ECC Merger Control: Distinguishing Concentrative Joint Ventures From Cooperative Joint Ventures

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Abstract

This Article examines the European Economic Community’s new procedure for controlling large-scale mergers in contrast to the existing control procedure under Community cartel law. It explains these two positions by defining the difference between Concentrative Joint Ventures and Cooperative Joint Ventures.
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INTRODUCTION

The European Economic Community (the “EEC” or the “Community”) has decided to control large-scale mergers under a new procedure that will be distinct from the control procedure under Community cartel law. This may cause difficulties for all share or asset acquisitions that do not clearly fall within the scope of either merger control or cartel control. In the absence of clear-cut definitions, hybrid transactions could end up being notified to the Commission pursuant to concurrent Community control procedures.

“Merger control” is conceptually different from “cartel control.” While mergers bring independent corporate entities under common control and therefore affect competition by concentrating supply power, cartels among actual or potential competitors restrict competition by coordinating competitive behavior. Many antitrust laws acknowledge this distinction by subjecting the two categories to separate treatment. Cartels are generally prohibited; mergers are generally allowed and only in exceptional cases prohibited.

There is an additional category of commercial conduct relevant under antitrust laws, the **abuse of a dominant position**. The Treaty of Rome (the “EEC Treaty”) prohibits cartels under

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1. For the purpose of this Article, the term “cartel” is used in a broad sense to include any agreements, decisions by associations of undertakings, and concerted practices between independent undertakings that have as their object or effect the prevention, restriction, or distortion of competition and are therefore prohibited by Article 85(1) of the Treaty Establishing the European Economic Community. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85(1), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 32, 298 U.N.T.S. 11, 47-48, as amended by the Single European Act, O.J. L 169/1 (1987), Common Mkt. Rep. (CCH) ¶ 21,000, and as otherwise amended [hereinafter EEC Treaty].


Article 85(1)\(^5\) as well as abuses of a dominant position under Article 86\(^6\) if they "affect trade between Member States."\(^7\) The EEC Treaty, however, does not expressly provide for Community merger control.\(^8\)

Nevertheless, over the years the Court of Justice of the European Communities (the "Court of Justice" or the "Court"), in supporting a wide interpretation of Articles 85\(^9\)


\(^7\)2 B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 38.2 (1987 Supp.).

\(^8\)Compare EEC Treaty, supra note 1, with Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, art. 66, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 1, 61-67, 261 U.N.T.S. 140, 199-205 (requiring prior authorization by the Commission for any merger between two undertakings where at least one undertaking is covered by the ECSC Treaty).

\(^9\)EEC Treaty, supra note 1, art. 85, 1973 Gr. Brit. T.S. No. 1, at 32, 298 U.N.T.S. at 47-48. In BAT and Reynolds v. Commission, the Court held that the acquisition of a minority shareholding in a competing company may constitute an infringement of Articles 85 and 86 of the EEC Treaty. Joined Cases 142 & 156/84, 1987 E.C.R. 4487, 4575-86, ¶¶ 29-74, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761-17,766. Philip Morris acquired a direct stake of just under 25% of the votes, but 30.8% of the equity in Rothmans which was a competitor of Philip Morris. Id. at 4569, ¶ 7, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,724. The Court reasoned that because the acquisition "was the subject-matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of Article 85." Id. at 4575, ¶ 51, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,761. This would suggest that "full" mergers between two undertakings where the merging companies lose their independent existence with respect to one another could not be subject to Article 85. See Hydrotherm v. Compact (Andreoli), Case 170/83, 1984 E.C.R. 2999, Common Mkt. Rep. (CCH) ¶ 14,112. In BAT and Reynolds v. Commission, the Court then concluded that "the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition." Id. at 4577, ¶ 37, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,762 (emphasis added).

However, the acquisition of an equity interest in a competitor might serve as an "instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business." Id. This would be the case in particular where, by acquiring a shareholding or through subsidiary clauses in the acquisition agreement, the predator company acquires legal or de facto control of the target company's commercial conduct, or where the acquisition agreement provides for commercial cooperation between the parties. Id. at 4577, ¶ 38, Common Mkt. Rep. (CCH) ¶ 14,405, at 17,762.

Unfortunately, the scope of the judgment is rather unclear since the decision turns on the rather peculiar fact of a company acquiring a minority stake in a direct competitor which therefore remained independent (taking into account that the acquired shares represented only a minority interest) but establishing de facto control through subsidiary clauses (basically a right of first refusal with respect to the transfer of shares). For a comprehensive analysis of the Philip Morris judgment, see Korah &
and 86\textsuperscript{10} of the EEC Treaty, has allowed the Commission of the European Communities (the "Commission") to use existing competition provisions in controlling some mergers and acquisitions. In an effort to put merger control on a sound basis, the Commission in 1973 proposed to the Council of Ministers (the "Council") a specific regulation on merger control.\textsuperscript{11} The Council, however, opposed the proposed regulation, and despite the Commission's willingness to amend the proposal, the disagreement persisted.

On December 21, 1989, the Council finally adopted a regulation "on the control of concentrations between undertakings" (the "Merger Control Regulation").\textsuperscript{12} The Merger Control Regulation pre-empts the powers of national antitrust authorities (but not of Member State courts) to assess on competition grounds\textsuperscript{13} proposed concentrations with "a Com-

\textsuperscript{10} EEC Treaty, supra note 1, art. 86, 1973 Gr. Brit. T.S. No. 1, at 33, 298 U.N.T.S. at 48-49. Europemballage and Continental Can Co. v. Commission ("Continental Can Judgment") established that an "abuse of dominant position" prohibited under Article 86 may occur where an undertaking already dominant in the relevant market strengthens that position, for example through a merger or acquisition, so that the added dominance thereby obtained substantially fetters competition. Case 6/72, 1973 E.C.R. 215, 225-26, Common Mkt. Rep. (CCH) ¶ 8171, 8286-8287.


\textsuperscript{13} Id. recitals 26-27, art. 21(2), at 3, 11. With respect to concentrations falling under the Merger Control Regulation, Member States' authorities have no power to (i) approve a concentration disallowed by the Commission, (ii) prevent (on competition grounds) a concentration found by the Commission to be compatible with the Common Market—unless the Commission empowers a Member State directly concerned to apply its own competition law to ensure effective competition in a distinct local market within its territory, or (iii) block (on competition grounds) an anti-competitive concentration approved by the Commission because its general benefits outweighed the detriment to competition. For exemptions from the general rule, see id. recitals 27-28, arts. 9, 21(3), at 3, 7, 11.

Notwithstanding the above, national courts have to apply to any merger agreement Articles 85 or 86 regardless of whether it has been cleared by the Commission in a merger control procedure because these provisions are directly enforceable as part of the Member States' law. Pursuant to existing case law, any joint venture agreement among actual or potential competitors is void under Article 85(1) unless the Commission has exempted the agreement pursuant to Article 85(3). See infra note 33 and accompanying text. It is doubtful that a Member State court could interpret a positive Commission decision under the Merger Control Regulation as an ex-
munity dimension"14 and provides the Commission with exclusive jurisdiction over all concentrations that fall within the scope of the Merger Control Regulation.15 However, operations that have as their "object or effect the coordination of the competitive behaviour of undertakings which remain independent" are not concentrations for the purpose of the Merger Control Regulation.16 Such coordinating operations are excluded from the Merger Control Regulation's scope and continue to be controlled under Articles 85 and 86 of the EEC Treaty. The exclusion of coordinating operations is thereby delineating the areas of merger control and cartel control.

There is no hard and fast division between concentrations and share or asset acquisitions having the object or effect of coordinating competitive behavior. Therefore many transactions appear to fall into both categories. In its Memorandum on Concentrations in 1966 the Commission conceded that the distinctions are elusive so that it is hard to say in the abstract exactly where the dividing line between a cartel and a concentration of enterprises falls.17 The Merger Control Regulation, however, does not offer clear guidelines as to what constitutes a "coordination" that is excluded from its scope.18

The absence of clear guidelines causes special problems for the future antitrust treatment of joint ventures. Joint ven-

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14. For the purposes of the Merger Control Regulation, a concentration shall have a "community dimension" where the following quantitative criteria are met: (i) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 billion (this will possibly be reduced to ECU 2 billion in 1995), (ii) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, and (iii) each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Merger Control Regulation, supra note 12, art. 1(2), O.J. L 395/1, at 3. Other criteria apply to financial institutions. Id. art. 5(3) at 5. See generally Lee & Robin, One-stop Shopping: Is Brittan on the Right Track?, INT'L FIN. L. REV. 7 (August 1989) (analyzing the anomalies in a Merger Control Regulation).

15. Merger Control Regulation, supra note 12, art. 21(1), O.J. L 395/1, at 11. For the definition of "concentration," see infra notes 45-47 and accompanying text.


17. Comm'n, Le problème de la concentration dans le marché commun, Collection Etudes, Serie Concurrence No. 3 (Brussels 1966).

18. But see Merger Control Regulation, supra note 12, art. 3(2), O.J. L 395/1, at 4.
tures resulting in a structure where independent enterprises, being actual or potential competitors in a certain market, jointly control a target company, combine elements of concentration and coordination of competitive behavior. Thus, in some jurisdictions, it has been suggested that joint ventures by their very nature fall into both categories and are therefore subject to both merger control and the cartel prohibition.¹⁹

Community competition law has been greatly influenced by German cartel law. The distinction between concentrations and coordinations made in the proposed Merger Control Regulation closely resembles the distinction developed by German case law to define the scope of merger control on the one hand and cartel supervision on the other hand. German case law has developed the concepts of "coordinative" joint ventures and "cooperative" joint ventures to distinguish joint ventures that are subject to merger control from those to be judged under cartel law aspects.

Anyone proposing to form a joint venture in the Community will be faced with the following two questions: First, will the formation of the joint venture constitute a merger subject to the new system's notification requirement and control procedure; and second, will the joint venture agreement infringe the cartel prohibition and therefore require an exemption from the cartel prohibition in order to be enforceable? Clarifying the scope of the new EEC merger control instrument with respect to joint ventures will require some understanding of the objectives of and the systematic relationship between merger control and cartel control under EEC competition law.

I. THE OBJECTIVES OF MERGER CONTROL BY COMPARISON TO THE OBJECTIVES OF CARTEL CONTROL

A. Substantive Reasons for a Separate Treatment of Mergers

The Commission believes that dismantling Europe's internal frontiers will drastically change market conditions within the Community.²⁰ This trend is conceived to have mainly pro-

¹⁹. However, such a "double control" approach seems to be prevented by article 3(2) of the Merger Control Regulation, which excludes all coordinative joint ventures from being subject to the Merger Control Regulation. Id. art. 3(2), at 4.
competitive effects. However, the corporate restructuring needed to adjust to changing market conditions could lead to company structures that are too big in relation to the size of the relevant market.

The Commission therefore justifies a separate system of merger control as follows:

[It is . . . necessary to ensure that certain mergers do not entail lasting damage to competition. The danger of this happening is particularly present in those sectors in which a small number of firms would dominate the market. As analyses of the development of concentration show, it can also threaten other sectors particularly if oligopolies with few competitors of relatively equal size become a prominent feature of markets within the European Community. A further stage, marked by the tightening of existing oligopolies and the development of individual dominant positions, could then become discernible.

The Commission shall appraise mergers by examining the following facts affecting competition: the market position and the economic and financial power of the undertakings concerned; the suppliers' and users' opportunities of choice to access supplies or markets; the structure of the relevant markets considering international competition; the legal and factual barriers to entry into the market; and the supply and demand trends for the relevant goods or services and the interests of the intermediate and ultimate consumers.

The Commission will then conclude whether the resulting supply structure of the market would "create . . . a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial


21. Id.


24. Merger Control Regulation, supra note 12, art. 2(1), O.J. L 395/1, at 3.
part. This requires a definition of the relevant product and geographical markets and an economic assessment of the supply structure resulting from the implementation of the merger.

As such, merger control closely resembles the procedure under Article 86 of the EEC Treaty prohibiting an abuse of a dominant position. Accordingly, in the Seventeenth Report on Competition Policy, the Commission identified the objective of a separate merger control regulation as “to prevent both the creation, and the enlargement, of dominant market positions.”

Moreover, the Merger Control Regulation is based on Articles 87 and 235 of the EEC Treaty. This enables the Commission to assess proposed mergers not simply on the basis of their potential competitive effects but also on whether they otherwise contribute to the basic objectives of the EEC Treaty. Thus merger control clearly goes beyond a mere application of competition law. Under the auspices of merger control, the Commission can take into account aspects of industrial policy and can authorize a merger on the ground that it would support the development of a new sector of industry even though it impedes competition in the particular market.

By comparison, the Commission’s analysis of coordinative joint ventures focuses on the question of whether the coopera-


26. Merger Control Regulation, supra note 12, art. 2(2), O.J. L 395/1, at 3.


32. The Merger Control Regulation shall apply to concentrations whether or not they fall within the scope of Article 85 or 86 of the EEC Treaty.
tion of the venturers could impede actual or potential competition among the venturers and between the individual venturers and the joint venture. Maintenance of competition between parties involved in the transaction is of primary concern and not, as in the case of concentrations, whether the new entity resulting from a merger would have a dominant position in relation to the overall competitive structure of the market. Merger control even presupposes the elimination of competition among merging entities.

B. The Notification Procedure under the Proposed Merger Control Regulation

The finding that a stock or asset purchase agreement is invalid because it infringes the cartel prohibition is a cumbersome sanction once the agreement has been put into effect. The Merger Control Regulation therefore requires all concentrations falling within its scope to be notified to the Commission before being put into effect. All concentrations will have to be notified to the Commission regardless of whether they have as "their object or effect the prevention, restriction or distortion of competition within the common market" or whether they would result in an abuse of a dominant position.

In comparison, under Council Regulation 17 ("Regulation 17"), which implements Articles 85 and 86 of the EEC
Treaty, notification is required only if an agreement or concerted practice infringes the cartel prohibition of Article 85(1) of the EEC Treaty and if the parties consequently seek an exemption from the cartel prohibition pursuant to Article 85(3) of the EEC Treaty.

Once the Commission is notified of an infringing agreement pursuant to Regulation 17, the parties are free to implement the agreement even before the Commission has decided whether to grant an exemption. In comparison, the general rule under the Merger Control Regulation is that concentrations may not be implemented until the Commission has decided whether that concentration is compatible with the Common Market.

Under the Merger Control Regulation, the Commission must generally decide within a maximum period of five months following the date of notification. Under Regulation 17, the Commission is not required to reach a decision within a certain period of time, and in practice it can take from a few months to several years until the Commission issues a formal decision.

41. The parties' right to close the transaction is automatically suspended for three weeks. Merger Control Regulation, supra note 12, art. 7(1), O.J. L 395/1, at 6. Under Article 7(4) the Commission may grant an exemption from the suspension requirement to prevent serious damage. Id. art. 7(4), at 6. Thereafter, the Commission may order a continuation of the suspension until it makes a final decision. Id. art. 7(2), at 6. Under Article 7(3) of the Merger Control Regulation, the Commission may grant an exemption from the suspension requirement in the case of a public takeover or exchange bid that has been notified to the Commission by the date of its announcement provided that the acquirer does not exercise the voting rights attached to the acquired shares "or does so only to maintain the full value of those investments" until the merger is approved. Id. art. 7(3), at 6.
42. Id. art. 10, at 8. In case the Commission refers the notified concentration to the cartel office of a Member State, the decision may be delayed up to seven months following the date of notification. Id. arts. 9(4)(b), 9(6), at 7.
43. In most cases the Commission terminates a notification procedure by send-
From a procedural viewpoint, corporate restructurings require a speedy competition control mechanism well-suited to providing a higher degree of legal certainty. Regulation 17 is, therefore, "not well suited to mergers."44

II. THE DEFINITION OF "CONCENTRATION" UNDER THE MERGER CONTROL REGULATION

The Merger Control Regulation applies to all "concentrations" having a "Community dimension."45 A "concentration" shall be "deemed to arise" where two or more previously independent undertakings merge46 and, thus, become a single corporate entity, or where "one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings."47

"Control" can be obtained either through the acquisition of voting shares or through the creation of contractual rights that factually make it possible to exercise decisive influence on the target.48 Thus, the establishment of a joint venture among separate entities will constitute a "concentration" if one or more venturers acquire or establish a controlling interest in a separate corporate entity that will carry out a joint venture pro-
ject. Furthermore, the establishment of a joint venture by way of a partnership or cooperation arrangement will be a "concentration" if at least one venturer acquires joint control of, or a right to use, all or part of the assets of a partner.

III. THE EXCLUSION OF "COORDINATIONS" FROM THE SCOPE OF THE MERGER CONTROL REGULATION

Transactions bringing about or intending to bring about a coordination of competitive behavior among separate undertakings are expressly excluded from the scope of the Merger Control Regulation even if they would otherwise constitute a "concentration."49 "Coordinations" are not subject to the Merger Control Regulation but shall be examined pursuant to Regulation 1750 or under the other regulations implementing Articles 85 and 86 of the EEC Treaty.51

IV. APPLICABILITY OF THE MERGER CONTROL REGULATION TO JOINT VENTURES

A. General

A joint venture can briefly be characterized for the purpose of this discussion as a cooperation agreement between two or more separate undertakings under which each party is obliged to make a substantial contribution to the implementation of a common project, usually in the field of research and development of new products.52 The joint venture exists as a separate business and usually also as a separate legal entity but is jointly owned and controlled by the parent undertakings.53

If one person alone or more persons jointly acquire a con-

49. The Merger Control Regulation provides that "[a]n operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b)" of the Merger Control Regulation. Id. recital 23, art. 3(2), at 2, 4.
50. Regulation 17, supra note 38.
52. See C. Bellamy & G. Child, supra note 33, at chapter 5. EEC antitrust law does not use the term "joint venture" as a defined legal concept. The term "joint venture," however, is used in article 5(2) of the block exemption for patent licensing agreements. Comm'n Regulation No. 2349/84, O.J. L 219/15 (1984).
53. C. Bellamy & G. Child, supra note 33, at 194; Brodley, Joint Ventures and Anti-Trust Policy, 95 Harv. L. Rev. 1523 (1982).
trolling influence over the shares or the whole or parts of the assets of a joint venture, that acquisition will be considered as a "concentration" subject to the Merger Control Regulation. However, if a joint venture has as its "principal object or effect the coordination of the competitive behaviour" of independent undertakings it will not be a "concentration" and will therefore be excluded from the scope of the Merger Control Regulation; instead it will be subject to investigation under Articles 85 and 86 of the EEC Treaty. It is therefore necessary to develop reliable criteria to distinguish concentrative joint ventures, which have to be notified under the Merger Control Regulation, from coordinative joint ventures, which are excluded from the scope of the Merger Control Regulation and possibly have to be notified for an exemption from the cartel prohibition.

Any joint venture agreement involves a certain amount of "coordination" of the activities of the engaged parties. To make the cooperation vital, the participants usually agree upon a number of obligations and restrictions "coordinating" their competitive relationship. For example, in consideration for the basic obligation to make a substantial technological or financial contribution to the operation of the joint venture, the joint venture agreement usually imposes restrictions upon each party's right to conduct its own research in the joint venture's sphere, or to exploit unilaterally the partner's know-how or the results of the joint venture. The Commission therefore assumes that the partners of a joint venture coordinate their competitive behavior in one way or another when finding that all joint ventures between actual or potential competitors are automatically caught by Article 85 of the EEC Treaty. This "cartel aspect" could suggest that all joint ventures are "coordinations" that are outside the scope of the Merger Control Regulation. On the other hand, a joint venture usually

56. See supra note 33 and accompanying text; B. Hawk, supra note 7, at 249 (referring to GEC-Wier Sodium Circulators, O.J. L 327/26 (1977), Common Mkt. Rep. (CCH) ¶ 10,000).
also contains "concentrative" elements insofar as some of the parent's activities are partly pooled in a new business activity.57

In some jurisdictions58 this "double nature" of joint ventures has lent support to the view that joint ventures are subject to both merger control and cartel control. It must be welcomed that such a "parallelism" in the assessment of joint ventures is precluded under EEC antitrust law by (i) the reciprocal exclusion of the concepts of "concentrations" and "coordinations" in article 3 of the Merger Control Regulation59 in conjunction with (ii) the principle of exclusive application of the Merger Control Regulation to concentrations falling within its scope.60 Thus, as a matter of law, the formation of a joint venture will either be subject to merger control or to cartel control but shall not be subject to both review procedures.61

B. Concentration versus Coordination under German Cartel Law

Regarding the antitrust treatment of joint ventures, German law distinguishes "concentrative" from "cooperative" joint ventures. The distinction defines the scope of the merger control provision of section 23 of the German Antitrust Act62 in relation to the cartel prohibition of section 1 of that act.

If several enterprises simultaneously or successively acquire shares of at least 25% or 50% of the voting capital of another enterprise, that enterprise is considered a "joint venture" (Gemeinschaftsunternehmen) and as such subject to merger control.63 This is based on the theory that the formation of a joint venture is deemed to constitute a merger between, first, the joint venture and each parent company holding at least 25% of the shares of the joint venture, and second, between

60. Id. art. 22, at 11-12.
61. See supra note 13.
63. German Antitrust Act, supra note 4, § 25(2).
the individual parent companies. Mergers are subject to merger control and must be reported to the Federal Cartel Office if they meet certain quantitative tests regarding market shares, number of employees, and turnover.

The fact that the German Antitrust Act explicitly provides for merger control of joint ventures gives rise to the question as to whether these merger control provisions are exclusive and exhaustive or whether joint ventures are also subject to review under the general clause of section 1 of the German Antitrust Act prohibiting horizontal restraints of competition.

The relationship between the merger control provisions and the cartel prohibition for examining joint ventures has been a matter of controversy among competition lawyers for

64. R. MÜLLER, M. HEIDENHAIN & H. SCHNEIDER, supra note 62, at 85-86.
65. German Antitrust Act, supra note 4, § 23(1). A merger shall immediately be reported to the Federal Cartel Office if:
   - it results in, or increases a previously existing market share of at least 20 per cent in any market within the Federal Republic of Germany or a substantial part thereof
   - or a participating enterprise has a share of at least 20 per cent in any other market within the Federal Republic of Germany
   - or the participating enterprises collectively had at any time during the fiscal year preceding the merger at least 10,000 employees or a turnover of at least DM500 million.

R. MÜLLER, M. HEIDENHAIN & H. SCHNEIDER, supra note 62, at 88 (translating § 23(1) of German Antitrust Act); see F. BEIER, G. SCHRICKER & W. FIKENTSCHER, supra note 62, at 178-79. Pursuant to section 24 of the German Antitrust Act, the Federal Cartel Office must prohibit mergers that are anticipated to result in or reinforce a market dominating position. German Antitrust Act, supra note 4, § 24. Pre-merger notification has to be given to the Federal Cartel Office if:
   - one of the enterprises participating in the merger had [worldwide] turnover proceeds of at least two thousand million Deutsche Marks during the last preceding business year; or
   - at least two of the enterprises participating in the merger had each turnover proceeds of one thousand million Deutsche Marks or more during the last preceding business year; or
   - if the merger, pursuant to state law, is to be effected by legislative enactment or by other sovereign act.

R. MÜLLER, M. HEIDENHAIN & H. SCHNEIDER, supra note 62, at 201 (translating § 24(a) of German Antitrust Act).

66. German Antitrust Act, supra note 4, § 1. According to the cartel prohibition of section 1 of the German Antitrust Act, all agreements between undertakings or associations of undertakings having the purpose or the effect of influencing production or market conditions with respect to trade in goods or commercial services by restraining competition are void. Id.
There is now a consensus that the relevant merger control provisions do not generally exclude the application of the cartel prohibition of section 1 of the German Antitrust Act to joint ventures. The opposite view would lead to the unacceptable result wherein joint ventures not meeting the thresholds test of section 23(1) of the German Antitrust Act would completely escape antitrust control even if those joint ventures involve serious restraints of competition. Apart from that common ground, opinions are divided over the extent to which the cartel prohibition applies to joint ventures.

According to one view, which can be characterized as the “double control” approach, all kinds of joint ventures are subject to an investigation under both the merger control provisions and the cartel prohibition. However, most scholars reject this view mainly on the grounds that such a parallelism would lead to inconsistent results because the standards of appraisal of merger control and cartel control are different in substance and effect. While merger control is mainly based on quantitative criteria constituting dominance, the cartel prohibition condemns all agreements having an appreciable effect on competition regardless of the market power of the parties involved. Furthermore, the cartel prohibition, which nullifies any contract that restricts competition, may be invoked by competitors without any time limit, even if the Federal Cartel Office has cleared an agreement on the basis of the merger control provisions.

In order to avoid conflict between the two norms and avoid the practical problems resulting from the “double control” approach, a distinction between “concentrative” and “cooperative” joint ventures has been developed to draw a line...
between the ambits of merger control and the cartel prohibition. Accordingly, “concentrative” joint ventures are subject only to the merger control provisions, whereas “cooperative” joint ventures fall within the scope of the cartel prohibition. This approach is based on the theory that section 23 of the German Antitrust Act establishes a fiction of a partial merger between the joint venture partners that is only justified in cases where the elements of concentration prevail.

After a period of uncertainty, the concept of cooperative versus coordinative joint ventures is now well established in German cartel law. It was adopted in the guidelines of the Federal Cartel Office and was upheld by the German Federal Supreme Court in a decision in 1985. The discussion among German competition lawyers now focuses on defining the notions of “concentrative” and “cooperative” joint ventures. According to the guidelines of the Federal Cartel Office, a joint venture is to be considered as “concentrative” if: (1) the joint venture is a functioning undertaking in the sense that it possesses all the attributes of a separate undertaking; (2) the joint venture makes market-related performances and does not exclusively or prevalingly fulfill auxiliary functions for the parents on an upstream or downstream level; and (3) the parent companies do not, or cease to, engage in the market area covered by the joint venture.

Provided these conditions are met, the joint venture constitutes a so-called “partial merger.” As such, it enjoys a so-called “merger privilege” to the effect that the cartel prohib-

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75. German Federal Cartel Office (Bundeskartellamt), Report 1978, at 23.
76. German Federal Supreme Court, 96 BGHZ 69, at 78 (Oct. 1, 1985); see Court of Appeals of Frankfurt, 1989 WuW/E OLG 4323 (Dec. 1, 1988) (following the decision of the German Federal Supreme Court).
77. German Federal Cartel Office (Bundeskartellamt), Report 1985/86, at 63.
tion of section 1 of the German Antitrust Act does not apply. The merger privilege is limited to the formation of the joint venture and extends to the competitive restraints ancillary or necessary thereto, such as non-competition clauses indispensable to the parties entering into the joint venture agreement. The German Federal Supreme Court summarized the nature of a "concentrative" joint venture as follows:

[T]he essential feature of a concentrative joint venture is to be seen in the fact that it represents an independent business entity, planning, determining and implementing its activities on its own responsibility, whereas the parent companies are basically confined to exercising their voting rights deriving from their shareholdings.

In such independently managed joint ventures, operating in a separate market, the elements of concentration prevail over concerns that the cooperation might restrict competition between the partners. The formation of the joint venture is therefore regarded as a partial merger which is exclusively subject to merger control.

C. Evaluation of the German Concept of a Partial Merger and Consequences for EEC Competition Law

The German "partial merger" concept does not provide a ready solution for the difficult problem of applying the appropriate antitrust procedure to a particular joint venture. However, by avoiding the unsatisfactory consequences of the "double control" approach, the partial merger concept establishes distinctive criteria that improve the legal certainty potential venturers need.

The distinction between "concentrative" and "cooperative" joint ventures has been criticized as imprecise and vague. Nevertheless, this "weakness" is not due to the theoretical concept; instead, it is caused by the complexity of joint venture agreements which make assessments on a case-by-case basis inevitable.

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78. For a discussion of the "ancillary restraints" doctrine under EEC law, see B. Hawk, supra note 7, at 255.
79. German Federal Supreme Court, 96 BGHZ at 78 (Oct. 1, 1985) (translation provided by author); see Court of Appeals of Frankfurt, 1989 WuW/E OLG at 4324.
80. See supra note 70 and accompanying text.
81. For this criticism, see V. Emmerich, supra note 70, at 350.
The German partial merger theory greatly resembles the partial merger theory that the Commission has used in various instances. The Commission's partial merger theory which presumably derived from the partial merger concept established under German cartel law provides that the formation of a joint venture is to be treated as a "concentration" escaping Article 85 of the EEC Treaty if: (1) the partners have transferred a complete business to the joint venture and not merely a particular function thereof (such as research and development, buying or selling); (2) as a result, the parents have permanently and irreversibly abandoned business in the field of the joint venture; (3) the joint venture is under a single management so that the parents become pure holding companies; and (4) there is no way in which the joint venture might affect competition between the parents in other areas.

In the absence of a separate system of merger control under EEC competition law, the partial merger theory has been criticized as unsatisfactory. The Merger Control Regulation will put the partial merger theory into new perspective and allow it to fulfill its proper function. In the past the question was whether joint ventures fall within Article 85 of the EEC Treaty or escape antitrust control altogether. The question now will be whether a joint venture is subject to Article 85 of the EEC Treaty or the Merger Control Regulation.

Adopting the partial merger theory as the necessary criterion of distinction between concentrations and coordinations in the case of joint ventures seems to follow from a coherent

82. See SHV/Chevron, O.J. L 38/14 (1975), Common Mkt. Rep. (CCH) ¶ 9709; Comm'n, Fifteenth Report on Competition Policy, ¶ 26 (1986); Comm'n, Sixth Report on Competition Policy, ¶ 55 (1977); see also C. Bellamy & G. Child, supra note 33, at 435; Temple Lang, European Community Antitrust Law and Joint Ventures Involving Transfer of Technology, in 1982 FORDHAM CORP. L. INST. 203, 267 (B. Hawk ed. 1983); Temple Lang, supra note 57, at 132. See generally B. Hawk, supra note 7, at 260 (discussing the application of Article 85 to partial mergers within the Community).
86. Id. This antitrust concern is sometimes referred to as the "spill-over effect" of joint ventures.
87. See Temple Lang, supra note 57, at 140.
88. Joint ventures did not escape antitrust control if they constituted an abuse of a dominant position prohibited under Article 86 of the EEC Treaty. See supra note 10.
interpretation of the second paragraph of article 3(2) of the Merger Control Regulation which provides that

> [t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b) [of the Merger Control Regulation].

Thus, all joint ventures meeting the Commission's criteria of a partial merger are "concentrative" joint ventures and will have to be notified to the Commission pursuant to the Merger Control Regulation. They will be exclusively subject to merger control. This is true even if ancillary restrictions exist. All other, "cooperative" joint ventures will be exclusively subject to review under Regulation 17.

**CONCLUSION**

The Merger Control Regulation applies to concentrations and excludes from its scope operations having the objective or effect of coordinating competitive behavior between independent undertakings. It will be difficult to identify clearly a share or asset acquisition establishing a joint venture as being either a pure concentration or a coordination.

German cartel law has developed the concept of a "partial merger" to distinguish joint ventures subject to merger control from those subject to cartel control. The partial merger concept was also introduced into EEC competition law, but has been criticized as unsatisfactory and dubious because it did not fit into an antitrust law system without a separate procedure to control mergers. Based on a coherent interpretation of article 3(2) of the Merger Control Regulation and taking into account the objectives of the new Merger Control Regulation, the partial merger theory will be the criterion by which to distinguish concentrative joint ventures exclusively subject to merger control from cooperative joint ventures to which Article 85 of the EEC Treaty will be applicable.

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89. Merger Control Regulation, *supra* note 12, art. 3(2), O.J. L 395/1, at 4.
90. See *supra* notes 83-86 and accompanying text.