

Broberg on the European Commission's Jurisdiction to Scrutinise Mergers

Fourth edition

Morten P. Broberg

16

EUROPEAN MONOGRAPHS



Wolters Kluwer
Law & Business

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In this series European Monographs this book, *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers*, 4th Edition is the sixteenth title. The titles published in this series are listed at the end of this volume.

Preface to the Fourth Edition

This is the fourth edition of what originally was my PhD thesis submitted to the University of Copenhagen, Faculty of Law in 1997 and defended in 1998. Every time I begin work on a new edition I am astonished by the amount of time such revision entails. And every time I have promised myself that this shall be the last time I agree to revise the book. Strange as it may seem, with the passing of time I apparently forget how much work was put into the making of the previous edition, and so I agree when Kluwer Law International proposes that I produce a new edition. This time is no exception.

Due to some truly unforeseeable occurrences, completion of the present edition has taken much longer than expected. One consequence of the long gestation is that the number of required changes to the text has grown considerably. In this respect, it is of particular importance that on 16 April 2008 the Commission published its Consolidated Jurisdictional Notice, which replaced the various previous Commission notices dealing with jurisdiction. This is the most important single change between the previous and the present edition of the work. Moreover, the Lisbon Treaty entered into force in 2009 causing a change not only with regard to references to Treaty provisions, but also with regard to terminology ('Community' was replaced by 'Union', 'European Court of Justice' was replaced by 'Court of Justice of the European Union', 'Court of First Instance' was replaced by 'General Court', etc.). In addition, I have strived to update references to literature and to take into account the most recent caselaw of the Commission and the Union's courts. Whilst select parts of the new caselaw certainly has proved to be of considerable importance, it has been remarkable that the calculation of Union dimension only surfaces in a fraction of the very large number of new cases. This, presumably, is a strong indication that EU merger control in general and the establishment of the Commission's jurisdiction in particular have reached a stage of maturity.

From my first contact with Kluwer Law International, I have had the great pleasure of working together with *Karel van der Linde*. Karel retired from Kluwer before I was able to complete the present edition. I really have enjoyed my cooperation with him and am happy that I can express my most sincere thanks to him here.

At Kluwer Law International, *Simon Bellamy* and his team has taken over from Karel, and I would like to extend my thanks to them all for taking the same professional approach as did Karel. The present edition has also benefited from valuable help from a number of colleagues in academia as well as from a good number of practitioners. These many persons have unselfishly provided me with relevant material, references and comments on the text of the third edition. I am deeply grateful to all of these. Whilst the number of persons who took time to help me is too large to list them all, three have provided help of such a kind that it would be wrong if I failed to mention them here. Thus, I would like to express a special word of thanks to my good colleague and friend Professor *Niels Fenger*, to Deputy Director of the EFTA Surveillance Authority *Tormod S. Johansen* and to *Laurits Schmidt Christensen*, lawyer at Accura Lawfirm.

As already noted, as with the production of the second and the third edition, the size of the work on the present fourth edition has taken me aback. However, in contrast to previous revisions, this time I am aware that it is likely that some time in the future Kluwer may propose that I produce a revised edition – and that I will agree to do this. I will therefore be grateful for all kinds of comments that may be useful for such revision, however big or small.

The first edition of the present work was completed under the supervision of Professor *Mogens Kocktvedgaard* who has been instrumental in my choice of career path. Professor Kocktvedgaard sadly passed away in the summer of 2003. This work is dedicated to the memory of this extraordinary person in sincere gratitude for all I learned from him.

Copenhagen November 2012
Morten P. Broberg

Preface to the Third Edition

When I finished the first edition of this book I had absolutely no idea that only a couple of years later Kluwer Law International would ask me to write a second edition; let alone that I would be asked to prepare a third one. Nevertheless, in the Summer of 2005 I was asked whether I would be willing to prepare a third edition. The fact that others apparently find it worthwhile to read my book certainly is very encouraging, so I decided to put aside most other tasks and complete the third edition before the end of 2005.

The most important development since the appearance of the second edition undoubtedly is the adoption of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). This regulation has replaced the original merger regulation that was adopted in 1989 and entered into force in 1990. With respect to jurisdiction – which is the core subject of this book – the new regulation has changed very little as concerns substance. Working my way through the manuscript as part of the revision I have nevertheless been surprised as to the very considerable number of amendments I have had to make due to the new regulation. In this third edition references to the Merger Regulation or to the Regulation denote references to regulation 139/2004. Where I refer to the Merger Regulation in connection with for example a Commission decision from 1995 this means that the *ratio decidendi* of that decision may be applied to regulation 139/2004 (as well as to the Original Merger Regulation). In a number of instances it has been necessary to distinguish between the original merger regulation and the one that is now in force. In these situations I refer to the ‘Original Merger Regulation’ and to the ‘New Merger Regulation’.

I frequently refer to the various Commission notices laying down the Commission’s interpretation of the Merger Regulation. The attentive reader will soon observe that these notices refer to the Original Merger Regulation, not to the New Regulation. At the time of writing the Commission has initiated work on a revision of the notices. This is a very considerable task, however, and the intention is that the new notices will be adopted sometime in 2007 – at the earliest.

I have attempted to state the law as it appears on 15 September 2005. Equally, conversions into EUROS have been made on the basis of the exchange rates applying on that day.

This work I have dedicated to *Professor, dr.jur. Mogens Koktvedgaard*. Sadly Professor Koktvedgaard passed away in the Summer of 2003. While the loss this created is deeply felt, I continue to greatly appreciate all that I learned from him.

Copenhagen September 2005

Morten P. Broberg

Preface to the Second Edition

The first edition of this work was finished in the autumn of 1997 and published in April 1998, meaning that it was possible to take into account the first revision of the Merger Regulation. Much to my joy the work sold very well and therefore early in 2000 I agreed with Kluwer Law International to prepare a second edition. This has proved to be a much more extensive task than I had imagined and so I have more than once had to ask Kluwer to extend the submission deadline. Fortunately, Kluwer proved to be very obliging to my tedious requests. Final completion of the second edition awaited the Commission's publication of its proposal for a revised Merger Regulation. The proposal was published on 11 December 2002 and – much to my surprise – both the turnover thresholds defining Community dimension and the rules on calculating the relevant turnover have been left almost untouched. With regard to jurisdiction, the Commission instead proposes to amend (or 'fine-tune' as they put it) the referral mechanisms between the Commission and the Member States. I have been assured that I may now safely rule out the possibility that the definition of Community dimension will be changed as part of this revision. As it is, moreover, likely that the revised Regulation will not be adopted until the end of 2003 (and apply as of 1 May 2004) and as I cannot continue to postpone completion of the second edition for all eternity, I have decided to complete the work on the second edition now. I will, however, outline the extent to which any foreseeable amendments may have an impact on my examination. According to the Commission's proposal, the original Merger Regulation (Regulation 4064/89) and the amending regulation (Regulation 1310/97) will be recast into a new EC Merger Regulation. This together with the amendments now proposed by the Commission will mean that the numbering of the subarticles (and possibly also of some articles) will change. Since the numbering in the finally adopted version is likely to differ from the numbering found in the Commission's proposal, this work will be based on references made to the regulations presently in force (*i.e.* Regulations 4064/89 and 1310/97).

The second edition is, first of all, an updated version of the first edition. Apart from taking into account the revised notices, I have gone through the excessive number of cases issued since the first edition. Moreover, as far as possible I have updated the references to the legal doctrine and references to the EURO have

replaced references to the ECU.¹ In addition to this 'normal revision', I have also tried to orient the second edition more towards the needs of practitioners. One reason for this is simply that since publishing the first edition I have gained practical experience, *inter alia* from work in private practice. This experience has given me a better understanding of the problems that a practitioner is faced with. For instance, I am now much more appreciative of the great advantages of the one-stop-shop principle.

Also, during my work on the second edition I have drawn on the assistance of a number of people. In particular, I should like to mention *Ms Anny Tubbs* and *Mr Niels Fenger*, both of the EFTA Surveillance Authority, *Dr Søren Schønberg*, formerly in the cabinet of Advocate General Francis Jacobs at the European Court of Justice and now an official of the European Commission and *Dr Ole Spiermann* of the University of Copenhagen. The views expressed, as well as all errors and omissions, remain my own.

This work was originally written as a PhD thesis under the supervision of *Professor, dr.jur. Mogens Koktvedgaard*. Working with a true master has been a great privilege which I continue to cherish and benefit from. To him I dedicate this work with great affection and thanks.

Copenhagen March 2003
Morten P. Broberg

1. For the sake of convenience all references to ECU have been changed to references to EURO (converted on a one-to-one basis).

Preface to the First Edition

This book is based on my PhD thesis on the European Commission's jurisdiction to control mergers. Writing this thesis has been far from a solitary process. On the contrary, throughout the writing I have been in contact with legal practitioners, academics, government officials and many others. The help which many of them provided me with has been essential for the successful completion of my thesis.

I would have liked to have mentioned each of those who so unselfishly helped me in my work, but the number of people who helped me is so large that this is simply impossible. I must therefore limit myself to simply expressing my sincere thanks to them all. Some have, however, helped me to such an extent that failing to mention them here would be truly unjust.

The first person whom I must mention is my old friend, good colleague and fierce critic, *Mr Niels Fenger* who read every piece of my thesis at the drafting stage. Many of my ideas have been tested on him. And many ideas have not passed this test.

It will be no surprise that several fonctionnaires in the European Commission provided essential help and support in my work. Special mention must go to the former director of DG IV's library, *Mr Hans Witt*. Also, I must mention *Mr Luc Norro* who was a perfect conseiller while I was a stagiaire in DG IV in 1992-93. Many people from the Commission's Merger Task Force have helped me on numerous occasions. Particular mention must go to *Mr José Chantre* who on several occasions took time to provide me with comments and advice.

I spent the first year working on the thesis as a visiting research scholar at Université Robert Schuman, *Centre d'Etudes Internationales et Européennes*, in Strasbourg, where *Professor Vlad Constantinesco* was my hospitable and generous host. In Strasbourg, *Professor Robert Kovar* kindly took time to read and discuss drafts of my work. I am most grateful for this.

Following my year in Strasbourg, I spent my second year at the *Max-Planck-Institut für ausländisches und internationales Patent-, Urheber und Wettbewerbsrecht* in Munich where *Dr Annette Kur* was my hospitable and generous host.

In Munich, I had numerous interesting discussions which greatly benefited my work with other scholars at the Institute. Particular mention must, however, go

to *Dr Andreas Heinemann* of both the Max-Planck-Institute and the University of Munich.

The third and last year, I spent at the University of Copenhagen. Throughout the work on my thesis, I have benefited from the enduring support and excellent advice provided by my supervisor, *Professor, dr.jur. Mogens Koktvedgaard*. From the very beginning until the very end of my work, Professor Koktvedgaard has provided an unbelievable number of comments and insights. Moreover, Professor Koktvedgaard has continuously provided me with invaluable support in my work. It will be no surprise to learn that I enjoyed my work under his supervision enormously, and I feel very grateful to him for the generous help which I received throughout my three years as a research fellow at the University of Copenhagen. And which I continue to receive.

The thesis will be examined by a distinguished Committee of Examiners consisting of the committee chairman, *Adj. Professor, Former President of the European Court of Justice, jur.dr. h.c. Ole Due*, University of Copenhagen together with *Professor, dr.jur. Jens Fejøl*, Copenhagen Business School and *Professor, jur.dr. Ulf Bernitz*, Stockholm University. I am, of course, both honoured and delighted that these highly distinguished authorities have agreed to examine my thesis.

Lastly, I am indebted to *Det Finneske Legat* for sponsoring parts of the costs associated with the publication of the thesis and to Kluwer Law International which agreed to publish the thesis in their European Monographs Series.

Needless to say, I alone shall be held responsible for any remaining errors and inadequacies in the work.

Copenhagen, October 1997
Morten P. Broberg

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