COMPETITION LAW in the EUROPEAN COMMUNITY

David M Jacobs
and
Jack Stewart-Clark

with a foreword by **Sir Leon Brittan**

2nd Edition

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Foreword

Throughout its history the Commission has been dismantling barriers to trade. We are now in a phase of intense activity which will complete this process, in order to create a Single European Market after 1992.

We have paid a high price for segmenting the Community into individual domestic markets. The Cecchini Report estimated this loss at between 4.3 per cent to 6.4 per cent of Community Gross Domestic Product (GDP) or 200 billion ECU in 1988, and fragmented markets have meant chronic decline in the competitiveness of some of our firms. Protected by barriers to trade, they have lost their competitive edge and sense of enterprise. These same barriers have denied opportunities to new entrants, whose entrepreneurial skills have been smothered. The 1992 programme is designed to reverse these conditions. It will reduce the burdensome costs of administration and technical compliance, whilst liberalizing previously closed markets.

One of the most beneficial aspects of the Single European Market is the widening of choice it will provide to all consumers. The entry of new firms, the opening of markets and the easing of trade will all add to the range of goods and services available to every customer in the Community. Diversity and choice are the natural consequences of the Single European Market. It follows that firms will need to compete more strenuously. They will need to innovate, watch their costs, tend to the quality of their products and enhance the skills of their employees. Competition provides benefits to all. Diversity, choice and competition will be the dominant features of the European landscape after 1992.

This brings me to the matter of acquisitions and mergers. There is little point in the Commission's efforts to dismantle impediments to competition and trade if businesses build new ones. The 1992 programme is markedly pro-competitive but some mergers and acquisitions may be anti-competitive. In order to avoid having less choice, narrowed diversity and reduced competition, we have to be able to permit mergers that strengthen industry without damaging competition, but prevent mergers which diminish effective choice in a damaging way.

Mergers and acquisitions occur in as disparate activities as football clubs and defence electronics companies. Most mergers are between firms from the same country. Increasingly, mergers involve companies in more than one Member State or companies from Member States and non-members. The Commission's figures for 1987/88 show that there were over 320 national mergers, 146 Community mergers and 91 involving Community companies with those from other countries. Of the 383 mergers in industry that we recorded, 70 per cent involved firms whose combined turnover exceeded 1,000 million ECU. In the service sector over 40 per cent of mergers surpassed this figure. Our latest research indicates the total number of mergers in industry is up by 20 per cent, with Community mergers growing by over 50 per cent and the number where the combined turnover exceeds 1,000 million ECU has grown by 40 per cent. Obviously the approach of the Single European Market has had an influence on corporate structures.

In some quarters 1992 has been used as the justification for the formation of new, very large, merged enterprises. Usually an acquisition has been promoted on the grounds of economies of scale. This is a valid concept, but sometimes I am concerned that emphasis on economies of scale overlooks other aspects of business to the detriment of a company's overall competitiveness. The 'economies-of-scale-by-acquisition' argument has less force than it used to. It is still relevant to some product markets, but not all of them. The case for new investment in new technology is stronger than ever, and nimble, flexible enterprises will frequently outperform lumbering competitors.

Let me make it clear, the Commission is not against mergers and acquisitions. We adopt a neutral attitude, and in fact view them favourably in many instances. For small and medium enterprises there are often considerable advantages to be gained from collaborative ventures, the exchange of ideas, the transfer of technology and formal mergers.

They are also one of the major means of removing inefficient management. What might be called the 'competition for corporate governance' can perform a key role in stimulating efficiency. The mergers that concern the Commission are those that insulate the resulting company from the forces of competition. Diversity and choice, the central elements of the

Single European Market, are achieved by firms vigorously and fairly competing against each other. Consequently, mergers which negate these conditions poison the very essence of the 1992 programme. This is why merger control is such an important matter for the future development of the Community's economy.

My duties are clear. I have to ensure that a merger or acquisition does not restrict competition, produce obstacles to market entry and damage the interests of consumers. In pursuance of these duties the Commission and its Competition Directorate-General must examine a relevant merger before it is consummated. To do otherwise would give rise to damaging uncertainty amongst customers, suppliers and shareholders. This pre-merger control is a key aspect of the new Community regulation which should be enacted very soon. It represents a new instrument which enhances and partially replaces our existing arsenal for competition policy. In this way it will provide a much needed coherence to this vital policy area.

The proposals for the new regulation establish a threshold of five billion ECU for an initial period. Any mergers where the combined worldwide turnover exceeds this figure will be examined by the Commission when each of the firms concerned has a Community turnover of 250 million ECU or more, unless all of the parties achieve two-thirds of their turnover in one and the same Member State. Otherwise, the matter will be dealt with by the appropriate national bodies. The thresholds will be reviewed in four years, and it is the intention of the Commission that they will be revised downwards after the initial phase of application.

The fundamental consideration in our decision on the proposed merger will be its effect on competition. If the merger is incompatible with this concept, it will be prohibited and if it supports the process of competition it will be allowed to proceed. In some cases the Commission will allow a merger only when certain conditions are satisfied.

The regulation on merger control embodies certain important principles. Firstly, it ensures 'one-stop-shopping'. It is clearly absurd to require the parties to obtain the separate agreement of several individual national competition authorities. With the new regulation the parties will normally only have to deal with the Commission.