. 142 Under the view that an express prohibition or mandate is required for civil sanctions to apply, violations of provisions or administrative declarations phrased in terms of the invalidity or nullity of agreements are not subject to either private damage actions or injunctive relief. Consequently, no private action under section 35 could be brought against violations of sections 1 or 15, the principal provisions against horizontal and vertical restraints and abuses of market power under section 22. Until 1975 both the principal commentaries 143 and cases 144 gave support to this view. There was, however, dissent, particularly with respect to section 1. 145

Not only does such view exclude the most important violations from the reach of private law sanctions under section 35, it also creates the anomaly that certain conduct, such as ‘‘concerted practices’’ under sec-

140. See Benisch, Muller-Henneberg, supra note 14, at § 35, ¶ 3; H. Kaufmann & H.G. Rautmann, Kommentar zum Gesetz gegen wettbewerbsbeschränkungen § 35, ¶ 3, n.11 (4th ed. 1980) [hereinafter cited as Frankfurter Kommentar]; E. Langen, E. Niederthinger & U. Schmidt, Kommentar zum Kartellgesetz 618 (5th ed. 1977); H. Muller & P. Giessler, supra note 7, § 35, ¶ 13. See also L. Linder, supra note 126, at 30. The first reported decisions on § 1 of the GWB were at odds with all the commentaries. These decisions held that an injunction or compensation under § 35 could be awarded for violations of § 1 since the section could be considered a ‘‘protective provision’’ when read in connection with § 38(1). Judgment of Sept. 8, 1959 (Filmtransport), Düsseldorf Dist. Ct., W. Ger., WuW/E LG/AG 146; Judgment of Dec. 18, 1964 (Zweitaxi), Mannheim Dist. Ct., W. Ger., WuW/E LG/AG 259.

141. See, e.g., Frankfurter Kommentar, supra note 140, § 35, ¶ 12. The 1980 amendments added a new paragraph 2 that makes it clear that violations of administrative and court orders are subject to damage actions and private injunctive relief. This was not in doubt, however. The purpose of the revision was to permit recovery or damages from the time the order was served rather than from the time when all appeals were completed. Riesenkampff (1981), supra note 3, at 73. See also Judgment of June 8, 1977 (Objektschutz), Karlsruhe High Ct., W. Ger., WuW/E OLG 1952.


143. See Benisch, Muller-Henneberg, supra note 14, at 869 (2d ed. 1963); Frankfurter Kommentar, supra note 140, at § 35, ¶ 3-11; B5 H. Muller & P. Giessler, supra note 7, ¶ 13.


tion 25(1), are subject to private damage suits and injunctions only if not subject to formal agreement. Once formalized in a contract, such conduct would violate section 1 as a horizontal restraint or section 15 as a vertical restraint and thus be excluded from the scope of section 35. Doubts as to whether this result accurately reflects the legislative intent are increased by the fact that section 25(1) was added to the GWB in 1973 in response to the Federal Supreme Court decision in the *Teerfarben* case\(^\text{146}\) to ensure that the lack of proof of a formal contractual undertaking would not lead to easy evasion of section 1.\(^\text{147}\) Such anomalies are inexorable, however, given the awkward scheme followed in the GWB, on the one hand simply invalidating agreements and contractual arrangements but making the performance of such involved agreements subject to an administrative fine, while prohibiting noncontractual conduct outright on the other hand. Other than possible concern over abstract notions of freedom of contract and party autonomy, there seems little reason to penalize the former less severely. Moreover, the evidence of any real legislative intent to do so is sparse at best.

The Federal Supreme Court threw open the issue of whether a damage action can be brought against formalized horizontal and vertical restraints in its decision of April 4, 1975, in the *Krankenhauszusatzversicherung* case.\(^\text{148}\) The case involved a suit by several private health insurance firms against two public hospital insurance plans (with some ten million members) and four private insurers who had agreed to a common special insurance program for cases of higher risk, to the disadvantage of competitors who were not included. The plaintiffs alleged violations of section 1 of the Law Against Unfair Competition\(^\text{149}\) as well as sections 1 and 26(2) of the GWB. The court decided the case solely on the grounds of section 1 of the GWB, holding that at least *competitors* came within the protected scope of section 1 and could thus obtain injunctive relief or damages under section 35. The case caused considerable controversy and attempts to limit its application.\(^\text{150}\) It is generally interpreted to limit the protective

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reach of section 1 to competitors,\textsuperscript{151} or possibly a contract party\textsuperscript{152} who can show injury as a result of an agreement proscribed under section 1. Suppliers or direct buyers, much less the ultimate consumers who suffer from the effects of an illegal cartel, are still not considered within the protected category.\textsuperscript{153} Ultimately, however, as Professor Fritz Rittner notes,\textsuperscript{154} it is left to judges to decide what interests are protected and the *Krankenhauszusatzversicherung* case leaves them with a somewhat greater margin for a flexible response to the issue. Nonetheless, the decision has not altogether removed the barriers to more effective resort to article 35 as a sanction.

A second potential limitation on the efficacy of damage actions is the necessity of proving fault (negligence or intentional conduct) on the part of the defendant. Proof of fault along with that of injury and causality are requirements in damage actions but not (except in terms of standing) for injunctive relief.\textsuperscript{155} Yet, from the cases surveyed there does not appear to be any significant difference between resort to injunctions and damage claims.

At least brief mention should be made of the third type of civil sanction. Agreements that violate GWB sections 1 and 15 are made either invalid or void by the express language of the statute. Moreover, as noted previously, the enforcement authorities have express authority to issue declarations of the invalidity or nullity of offending agreements. Such agreements plus those expressly prohibited are therefore subject to either judicial declaration or the defense to a contract enforcement action that they are invalid or void under generally applicable provisions of German civil law—that is, sections 134 and 139 of the BGB.\textsuperscript{156} Exercised infrequently and only in unusual circumstances, this remedy cannot be considered generally effective or meaningful as a sanction. From the lower court decisions reviewed by the author, it appears that few parties to cartel agreements bring contract actions to invalidate agreements under section 1. Similarly, the remedy is seldom used in cases subject to section 15.

In conclusion, without the incentive of treble or even, as proposed by Professor Steindorff,\textsuperscript{157} double damages, which are not available under

\begin{itemize}
\item \textsuperscript{151} See Judgment of May 25, 1977 (*Zeitschriftenvertrieb*), Karlsruhe High Ct., W. Ger., 1977 WuW/E OLG 1855.
\item \textsuperscript{152} Judgment of Feb. 15, 1963 (*Brückenbauwerk*), Celle High Ct., W. Ger., 1963 WuW/E OLG 559, 561.
\item \textsuperscript{153} Goll, *Verbraucherschutz in Kartellrecht*, 1976 *Gewerblicher Rechtsschutz und Urhberrecht* [GRUR] 456, 491.
\item \textsuperscript{154} F. Rittner, *supra* note 42, at 308.
\item \textsuperscript{155} Id. at 310.
\item \textsuperscript{156} Mayer-Maly, 1 *Münchener Kommentar zum bürgerlichen Gesetzbuch*, § 134, ¶ 66 (F. Säcker ed. 1st ed. 1978).
\item \textsuperscript{157} Steindorff, *8 Commission Hearings*, *supra* note 16, app. 6, at 7.
\end{itemize}
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the German system, civil sanctions under the GWB are not likely to provide a significant deterrent to antitrust violations.

B. Japanese Law

In no area is the contrast between German and Japanese experience in antitrust enforcement greater than with respect to private enforcement actions. Although Japanese law is considerably more permissive of damage actions, with the important exception that actions brought under the Japanese statute as opposed to tort actions under the Civil Code require an FTC decision as a prerequisite, there apparently have been only a half dozen damage suits in Japan. Of the reported cases, two were settled by compromise and another for lack of the requisite FTC decision. The others were dismissed for failure to prove damages.

The Antimonopoly and Fair Trade Law sets out the basis for a claim for damages in article 25:

1. Any entrepreneur who has effected private monopolization or an unreasonable restraint of trade or who has employed an unfair business practice is liable for compensation to persons injured thereby.

2. No entrepreneur may be exempted from the liability prescribed in the preceding paragraph by proving the non-existence of willfulness or negligence on its part.

Because of the second paragraph, article 25 is construed simply to provide for strict liability for damages caused by a violation. Ordinary but high standards for proof of damages and causation must be met by the plaintiff. Damage actions under section 25 are also limited to violations by entrepreneurs, which as defined in article 2(1) excludes trade associations.

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158. The first case settled by compromise was K.K. Kosaka Seikyoku v. Taishō Seiyaku K.K., 9 Shinketsushū 162 (1957) (reported even though settled by compromise). The second case arose out of the oil cartel cases. See Miyasaka, Shōhisha ni yoru iōyu karutēru ni tsuite no songai baishō seikyū soshō (Consumer litigation for compensation for damages resulting from the kerosene cartel), 76 JURISTU 252, 255 (1982). See also Ramseyer, Japanese Antitrust Enforcement after the Oil Embargo, 31 AM. J. COMP. L. 395, 418 (1983).


161. 2 A. SHÔDA, supra note 6, at 355.

162. Id. at 357.

163. Antimonopoly and Fair Trade Law art. 2(1) provides: "The term 'entrepreneur' as used in this Law means a person who carries on a commercial, industrial, financial or any other business."

164. Shōda, supra note 160, at 2 (16 LAW IN JAPAN at 3).
Article 26 also restricts the application of the statutory damage action to instances in which the FTC has entered a final recommendation, consent, or contested decision, or a final surcharge order under article 54-2(1). Consequently, no damage action can be maintained under the statute without prior formal action by the FTC. Nonetheless, the view that an ordinary tort action under article 709 of the Civil Code can be brought without a final FTC decision, thus permitting damage actions against trade associations, has long been widely held among Japanese antitrust and civil law scholars. In 1981 the first judicial decision so holding was handed down in a tort action against the Sekiyu Renmei, the petroleum industry association, and individual petroleum firms for price-fixing in 1973. Proof of negligence or willful conduct is required in tort action, as opposed to strict liability under the statute.

The findings in Commission decisions do not bind the courts in a damage action under article 25. This accords with the effect given to final court judgments since, at least at present, collateral estoppel is not recognized in Japanese law. However, the FTC’s findings do constitute prima facie evidence of the violation.

The difficulties faced by plaintiffs in proving damages seem to explain best why so few damage actions are brought. The first significant damage action was the 1977 case of Ōkawa v. Matsushita Denki Sangyō K.K., which arose out of a 1971 consent decision against Matsushita Electric Industrial Company for resale price maintenance. The case involved two principal legal issues: whether consumers had standing to bring a damage action under articles 25 and 26 of the Antimonopoly and Fair Trade Law, and the scope of review of the FTC’s findings. The Tokyo High Court held first that consumers do have standing. Thus a broader spectrum of damage actions are possible in Japan than in Germany, at least at present, although the reverse seems to be the case, as noted, for direct appeals from administrative actions. On the second issue the court refused to apply the substantial evidence rule to damage actions. The consent decision was held to provide prima facie evidence of the violation but not to bind the court. Nonetheless the court affirmed the findings that there had been a violation. Ultimately, however, the plaintiffs lost. They failed to meet the requirements for proof of the amount of damage sustained as a result

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165. See S. IMAMURA, DOKUSEN KINSHI HÔ (Antimonopoly law) (52 HORITSUGAKU ZENSHÔ) 84 (rev. ed. 1967).
167. 2 SHÔDA, supra note 6, at 357.
170. Id.
of the violation. They could not show what the retail price of color television receivers would have been had the defendant not engaged in illegal resale price maintenance.

Because of the failure to prove damages, the courts have dismissed the three damage actions brought in the wake of the Oil Cartel cases. The first two were brought in the Tokyo High Court under articles 25 and 26. One of these was settled, but the plaintiffs lost the other in a 1981 decision. The plaintiffs won on the principal legal issue as to whether legitimate administrative guidance by MITI was a defense, but the high court dismissed the action for failure to prove damages.

Additional institutional barriers to litigation, such as delay and costs, the lack of the treble damage incentive, and a possible reluctance on the part of business firms to sue as a result of complex and close interrelationships even with their competitors also work to preclude effective use of the damage action as either remedy or penalty in antitrust enforcement. With only about 2,700 judges and 11,000 trial lawyers in Japan as compared to over 17,000 judges and 35,000 lawyers in the Federal Republic, litigation is a far slower and much more costly affair in Japan. The least delayed of the six antitrust damage actions was the Yamagata District Court tort action, which took over seven years from the time of both the violation and filing. With appeals it would have taken at least two years longer. Because the remaining cases were brought under articles 25 and 26 and thus were based on an FTC decision, they took even longer from the date of the violation.

As to the private law consequences of antitrust violations, it should be noted first that contracts and other juristic acts (hōritsu kō) that violate public law are not necessarily invalid under Japanese law. As articulated by the Supreme Court, upholding contracts entered without prior approval in violation of the 1949 Foreign Exchange and Foreign Trade Control Law, the test is whether the proscription involved is merely regulatory (torishimari hōki) or mandatory (kyōkō hōki). Whether or not an

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171. See Kaneko, Sekiyu yami karuteru songai baishō sekityu jiken Tōkyō kōsai hanketsu o megute (Concerning the Tokyo high court decision in the secret oil cartel damage action), 377 Kösei Tōrihiki 26 (1981).
172. See supra note 158.
174. 36 Minshū 265 (Sup. Ct., March 9, 1982).
176. Statistisches Jahrbuch 1981 für die Bundesrepublik Deutschland 323.
177. Gai‌koku kawase oyobi gai‌koku bōeki kanri hō (Law No. 228, 1949).
antitrust violation renders contracts or other juristic acts invalid, and if so, to what extent the act is void or only voidable, has long been an issue of some dispute.\footnote{79}

The recent Supreme Court decision in \textit{K.K. Miyagawa v. Gifu Shôkô Shinyô Kumiai} provides a partial answer. The case declared invalid a condition in a loan agreement that the borrower maintain a low-interest deposit equal to the borrowed amount as security. The court held that this violated article 19 as an unfair business practice under item 10 of the FTC’s 1953 General Designation of Unfair Business Practices,\footnote{81} prescribing taking unfair advantage of a superior bargaining position. On the issue of the validity of the contract provision, the Court reversed the decision of the Nagoya High Court. The Supreme Court\footnote{82} held that the provision was not invalid as either a violation of the Antimonopoly and Fair Trade Law or under the public policy provision of the Civil Code (article 90), but rather held it to be unenforceable to the extent it violated the Interest Rate Restriction Law.\footnote{83} Unfair business practices in violation of article 19 are not per se invalid, the Court stated.\footnote{84} Since only the FTC is authorized to take remedial measures, not the courts, the Court continued, it would be improper for the courts to invalidate contracts and other juristic acts for antitrust violations.\footnote{85} The opinion did not foreclose completely the possibility, however, that the gravity of the violation and the consequences of invalidating a contract could dictate a different result in different circumstances. The Court thus opted for an idea first suggested by Professor Ienobu Fukumitsu that the nature of the antitrust offense and consequences of invalidating the contract should be weighed.\footnote{86} The net result is that the law in this area remains vague and uncertain and does not promote preventive self-enforcement.


\footnote{179} See, e.g., S. \textit{Imamura}, \textit{supra} note 165, at 172; \textit{Shôda}, \textit{supra} note 6, at 500.

\footnote{180} 31 Minshû 449 (Sup. Ct., 2d P.B., June 20, 1977).


\footnote{182} \textit{Miyagawa}, 31 Minshû at 459.

\footnote{183} Rikoku seigen hô (Law No. 100, 1954).

\footnote{184} \textit{Miyagawa}, 31 Minshû at 459.

\footnote{185} For comment on this point, see \textit{1 A. Shôda, supra} note 6, at 501.

\footnote{186} Fukumitsu, \textit{Dokusen kinshi hô ihan kô ni kôryoku} (The validity of acts in violation of the Antimonopoly Law) (pts. 1 & 2), 82 \textit{Kokumin keizai zasshi} 25 (Dec. 1950); 83 \textit{Kokumin keizai zasshi} 14 (Mar. 1951).}
V. CONCLUSION: ADVERSE PUBLICITY

If the formal sanctions of both German and Japanese antitrust law have failed to provide fully effective deterrents to antitrust violations, at least until very recently, it does not necessarily follow that there has been no deterrent or that antitrust enforcement has been a failure in both countries. Although impressionistic conclusions are probably correct that businessmen in both countries have been less sensitive to the antitrust consequences of their conduct than their counterparts in the United States, their awareness of the consequences and concern to avoid prohibited conduct has increased, at least in Japan, along with the increase in the number of enforcement actions. As a theoretical proposition the argument may be sound that fines that do not cover the actual profits gained from a violation do not provide an effective sanction. Reality is more complex. There is at least one additional element to add to the calculus: the effect of adverse publicity.

In both the Federal Republic and Japan publicity of violations appears to have been the most significant sanction imposed on the offender, and the most effective deterrent. The use of publicity as a sanction not having been carefully scrutinized in either country (or anywhere else), we know too little to reach certain conclusions and can only offer some general, speculative observations.

In the Federal Republic during the debate over the introduction of criminal sanctions, those involved directly with antitrust enforcement were unanimous in the opinion that aside from an increase in the maximum fines no additional sanctions were necessary. Helmut Gutzler, as vice president of the Federal Cartel Office, repeatedly asserted that adverse publicity was not only the most effective sanction available, but also sufficient to provide the necessary deterrent. The current president, Wolfgang Kartte, apparently considers adverse publicity more important than any monetary penalty and argues that the addition of criminal sanctions could severely restrict the authorities' ability to use publicity effectively, apparently because of legal limitations on publicizing criminal

187. In a major price-fixing enforcement action brought by the Federal Cartel Office in the mid-1970's, the chairman of the industry association argued on appeal that he did not even know that there was an antitrust statute in Germany. Gutzler, supra note 37, at 530.

188. This conclusion is based on discussions with Japanese in-house corporate lawyers as well as scholars, such as Kobe University Professor Setsuo Miyazawa, who have studied the growth of the legal departments in major Japanese firms.

189. See, e.g., Steindorff, 8 COMMISSION HEARINGS, supra note 16, app. 6, at 22.

190. See Gutzler, 8 COMMISSION HEARINGS, supra note 16, app. 7, at 38; 10 id. app. 4, at 49; Gutzler, Zur Begründung und Durchsetzung des Kartellverbots, in WETTBEWERB IM WANDEL: FEST-SCHRIFT FÜR EBERHARD GÜNTER 177 (1976); Gutzler, supra note 37, at 537.

actions. Giving credence to such views is the chorus of criticism over the Federal Cartel Office’s use of press releases and other forms of publicizing administrative fine decisions.

The Japanese FTC also makes full use of publicity as a means of enforcement. Just the announcement of an FTC investigation may confirm public suspicions about illicit business activity, or otherwise tarnish the reputation of the offending firm being investigated. Adverse publicity in turn may lead to political pressure on the firm to seek an accommodation with the Commission. In addition, officials in the various ministries who view their responsibility broadly to include oversight of industry activities may become involved out of a desire to curtail improper activities of a particular firm in order to protect the reputation of the industry as a whole, or the ministry, or both. The reaction of MITI denouncing the result of the Oil Cartel cases illustrates the sensitivity of the economic ministries to publicity of their role in the formation of covert cartels, thus belying the impression by many foreign observers that administrative guidance to foster cartels is accepted generally in Japan as a legitimate exercise of governmental power. Thus in recent years the Commission seems to have made increasing use of the publicity tool for enforcement. There is another facet to adverse publicity as a sanction in Japan.

Until the Commission issues its formal recommendation, the enforcement process may be carried out with little public disclosure. Under article 45(3), the Antitrust and Fair Trade Law currently requires the Commission to notify the party reporting a violation of the decision to proceed to a formal investigation. This requirement was not added to the statute until 1977. Under regulations prior to 1977, the Commission was not required to inform the complainant although to do so was allowed and generally practiced. Despite the apparent purpose to insure that the Commission responds to complaints and thus to permit greater public scrutiny of its handling of cases at a preliminary stage, the effect is as likely to be an increase in the number of unreported cases dealt with informally, with

192. _Id._


194. See Tsusanshō [MITI], Gyōsei shidō ni tsuite no kangaekata o matomeru (Thoughts on administrative guidance), 902 SHÔHÔMÛ 87 (1981), translated in Repeta, _The Limits of Administrative Authority in Japan: The Oil Cartel Criminal Cases and the Reaction of MITI and the FTC_. 15 _LAW IN JAPAN_ 24. 55–56 (1982).

195. See, e.g., W. PAPE, _supra_ note 70.

196. See Haley, _supra_ note 94.
officials delaying any formal report of the complaint until the matter has
been thoroughly considered internally. Several thousand complaints are
made to the Japanese FTC each year. Hardly more than 500 are fully
investigated. Of these no more than a handful result in formal deci-
sions.197

Several concerns underlie the desire of the Commission to control pub-
lic information about a case. Some violations pose considerable political
problems for the Commission staff. This has been especially true in the
case of potential violations by banks and other financial institutions regu-
lated by the Ministry of Finance. The relationship between the Ministry
of Finance and Commissioners, many of whom were formerly Finance
officials, is quite close, and some cases are simply too controversial to
handle. The staff has an understandable if not laudable interest in prevent-
ing the agency from getting caught in a crossfire between consumer and
other organizations (especially those with political ties to the opposition
parties) and major ministries or the ruling party. A more legitimate con-
cern is that advance publicity about a pending investigation may ruin the
chances for successful prosecution. As explained above, the agency is
forced to rely in many instances on spot inspections and searches and
seizures to gather evidence of a violation. Publicity in such instances
forewarns and may lead to the destruction of vital documentation.

Publicity as a sanction raises two separate issues. The first is the di-
lemma of any liberal legal order: how can law enforcement be truly effec-
tive in a society with significant constitutional restraints on governmental
power? Yet without adequate means of enforcement how can the public
policies served by the law—including those limiting the government—
themselves be effectively maintained? If it is true that adverse publicity is
as meaningful a penalty as a fine, must its use be subject also to the
procedural restrictions applied to the imposition of other penalties to pro-
tect the citizens from arbitrary governmental action? The use of publicity,
for example, precludes even the most fundamental protection, such as
judicial review. Such questions are left unanswered by those who assert
that the enforcement authorities are obligated to provide the public with
information or consider that the procedural safeguards of the proceedings
being publicized provide adequate protection to the parties.198

197. Id.
198. Both arguments are made by Scholz, supra note 193. Doubts over the probity of publicity
as a sanction have also been raised by Karsten Schmidt. K. SCHMIDT, KARTELLVERFAHRENSRECHT—
KARTELLVERWALTUNGSRECHT—BÜRGERLICHES RECHT 293 (1977). But see K. LÖDERSSEM, ERFahrung
ALS RECHTSCHELLE: EINE FALLSTUDIE AUS DEM KARTELLSTRAFRECHT 206 (1972); K. TIEDEMANN, KAR-
TELLVERSTÖBE UND STRAFRECHT 34 (1976) (discussing the institutionalization of publicity as a formal
sanction).
Whether concern over the "due process" implications of adverse publicity are frivolous or deserve careful thought depends ultimately on how serious a penalty adverse publicity imposes and how it functions as a sanction. If publicity is not in fact a significant penalty or one that cannot be made subject to legal control, further discussion seems pointless. Unfortunately, even these fundamental questions remain unexplored. In Japan, the argument can be made that loss of reputation functions as a substitute for formal legal sanctions throughout the legal system and can be viewed both as a contributing factor and consequence of the inadequacy of the formal institutionalized system to provide effective sanctions and legal relief;[199] whether reality conforms to such theorizing awaits future research. In the Federal Republic, however, the issue is apparently hardly even raised.[200] More is at stake, says Helmut Gutzler,[201] than corporate "image," but what that is remains unanswered.

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199. See generally Haley, supra note 51.
200. K. LUDERSSEN, supra note 198, at 207 (attempting a brief explanation based apparently on G. Katona, Psychological Analysis of Economic Behavior (1951)).
201. Gutzler, supra note 37, at 537.