

Book Review:

Surveying the Landscape of EC Merger Enforcement

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Merger Control in the European Union

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Reviewed by Frank Fine

Merger control is arguably the fastest developing area of EC competition law. On a purely quantitative basis, the number of merger control cases decided annually by the European Commission continues to greatly exceed the total number of non-merger decisions issued by the Commission under the EC competition rules, including the scores of decisions relating to state subsidies or “aids” as they are known in EC-speak. In 2001 alone, in a year mired in global recession, the Commission adopted 340 decisions—almost surpassing its record of 345 decisions adopted in 2000, when the bull market peaked. On matters of substance, such a torrent of case law has resulted in a rich body of Commission policy (and nuances on policy) on everything from market definition to collective dominance.

Unfortunately, the explosive character of EC merger control not only breeds a constant demand for new, updated works, but also, as a byproduct, it shortens the shelf life of almost everything that is published in this field. Unfortunately for its authors, *Merger Control in the European Union* is only the latest book on EC competition law which will be evaluated, perhaps, more for what the authors were unable to account for by virtue of their self-imposed timetable for delivery of the book, than for what valuable contribution in thinking or synthesis of case law they were able to make. Unfortunate indeed for authors Navarro, Font, Folguera, and Briones because within several months after their publication of *Merger Control*, specifically on December 11, 2002, the European Commission adopted, what it has termed euphemistically as, “the most far-reaching reform of its merger control regime since the entry into force of the EU Merger Regulation in 1990.”¹

Of course, when the Commission announced its “far-reaching reforms,” it was reeling from criticism over its handling of the *Schneider/Legrand*² and *Tetra Laval/Sidal*³ mergers. Any experienced observer of the Commission would have already had some skepticism as to whether the Commission changed all that much in EC merger enforcement, or whether it was simply seeking

¹ Comm’n Press Release (IP/02/1856) of December 11, 2002, http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1856|0|RAPID&lg=EN.

² Tetra Laval BV v. Commission, Cases T-05 & T-80/02 (Ct. First Instance Oct. 25, 2002).

³ Schneider Elec. SA v. Commission, Cases T-310/01 & T-77/02 (Ct. First Instance Oct. 22, 2002).

to end the feeding frenzy that ensued from the reversals of these two Commission decisions by the Court of First Instance.

In matters relating to substantive assessment, Commissioner Monti has already made it clear that he will not adopt the U.S.'s substantial lessening of competition (SLC) standard. The revised Merger Regulation will, however, be amended to make clear that the Regulation will apply to oligopolistic dominance, which was most recently applied in the *Airtours/First Choice* case.⁴ There are also draft guidelines now in circulation covering horizontal mergers, in which the Commission will clarify what it has been doing in decided cases. U.S. antitrust lawyers are much more troubled by the Commission's creative assessment of portfolio effects, but guidelines on conglomerate and vertical mergers will have to wait. Efficiencies, however, will be considered by the Commission, although no one (or no one should, at any rate) seriously expect the Commission to apply efficiencies more robustly than the federal agencies have done, as the Commission is only offering this concession as a sop to U.S. critics.

Then there are the "radical" institutional and procedural reforms, such as the hiring of a Chief Economist, the establishment of a peer "review panel" consisting of "experienced officials" with the murkiest of mandates,⁵ access to the file upon opening of a second stage investigation (rather than when a Statement of Objections is issued), additional staff for the Hearing Officer, a longer period for settlements and opportunities for "state of play" meetings with case handlers. The most far-reaching change in procedure is the abandonment of deadlines for the filing of notifications. The Commission will be adopting the U.S. approach, whereby the investigation is deemed to begin when notification is made, whenever that should happen to be, and with the consequences attendant in delays, such as inability to complete the deal.

The above far-reaching reforms (and more) are expected to enter into force on May 1, 2004, which is also, coincidentally, when ten countries from Central Europe will have the privilege of becoming EU member countries.

I leave it to the reader to decide whether the Commission's reforms significantly alter the landscape of EC merger enforcement. This author's impression is that the landscape remains largely the same. Those who disagree may at least find comfort in the fact that the Commission's reforms will not take effect for almost one and one-half years. Messrs. Navarro et al., even by this conservative standard, would enjoy a longer shelf life than most authors in the field.

Is *Merger Control in the European Union* worth purchasing? The answer must be an unqualified, "yes."

By the time Messrs. Navarro et al. completed their final draft of *Merger Control*, the Commission had decided approximately 1,600 merger cases. The Commission's reforms will probably not result in the reversal of a single case law precedent, at least for the foreseeable future.

Merger Control covers not only all transactions that are capable of falling within the scope of the EC Merger Regulation, but also the treatment of cooperative joint ventures, which remain subject to Article 81 of the EC Treaty. Particularly noteworthy is the exhaustive treatment of

⁴ *Airtours v. Commission*, Case T-342/99, [2002] E.C.R. II-2585 (Ct. First Instance June 6, 2002). In the context of merger control, oligopolistic dominance goes back to the *Kali und Salz* case of 1994. *Kali und Salz*, 1994 O.J. (L 186) 30.

⁵ Query as to what "independent" thinking or other added value this review panel can be expected to contribute when the Advisory Committee, which consists of representatives of the Member State antitrust authorities, is already mandated by the Merger Regulation to provide advisory opinions on mergers reviewed by the Commission.

horizontal and vertical mergers, as well as collective dominance. On the procedural side the authors lead the reader through the succession of steps constituting first- and second-stage investigations, which will be of particular interest to U.S. lawyers and which are largely unaffected by the Commission's reforms. The chapter dealing with Article 9 referrals, "legitimate interests" and other institutional concerns is also very informative, although the Commission does plan to simplify Article 9 procedures.

The book contains an Annex, which includes the primary and secondary legislation applicable to EC merger control, and a comprehensive list of Commission merger decisions adopted since the entry into force of the Merger Regulation. This list is particularly useful for its identification of the sector(s) affected by each transaction.

On the negative side, the authors neglect technology and innovation markets almost entirely, and there is no treatment of "unilateral effects," a concept that has been quite fashionable on the international conference circuit, but ignorance of which, if the agitated behavior of some lawyers is any indication, might even be career-threatening. The former is a truly important oversight, which will hopefully be corrected in a subsequent edition. The latter omission should not be deemed significant, due to the rare circumstances in which this notion (or doctrine, if it rises to this distinction) is likely to be applied. Its omission, however, might be considered by some to be unfortunate in view of the controversy surrounding this notion or doctrine.

Merger Control will remind the reader of *EC Law of Competition* (ed. Faull & Nikpay), which Oxford University Press published in 1999. Like the earlier volume, *Merger Control* is comprehensive, thoroughly documented, and provides unique benefits because of the participation of past and present officials of DG Competition, in this case Andres Font Galarza and Juan Briones Alonso. These insights and observations will be well received by practitioners. ●