EUROPEAN MERGER REMEDIES

Law and Policy

Dorte Hoeg

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As merger transactions become more complex, so do the remedies involved. This book seeks to identify and examine the most important aspects of merger remedies, which have emerged and evolved in the European Commission's policy and practice over the past 20-plus years. The in-depth analysis of applicable provisions and guidelines is structured in accordance with a typical 'remedies lifecycle': the negotiation, submission, assessment, adoption, implementation and enforcement of remedies. Furthermore, numerous conditional clearance decisions and judgments as well as studies and legal literature on the subject are described and put into a coherent analytical framework with the aim of providing as much nuance as possible in the evaluation of the Commission's past and present remedies policy and practice.

While the Commission indisputably has accomplished numerous successes in its remedies enforcement over the years, it has also encountered some significant obstacles and shortcomings along the way. To this effect, the final chapter in the book critically assesses whether the current framework, which has remained unchanged since 2008, continues to provide an adequate regulatory response to today's remedies issues and challenges. Where adjustments and improvements are deemed desirable or necessary, possible measures are considered.

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Preface

As merger transactions become more complex, so do the remedies involved. The purpose of this book is to provide a comprehensive account and analysis of the most important merger remedies aspects, which have emerged and evolved in the European Commission's policy and practice over the past 20-plus years. The description of applicable provisions and guidance is structured in accordance with a typical 'merger remedies lifecycle': the negotiation, submission, assessment, adoption, implementation and enforcement of remedies. Furthermore, relevant conditional clearance decisions and judgments as well as studies and literature on the subject are described and put into a coherent analytical framework with the aim of providing a nuanced evaluation of the Commission's past and present remedies policy and practice.

While the Commission indisputably has accomplished numerous successes in its remedies enforcement over the years, it has also encountered some significant obstacles and shortcomings along the way. To this effect, the final chapter in this book critically assesses whether the current framework, which has by and large remained unchanged since 2008, continues to provide an adequate response to today's remedies issues and challenges. Where adjustments and improvements are deemed desirable or necessary, possible measures are considered. As the topic of merger remedies embraces a wide range of comprehensive issues, the main focus in this book is on structural remedies as they continue to be the most frequently occurring and preferred solution in the Commission's decisional practice.

This book has been in the making for many years. My first professional encounter with merger remedies dates back to the mid 1990s when I worked as an official for the Danish Competition Authority and among other things participated in the consultations of the EU's Advisory Committee on Concentrations and had the opportunity to observe and be involved in the Commission's remedies work from the perspective of a Member State. When I later became a national expert and a case handler in DG Competition (then Merger Task Force) a substantial amount of my time and efforts were devoted to the day-to-day handling of merger remedies cases. Later I enjoyed the privilege of undertaking doctoral research in the very same field, which led to the award of a PhD by King's College London in 2012. Thus with the experience from a Member State, the Commission and academia, I have strived to write a balanced and comprehensive account of how the Commission's remedies policy and practice are perceived today and how they have evolved over the years.

Many people have helped, encouraged and inspired me along the way, including mentors, colleagues and friends. As this publication is a revised version of my PhD thesis, I would like to thank Richard Whish, Ariel Ezrachi and Philip Marsden for their helpful and constructive feedback. A special thanks is also extended to the staff at Hart Publishing for taking on this publication and for their patience in waiting for the completion of the manuscript and their help throughout the drafting and publication process. Finally, I wish to thank the people dear and close to me for allowing me to stubbornly pursue my ambition of writing this book, which I would like to dedicate to my three children, Sophie, Olivia and Sebastian.

During the writing and editing of this book I have been reminded how the topic of merger remedies continues to constantly evolve, requiring continuous attention and adaptation. Every endeavour has been made to include the very latest developments and sources as of 1 May 2013. As it is my hope that this book will be the beginning of an evolving process following future merger remedies developments, I would be grateful for comments and ideas on any aspects dealt with in this publication at merger.remedies@gmail.com.

Dorte Hoeg
Brussels, May 2013

Abbreviations

AAI	American Antitrust Institute
ABA	American Bar Association
AC Opinion	Opinion of the Advisory Committee on Concentrations
ACCC	Australian Competition & Consumer Commission
BIAC	Business and Industry Advisory Committee (OECD)
CCP	Centre for Competition Policy
Commission	EU Commission
Competition Report	Annual Report on Competition Policy by the EU Commission
DG Competition	Directorate General of the Commission for Competition Policy
DG Enterprise	Directorate General of Enterprise and Industry
DoJ	US Department of Justice (Antitrust Division)
ECR	European Court Reports
EU Court	European Court of Justice and European General Court
FMCGs	fast-moving consumer goods
FTC	US Federal Trade Commission (Bureau of Competition)
IBA	International Bar Association
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IFLR	International Finance Law Review
IPRs	intellectual property rights
JV	joint venture
MFT	Merger Task Force (DG Competition)
MTDC	Model Text for Divestiture Commitments
MTTM	Model Text for Trustee Mandates
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
SIEC	Significant Impediment to Effective Competition
SO	Statement of Objections
SPA	sales and purchase agreement
TFEU	Treaty on the Functioning of the European Union
UK CC	UK Competition Commission
UK OFT	UK Office of Fair Trading
US SEC	US Securities and Exchange Commission

Table of Cases

European Union

Commission Decisions

Court of Justice

General Court

European Ombudsman

United States of America

Department of Justice (Antitrust Division)

Federal Trade Commission

Denmark

Konkurrencerådet (Danish Competition Council)