Directory of EU Case Law on Merger Control

'The Merger Brick'

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Law & Business

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Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3285-7

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

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Foreword

My view on *ex ante* merger control has always been ambivalent. On the one hand, I see a clear need to avoid an accumulation of economic power that distorts the competitive process and that may have undesirable political side effects, as we have recently seen in the British newspaper industry. A more thorough review of banking mergers could also have avoided the some of the mischief hurting Europe's economy. Whatever the economists may think about today's objectives of merger control, merger control is part of the wider set of rules which ultimately ensure our economic and political freedom.

On the other hand, I have always been concerned by the societal costs of public control, especially if it relies on a system of prior approval, as it does in the European Union. The costs and delays of obtaining such approval also affect harmless transactions. In addition, the practice of conceding 'undertakings or remedies' so as to avoid protracted proceedings, may undermine the business rationale of the transaction and lead to suboptimal results. Time pressed managers may be tempted to make unnecessary sacrifices so as to gain a few additional months on the calendar leading to the closing date of their deals.

Apart from this conceptual ambivalence, European concentration control is puzzling and fascinating in itself. It brings together economic policy, administrative practices and competition law in situations where complex decisions have to be made about future events within relatively tight deadlines. This decisional process involves a large number of actors, each with diverging interests and different backgrounds. This process is far more complex than a straightforward opposition of, on the one hand, the parties to the concentration and, on the other hand, the regulator. The relationship between the parties to the concentration is not necessarily harmonious, especially in cases of hostile take-overs or in situations where the acquiring party made an unconditional public bid on the target's shares.

The interference of complainants, other third parties and national governments may further blur the picture.

In addition, the whole process is a human one, involving professionals of various origins and guided by diverging interests. In complex cases, each player in the process leading to the Commission's decision will line up a team of advisors, economists, lawyers and bankers who will not necessarily agree, especially where success fees and bonuses are at stake. Similarly, it would be naive to think that the Commission's camp is composed of like minded, benevolent officials. The adoption of decision in a contentious case by a large administration involves a wide range of experts and services.

Does this mean that EU merger control takes place in a Hobbesian jungle? No, the whole process is at the end of the day governed by the rule of law. The rulings of the Union courts in cases such as Airtours, Tetra Laval, Schneider and Sony/Bertelsmann show that the Commission's margin of discretion has its limits. Even if judicial relief is necessarily *ex post*, the threat of court proceedings implies that the case law on concentration control law will be on the mind of the actors involved in the proceedings and that it will deter them from taking untenable positions.

One of these actors is Steven Noë. I know Steven since the end of the nineties when he was still a young lawyer at one of the most prominent Dutch law firms. Steven is now a member of the Commission's Legal Service in charge of merger coordination. In this capacity, he is part of the Commission's internal checks and balances reminding his colleagues of the limits to the Commission's powers. Whether the Legal Service succeeds in doing so depends on its intellectual and moral authority, which in it turn depends on thorough knowledge of the law. It is not a surprise that one regularly meets members of this service who are walking databases able to quote the courts' case law on very specific or esoteric issues.

Steven's decision to share his knowledge and to make it accessible to all those who are interested in merger control must be applauded. By disseminating knowledge of the law, Steven contributes to enforcing the rule of law. His Merger Brick indeed allows everybody to have immediate access to the relevant quotes of the case law of the Union courts on a particular topic. The book has a very detailed table of contents structured in fourteen chapters.

When consulting this impressive directory, I was surprised to note that so many different issues had already been the subject of court litigation. Even if one should be cautious in attaching to much value to precedents in fact-driven merger cases, it is possible to infer jurisprudential rules from the case law. Steven contributed to identify most of these rules by underlying the relevant sentences. Reading the underlined passages will help the reader to acquire or refresh his knowledge of the main principles governing European concentration control.

Unfortunately, imposing the rule of law in merger control proceedings will succeed only if the rules are respected and enforced. It is therefore not surprising to note that Steven considers the chapter on the action for annulment as the most

important chapter of his book. It is indeed in the context of such actions that most of the case law of the Union courts on merger control was developed.

Finally, the precedents being set and made accessible by the Merger Brick, one may hope that the rule of law is respected by itself and that future litigation can be avoided.

Luxembourg, 23 October 2011
Marc van der Woude
Judge at the General Court of the European Union

Introduction

This book seeks to give quick and accurate access to the case law on EU merger control. To that end, it presents the relevant parts of judgments on the Merger Regulation by topic, allowing the reader to quickly find out what the Court of Justice or the General Court of the European Union has held on a particular issue. It is intended for all those interested in EU merger control.

To make full use of this book it is important to become familiar with its structure. That structure is of course apparent from the detailed table of contents, which is intended to guide the reader directly to the relevant case law. But it is useful to present the main structure here. The book starts with an overview of merger cases in Chapter 1. This includes a list of the cases that have been decided by the Union courts, as well as lists of the cases that are pending and that have been withdrawn or become devoid of purpose. There are also lists of orders on interim relief and taxation of costs (the list includes the sums awarded), a table of all Commission merger cases that triggered litigation before the Union courts, and finally a list of cases concerning requests for access to documents under Regulation No 1049/2001 that relate to merger control. Chapter 2 presents judgments on a number of important general issues, such as the primary purpose, aims and general scheme of the Merger Regulation, as well as the legal bases for the regulation and principles guiding its interpretation. Chapter 3 is about jurisdiction; it details the case law on the scope of application of the Merger Regulation. This chapter considers the key notions of 'concentration' and 'EU dimension', but also the referral of cases to and from the authorities of the Member States, and the relation between the Merger Regulation and national law and international law.

Chapters 4–8 deal with the competitive assessment of mergers. Chapter 4 is an important chapter that sets out general principles for the appraisal of concentrations under the Merger Regulation, considering the assessment of the effects of a concentration, principles relating to evidence and the relevance of previous decisions

and policy statements. It also includes judgments on concepts such as the relevant market, a dominant position, a substantial part of the internal market, serious doubts, ancillary restraints and the relation of the Merger Regulation to other rules of Union law. Chapters 5 and 6 then consider coordinated effects and non-coordinated effects, and Chapter 7 discusses factors than can mitigate the likely anticompetitive effect of a merger: in particular entry, buyer power, and efficiencies. The structure of this chapter has been inspired by the Commission's Horizontal Merger Guidelines[1], even though most of the case law pre-dates the adoption of these guidelines. While the assessment of the anticompetitive effects of a merger is always case-specific, making it sometimes difficult to draw more general conclusions, the case law reported in these chapters serves to illustrate how factors that may also be relevant in other cases are applied in practice. Chapter 8 deals with commitments (also commonly referred to as remedies) that undertakings may offer with a view to rendering their merger compatible with the internal market. Chapter 9 then is about the administrative procedure before the Commission. It deals with the obligations of the Commission and the parties during the administrative procedure; the Commission's powers to request information, carry out inspections, and impose fines and period penalty payments; the right to be heard of the undertakings concerned and third parties; and the cooperation between the Commission and the Member States and the consultation of the Advisory Committee on concentrations. Chapter 10 details the case law on the Commission's duty to state reasons in decisions under the Merger Regulation.

Chapters 11–14 concern the review of the Commission's actions by the courts of the European Union. Chapter 11 on the action for annulment is the most important chapter of this part of the book. It considers first the conditions under which an action for annulment can be brought in the field of merger control; this involves the question whether there is a challengeable act, whether a private person that brings an action is directly and individually concerned, whether the applicant has an interest in bringing proceedings, and the application of time-limits for bringing an action. It then considers the principles that govern the review of the legality of Commission decisions, including the standard of review to be applied by the Union courts. Chapter 12 deals with the action for damages, setting out the conditions under which the Commission is required to pay compensation for damages that it caused third parties in the performance of its duties in the field of merger control. Chapter 13 contains judgments on two specific issues in court proceedings; first, the expedited procedure, and second, applications for the production of documents. Chapter 14 contains tables with the results of court actions and lists the cases in which requests for expedited procedure were granted and refused.

It is equally important to bear in mind what is not in this book. Since the purpose of this book is to set out case law specific to merger control, it does not include case law on other areas of competition law, or indeed on Union law in general. Clearly, such case law may be relevant for merger control. The Merger Regulation and Articles 101 and 102 TFEU are both part of the Union system

1. OJ C 31, 5.2.2004, p. 5.

designed to ensure that competition in the internal market is not distorted and several concepts used in the regulation are derived from these Treaty provisions. Moreover, certain provisions in the Merger Regulation are similar or almost identical to provisions of Regulation No 1/2003, for instance those setting out the powers of the Commission to request information, carry out inspections and impose fines or periodic penalty payments. While this book includes, on a few occasions, particularly relevant judgments rendered in cases under Article 101 or 102 TFEU, as a rule such case law is not included. The reader is therefore advised to always consider whether case law on other areas of competition law is relevant in a particular case. The same caveat obviously applies to the law that governs actions before the Union courts; the case law on court procedure reported in this book is specific to merger control and general issues are not covered. Finally, since the focus of this book is on judgments of the Union courts, it does not include the opinions of the Advocate-Generals written in cases heard by the Court of Justice. The interested reader will of course benefit from reading these learned opinions; some excellent ones have been written in merger cases.

References in the headings to the Merger Regulation should be understood as references to the current Merger Regulation, i.e., Regulation No 139/2004[2], unless indicated otherwise. Most of the cases reported have been decided under Regulation No 4064/89[3], which differed from Regulation No 139/2004 in several aspects. In accordance with the practice of the Commission, this book uses the terminology resulting from the Treaty of Lisbon (such as 'EU dimension' and 'internal market', instead of 'Community dimension' and 'common market'), even though the text of the Merger Regulation itself has not yet been brought in line and the judgments reported in the book obviously use the old terminology. The texts used in this book have been taken from the website of the Court of Justice and may therefore diverge from the text published in the official European Court Reports. In a few cases, no English text was available and the French text has been used. Where useful, the most relevant parts of a judgment have been underlined.

This book has grown over several years of practising EU merger control law. It was originally a working document for use in the competition team of the Commission's Legal Service. My colleague Fernando Castillo de la Torre was first to create a directory of cartel judgments for internal use, which he called 'the brick'. It was then inevitable that my directory of merger control judgments became known in the Legal Service as 'the merger brick'. This explains the subtitle of this book. While this book is no longer a working document, it can still be further improved. Comments and suggestions to that end are welcome. Finally, the usual disclaimer applies: the views expressed in this work are those of the author and cannot be ascribed to the European Commission.

2. OJ L 24, 29.1.2004, p. 1.
3. OJ L 257, 21.9.1990, p. 14 (corrected version). Regulation No 4064/89 was amended in 1997 by Regulation No 1310/97, OJ L 257, 21.9.1990, p. 14 (corrected version).

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