Merger Control in Europe

The Gap in the ECMR and National Merger Legislations

Ioannis Kokkoris

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Merger Control in Europe

This book addresses the phenomenon of mergers that may result in non-coordinated effects in oligopolistic markets. Such cases are sometimes referred to as "non-collusive oligopolies", or "gap cases" and there is a concern that they might not be covered by the substantive test that some member states of the EU use for merger assessment. Ioannis Kokkoris examines the argument that the EC Merger Regulation (Regulation 4064/89) did not capture gap cases and considers the extent to which the revised substantive test in Regulation 139/2004 deals with the problem of non-collusive oligopolies.

The author identifies actual examples of mergers that gave rise to a problem of non-coordinated effects in oligopolistic markets, both in the EU and in other jurisdictions, and analyses the way in which these cases were dealt with in practice. The book considers legal systems such as those in the United Kingdom, the United States, Australia, and New Zealand. The book investigates whether there is any difference in the assessment of non-collusive oligopolies between the various substantive tests that have been adopted for merger assessment in various jurisdictions. The book also looks at the various methodological tools available to assist competition authorities and the professional advisers of merging firms to identify whether a particular merger might give rise to anticompetitive effects and explores the type of market structure in which a merger is likely to lead to non-coordinated effects in oligopolistic markets.

Ioannis Kokkoris is a Reader at the University of Reading (UK). He is an international consultant on competition policy at the Organisation for Cooperation and Security in Europe (OSCE). He is also a Visiting Professor at Bocconi University (Italy), and City University (UK) and a Visiting Fellow at Durham University (UK).

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Preface

This book aims to address the issue of mergers leading to non-coordinated effects in oligopolistic markets ("non-collusive oligopolies" or "gap" cases); to examine how the legal substantive test deals with non-collusive oligopolies; and to identify such cases in the current case law of the EC as well as of other jurisdictions. An improved understanding of mergers leading to non-coordinated effects in oligopolistic markets, as well as of the contributing factors, firmly rooted in economic theory is essential in three respects: reducing the number of transactions with adverse impact on competition, increasing the number of beneficial transactions, and reducing the uncertainty surrounding merger approval.

The Commission faced intense criticism following the *Airtours/First Choice* case, which appeared to illustrate the existence of the so-called "gap" in the application of the old EC Merger Regulation ("ECMR") and emphasized the need for an economically sound basis of merger assessment. The "gap" corresponds to the situation where the post-merger entity's market power would not amount to single firm or collective dominance but where the merger may nonetheless lead to non-coordinated effects in oligopolistic markets.

Even though the legal substantive test has been changed from the "dominance test" to the Substantial Impediment to Effective Competition ("SIEC") in the recast ECMR, and thus would appear to rectify the "gap" in the European Community merger regime, the occurrences of such "gap" cases may not cease under national laws that still adhere to the traditional dominance test. Such regimes are still likely to experience cases where they will be facing mergers which will have the features of a non-collusive oligopoly but will be unable to apply the current dominance test. They may thus resort to other methods of trying to deal with mergers having an adverse impact on competition.

Chapter 1 addresses how the "gap" resulted from the application of the dominance test as the legal substantive test in the assessment of mergers. Chapter 2 examines amendments in the ECMR designed to rectify the "gap". Chapter 3 presents important issues in the assessment of "gap" cases such as the quantitative methods used to accurately assess the adverse impact of a merger on competition. Chapter 4 identifies "gap" cases and demonstrates that the amendments in the ECMR were justifiable, and Chapter 5 presents economic evidence of the existence of such cases. Finally, criteria for the assessment of "gap" cases are presented.

Dr. Ioannis Kokkoris
London, 22 January 2010

Foreword

The debate that led to the 2004 adoption of the recast EU Merger Regulation was lively, stimulating and, at times, quite contentious. The original Merger Regulation of 1989 provided for the prohibition of a merger that "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded". Over a period of time case-law of the Community Courts, most notably *Gencor* v *Commission* in the General Court (then the Court of First Instance) and *France* v *Commission* in the Court of Justice, established that a "dominant position" could include a "collective dominant position"; but it was not entirely clear what phenomena were included within the concept of collective dominance. There was a growing consensus that what we now call coordinated effects in oligopolistic markets were covered; but what was less clear was whether the enhanced ability of a non-dominant firm, following a merger, to exercise individual, as opposed to collective, market power, could be addressed. This phenomenon came to be known as "non-collusive oligopoly"; and its possible exclusion from the concept of collective dominance was commonly referred to as the "gap" in EU merger control.

If such a gap existed – and if it was sufficiently large that it needed to be filled – it seemed that a change in the legislation was required. The debacle of the *Airtours/First Choice* decision of the Commission added to the confusion in this area, since the General Court's annulment of the Commission's decision seemed to restrict the concept of collective dominance to "conventional" coordinated effects cases.

The appropriate standard of merger control was hotly debated throughout 2002 and 2003. A strong body of opinion believed that there was no need to change the dominance test at all; perhaps the gap did not exist; perhaps it could, even after *Airtours*, be covered by collective dominance; or perhaps it was so theoretical that it was simply not worth the disruption of legislative change that would undermine the decisional practice of the Commission and the jurisprudence of the Community Courts acquired over a period of more than a decade. However, an equally strong body of opinion pointed out that many jurisdictions, particularly in the "Anglo-Saxon" world, used the language of "substantial lessening of competition" for merger control, an expression that seemed both more intuitively natural for this purpose – will there be less competition in the market after the merger than before it? – and more "dynamic" than "static". As is well-known, the matter was finally resolved by the deceptively simple device of reversing the word order of the 1989 Regulation: henceforth a merger would be prohibited that would impede effective competition, "in particular" as a result of the creation or strengthening of a dominant position. Recital 25 of the 2004 Regulation explained that this reformulation should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a merger resulting from the non-coordinated behaviour of undertakings which would not have a dominant position in the market concerned. In other words, the point was to fill the gap.

I vividly remember the debates on this subject, and the passions that were sometimes aroused. But I also recall a particular frustration: the dearth of "gap cases" in history to use as a basis for argument. That is not to say that there had never been gap cases; but rather that they had never been articulated as such. Mergers may have been prohibited (or modified) because of an anxiety about non-collusive oligopoly, but the competition authority may not have used that language in its decision. A finding that a merger would substantially lessen competition need not necessarily have identified non-collusive oligopoly as a theory of harm; and cases decided on the basis of creation or strengthening of dominance might, for example, have proceeded on the basis of a fairly suspect (unduly narrow) market definition. To quite a large extent, therefore, the debate took place at a somewhat theoretical level, unsupported by empirical evidence.

What was needed at that time was a book that covered precisely the ground explored in this one. Dr Kokkoris, after explaining the nature of the problem, proceeds to look at cases in various jurisdictions – the EU of course, but also the US, UK, New Zealand and Australia, for example – in which there have been cases that were, or probably were, gap cases. There is much research here that anyone interested in this subject will find invaluable. *Airtours* of course is discussed; but then several other important EU cases are also reviewed, including, for example, *Oracle/PeopleSoft*, *Sony/BMG*, *Johnson & Johnson/Guidant* and *T.Mobile/tele.ring*. *LloydsTSB/Abbey National* in the UK and *Heinz/Beech-Nut* in the US are discussed; and the interesting situation in Australia, which went from the "SLC" test to dominance and then back to SLC is also looked at: the author suggests that more research on the experience in Australia might be useful. The author's conclusion – with which I agree – is that there was indeed a gap in the dominance test, and that it needed to be filled.

Does this matter, now that the EU Regulation was been reformulated? The answer, surely, is yes, not least since there are many Member States of the EU that retain the dominance test: the author usefully summarizes the various tests in Europe in an Appendix to the book. This book usefully draws together the arguments for and against the gap and the need to fill