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# European Merger Control: Legal and Economic Analyses on Multinational Enterprises, Volume 1

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EUROPEAN MERGER CONTROL: LEGAL AND ECONOMIC ANALYSES ON MULTINATIONAL ENTERPRISES, Volume 1. Edited by *Klaus Hopt.* Berlin, West Germany: Walter de Gruyter & Co. 1982. Pp. viii, 262. $51.

At a time when corporate mergers and acquisitions dominate the American economic scene, it is appropriate to compare the approaches of other industrialized countries to the problems posed by this form of business activity. In *European Merger Controls,* Klaus Hopt presents a collection of legal and economic analyses of the merger control systems in several European countries, and of the European Economic Community (EEC), that should interest both students of comparative law and practitioners of international law.

The articles collected by Professor Hopt note that, until recently, most European nations did not perceive a threat from excessive economic concentration. Although the trend toward economic concentration has been evident for several decades (pp. 155-57), most European governments actually favored this practice. Lawmakers in France (pp. 104-05), Great Britain (p. 47), and Germany (pp. 73-74), among others, believed that large enterprises contributed to efficiency and helped maintain a competitive edge in world markets. Not surprisingly, the anti-merger legislation adopted in Europe during the 1960's and 1970's reflects the strong philosophical undercurrent that "bigger is better." Consequently, the book maintains that much of the European anti-merger legislation contains procedural and substantive weaknesses.

The articles note three common problems in this legislation. First, the criteria used to investigate the legality of a merger are often ill-defined.[1] Second, the procedural steps used to invalidate a merger often favor the merging enterprises over the government investigators.[2] Finally, most of

1. Throughout the text the commentators note the amorphous standards that are used to test the legality of a merger. In Great Britain, for example, a merger cannot be invalidated unless it is against the "public interest." Although the British merger control law lists several factors to be considered when assessing the "public interest," such as whether the merger will promote competition, reduce costs, and maintain employment, pp. 57-58, this list is merely illustrative. The author of the article on the British experience admits that "in practice the statutory guidelines were never considered strictly and members of the [Monopolies] Commission in the final analysis would utilize a large measure of intuition." P. 195.

The British system can be compared with the German merger control law which has a different procedural structure but leads to a similar public interest evaluation. The first phase of a German merger investigation is strictly legalistic and looks to the size of the merging enterprises and the potential for market domination. Pp. 79-80. However, even if a merger is declared illegal, the decision can be appealed to the Federal Minister of Economics who then can exempt the merger if the "public interest" in general justifies the merger. P. 81. The French, p. 116, and Swiss, p.130, commentators also criticize the imprecision of the standards used to test the validity of mergers in their countries.

2. The procedural devices that favor the merging corporations over the investigative body include placing the burden of proof on the government to show that the merger is against the public interest, p. 195, and making certain political decisions on mergers virtually nonreviewable by the courts, p. 81.

the statutes contain escape clauses that may permit the merger even if it is found to be illegal.[3]

Given these weaknesses, it is not surprising that most of the commentators in *European Merger Control* conclude that the merger control legislation in their respective countries is largely ineffective in practice. For example, one commentator notes that in Britain, few of the eligible mergers are investigated, let alone invalidated (p. 46). Another article concludes that Swiss legislation has become ineffective due to the many exceptions that have "perforated" the original intent of the law (p. 128).[4] On the other hand, the German merger control system is rated as a qualified success because it serves as a deterrent to mergers and acquisitions by the largest corporations (p. 96). The German system has the advantage of clear criteria and legal presumptions which lead to investigation and prima facie invalidation of a merger (pp. 79-80). Since these criteria include the size of the merging enterprises and the resultant market share, large corporations face rigid scrutiny and are thus deterred from engaging in much potential merger activity.

Interestingly, although the European nations surveyed have been largely ineffective in controlling economic concentration in the industrial setting, some countries have been able to control other mergers for noneconomic reasons. For example, the French (p. 120) and the British (p.49) have stringently controlled newspaper mergers because of the threat they see to freedom of expression. This experience demonstrates that at least some of the European nations can implement effective anti-merger legislation given a real political or popular commitment.

Hopt's collection allows the reader to compare merger control legislation not only among European nations but also between the individual countries and the EEC. Merger control has been a part of the EEC since the European Coal and Steel Community Treaty of 1951 (p. 249). This treaty was followed in 1973 by a comprehensive proposal for merger control[5] (p. 182) which has bogged down in a bureaucratic morass and may never be finally approved (p. 184). Until the national laws are strengthened or a comprehensive community-wide merger control law is enacted, the European Court of Justice will continue to control unacceptable mergers by Article 86 of the EEC Treaty, which prohibits the abuse of a dominant position (pp. 174-75).

From an American perspective it is not surprising to find European

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3. The defenses available to justify a merger that would otherwise be illegal vary from country to country. For example, a merger in France that is harmful to competition can be justified if the effect of the merger is to increase efficiency or productivity and thereby contributes to "economic and social progress." P. 117. In Britain, p. 55 and Germany, p. 92, there is also a defense available for an anti-competitive merger that increases efficiency. These defenses have thus far been rejected in the United States. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967). *But see* 4 P. AREEDA & D. TURNER, ANTITRUST LAW § 1016 (1980) (arguing that the efficiency defense should be available).

4. The author of the article on the Swiss Cartel Act cites one example of exceptions that reduce the effectiveness of the Act. The Cartel Act provides that interference with competition is lawful when it is warranted by an "overriding legitimate interest" and does not excessively interfere with free competition. P. 128.

5. For the full text of the proposed EEC merger control law, see pp. 253-62.

lawmakers facing a great many difficulties with their relatively new merger control laws. The antitrust/merger control area has been among the most complicated in American jurisprudence and is continually evolving. In fact, the current difficulties facing the European countries are reminiscent of the American experience in the early years of the Clayton Act.[6]

The editor of *European Merger Control* succeeds in his basic goal. His collection of articles addresses the concrete problems of merger control in Europe from several perspectives and provides the reader with an overview of the political and legal problems facing policymakers in Europe.[7] The presentation permits readers to compare current legislation and actual practice under the acts, to discern trends for the future of merger control in Europe, and to draw parallels to the American experience. Finally, the articles cite many sources, and contain bibliographies and the texts of several European merger control laws which furnish the reader with a starting point for further investigation of the vast literature on the subject.

The articles in *European Merger Control* delineate the common practical and theoretical problems that face the European nations in their attempts to control economic concentration. Until these nations accept the principle that competition is an end in itself, however, there will be little effective merger control in Europe.

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6. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 576-675 (1977). For a collection of articles reviewing the recent history of section 7 of the Clayton Act and the effect of the 1950 amendments, see 49 ANTITRUST L.J. 1391, 1391-1469 (1982).

7. Volume II of Professor Hopt's collection, GROUPS OF COMPANIES IN EUROPEAN LAWS, presents more specific studies of particular consolidations in Germany, France, Great Britain, Switzerland, Scandinavia, and the EEC. Several selections in Volume II appear in French.