
THE LEGAL CONTROL OF
MERGERS
IN THE EUROPEAN COMMUNITIES



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THE LEGAL CONTROL OF MERGERS IN THE EC

*For B,
Thomas and Sophie*

Preface

The adoption in December 1989 of Regulation 4064/89 on the control of concentrations between undertakings brought to an end an inordinately long period of gestation, during the last years of which both child and midwife did their share of kicking. On more than one occasion there were grounds for very serious fear that a successful delivery would not be achieved, and there is still a tendency to watch the child closely to see if it has been irreparably harmed by the traumas of birth. And if we have already been able to observe the first teetering steps, it is too soon to predict in what direction they will eventually lead.

The writing of this book has been among my list of projects for more than ten years, although for a long time it awaited the catalyst that would translate it from the germ of an idea to a concrete proposal. That came with the decision of the European Court of Justice in *BAT & Rf Reynolds v Commission*. Consequently, much early work has been discarded or radically reworked as the text of Regulation 4064/89 crystallised and was implemented. Since the book was inevitably to appear during a period of significant transition in Community control of mergers and acquisitions, some strategic decisions had to be taken about what could properly be covered, and should most usefully be included in a single volume on the subject. Of these, two must be stressed. First, although the supervision of Commission decisions in the field of competition law by the Court of Justice, and the investigative procedures of the Commission (which under Regulation 4064/89 are modelled on and similar to those under Regulation 17), are well-documented elsewhere, it was felt that treatment of the topic of merger control would not be complete without proper coverage of these important practical matters. Secondly, although it was recognised that the criteria for control under article 2 of the Regulation, and especially the notion of significantly impeding competition on the common market, are imprecise and offer little by way of guidance to undertakings and their legal advisers, it was decided that it would be idle speculation to attempt to predict how these concepts would be employed by the Merger Task Force or interpreted by the Court of Justice (and it is important that the latter should not be forgotten amid the flurry of Guidance Notes issued by the Commission). Before very long,

there will be a body of decisions from which Commission policy can be distilled, and at that point a more useful commentary will be provided.

The law is stated as of 31 January 1991, although occasionally it has been possible to include later material in the footnotes. It has not been possible to include reference to either the first full clearance (with stringent conditions attached) in *Alcatel/Telettra*, or the first Commission refusal to a Member State request for transfer of the matter to its authorities for a distinct market investigation under article 9 (*Varta/Bosch*).

The greatest and perhaps only pleasure in writing a preface is in the opportunity it affords to thank publicly all who have contributed to the writing of the book. My former colleagues at Durham gave generously of their time so that I might take research leave, for which I must also thank the University's Research and Initiative's Committee. My new colleagues at Reading have been understanding about my need to complete this task while also finding my feet in new surroundings. The Department has also generously supported my collaboration with Julian Ellison in Brussels. Officials at the Merger Task Force, elsewhere in the Commission, and at the Department of Trade and Industry, have been very helpful in providing advice and documentation. The Appendices are reproduced with the permission of, and with due thanks to, the Publications Office of the Commission. I must also thank Andrew Soundy, Roger Finbow and Nigel Parr of Ashurst Morris Crisp, each of whom made a significant contribution to the publication. I would also like to thank all at Blackstone Press for their encouragement, and for being constantly cheerful, helpful and tolerant of an author's foibles.

I have reserved a separate paragraph to record my thanks and my indebtedness to Julian Ellison. He has been an unfailing source of enthusiasm and critical rigour, of moral support and practical advice. He has contributed a practical element wherever necessary, and in particular his expertise and experience in handling mergers and acquisitions made sense of the difficult question of the identification of concentrations, which is addressed in the first section of Chapter 2. His contributions to the book have been invaluable.

My final words are for my wife Barbara, and our children Thomas and Sophie. Their patience has been great, and their support immeasurable. They are the very best inspiration anyone could wish for.

T. Antony Downes
Reading

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