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Developments in European Competition Policy: How EC Merger Regulation No. 4064/89 Prevents German Law from Blocking Large Cross-Border Concentrations

I. Introduction

The treatment of takeovers and mergers has been one of the most debated areas of European competition law.[1] These forms of business concentration involve a change in corporate structure.[2] For example, Company A may acquire Company B as a subsidiary, or Company A may assume all of the assets and liabilities of Company B.

Mergers generally fall into one of three categories, each having a different influence on market competition. A horizontal merger involves concentration of firms that sell similar products in the same geographic location.[3] In a vertical merger, a company requiring a certain item for production will acquire its supplier.[4] The third category, conglomerate merger, occurs between companies that either produce complementary products,[5] similar products distributed in different geographical markets,[6] or completely unrelated products.[7]

During the 1980s, the business world witnessed a surge in merger activities. According to William Staple, the director of NM

1. Nicholas Green et al., The Legal Foundations of the Single European Market 276 (Trevor C. Hartley ed., 1991). "Merger" in this Comment refers to both total integration mergers and partial mergers (i.e., concentrative joint ventures).

2. *Id.*

3. James A. Lamberth, Note, *A Comparison of Merger Control Laws in West Germany and the United States*, 21 Geo. Wash. J. Int'l L. & Econ. 251, 252 (1987). Horizontal mergers are given close scrutiny by regulators because they involve concentrations in an industry that may have detrimental effects upon market entry and competition among existing firms. *Id. See* Sir Leon Brittan, Competition Policy and Merger Control in the Single European Market 38 (1991).

4. Lamberth, *supra* note 3, at 252. Such mergers have a tendency to be anticompetitive because, by dominating supplies of important raw goods, competing firms find it difficult to enter the production market. *Id.*

5. *Id.* Such mergers are referred to as "product extension mergers." *Id.*

6. *Id.* Such mergers are referred to as "market extension mergers." *Id.*

7. *Id.* These are "pure conglomerate mergers." Conglomerate mergers may be anticompetitive because they remove firms from the market. This may lead to higher prices and decreased consumer choice. *Id.*

Rothchild & Sons, four factors accounted for this explosion. The primary factor was the interest of companies to dispose of peripheral activities and establish concentrated control in core businesses.[8] Second, the deregulation of financial markets made capital readily available.[9] Small firms with minimal cash were thus able to raise enormous sums through high-yield corporate bonds ("junk bonds").[10] Third, competition and free trade became increasingly liberal, making inefficient companies desirable targets of takeover bids.[11] Finally, companies sought to establish themselves in key markets.[12] Instead of traditional organic growth, they preferred mergers with existing companies.[13]

While hostile takeovers and leveraged buyouts proliferated in both the United States and the United Kingdom, German companies remained committed to traditional corporate growth.[14] Germans do not share the Anglo-American entrepreneurial tradition of buying and selling companies.[15] Additionally, protectionist German universal banks have kept a tight leash on companies to discourage foreign takeovers.[16]

The German merger environment should change drastically in the 1990s. Germany's recent reunification has increased its importance in the world marketplace.[17] In this time of internationalization of markets, foreign investors rely on the importance of international mergers to remain competitive in Europe.[18] For United States companies, mergers with German firms will provide opportunities to participate in the development of the European Community ("EC") and the growing Eastern European markets.[19]

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8. William Staple, *M&A in the 1990s*, INT'L M&A, 1992, at 3.
9. *Id.*
10. *Id.* In 1985, merger transactions increased in value to an all-time high of almost $180 billion, 47% higher than the previous record breaking year. Additionally, the number of announced mergers rose from 2543 in 1984 to 3001 in 1985. *See* 50 Antitrust & Trade Reg. Rep. (BNA) No. 1257, at 492-93 (Mar. 20, 1986).
11. Staple, *supra* note 8, at 3.
12. *Id.*
13. *Id.*
14. *See* Dr. Paul Achleitner, *Why Germans are Shedding Their Inhibitions About Anglo-Saxon M&A*, M&A EUR., Apr. 1991, at 19.
15. *Id.*
16. LESTER THUROW, HEAD TO HEAD 135 (1991).
17. Achleitner, *supra* note 14, at 19.
18. *See* Karlheinz Quack, *Merger Control in Germany: A Comment*, *in* INTERNATIONAL MERGERS & JOINT VENTURES 202-04 (Barry Hawk ed., 1990); Kurt E. Markert, *German Antitrust Law and the Internationalization of Markets*, 64 CHI.-KENT L. REV. 897, 897 (1988).
19. Achleitner, *supra* note 14, at 19.

These changes in the German environment have raised new legal issues. During the 1980s, investors structuring a German merger had to comply with the detailed and stringent German merger control laws. Today, the same transaction may be governed by the 1989 EC merger control regulation. In some respects, this law affords more favorable treatment to large mergers.[20] Therefore, in this new environment, businesses contemplating mergers with German companies must understand the European legal structure and be able to control the variables of a merger in order to take advantage of the EC law's benefits.

This Comment is primarily designed to aid practitioners interested in cross-border mergers involving German companies. It will begin by exploring the background and history of European mergers. Next, this Comment will explore the law governing mergers with German companies prior to the 1989 EC merger control law. Then it will explain the provisions of the EC merger control law and its effect on mergers in Europe, specifically in Germany. Finally, this Comment will suggest a structure for a merger with a German company that takes advantage of the benefits of the new legal environment. This Comment will conclude that the new law, coupled with EC economic policies, encourages large mergers in Germany which were not previously feasible.

II. Overview of European Mergers

This section of the Comment briefly discusses the development of the European Community. Next, it traces the history of mergers during the 1980s. Finally, this section highlights the need for a comprehensive merger control law to facilitate the EC's goals of fostering competition and efficiency.

The Treaty of Rome ("Treaty") established the European Community on January 1, 1958.[21] The Treaty vested regulatory power in

20. Quack, *supra* note 18, at 204.

> [T]he rather liberal EEC rules, which exclude the application of stricter national regulations, could have the result that the larger mergers will pass the European test and the smaller ones will be prohibited by Germany's Federal Cartel Office in accordance with the old, pessimistic German saying: "The little guys will be hung, the big ones will always get away!" *Id.*

21. Treaty Establishing the European Economic Community [EEC Treaty], Mar. 25, 1957, 298 U.N.T.S. 11. Hansjurgen Herrmann, *EEC Merger Regulation: One Year After*, *in* 14th Annual Institute for Corporate Counsel: Doing Business and Investing Abroad 1991, at 301, 302 (PLI Corp. Law and Practice Course Handbook Series No. 752, 1990).

the EC Commission ("Commission") and eliminated tariffs between European nations.[22] Originally, there were six Member States: France, Italy, Germany, Belgium, the Netherlands, and Luxembourg; in 1986, the Single European Act increased the number to twelve, adding the United Kingdom, Ireland, Denmark, Spain, Portugal, and Greece.[23]

If the EC successfully creates a barrier-free single market with the European Free Trade Association, eighteen nations and 375 million consumers will unite in a common market on July 1, 1993.[24] In anticipation of the new liberal trade structure, the wave of mergers experienced in the United States is spreading to Europe.[25] In 1987, the Commission reported that European mergers surged from twenty-nine in 1983-1984 to fifty-two in 1985-1986.[26] "The reason for that state of affairs included the relatively smaller size of Community companies, the existence of 12 fragmented markets and industry's consequent inability to achieve the necessary economies of scale in research and development and production . . . ."[27] The Commission has particular interest in encouraging mergers in industries where there is overcapacity or significant domination by United States and Japanese companies.[28] Due to the importance of these mergers to the EC, their competitive effects must be evaluated by a Community-wide standard.[29]

In the Treaty of Rome, the EC expressed its goal of full eco-

22. Joel Davidow, *Competition Policy, Merger Control and the European Community's 1992 Program*, 29 COLUM. J. TRANSNAT'L L. 11, 11 (1991).

23. *See* Markert, *supra* note 18, at 897.

24. Bruce Barnard, *EC to Restart Talks Next Week on 18-Nation Single Market*, J. COM., Jan. 27, 1993, at A3. *See generally* ROGER BROAD & ROBERT JARRETT, COMMUNITY EUROPE: A SHORT GUIDE TO THE COMMON MARKET 85-87 (1968).

25. *See* Achleitner, *supra* note 14, at 19. *See also* Ingo L. O. Schmidt, *The Bigness Mystique and the Merger Policy Debate: A Comment from West Germany*, 9 NW. J. INT'L L. & BUS. 618, 622 (1989).

26. COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTEENTH REPORT ON COMPETITION POLICY 218 (1987).

27. CLIFFORD CHANCE, THE CCH GUIDE TO 1993: CHANGES IN EEC LAW 14 (1990). *See also* Lamberth, *supra* note 3, at 252 (supporting the view that most mergers are desirable and efficient). In highly concentrated industries, controlling firms have the power to exclude others. Anticompetitive mergers may lead to increased prices, excess profits, and limited consumer choice. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, MERGER POLICIES AND RECENT TRENDS IN MERGERS 7 (1984).

28. *See* CHANCE, *supra* note 27.

29. GREEN ET AL., *supra* note 1, at 200. BRITTAN, *supra* note 3, at 43.

nomic integration of its Member States.[30] In order to achieve this goal, free and fair competition must be preserved. Therefore, Articles 3, 85, and 86 of the Treaty mandate that corporate enterprises avoid non-competitive business practices[31] and prohibit "restriction or distortion of competition within the Common Market."[32]

Individual national authorities, each with their own approaches, have provided insufficient regulation.[33] Realizing these difficulties, the Council of the Ministers of the European Communities adopted Regulation No. 4064/89 ("Merger Control Regulation").[34] The Merger Control Regulation, effective September 21, 1990, gives the Commission exclusive jurisdiction over large scale mergers.[35] However, many Member States are reluctant to surrender antitrust power once reserved for the sovereign states to a multinational body.[36] Germany is particularly fearful of transferring such power to the EC.[37] In 1973, the German government passed one of the most comprehensive and wide reaching merger control laws, but it has now lost exclusive jurisdiction over large mergers to the new Merger Control Regulation.[38]

III. MERGERS IN GERMANY UNDER THE GWB

This section of the Comment outlines the merger environment in Germany from World War II to the present. Next, it discusses Ger-

30. *See generally* Derek Prag, *The Treaty of Rome*, *in* THE COMMON MARKET: THE TREATY OF ROME EXPLAINED (J. Calman ed., 1967).

31. EEC TREATY arts. 3, 85, 86. Restricted practices include: price fixing; limits and controls on production; imposing dissimilar conditions upon equivalent transactions with similarly situated trading parties; and imposing upon trading parties obligations that are unrelated to the underlying transaction. *Id.*

32. *Id.* art. 85.

33. Diane Price, *The EEC and Cross Border Mergers*, 132 SOLIC. J. 1412, 1412 (1988).

34. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989-90 O.J. (L 257/13) [hereinafter Merger Control Regulation].

35. DROSTE KILLIUS TRIEBEL, BUSINESS LAW GUIDE TO GERMANY ¶ 1016 (3d ed. 1991). Large scale mergers are those where the preceding year's worldwide turnover of all undertakings exceeded ECU 5 billion; a Community-wide turnover of no less than two undertakings exceeded ECU 250 million. *Id.* *See infra* notes 154-56 and accompanying text.

36. Michael J. Reynolds, *Merger Control in the EEC*, 17 J. WORLD TRADE L. 407, 422 (1983). "Some member states (*Germany*, Denmark and the Benelux countries) are in favor of a purely consultative Committee with the final decision resting with the Commission." *Id.* (emphasis added).

37. Dr. Martin Hirsch, *Member State Merger Law and Policy in the Wake of the EEC Regulation — A German View*, *in* EUROPEAN/AMERICAN ANTITRUST & TRADE LAW, at 27-1, -2 (Barry Hawk ed., 1988). "German governments have in the past resisted all endeavors to adopt an EEC regulation on merger control." *Id.* at 27-2.

38. *Id.* at 27-1, -2.

many's growing need for merger control in the 1970s and 1980s. The remainder of this section analyzes the details of the German merger control law.

A. *History of Mergers and the Need for Control in Germany*

Following the end of World War II, the Allied powers made strong efforts to decentralize West German industry.[39] These structural reorganizations helped to bolster the nation's economic performance.[40] Germany went from a nation of bureaucratic giants to one of efficient and manageable firms.

However, in 1967, the German government showed its lingering affinity for "big business" when it announced: "Larger markets demand in many ways larger and more efficient company units . . . . The Federal government is concerned to remove obstacles which stand in the way of concentration of enterprises . . . so that the development of firms of optimum size will not be hindered."[41]

This view was consistent with the 1960s idea that "merger-induced bigness promotes international competition, efficiency, and technological progress."[42] These sentiments spurned an increase in merger activity.[43]

While German merger activity increased during the 1970s and 1980s,[44] the nation did not experience the merger explosion felt in other European countries, such as France and the United Kingdom, and the United States.[45] Traditionally, the German speaking world has not shared the Anglo-Saxon practice of buying and selling companies, but rather favored organic growth.[46] Therefore, Germany did not explicitly regulate corporate mergers and acquisitions in the past.[47] Instead, it was "a widely accepted position in the German

39. Walter Adams & James W. Brock, *The Bigness Mystique and the Merger Policy Debate: An International Perspective*, 9 NW. J. INT'L L. & BUS. 1, 34 (1988).

40. *Big Won't Work; Small Should Mean More Technological*, ECONOMIST, Dec. 25, 1976, at 60, 61.

41. George H. Kuster, *Germany*, *in* BIG BUSINESS AND THE STATE: CHANGING RELATIONS IN WESTERN EUROPE 64, 79 (Raymond Vernon ed., 1974).

42. Schmidt, *supra* note 25, at 618.

43. Adams & Brock, *supra* note 39, at 34. The number of mergers performed from 1969 to 1970 exceeded the total of the previous decade. *Id.*

44. Schmidt, *supra* note 25, at 619.

45. *See* Adams & Brock, *supra* note 39, at 34.

46. Achleitner, *supra* note 14, at 19. *See supra* notes 14-16 and accompanying text.

47. DR. DIETER BIENERT, CORPORATE ACQUISITIONS AND MERGERS IN GERMANY 19 (1991). *See supra* notes 14-16 and accompanying text.

business community that . . . competition is sufficiently protected by the Antitrust Act and any other interests are adequately taken care of by voluntary compliance with non-binding guidelines."[48] Practitioners should note that the harmonization efforts of the EC Commission are likely to disrupt this flexible system in favor of a more detailed regulatory framework.[49]

B. Structural Merger Defense

Even without substantive merger regulation, German companies have managed to prevent threatening acquisitions.[50] They have used two primary structural defense mechanisms. First, German companies traditionally rely upon debt rather than equity to finance growth.[51] Thus, there are few publicly held corporations,[52] and the banking system controls more than two-thirds of the one hundred largest firms.[53] Second, publicly traded German corporations have defended themselves by limiting shareholders' voting rights[54] and by restricting transfer of interests.[55] A German company's articles of association or partnership agreement may provide that a transfer of interest requires the consent of the management, shareholders, or partners.[56] Together, these methods have effectively warded off large-scale takeovers by foreign investors and hostile parties.[57]

With the recent reunification, speculation and investment in Germany have greatly increased.[58] Since small, undercapitalized compa-

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48. BIENERT, *supra* note 47, at 19. Such guidelines include the "Guidelines on Voluntary Public Tender Offers," the "Insider Trader Rules," and the "Dealer and Advisor Rules." *Id.*

49. *Id.*

50. *See supra* notes 47-48 and accompanying text.

51. Achleitner, *supra* note 14, at 19.

52. In September 1992, there were only 2682 German stock corporations compared with almost 400,000 limited liability companies (non-marketable shares can only be transferred by notarial deed). Of the 2682 stock corporations, approximately 500 have their shares traded on the German stock exchange. *See* Christian Broderson & Walter Henle, *Germany*, INT'L M&A, 1992, at 3.

53. Leonard P. Feldman, *German Reunification: The Effect on International Joint Ventures*, 5 FLA. J. INT'L L. 271, 276 (1990) (Bank officers provide strategic direction and sit on the boards of German companies). *See supra* note 16 and accompanying text.

54. Broderson & Henle, *supra* note 52, at 48. Generally, German corporations do not permit common stock owners to vote unless their holdings exceed five-percent of aggregate capital. *Id. See* BIENERT, *supra* note 47, at 21.

55. Broderson & Henle, *supra* note 52, at 48 (German insurance companies often use this restriction).

56. BEINERT, *supra* note 47, at 21.

57. *Id.*

58. *See supra* notes 17-19 and accompanying text.

nies are now vulnerable to take-overs by larger, more liquid conglomerates, Germany needs laws that allow enough freedom for efficient market competition while still restricting corporate raiding.

C. *Addition of German Merger Control Law*

Germany first added merger control provisions to its antitrust law (known as the Law Against Restraints on Competition, or Gesetz gegen Wettbewerbsbeschränkungen ("GWB")[59]) in 1973.[60] The GWB was subsequently amended, most recently in 1990.[61] The primary emphases of previous amendments were: more stringent merger controls;[62] improved supervision of concentrations to prevent anticompetitive abuses by "market dominating enterprises;"[63] and the overall goal of preserving efficient competition.[64] The resulting regulation has been applauded as one of the most extensive and sophisticated statutory schemes in its domain.[65]

Practitioners involved in a cross-border merger governed by the GWB must understand its scope and procedural requirements. Where the language is vague, the GWB's underlying policies, as evidenced by the subsequent amendments, provide additional insight.

1. "Merger" Defined Under GWB

The merger control provisions in the GWB apply to "mergers" between "enterprises," including acquisitions of assets or "shares," and the formation of "joint ventures."[66] The term "enterprise" is read broadly to include all individuals, partnerships, companies, cor-

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59. Act Against Restraints of Competition, Gesetz gegen Wettbewerbsbeschränkungen/ GWB [BGB1.I], *reprinted in* Schönfelder No. 74, at 2294. *See generally* DR. ALEXANDER RIESENKAMPFF, LAW AGAINST RESTRAINTS OF COMPETITION: TEXT AND COMMENTARY IN GERMAN AND ENGLISH (1977).

60. Patrick J. Roach, *Review of Foreign Merger and Acquisition Laws: West German Acquisition and Merger Controls*, 52 ANTITRUST L.J. 1007, 1007 (1983).

61. *See* DROSTE KILLIUS TRIEBEL, *supra* note 35, ¶ 1015; Dr. Martin Heidenhain, *Antitrust Law: Merger Control, in* BUSINESS TRANSACTIONS IN GERMANY § 36.01[1] (Dr. Bernd Rüster ed., 1992). In 1990, the German Economics Minister announced that foreign small and medium-sized firms could own more than 50% of East German companies. Large companies, however, were still restricted to 49% ownership. *Changes to East German Joint Venture Law Elicit Approval, Skepticism in West Germany*, 7 INT'L TRADE REP. (BNA) No. 5, at 166 (Jan. 31, 1990).

62. JOCHIM SEDEMUND, *Germany: Federal Republic, The Impact of Recent Amendments to German Cartel Law, in* INTERNATIONAL ANTI-TRUST: NATIONAL LAWS 66 (1981).

63. *Id.*

64. *Id.*

65. Roach, *supra* note 60, at 1007.

66. *See* Heidenhain, *supra* note 61, § 36.01[2].

porations, and other entities engaged in business activities.[67] "Shares" encompass all interests or participations in corporations, companies, or other enterprises.[68]

Therefore, a "merger" under the GWB may include: the acquisition of the assets of another enterprise;[69] the acquisition of the shares in another enterprise;[70] certain agreements by which an enterprise gains control over another;[71] or any other affiliation between enterprises where one entity dominates another.[72]

This broad language gives German officials control over most transactions involving the transfer of interest in business organizations. It further emphasizes the importance of understanding the details of the GWB in order to achieve the most beneficial treatment.

2. Notification Requirements Under GWB

If a transaction qualifies as a merger, the GWB requires notification of the Federal Cartel Office ("FCO").[73] This notification requirement enables the FCO to review prospective mergers in order to prevent possible anticompetitive effects in advance.[74]

a. *Procedural Requirements*

The GWB requires merging parties to notify the FCO prior to

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67. *Id.* "Architects, auditors, lawyers, physicians and other professionals as well as scientific, artistic and athletic organisations or associations, therefore constitute enterprises to the extent that they are engaged in business activities." *Id.*

68. *Id.*

69. *Id.* This requires acquisition of *all* or a *substantial part* of another enterprise's assets (emphasis added). *Id.*

70. *Id.*

> According to the 1973 Amendment, the acquisition of shares in another enterprise constituted a merger only if the shares acquired equal 25 percent of more of the voting capital of another enterprise. Following attempts to circumvent the 25 percent threshold, the 1980 Amendment provided that the acquisition of less than 25 percent of the voting capital of an enterprise constitutes a merger, provided the acquiring enterprise is granted by agreement, articles of association or otherwise additional minority rights. Moreover, the 1990 Amendment provided that the acquisition of a minority interest also constitutes a merger of the acquiring enterprise without being granted additional minority rights may directly or indirectly exercise a "significant competitive influence" on the other enterprise. These Amendments have rendered the 25 percent threshold almost obsolete.

Id.

71. *Id.* For example, an arrangement where an enterprise does not acquire another but rather establishes control over or receives profits from another enterprise. *Id.*

72. BEINERT, *supra* note 47, at 29-30.

73. Lamberth, *supra* note 3, at 254.

74. *Id.*

commencement of the merger if one of the enterprises participating in the transaction achieved a turnover of at least DM two billion in the previous business year;[75] or if at least two of the participating enterprises each achieved a turnover of at least DM one billion in the last completed business year;[76] or if the merger is to be effected by legislation or any other governmental act.[77]

If prior notification is required, the parties must have FCO approval before completing the merger.[78] Therefore, practitioners should try to structure transactions to avoid compulsory prior notification and unnecessary delay. Even where prior notification is not required, practitioners may consider notifying the FCO in order to expedite the post-merger notification and clearance process.[79] Regardless of whether parties choose voluntary or mandatory pre-notification, every merger where the enterprises have combined sales of DM 500 million in the preceding fiscal year requires notification without undue delay after its completion.[80]

b. Required Contents of Notification

One relief to practitioners is that the requirements of GWB notification are not particularly stringent. The first requirement of the notification is a list of the enterprises involved in the merger and an identification of the form of the merger.[81] Second, each participant must disclose its identity and market share.[82] Although not required,

75. Jurgen Lindemann, *Merger Control in Germany*, *in* BANKRUPTCY DEVELOPMENTS FOR WORKOUT OFFICERS AND LENDERS COUNSEL 1990, at 283, 285 (PLI Comm. Law and Practice Course Handbook Series No. 547, 1990).

76. *Id.*

77. Heidenhain, *supra* note 61, § 36.01[3][c]. Lamberth, *supra* note 3, at 254.

78. Lindemann, *supra* note 75, at 285. If the FCO notifies the parties within one month, it has up to one year from the date of notification to prohibit a merger. Failure to notify results in the FCO's waiving its rights to prohibit merging. Heidenhain, *supra* note 61, § 36.01[3][c].

79. "Mergers not falling under the prior notification duty shall be notified without undue delay after consummation. These mergers may, however, be notified prior to consummation and prior notification may be advisable because the term for decision by the FCO in case of prior notification is much shorter than in case of notification after the consummation; also prior notification avoids the risk that a merger already completed has to be dissolved." *Id.*

80. *See* Heidenhain, *supra* note 61, § 36.01[3]; BEINERT, *supra* note 47, at 31.

81. Lindemann, *supra* note 75, at 285. This may be asset purchase, stock purchase, or other agreement.

82. The following data must be supplied:

a) the name of the enterprise, its registered office and the type of business (summary account of the range of products and services);

b) the turnover achieved during the last completed business year preceding the merger or notification;

c) the market shares in the German domestic market including the basis of their

participants are advised to provide further information regarding the effects of the merger on the relevant markets.[83]

Because the GWB does not specify a filing format, practitioners have considerable latitude in drafting notifications. This leaves room for inclusion of persuasive data, particularly regarding voluntary information.

3. Standard of FCO Review

The FCO prohibits mergers that will allow companies to strengthen a "market-dominating position."[84] It will allow a merger, however, if it will lead to "improvements in the conditions for competition . . . [that] will outweigh the disadvantages of market domination."[85] This latter provision is referred to as the "balance-clause."[86] Unfortunately, the FCO and the courts rarely accept the balance clause argument.[87]

While the GWB itself does not contain specific standards to evaluate a merger, it does include certain guidelines and presumptions which aid the FCO.[88] For example, under the GWB, an enterprise has a dominant market position if it:

> calculation or estimate (Section 23 subsection five requires only market shares of 20 percent or more to be listed but at least for the product markets affected by the merger, it is advisable to give detailed information also, if market shares are less than 20 percent).

Id.

83. Such information may include market shares of the main competitors, technical and price competition, barriers to market entry in the industry, potential effects on competition, and effects on demand. *Id.* at 286.

84. *See* Heidenhain, *supra* note 61, § 36.01[4].

85. Kurt E. Markert, *Merger Control in Germany: Substantive Aspects, in* INTERNATIONAL MERGERS AND JOINT VENTURES 149-50 (Barry Hawk ed., 1990).

86. "The clause is essentially a test that seeks to balance the anticompetitive effects of a merger measured in terms of market domination against possible procompetitive effects of the same merger on other markets." *Id.* at 150.

87. "It is indeed almost impossible to persuade the FCO and the courts to accept a merger which leads to a market dominating position or which strengthens an existing one by arguing that improvements in the conditions of competition will outweigh the disadvantages of the market domination." Quack, *supra* note 18, at 202.

> During the more than 17 years since the introduction of merger control in Germany, only very few attempts to save anticompetitive mergers by trying to bring the "balance-clause" into play have been successful. As the burden for proving sufficiently strong procompetitive effects is fully on the participating firms, the chances of persuading the Cartel Office or the courts to accept a market dominating merger by application of the "balance-clause" are minimal.

Markert, *supra* note 85, at 150.

88. *See* Heidenhain, *supra* note 61, § 36.01[4][a].

— is without competitors or encounters no substantial competition or
— has a superior market position in relation to its competitors (criteria are: its market share, its financial strength, its access to supply and sales markets, relationship with other enterprises, legal or factual barriers to the entry of other enterprises into the market).[89]

The FCO presumes that a merger would create a market-dominating position if:

— an enterprise has a market share of at least one-third for a specific kind of goods or commercial services,[90]
— three or fewer enterprises together have a market share of fifty percent or more, or
— five or fewer enterprises together have a market share of two-thirds or more.[91]

The FCO gives participating enterprises an opportunity to rebut these presumptions.[92] However, if the FCO's findings do not conclusively show whether or not the merger participants hold a market-dominating position, it will assume that such a position exists.[93] Practitioners must follow the FCO procedure and should persuasively present the relevant data in order to show that the proposed merger is consistent with the German market.[94]

4. German Law and Foreign Mergers

One of the most powerful aspects of the GWB is its application to foreign mergers. Under the "effects doctrine," the GWB governs all restraints on competition which impact the German domestic market.[95] The FCO, in its *Guidelines on Domestic Effects of Foreign Mergers,* stated that it will assume that a foreign merger will influence the German market when the participating enterprises have been do-

89. Lindemann, *supra* note 75, at 286.

90. This is referred to as the "presumption of monopoly." "The presumption of monopoly applies only if the enterprise concerned and its affiliates had during the last fiscal year preceding the merger worldwide consolidated sales of DM 250 million or more." Heidenhain, *supra* note 61, § 36.01[4][d][i].

91. Lindemann, *supra* note 75, at 287. The final presumption is referred to as the presumption of oligopoly. "The presumptions of oligopoly apply only if the enterprise concerned had during such period worldwide consolidated sales of DM 100 million or more." Heidenhain, *supra* note 61, at § 36.01[4][d][i].

92. Heidenhain, *supra* note 61, § 36.01[4][d].

93. *Id.*

94. *Id.*

95. *Id.* § 36.01[8].

ing business domestically through subsidiaries, branches, or imports.[96]

The FCO has the power to prohibit and dissolve foreign mergers to the extent that they create or strengthen a dominant market position within Germany.[97] In 1980, the FCO exercised its authority to prohibit two mergers performed abroad which it deemed strengthened a dominant market position. The first transaction involved a German company's acquisition of shares in a British corporation.[98] In the second case, a foreign subsidiary of a German company sought to acquire a French production facility.[99] In 1982, the FCO prohibited the transfer of stock in a British corporation from a South African company to a United States company because it determined that the foreign merger consolidated German subsidiaries, creating a dominant market position.[100]

The FCO has intervened in a number of subsequent foreign mergers. Recently, the FCO prohibited a merger between Philip Morris and Rothmans Tobacco because both companies had German subsidiaries.[101] Germany has justified such wide-reaching regulation on the basis that the consolidation of enterprises outside of Germany may strengthen a dominant market position within the nation. However, this may be an abuse of the FCO's power.[102] As a result, companies around the globe may avoid merging with German entities for fear that the FCO may retroactively prohibit a completed concentration.

96. RUDOLF MUELLER ET AL., GERMAN ANTITRUST LAW ¶ 392 (3d ed. 1984).

97. Note that the FCO does not have the power under the Law of Nations to prohibit and dissolve mergers in their entirety but only their "effects" on the domestic market. *See* Heidenhain, *supra* note 61, § 36.01[8].

98. WuW/E BKartA 1875 (RUckspiegelglAser, decided May 27, 1980). Deutsche Uhrenglasfabrik acquired the shares of Eurotech Mirrors Int'l.

99. WuW/E BKartA 1937 (Bayer/Firestone, decided Sept. 23, 1980). Bayer France, a subsidiary of Bayer AG, planned to acquire a Firestone production facility (including machinery, patents, stocks, customer lists, etc.). The FCO prohibited the merger, claiming that the increase of the market share, the increase in production capability, and the elimination of a competitor strengthened Bayer AG's market-dominating position. The Court of Appeals later overruled the decision. Court of Appeals, WuW/E OLG 2411, Synthetischer Kautschuk I (1980).

100. WuW/E BKartA 1943 (Philip Morris/Rembrandt, decided Feb. 24, 1982).

101. Lindemann, *supra* note 75, at 283.

102. *See id.*

C. Observations of the GWB and the Need for a Community-Wide Standard

Practitioners should be aware of several characteristics of the GWB when planning a merger. First, the language of the statute concentrates on the structure of the enterprises rather than their conduct.[103] Second, the FCO has generally adhered to the GWB's structure and it has not rigidly applied the various presumptions.[104] Third, if a party to a horizontal merger already dominates a particular market, the concentration will most likely be prohibited on a "per se" basis.[105] Fourth, the FCO merger review standard applies to foreign mergers to the extent that they create or strengthen a dominant market position within Germany.[106] Finally, because of the GWB's broad definition of a "merger," the same FCO standard of review applies to concentrated joint ventures.[107]

Practitioners should also be aware that GWB's scope appears to be quite broad. Those anticipating a merger in Europe may have to evaluate its effects upon German competition even if the concentration does not involve a German company. For those who are merging with German companies, the size of the transaction may govern its treatment by the FCO. As discussed above, the GWB's broad presumptions discourage large scale mergers.[108]

It appears that the GWB's provisions and the FCO's application may be overly stringent for non-German companies. This may discourage cross-border mergers by prohibiting the development of more efficient economies of scale, adversely affecting the citizens and economies of the EC. Thus, it seems that, instead of reaching across the borders of other nations, a Community-wide standard would be more predictable and efficient.

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103. Markert, *supra* note 85, at 154-55. This is most patently seen in the pre-merger notification market share and other financial thresholds. *Id. See supra* notes 75-79 and accompanying text.

104. *Id.* at 155-56. "[A] systematic analysis of all relevant cases until 1986 showed that in less than ten percent of these cases the presumption was not regarded as having been rebutted." *Id. See supra* notes 89-94 and accompanying text.

105. *Id.* at 157. Such an enterprise may only argue the "balance-clause" which, as discussed, is virtually never successful. *Id. See supra* notes 84-87 and accompanying text.

106. *Id.* at 157. "Applying domestic merger law to international and foreign mergers not only requires special care in view of possible conflicts with foreign governments, but also illustrates in particular the need to include international competition into the merger reviewing process." *Id.* at 158. *See supra* notes 95-102 and accompanying text.

107. *Id.* at 158. "[S]uch cases are most likely to arise where one of the parents already has a dominant position and the joint venture is closely related to the dominated market." *Id.*

108. *See supra* notes 88-93 and accompanying text.

III. EC Merger Control Law

This section of the Comment will begin by tracing the development of EC merger controls under the Treaty of Rome. Next, it will show why the Community could not rely on the Treaty to accomplish its economic goals and instead created a comprehensive regulation. Finally, this section will present the EC Merger Control Regulation and will analyze its interplay with the GWB.

During the early years of its power, the EC Commission read the Treaty of Rome strictly.[109] The Commission stated in a 1966 memorandum that Article 85, dealing with restrictive trade agreements, should not apply to mergers.[110] The primary reason for this decision was that most acquisitions, such as hostile takeovers, are effected through tender offers rather than by official agreement. Therefore, the Commission felt that extending the power of Article 85 to stock transactions would create inconsistent and inequitable results.[111]

The Commission recognized early that Article 86 restricted mergers which constitute an "abuse of a dominant position."[112] The European Court of Justice, however, did not confirm this position un-

109. *See* COMMISSION COMPETITION SERIES NO. 3, THE PROBLEM OF INDUSTRIAL CONCENTRATION IN THE COMMON MARKET (1966). *See also* Mario Siragusa & Dirk Vandermeersch, *EC Merger Control: An Introduction*, *in* MERGERS AND JOINT VENTURE ACTIVITIES IN THE EEC: A GUIDE TO DOING BUSINESS UNDER THE NEW REGULATIONS 13, 13 (1990).

110. *Id.* Article 85 states:

> The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:
> (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
> (b) the limitation or control of production, markets, technical development or investment;
> (c) market-sharing or the sharing of sources of supply;
> (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage . . . .

EEC TREATY art. 85.

111. FRANK L. FINE, MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC 6 (1989). The Commission occasionally applied Article 85 to mergers when it recognized agreements that would threaten Community competition. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTEENTH REPORT ON COMPETITION POLICY 81-83 (1985); Cases 142/84 & 156/84 British Am. Tobacco Co., Ltd. & R.J. Reynolds Indus. Inc. v. Commission, 1987 E.C.R. 4487 [1986-88] Comm. Mkt. Rep. (CCH) ¶ 14,405 (1987); William Dawkins & Lisa Wood, *EC Forces Changes in Irish Bid Battle*, FIN. TIMES, Aug. 18, 1989, at 19.

112. Article 86 states:

til 1973 in the *Continental Can* judgment.[113] In *Continental Can*, the Court found:

> [Article 86] applies not only to practices that may cause a direct prejudice to consumers but also to those that cause a prejudice to consumers through interference in the *structure* of actual competition . . . . There may therefore be abusive behavior if an undertaking in a dominant position *strengthens that dominant position* so that the degree of control achieved *substantially obstructs* competition.[114]

Some authors have argued that the Court's interpretation of the Treaty is an inadequate basis for merger control.[115] They claim that "not every merger which adversely affects the structure of competition within the Community and affects trade between member states, involves undertakings which are or thereby become dominant within the meaning of Article 86."[116] The EC included Article 86 in the Treaty to guard against abuse of, and not merely the existence of,

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> To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.
>
> Such improper practices may, in particular, consist in:
>
> (a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;
>
> (b) the limitation of production, markets or technical development to the prejudice of consumers;
>
> (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
>
> (d) the subjecting of the conclusion of a contract to the acceptance, by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

EEC TREATY art. 86.

113. Pierre Raoul-Duval & Gide Loyrette Nouel, *The EEC Merger Control Regulation*, C356 A.L.I. 455 (1990); Case 6-72 Europemballage Corp. & Continental Can Co. v. Commission, 19 E.C.R. 215, [1971-73 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171 (1973).

114. Continental Can Co. v. Commission, 1973 C.J. COMM. E. REC. 215, *reprinted in* (1971-73 Transfer Binder) Common Mkt. Rep. (CCH) ¶¶ 8171, 9481 (1973) (emphasis added). In this case, the Continental Can Company, a New York manufacturer of packaging products, sought to purchase a controlling interest in its Netherlands-based licensee. Because Continental Can had gained control of a German packaging company the previous year, the Commission determined that Continental already had a dominant position in the Common Market and disallowed the merger. The European Court of Justice overruled the Commission's order terminating the merger but upheld the use of Article 86 as a basis for dissolving concentrations that create a market dominating position. *Id.*

115. Christopher Sherliker, *Merger Regulation in the EEC*, 134 NEW L.J. 809, 809 (1984).

116. *Id.* Article 86 provides inadequate merger control for three reasons. First, it does not apply to the *creation* of a market dominating position, but only to *increases* in pre-existing dominant positions. Second, there are no protections for mergers which are desirable in totality but violate the Article's terms. Third, Article 86 can only remedy and cannot prevent the

market power.[117] For example, virtual control of an entire market for a product does not constitute a violation, but abuse of such a controlling position by unfairly establishing prices to injure and discourage competition is a violation.[118] Therefore, under Article 86, it makes more sense for the Commission to allow mergers, and then monitor the conduct of the new enterprise.[119]

A. *Need for Community-Wide Merger Control*

As discussed, the Court of Justice modified the applicability of the Treaty of Rome to mergers during the 1970s and 1980s.[120] This left considerable gaps in the law, which limited the Commission's power to regulate.[121] Instead of judicially forcing merger control under the Treaty of Rome, the Commission advocated and finally passed a comprehensive EC Merger Regulation.

During the 1970s, the Commission urged the Member States to authorize Community-wide merger control.[122] The Commission felt that such a regulation would increase the efficiency of antitrust enforcement in the EC.[123] Smaller Member States were in favor of such a law.[124] They "accepted the logic of a Community merger control as a consequence of the combination of the already existing competition rules with the progress towards an Internal Market in terms of the 1992-Program."[125] On the other hand, larger nations with their own merger regulations, such as Germany, were reluctant to surrender power to the Commission.[126]

The Directorate General ("Directorate") of the EC argued that the success of the 1992-Program was directly related to an effective

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harmful effects of an undesirable concentration. *See* Alec Burnside, *Merger Control With a European Dimension — The Draft Regulation*, 16 INT'L BUS. LAW. 349 (1988).

117. *See generally* EEC TREATY.

118. *See generally* Reynolds, *supra* note 36.

119. *Id.*

120. *See generally* Raoul-Duval & Nouel, *supra* note 113.

121. *Id.* at 455-56. *See supra* notes 109-18 and accompanying text.

122. *See* 2 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST 664-65 (2d ed. 1990).

123. Marttijn van Empel, *Merger Control in the EEC*, 13 WORLD COMP. L. & ECON. 5, 6-7 (1990).

124. *Id.* at 7.

125. *Id.* The "1992-Program" is the movement towards a more complete common market named after the year-end target date for the single European Market. Davidow, *supra* note 22, at 14-15.

126. *Id.* at 7-8.

EC merger control policy.[127] The Directorate supported its position by showing that European companies engaged in far too few mergers.[128] This small number was due in large part to strict national laws, like Germany's, which hindered or prevented acquisition by foreigners.[129]

One key objective of the EC is to revise European corporate law and preempt restrictive national regulations in order to stimulate foreign investment.[130] The Commission has argued that deregulation in the common market would lead to large trans-European acquisitions, mergers, and joint ventures.[131] The Commission has also conceded, however, that this approach will lead to some anti-competitive transactions, which should be reviewed at the EC level.[132]

The Commission seemed to be walking the line between strong antitrust controls and a liberal trade structure. Those favoring rigid antitrust regulation feared giant, anti-competitive Anglo-Saxon style mergers.[133] If unchecked, such activity could undermine the purpose of the EC, which is to create an efficient and diverse market.[134] These advocates were primarily from the smaller Member States which did not have detailed merger control provisions.[135] Germany, with perhaps the most detailed regulation, did not share these concerns.[136]

The Commission hoped that the Regulation would appeal to firms and Member States by providing "legal certainty" and "one-stop shopping."[137] "Legal certainty" means that once the Commission decides that a merger conforms with the control provisions, it assures the parties that the transaction will not be retroactively challenged.[138] German law does not promise this; rather, under the

127. *See* Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final at 134, 143-44, 157-58.

128. *See* Frank L. Fine, *EEC Merger Control in the 1990s: An Overview of the Draft Regulation*, 9 NW. J. INT'L BUS. 513 (1989).

129. *Id.*

130. *Id.*

131. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 245 (1987).

132. *See generally id.* The Commission considered national regulation inadequate because not all Member States had sufficient competition policy. *Id.*

133. Davidow, *supra* note 22, at 11.

134. *Id.*

135. *Id.*

136. Larger nations with detailed regulations opposed the regulation because the control of mergers was considered an important aspect of national autonomy that should not be governed by the EC. *Id.* at 16.

137. Davidow, *supra* note 22, at 26.

138. *Id.*

GWB, the FCO has up to one year to invalidate a transaction.[139]

"One-stop shopping," based on the doctrine of supremacy, gives the Commission exclusive jurisdiction over very large, transnational mergers.[140] This provision eliminates the Member States' rights to review or challenge a merger within the scope of the regulation.[141] Such a system is favorable for foreign enterprises desiring to merge with German companies. Instead of complying with strict, protectionist German law, they could file exclusively with the EC Commission.[142]

In 1973, the Commission submitted the Regulation for the Member States' consideration. The critics identified three primary problems: (1) the Regulation's low monetary threshold;[143] (2) the possibilities of long delays by the Commission in merger approval;[144] and (3) excessive supremacy over national law and policy.[145] Because of these objections, the members did not approve the Regulation.[146] Understanding the importance of merger control to the EC, the Commission made a series of compromises over the years to make the Regulation palatable.[147]

B. Merger Control Regulation No. 4064/89

It was not until December 21, 1989, that the Council of Ministers of the European Community finally adopted Regulation No. 4064/89.[148] The Commission had four main reasons for wanting the EC to adopt the Regulation.[149] First, the EC Commission believed that achieving an integrated common market required exclusive jurisdiction over large European mergers with a so-called "Community

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139. BEINERT, *supra* note 47, at 31.

140. *Id.*

141. Davidow, *supra* note 22, at 26.

142. Note that when the Member States adopted Regulation 4064/89, there was a compromise giving states the power to review transactions which had a significant national impact. *See infra* notes 194-200 and accompanying text.

143. HAWK, *supra* note 122, at 910-11.

144. *Id.*

145. *Id.*

146. Otto Sandrock & Elke van Arnheim, *New Merger Control Rules in the EEC*, 25 INT'L LAW. 859, 862 (1991).

147. *Id.* at 863.

148. Merger Control Regulation, *supra* note 34.

149. Philippe De Smedt & Georges Vandersanden, *The EC Merger Control Regulation*, 13 HASTINGS INT'L & COMP. L. REV. 437, 440-41 (1990).

dimension."[150] Second, the Treaty of Rome did not provide adequate procedures for merger evaluation.[151] The third reason for the Regulation's adoption was the EC Commission's hope that a greater role in Community affairs and a larger staff would increase its political clout.[152] Finally, the Treaty of Rome lacked adequate antitrust provisions.[153]

Regardless of the Commission's motivations, the Merger Control Regulation, which became effective on September 21, 1990, may have created a much needed "level playing field" in the area of European merger control law.[154] This would be beneficial to foreign investors and practitioners contemplating a large-scale merger. Instead of having to research the possible effects of a merger and comply with often strict controls of each affected nation (in this case the GWB), an investor would only have to follow the provisions of the EC Regulation.

1. Structural Threshold of the Regulation

As stated in Article 1(1), the Regulation applies to all concentrations with a "Community dimension."[155] This standard is met if the aggregate world-wide turnover of all the undertakings concerned is more than five billion ECU,[156] and the aggregate Community-wide turnover of each of at least two undertakings concerned is more than ECU 250 million.[157] Thus, the Regulation applies only to large mergers. The Commission and Member States appear to have developed this structural threshold on the premise that such transactions will

150. *Id.* The Commission was afraid that Member States with strict controls (e.g., Germany) may block important mergers and acquisitions of European companies. *Id.*

151. *Id.* Under Article 86 of the Treaty of Rome, the EC Commission could only intervene subsequent to the concentration. This "ex post facto" regulation created unneeded confusion and uncertainty in the business community. *Id.*

152. *Id.*

153. *Id.* Article 86 could not prevent two non-dominant companies from forming a monopoly. The Regulation, on the other hand, is aimed at preempting the "monopolization process." *Id.*

154. Raoul-Duval & Nouel, *supra* note 113, at 455 ("[M]ergers falling within the Regulation will be governed . . . by one set of rules.").

155. Merger Control Regulation, *supra* note 34, art. 1(1). The Commission recognizes a concentration when: (1) two or more previously independent undertakings merge; or (2) one or more persons already controlling at least one undertaking acquire direct or indirect control of the whole or parts of one or more companies, whether by purchase of securities of assets, by contract, or by other means. *Id.* art. 3(1).

156. *Id.* art. 1(2)(a). An ECU (European Currency Unit) is an average of a bundle of currencies. In 1989, one ECU equaled 1.10 United States dollars.

157. *Id.* art. 1(1). Aggregate turnover is the sum of the preceding fiscal year's sales less sales rebates and turnover taxes. *Id.* art. 5(1).

naturally have a community dimension. If possible, investors may want to incorporate large firms in a transaction in order to reap the benefits of "one-stop shopping."

2. Notification Requirements of the EC Regulation

Like the GWB, the EC law requires that parties provide adequate notification.[158] Parties must report concentrations of a community dimension to the Commission not later than one week after the earliest of the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.[159] If parties to a concentration intentionally or negligently fail to fulfill this requirement, either by omitting any notification or supplying incorrect or misleading information, the parties will be liable for fines of up to ECU 50,000.[160] This requirement, although strict, is similar to that in most merger control regulations. Therefore, the notification requirement will probably not dissuade an eager investor from merging with a German company. Furthermore, the requirement simplifies filing for practitioners. Instead of possibly neglecting notification of affected member states, one must only comply with the requirements under the Regulation.

3. The EC Commission's Standard of Review

The Commission's standard for analyzing a proposed merger is set forth in Article 2(3): "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."[161] The Commission will initiate proceedings[162] if the concentration "raises serious doubts as to its compatibility with the com-

158. With concentrations having a community dimension, the Commission's role is similar to that of the German FCO. *See supra* notes 79-80 and accompanying text.

159. Sandrock & van Arnheim, *supra* note 146, at 870. Note that this requirement differs from the notification procedures of the GWB. *See supra* notes 75-80 and accompanying text.

160. Merger Control Regulation, *supra* note 34, art. 14(1).

161. *Id.* art. 2(3).

162. *Id.* art. 6(1)(c). The Commission may choose to suspend a concentration under Article 7 and research its possible effects on the Community. van Empel, *supra* note 123, at 15-16. The Commission may also grant derogations from the suspension "in order to prevent serious damage to one or more of the undertakings concerned by a concentration or to a third party." *Id.*

mon market."[163]

The parties must wait three weeks after notifying the Commission before they may effect the merger.[164] The Commission may elect to extend this suspension in order to review the concentration.[165] The Commission will void any merger effected in violation of this rule, and the parties may be subject to fines totalling up to ten percent of their aggregate world-wide turnover.[166] The Commission will generally notify all interested parties of the initiation of proceedings within one month,[167] enabling Member States to evaluate the proposed merger and alleviating the enterprises of this responsibility.

During the appraisal process, the Commission determines whether the parties to an undertaking have a "dominant position" in the marketplace.[168] Any concentration that hinders effective competition will be declared incompatible with the Common Market.[169] Although the Commission has a list of criteria to determine whether a merger is "compatible with the Common Market," it is unclear how much weight the Commission assigns to each factor.[170] The factors considered include: the market structure for the products and services provided by the merging companies; the relative market position of each party to the concentration; consumer interests; and legal barriers.[171]

Practitioners may use these procedural hurdles as weapons in a hostile takeover battle.[172] By persuading the Commission to temporarily suspend an acquisition, a vulnerable target may avoid a raider. However, it must be noted that suspensions do not apply to mergers involving securities.[173]

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163. Merger Control Regulation, *supra* note 34, art. 6(1)(c). The Commission, however, does not further define or give criteria for "serious doubts." Davidow, *supra* note 22, at 30.

164. Sandrock & van Arnheim, *supra* note 146, at 870.

165. *Id.*

166. *Id.* at 170-71.

167. Merger Control Regulation, *supra* note 34, art. 10.

168. Sandrock & van Arnheim, *supra* note 146, at 869.

169. *Id.* Merger Control Regulation, *supra* note 34, art. 2(3).

170. *See* Edward F. Glynn, Jr., *An American Enforcer Looks at the EEC Merger Proposal*, 59 ANTITRUST L.J. 237, 238 (1990).

171. Sandrock & van Arnheim, *supra* note 146, at 868-69.

172. van Empel, *supra* note 123, at 15.

173. Merger Control Regulation, *supra* note 34, art. 7(5). Suspensions under Article 7 "have no effect on the validity of transactions in securities . . . which is regulated and supervised by authorities recognised by public bodies, operates regularly and is accessible directly or indirectly to the public, *unless* the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2." *Id.* (emphasis added).

The Advisory Committee is comprised of representatives of the Member States who are consulted before the Commission renders its final decision.[174] The Commission will usually decide on the merger's compatibility with the common market within four months,[175] and the parties may be heard "at every stage of the procedure up to the consultation of the Advisory Committee."[176] The Committee enables the European nations to oversee the determinations of the Commission. This oversight benefits foreign investors by keeping the Member States "at bay," making them less eager to demand that a proposed merger be reviewed under national law.

4. The Reach of the EC Regulation

Similar to the "effects doctrine" of the GWB, the EC Regulation may apply to mergers involving enterprises based in non-member countries.[177] Community law will apply if "the companies participating in the concentration . . . have activities within the Community, either through subsidiaries or through direct sales, and such activities . . . [are] carried out in at least two member states."[178] Although this requirement may be burdensome for those developing a merger without a European enterprise, parties need only refer to EC law and not to the laws of Member Nations.

C. Relationship Between German and EC Merger Controls

Unfortunately for the practitioner, analyzing a merger's potential effects on different markets may be time consuming and costly. Under the Regulation, enterprises need only satisfy the Commission. Because the Regulation provides for "one-stop shopping,"[179] those seeking to merge with German companies will attempt to fall within the jurisdiction of the EC. Therefore, to minimize costs and delay, practitioners must be aware of the parallel application of German and Community law.

As discussed above, both Germany and the EC have broad juris-

174. Merger Control Regulation, *supra* note 34, art. 19(3). "An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles 8(2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23." *Id.*

175. *Id.* art. 10.

176. *Id.* art. 18.

177. Hirsch, *supra* note 37, at 27-28. *See supra* notes 95-101 and accompanying text.

178. *Id.*

179. *See supra* notes 139-41 and accompanying text.

diction over mergers within and outside of Germany[180] and the EEC respectively.[181] Because there are instances where both laws may apply, it is important that practitioners understand how to resolve a potential conflict of laws.

Prior to the Regulation's enactment in 1989, the strict GWB would have exclusively governed such a transaction. Today, the same concentration may be reviewed by the EC Commission under the more "merger friendly" EC Regulation. Therefore, the Regulation may permit a once-restricted merger if the parties structure the deal in order to fall within its purview.

1. Supremacy of EC Law

Since the signing of the Treaty of Rome, the Member States have recognized that Community law has precedence over national laws.[182] As the European Court of Justice stated with regard to cartel law in *Wilhelm v. Bundeskartellamt*, this principle of supremacy applies particularly to economic and corporate regulations.[183] The Court held that EC and national antitrust laws operate in "separate but parallel spheres."[184] Thus, national law should apply alongside EC law, and, only where the two conflict, the Community law should supersede.[185]

Under Article 21(2), national competition regulation should not be applied to any undertaking with a "Community dimension."[186] The primary purpose of the Regulation is to give the European Commission exclusive jurisdiction over large corporate mergers,[187] while small mergers continue to be governed by national law.[188] In most situations, the Commission evaluates a proposed merger's "compatibility . . . with the common market."[189] Under certain circumstances,

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180. Heidenhain, *supra* note 61, § 36.01[2] (discussing the "effects doctrine" under the GWB). *See supra* notes 177-78 and accompanying text.

181. *See* Hirsch, *supra* note 37 (discussing the "effects doctrine" under the EC Regulation). *See supra* notes 140-42 and accompanying text.

182. *See* Case 106/77 Administration Des Finance De L'état v. Simmenthal, 1978 E.C.R. 629, 644, ¶¶ 22-24, [1977-78 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8476 (1978).

183. Case 14/68, 1969 E.C.R. 1, 14, ¶ 6, [1967-70 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8056 (1969).

184. Sandrock & van Arnheim, *supra* note 146, at 872.

185. Hirsch, *supra* note 37, at 27-8, -9, -11.

186. Sandrock & van Arnheim, *supra* note 146, at 873.

187. Jim Evangelist, *Toward a More Competitive Common Market: European Economic Community Council Regulation No. 4064/89; On the Control of Corporate Mergers within the European Community*, 22 RUTGERS L.J. 457, 459 (1991).

188. *Id.*

189. Davidow, *supra* note 22, at 31.

however, the Commission may refer the concentration to a member state with a "distinct market interest."[190]

2. Parallel Application of German and EC Laws

German officials have expressed concern over the "one-stop shopping" approach.[191] Parallel application of both laws is still possible, however. There are in fact three instances which favor German over EC merger control law. First, the Regulation only applies to concentrations within the scope of Article 21(2).[192] Therefore, any undertaking without a "Community dimension" is covered by the GWB. Second, Article 9[193] embodies the "German clause."[194] At the request of German officials, the Commission will refer a notified concentration to the FCO. Such undertakings must threaten to create or strengthen a dominant position in Germany in order to trigger the notification requirement. EC officials regard this exemption as a compromise between the Commission's desire to have sole jurisdiction over Community concentrations and the position of the member nations to retain control over their own economies.[195] Germany, in particular, defended the GWB against the imposition of a system that seemed to be unduly influenced by industrial policy considerations.[196]

Article 21(3) provides the final exception to the Regulation's exclusive application.[197] Where the Commission finds a concentration to be compatible with the common market, the German government may take appropriate measures to protect the nation's interests.[198] Legitimate interests include public security, plurality of the media, and prudential concerns.[199] This provision clarifies that national interests other than merger control objectives may override a decision taken by the Commission.[200]

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190. *Id.* at 31-32.

191. *See* Trevor Soames, *The Community Dimension in the EEC Merger Regulation: The Calculation of the Turnover Criteria*, 1990 EUR. COMPETITION L. REV. 213, 222 (1990).

192. *Id.*

193. Merger Control Regulation, *supra* note 34, art. 9.

194. BRITTAN, *supra* note 3, at 39-40.

195. Davidow, *supra* note 22, at 19.

196. BRITTAN, *supra* note 3, at 40.

197. *Id.*

198. Merger Control Regulation, *supra* note 34, art. 21(3).

199. Sandrock & van Arnheim, *supra* note 146, at 874.

200. *Id.*

IV. PRACTICAL EFFECTS AND CONSIDERATIONS

As the Common Market develops, the legal and business communities will test the effectiveness of the EC Merger Control Regulation. Certainly, the EC now has a modern, comprehensive and effective procedure for regulating competition. Also, the new law gives the EC Commission significant powers such as obtaining information from parties, suspending transactions, and sanctioning companies.[201]

One certain effect of the Regulation will be a stronger GWB. There are two main reasons for this. First, the strict notification requirements of the EC law will give the FCO timely and detailed information.[202] Second, the "referral to national law" provision gives the German government an active check on the EC Commission.[203]

In coming years, the EC will undoubtedly try to lower the monetary threshold of the Regulation.[204] This would give the Commission increased control over European mergers at the expense of the Member States. Although Germany will once again resist this effort, this would be a positive change for foreign investors. Unlike the German government, the EC would welcome an increase in European merger activity (exemplified by the policies behind the Regulation).[205]

European business leaders have predicted that the new Regulation will lead to consolidation of large firms.[206] This prediction for drastic change is due to a number of reasons. First, American companies will be better able to compete with European firms with a stronghold in the EC.[207] Second, many companies previously contemplating mergers with German companies may have resisted because of the strict GWB.[208] Third, the reunification of Germany has created a number of new targets for acquisitions.[209] Associated with

201. *See* Merger Control Regulation, *supra* note 34.

202. *Id.* art. 9. This is evidenced by Italy's development of a merger control package. *See generally* Patrizio Bianchi & Giuseppina Gualtieri, *Mergers and Acquisitions in Italy and the Debate on Competition Policy*, 34 ANTITRUST BULL. 601 (1989).

203. *See supra* notes 194-96 and accompanying text.

204. BRITTAN, *supra* note 3, at 39.

205. Davidow, *supra* note 22, at 16. "The Directorate's reasoning [for an EC antitrust merger control policy] started with the premise that Europe has had far too few mergers, largely because various national laws and policies of the Member States hinder or prevent the acquisition of domestic firms by foreign ones." *Id.*

206. *See generally* Fine, *supra* note 128.

207. *Id.*

208. *Id.*

209. *Id.*

this is the opportunity for American companies to position themselves for entry into the Eastern European market. Finally, because the Commission has an interest in large corporate mergers, it is likely that it will review foreign investors more leniently.[210]

Scholars and practitioners have speculated that Member Nations will try to seek exception from the Commission's authority whenever possible.[211] The law is too young, however, to determine what will happen. United States attorneys and entrepreneurs attempting to involve themselves in European mergers must certainly become aware of the applicable merger control laws. The new Regulation requires large firms to constantly consider the EC ramifications of mergers, joint ventures, and other similar transactions around the globe.[212] Thus, those contemplating a merger must establish the influence of the entities involved and should thoroughly research the laws of jurisdictions in which the concentration will have an effect.

It appears that the EC adopted the Merger Regulation to protect important mergers from the strict laws of some Member States, such as Germany. This has set an important precedent that the European market is dedicated to competition. Whether these policies, supported by the Regulation, will lead to increased efficiency and economic growth is yet to be determined. Today, however, American investors have a strong incentive to invest in previously restricted large mergers with German companies.

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210. *Id.* Review of the EC's policies shows that Community officials are willing to allow firms to merge and grow to whatever size will make Europe more internationally competitive. Therefore, the EC's strong competition policy should overcome German ideas of organic growth and protectionism. *Id.*

211. Evangelist, *supra* note 187, at 459.

212. Paul D. Callister, *The December 1989 European Community Merger Control Regulation: A Non-EC Perspective*, 24 CORNELL INT'L L.J. 97, 119 (1991).

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