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MERGER CONTROL IN EUROPEAN UNION

Abstract

The European Union's merger control mechanism is intended to prevent acquisitions and mergers from undermining competition in the European Single Market. The European Commission must be notified of all mergers and acquisitions that fulfill specified criteria under the EU Merger Regulation (EUMR), which went into effect in 1990. A minimum amount of revenue must be generated within the EU in order to meet the requirements, and at least two of the firms participating in the merger or acquisition must have activities in more than one EU member state. It is generally agreed upon that the Commission's implementation of the EU Merger Regulation was successful. The EC Merger Regulation is an increasingly sophisticated legal weapon, even if there will unavoidably be legal and practical advancements, such as improvements in forensic tools and economic modeling, that influence its future implementation. The analytical framework that will be used in any given case, the economic and other evidence that will probably be considered probative, the length of the Commission's review, and the likely result can all be predicted with a reasonable degree of certainty by counsel, which is at least as significant. The article discusses Commission's implementation of the EU Merger Regulation, Merger Control and the scope of application of the Merger Regulation in the European Union.

Keywords: *merger control, commission, EU Merger Regulation, legislation, international cooperation, European Union, internal market*

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Avropa İttifaqında birləşməyə nəzarət

Xülasə

Avropa İttifaqının birləşməyə nəzarət mexanizmi satınalma və birləşmələrin Avropa Vahid Bazarında rəqabəti sarsıtmasının qarşısını almaq məqsədi daşıyır. 1990-cı ildə qüvvəyə minmiş Aİ-nin Birləşmə Qaydası çərçivəsində müəyyən meyarlara cavab verən bütün birləşmələr və satınalmalar barədə Avropa Komissiyası məlumatlandırılmalıdır. Tələblərə cavab vermək üçün Aİ daxilində minimum gəlir əldə edilməlidir və birləşmə və ya satınalmada iştirak edən firmalardan ən azı ikisinin birdən çox Aİ üzv dövlətində fəaliyyəti olmalıdır. Komissiyanın Aİ Birləşmə Nizamnaməsini həyata keçirməsinin uğurlu olması ilə bağlı ümumi razılıq əldə edilmişdir. AK Birləşmə Nizamnaməsi, onun gələcək tətbiqinə təsir edən məhkəmə-tibb alətlərində və iqtisadi modelləşdirmədə təkmilləşdirmələr kimi qaçılmaz olaraq hüquqi və praktiki irəliləyişlər olsa belə, getdikcə daha təkmil hüquqi silahdır. İstənilən işdə istifadə olunacaq analitik çərçivə, yəqin ki, sübut hesab olunacaq iqtisadi və digər sübutlar, Komissiyanın nəzərdən keçirmə müddəti və ehtimal olunan nəticə, bütün bunlar ağlabatan əminlik dərəcəsi ilə proqnozlaşdırıla bilər, hansı ki olduqca əhəmiyyətlidir.

Məqalədə Avropa İttifaqının Birləşmə Nizamnaməsinin Komissiya tərəfindən həyata keçirilməsi, Birləşməyə Nəzarət və Avropa İttifaqında Birləşmə Nizamnaməsinin tətbiq dairəsi müzakirə olunur.

Açar sözlər: *birləşməyə nəzarət, komissiya, Avropa İttifaqı Birləşmə Nizamnaməsi, qanunvericilik, beynəlxalq əməkdaşlıq, Avropa İttifaqı, daxili bazar*

Introduction

The EU merger control system is designed to ensure that mergers and acquisitions do not harm competition in the European Single Market. Under the EU Merger Regulation (EUMR), which came into force in 1990, mergers and acquisitions that meet certain thresholds must be notified to the European Commission before they can be implemented. The thresholds include a minimum level of turnover within the EU, and the requirement that at least two companies involved in the merger or acquisition have operations in more than one EU member state.

The European Commission, which is the executive arm of the EU, is responsible for reviewing and deciding on merger notifications. The Commission conducts a detailed assessment of the potential impact of the proposed merger on competition in the relevant markets, taking into account factors such as market concentration, potential barriers to entry, and the degree of competition from other firms. If the Commission finds that a proposed merger is likely to significantly impede competition, it can block the merger or require the merging companies to take remedial actions such as divesting certain assets or businesses to address the competition concerns.

Analysis

Merger control rules were not included in the 1957 Treaty of Rome. Due to the fact that businesses might merge in order to get around the restrictions outlined in Articles 101 and 102 TFEU, this omission has major repercussions for the state of competition in the EU. Regulation 139/2004 (MR), which went into effect on May 1, 2004, succeeded the First Merger Regulation (Regulation 4064/89), which had been established in 1989. Mergers and acquisitions are referred to in the MR as "concentrations". Concentrations are categorized as either horizontal or vertical depending on whether they involve direct competitors, undertakings in a customer-supplier relationship, or conglomerates, which are neither horizontal nor vertical in nature. Horizontal concentrations occur when direct competitors are involved.

Only concentrations that have an EU dimension are within the scope of the MR. Article 1 of the MR sets out two sets of thresholds, expressed in terms of turnover of the undertakings concerned worldwide, and within the EU, to establish whether the relevant operation has an EU dimension. The thresholds also determine the jurisdiction of the Commission or of national competition authorities to deal with the intended concentration (Cairns, 2002: 255-256). Article 2(2) of the MR contains the substantive test for the assessment of the compatibility of the intended concentration with the requirements of the internal market. According to this test a concentration may be prohibited first, if it strengthens or creates a dominant position, and second when it takes place in the context of a non-collusive oligopoly and does not lead to a single or joint dominance but produces effects which significantly impede effective competition in the internal market or a substantial part of it (Kaczorowska, 2013: 878).

The Treaty of Rome was silent on the topic of mergers. This omission had serious consequences for competition conditions within the EU. Undertakings were able to circumvent the application of Articles 101 (1) and 102 TFEU. Instead of entering into agreements prohibited by virtue of Article 101(1) TFEU, they could achieve the same objectives by merging with other undertakings. In respect of Article 102 TFEU, an undertaking in a dominant position (the existence of which weakens competition within the relevant market) could lawfully increase its market power by acquiring or merging with its competitors and thus further reduce competition to the detriment of its customers/consumers, although the merged entity might then be subject to Article 102. The Commission was powerless to prevent such mergers between, and acquisitions by, undertakings having market power, and could only act afterwards under Article 102 or Article 101 TFEU. However, it made attempts to bring mergers within the scope of EU competition law. First, under Article 102 TFEU. In Case 6/72 Continental Can, (3) the Commission failed to prove that Continental Can held a dominant position in the German market, but the ECJ recognized, for the

first time, that Article 102 TFEU was, in principle, applicable to mergers. The main drawback was that the Commission could not prevent mergers from taking place but could only act after a merger had occurred. Second, under Article 101 TFEU in Joined Cases 142 and 156/84 Reynolds. The Commission was successful but the judgment showed that Article 101 TFEU was not an appropriate tool to deal with mergers, taking into account the nullity sanction under Article 101(2); the possibility of the revocability of exemption under Article 101(3); and, the lack of thresholds triggering its application to mergers (Bishop, S. and Walker, 2002).

Further, the judgment gave a clear signal to Member States reluctant to deal with mergers at EU level that in order to avoid further judicial developments by the ECJ on the control of mergers and the uncertainty of whether or not the Commission would exercise its discretion, a wise option for the Member States would be to adopt legislation on merger control, especially in the light of the then forthcoming completion of the internal market. It should be noted that in Reynolds the ECJ, by interpreting Article 101 TFEU broadly, had in effect extended the scope of the Treaty and thus judicially revised it. In the light of the above the Member States decided to deal with merger control at EU level (Kaczorowska, 2013: 878).

Concentrations are not prohibited by the MR. Articles 101 and 102 of the TFEU do not include any oppressive elements. The relevant market's structure is highlighted rather than an enterprise's anti-competitive behavior. On the one hand, numerous concentrations are essential in order to strengthen the competitiveness of EU undertakings, while on the other, concentrations may have detrimental impacts on the competitive structure of the market. Vertical, and horizontal concentrations can all be categorized.

Vertical. This refers to a concentration between undertakings operating at different levels of the economy (for example, between a manufacturer and its supplier of raw material). It does not increase the concentration of the relevant product market but “can give rise to a number of competition issues, including the possibility of foreclosure or of creating a more favourable environment for collusive behaviour. As with vertical restraints, anti-competitive effects are likely to occur only if there is horizontal market power at one or more of the vertical levels”.

Horizontal. This happens when there is a concentration of businesses that compete in the same product and geographic markets and operate at the same level of production and distribution. Such mergers and acquisitions have a significant effect on the market since they lower the number of companies operating in the relevant market by at least one following the merger or acquisition and often result in a bigger market share for the newly formed company. The relevant market's competitive structure is most likely to be negatively impacted by horizontal mergers. The parties that are real or potential rivals in the same relevant market when they propose to merge benefit greatly from the Commission's Guidelines on the Assessment of Horizontal Mergers.

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position as incompatible with the internal market. Its application in practice has been controversial with goals as diverse as the preservation of an undistorted competitive process, the protection of economic freedom, the maximisation of consumer welfare, social welfare, or economic efficiency all cited as possible or desirable objectives. These conflicting aims have raised complex questions as to how abuses can be assessed and how a dominant position should be defined (Nazzini, 2011: 111-113).

The fundamental rule is that any planned concentration that satisfies the MR's requirements must be reported to the Commission once the agreement has been signed, the public bid has been made known, or a controlling stake has been acquired (Lorenz, 2013: 40). A concentration cannot be put into effect before being notified or until it has been deemed acceptable by the Commission for the internal market; otherwise, the Commission may fine the involved enterprises.

Furthermore, according to MR Article 7(1), no concentration may be legally binding until the commission has rendered a compatibility determination or has not done so. Nevertheless, the other provisions of Article 7 limit this. Given the negative outcomes that may arise from such a circumstance, it is unlikely that parties will fail to inform in practice (Horspool, Humphreys, 2012:

418). First, if a concentration is carried out without notifying the Commission, the Commission may declare it to be incompatible with the internal market and order the separation of any merged undertakings or assets or the end of joint control. Second, the Commission may impose penalties for willful or negligent failure to disclose a concentration in accordance with Articles 4 and 22(3) prior to its implementation that do not exceed 10 percent of the combined turnover of the affected enterprises. According to Article 4(1) of the MR, notification may be given if the undertakings show the Commission that they have a good faith intention to enter into an agreement or, in the case of a public bid, that they have publicly declared their intention to make such a bid, and that their intended agreement or bid would result in a concentration with an EU dimension (Furse, 2007).

A pre-notification procedure was created by the MR, in which parties to a proposed concentration are permitted to submit pre-notification arguments to the Commission or the appropriate NCA. This is to resolve a situation where, in a small number of instances, the Commission or an NCA may have been incorrectly allocated jurisdiction due to the implementation of the numerical turnover thresholds specified in Regulation 139/2004. Article 4(4) of the MR governs requests to refer planned concentrations to NCAs, while Article 4(5) of the MR governs requests to refer concentrations to the Commission (Witt, 2012: 217).

According to Article 4(4), parties to a merger or acquisition with an EU component may request that the Commission refer the merger or acquisition, or specific portions of it, to an NCA of a Member State where the intended merger or acquisition may materially affect competition in a particular market of that Member State (Wang, 2011: 571). Where a concentration does not have an EU dimension but is expected to have an impact on at least three Member States, as described in Article 4(5), the parties are obliged to submit several notices. In this case, the parties may ask the Commission to evaluate the concentration, but this request will be denied if any of the involved Member States object to the Commission being granted authority.

Conclusion

The Commission's application of the EC Merger Regulation is widely considered to have been a success. Although there will inevitably be legal and practical developments, including advances in forensic tools and economic modelling, that shape its future application, the EC Merger Regulation is an increasingly mature legal instrument. At least as importantly, Commission practice has developed to a point where counsel are generally able to predict with reasonable certainty the analytical framework that will be applied in any given case, the economic and other evidence that will likely be considered probative, the duration of the Commission's review and the probable outcome.

Several markets and businesses have been impacted by the epidemic. The Commission will probably have to deal with a lot more transactions involving businesses that have been negatively impacted by the crisis in the upcoming years. While the crisis hasn't had much of an impact in certain economies, it has had a catastrophic short-term impact in others. The Commission will face a problem in separating the markets that have gone through a lasting structural change from those where the impacts are only transient (Budzinski, 2010: 445).

In conclusion, merger control in the EU is an important tool for ensuring that the European Single Market remains competitive and that consumers are protected from anti-competitive behavior. The system is based on the principle that competition is essential for innovation, efficiency, and the development of new products and services, and that a healthy competitive environment benefits both businesses and consumers.

References

1. Cairns, W. (2002). Introduction to European Union law. Second edition. London, Cavendish Publishing, pp.255-256.
2. Kaczorowska, A. (2013). European Union law. Third edition. London, Routledge, p.877.
3. Case 6/72 *Europemballage and Continental Can v Commission* (1973). ECR 215

4. Bishop, S. and Walker, M. (2002). The Economics of EC Competition Law: Concepts, Application and Measurement, 2nd edn., London: Sweet and Maxwell, para. 7.61.
5. Kaczorowska, A. (2013). European Union law. Third edition. London, Routledge, p.878.
6. Nazzini, R. (2011). The foundations of European Union competition law. The objective and principles of Article 102. Oxford, Oxford University Press, pp.111-113.
7. Lorenz, M. (2013). An introduction to EU competition law. Section on the economic foundations of EU competition law contributed by J. Dietrich. Cambridge, Cambridge University Press, p.40.
8. Horspool, M., Humphreys, M. (2012). EU law. 7th edition. Oxford, Oxford Universoty Press, p.418.
9. Furse, M. (2007). The Law of Merger Control in the EC and the UK, Oxford: Hart Publishing.
10. Witt, A.C. (2012). From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really about more Economics?. 49 CMLRev., p.217.
11. Wang, W. (2011). Structural Remedies in EU Antitrust and Merger Control. 34/4 World Competition, p.571.
12. Budzinski, O. (2010). An Institutional Analysis of the Enforcement Problems in Merger Control. 6 EuroCJ, p.445.

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