

European Merger Control

von
Dr. Michael Rosenthal, Dr. Stefan Thomas

1. Auflage

[European Merger Control – Rosenthal / Thomas](#)

schnell und portofrei erhältlich bei [beck-shop.de](#) DIE FACHBUCHHANDLUNG

Thematische Gliederung:

[Kartellrecht](#)



Verlag C.H. Beck München 2010

Verlag C.H. Beck im Internet:

www.beck.de

ISBN 978 3 406 59573 8

Rosenthal/Thomas
European Merger Control

beck-shop.de

European Merger Control

by

Michael Rosenthal

Stefan Thomas



Verlag C. H. Beck München 2010

Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,
online at: www.hartpub.co.uk

Published in North America (US and Canada) by Hart Publishing, c/o International
Specialized Book Services, 930 NE 58th Avenue, Suite 300, Portland, OR 97213-3786,
USA, eMail: orders@isbs.com

ISBN 978-3-406-59573-8 (Beck)
ISBN 978-1-84946-130-6 (Hart Publishing)

© 2010 Verlag C. H. Beck oHG
Wilhelmstr. 9, 80801 München

Printed in Germany by
fgb · freiburger graphische betriebe
Bebelstr. 11, 79108 Freiburg

Typeset by Reemers Publishing Services GmbH, Krefeld

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Verlag C. H. Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to C. H. Beck at the address above.

Preface

European merger control is among the most complex areas of competition law. The rapid pace of development in this area presents a further challenge: legislation and guidance documents are frequently issued and updated, and the formidable body of Court and Commission case-law continues to grow at a daunting rate.

This book provides a comprehensive treatment of European merger control law and procedure. It adopts an integrated approach that embraces both the law and economics of merger control which is necessary in order to capture the ever increasing importance of the effects-based analysis carried out by the Commission.

We have endeavored to ensure that the book is up-to-date to 1 March 2010. It thus reflects in particular the new numbering of the Treaty on the functioning of the European Union. The authors wish to acknowledge with appreciation the assistance that we received from Daniel Francis and Alexandros Papanikolaou.

beck-shop.de

Table of Contents

	Page
List of Abbreviations	XVII
A. Introduction	1
I. Objectives of EU Merger Control	1
II. History of EU Merger Control	3
III. Legal Framework of EU Merger Control.....	4
1. Merger Control Analysis under the EUMR	4
2. Legal Instruments.....	5
IV. The International Context of EU Merger Control.....	8
1. The EUMR and EU Member States	8
a) Article 21(4) EUMR	9
b) Article 346 TFEU (ex-Article 296 EC).....	10
2. The EUMR and EFTA States	10
3. The EUMR and Third Countries.....	11
a) The effects doctrine: notifiability of foreign concentrations in the EU	11
b) Parallel proceedings: notifiability in the EU and in third countries.....	12
aa) International cooperation.....	12
bb) Cooperation between the EU and the US.....	13
cc) ICN’s Recommended Practices for merger reviews	16
V. Applicability of Articles 101 and 102 TFEU.....	17
B. Jurisdiction	21
I. Allocation of Cases: The “One-Stop-Shop” Principle.....	22
II. “Concentration”	23
1. Merger.....	24
2. Acquisition of control.....	25
a) “Acquisition”	25
aa) “Person” or “Undertaking” acquiring control.....	25
(1) Natural persons.....	25
(2) Public entities	26
(3) Formal holders of rights vs actual power to exercise rights	26
bb) Means of control/“Lasting basis”.....	26
(1) Agreement to divide assets	27
(2) Joint control during “start-up period” only.....	28
(3) Interim buyer	28
cc) Object of control.....	28
b) “Control”.....	29
aa) Acquisition of sole control	30
(1) De jure sole control.....	30
(2) De facto sole control.....	31
bb) Acquisition of joint control	32
(1) Equal equity interest	33
(2) Absence of equal equity interest	33
cc) Change in an established arrangement of joint control.....	38
(1) Addition of new controlling parties	38
(2) Loss of controlling parties	39
3. Creation of a Joint Venture	39
a) Overview	39
aa) Creation of a new Joint Venture	39
bb) Joint acquisition of an already-existing undertaking from a third party	39

Table of Contents

c) Transformation of a previously solely-controlled subsidiary into a Joint Venture.....	40
b) The Full-Functionality Test	41
aa) Operational/strategic autonomy	41
bb) Sufficient resources	42
cc) Activity goes beyond one specific function for the parents	42
dd) Dependence on parent companies	43
ee) Lasting basis	45
c) Changes to the operation of an existing Joint Venture	46
d) Joint Ventures without Full-Functionality	47
4. Staggered Transactions.....	47
a) Interrelated/interdependent transactions	48
b) Same undertaking(s) must acquire control	48
c) Mutually conditioned transactions	49
d) Series of securities transactions	50
e) Jurisdictional implications of the “single concentration” doctrine	50
5. Special Exceptions	50
a) Acquisition of securities by a securities dealer	50
b) Acquisition of control by an office-holder relating to winding-up.....	51
c) Acquisition of control by a financial holding company.....	52
III. “Community Dimension”	53
1. Introduction	53
2. Community Dimension.....	54
a) Primary turnover thresholds: Article 1(2) EUMR.....	54
b) Alternative turnover thresholds: Article 1(3) EUMR	55
3. “Undertakings Concerned”	55
a) Merger.....	55
b) Acquisition of control.....	56
aa) Acquisition of sole control	56
bb) Acquisition of joint control	58
c) Acquisition of part of an undertaking.....	60
aa) Turnover calculation	60
bb) Acquisitions in stages	61
4. Turnover calculation and allocation	62
a) Turnover calculation	62
aa) Accounting principles.....	62
bb) Adjustments	63
cc) Ordinary activities	63
dd) Corporate groups	63
(1) Turnover of other group companies included	63
(2) Captive use excluded	65
ee) Joint Ventures.....	65
ff) State-owned companies.....	66
gg) Financial institutions and insurance undertakings.....	66
b) Turnover allocation.....	66
aa) Sale of goods.....	67
bb) Provision of services.....	67
IV. Re-Allocation of Cases: Referrals.....	68
1. General Principles	68
2. Pre-Notification Referrals	69
a) Referral to the Member States (Article 4(4) EUMR)	69
aa) Legal standard.....	69
bb) Procedure	70
cc) Referrals according to the EEA Agreement.....	71
b) Referral to the Commission (Article 4(5) EUMR)	72
aa) Legal standard.....	72
bb) Procedure	73
cc) Referrals according to the EEA Agreement.....	74

Table of Contents

3. Post-Notification Referrals	74
a) Referrals to the Member States (Article 9 EUMR).....	74
aa) Legal standard.....	74
bb) Procedure	77
cc) Referrals according to the EEA Agreement.....	78
b) Referrals to the Commission (Article 22 EUMR).....	79
aa) Legal standard.....	79
bb) Procedure	80
cc) Referrals according to the EEA Agreement.....	81
C. Substantive Appraisal	83
I. Overview	86
II. Market Definition.....	88
1. General Principles	88
a) The role of market definition	89
b) Prospective nature of merger control analysis.....	89
c) Relevance of Commission precedents.....	90
2. Product Market	91
a) Supply and demand markets.....	91
b) Basic principles.....	92
aa) Demand-side substitutability.....	93
(1) Quantitative evidence.....	95
(2) Evidence of actual substitution and shock analysis	100
(3) Buyer or consumer preferences	100
(4) Barriers, including costs, to customer switching	101
(5) Potential for price discrimination.....	101
(6) Other considerations.....	102
(7) Views of customers and competitors.....	103
(8) Internal documents	103
bb) Supply-side substitutability.....	103
3. Geographic Market	105
a) Overview	105
b) Relevant considerations	106
aa) Customer behaviour and trade flows	106
bb) Demand characteristics	107
cc) Views of customers and competitors	107
dd) Licensing	108
ee) Language	108
ff) Scope of network.....	109
gg) Point-of-origin/point-of-destination (“O&D pair”) approach	109
hh) Radius of competition.....	110
ii) Transportation costs.....	111
jj) Necessity of modification/adaptation of products or services.....	112
kk) Supply-side substitutability.....	112
ll) Chains of substitution.....	112
c) Weighing competing considerations	113
d) “Substantial part” of the common market	113
4. Temporal Market	114
5. Concluding Observations.....	114
a) Market context	114
b) Market definition in practice.....	115
III. Horizontal Effects.....	116
1. General Principles	116
2. Non-Coordinated Effects	117
a) General Principles.....	117
b) Legal Standard.....	118
aa) Market share.....	118
(1) Calculating market shares.....	118
(2) Using market share	121

Table of Contents

bb) Market concentration	124
cc) "Close competitors"	126
dd) Limited ability to switch suppliers	128
ee) Competitors unlikely to increase supply	129
ff) Merged entity able to hinder expansion by competitors.....	130
gg) Elimination of an important competitive force	131
hh) Level of vertical integration	132
ii) Elimination of a "close-to-substitute"	133
jj) Ability to offer better price.....	133
3. Coordinated Effects.....	133
a) General Principles.....	134
b) Legal Standard.....	135
aa) Reaching terms of coordination	137
bb) Transparency	139
cc) Deterrence	141
dd) Outsider reactions	142
4. Loss of Potential Competition	144
a) General Principles.....	144
b) Legal Standard.....	145
aa) Significant constraining influence	146
bb) No other potential entries	146
5. Assessment of Buyer Power in Procurement Markets	147
IV. Vertical Effects	148
1. General Principles	148
a) Non-Horizontal Merger Guidelines	148
b) Theories of harm.....	149
2. Input Foreclosure	151
a) General Principles.....	151
b) Legal Standard.....	152
aa) Ability to foreclose access to inputs.....	152
(1) Importance of input	153
(2) Market power: ability to affect market conditions	155
(3) "Counter-strategies"	157
(4) Other factors	158
bb) Incentive to substantially foreclose access to inputs.....	159
cc) Likely impact on effective competition	163
(1) Anti-competitive effects	163
(2) Pro-competitive effects	164
3. Customer Foreclosure.....	166
a) General Principles.....	166
b) Legal Standard.....	167
aa) Ability to foreclose access to customers.....	167
bb) Incentive to substantially foreclose access to customers	170
cc) Likely impact on effective competition	171
(1) Anti-competitive effects	171
(2) Pro-competitive effects	172
4. Other Non-Coordinated Effects	172
5. Coordinated Effects.....	173
a) General Principles.....	173
b) Legal Standard.....	173
aa) Reaching terms of coordination	173
bb) Transparency	174
cc) Deterrence	174
dd) Outsider reactions	174
V. Conglomerate Effects.....	175
1. General Principles	175
2. Foreclosure: Bundling and Tying.....	175
a) General Principles.....	175

Table of Contents

b) Legal Standard.....	179
aa) Ability to foreclose.....	179
(1) Market power.....	179
(2) Common pool of potential customers.....	180
(3) Economies of scale or scope; network externalities.....	180
(4) Existing customer practice.....	181
(5) Industry-specific technical factors.....	182
(6) Counter-strategies.....	183
bb) Incentive to foreclose.....	183
cc) Overall impact on competition.....	185
(1) Anti-competitive effects.....	185
(2) Pro-competitive effects.....	185
c) Standard of proof.....	186
3. “Portfolio Effects”.....	188
4. Strengthening of Resources.....	191
5. “Spill-over”.....	194
6. Coordinated Effects.....	194
VI. The Causal Link in Merger Review.....	195
1. Relevance of Pre-Existing Links.....	195
2. Relevance of Parallel Transactions.....	197
a) Previous parallel approach.....	197
b) Current “first come, first served” approach.....	198
3. The Failing Firm Defence.....	199
a) General Principles.....	199
b) Legal Standard.....	200
aa) Kali & Salz.....	201
bb) BASF/Eurodiol/Pantochim.....	202
cc) Horizontal Merger Guidelines.....	203
c) Standard of proof.....	205
VII. Countervailing Factors.....	205
1. Countervailing Buyer Power.....	206
a) General Principles.....	206
b) Legal Standard.....	206
aa) Buyer characteristics.....	207
bb) Market characteristics.....	207
2. New Market Entry.....	209
a) General Principles.....	209
b) Legal Standard.....	210
aa) Likelihood of entry.....	210
bb) Timeliness of entry.....	213
cc) Sufficiency of entry.....	214
3. Efficiencies.....	214
a) General Principles.....	214
b) Legal Standard.....	216
aa) Consumer benefit.....	216
bb) Merger-specificity.....	219
cc) Verifiability.....	220
c) Proving efficiencies.....	223
d) Role of efficiencies at national level.....	224
VIII. Assessment of Full-Function Joint Ventures.....	225
1. General Principles.....	225
2. Legal Standard under Article 2(4) EUMR.....	226
a) Coordination as object or effect.....	226
aa) Coordination risk.....	227
(1) Markets in which the parents are active.....	227
(2) Symmetry of the parents’ activities.....	228
(3) Information exchange between the parents.....	228
(4) Role of the JV in the parents’ decision-making processes.....	229

Table of Contents

bb) Object or effect	229
b) Lawfulness of coordination under Article 101 TFEU	230
aa) Restriction of competition in violation of Article 101(1) TFEU	230
bb) Exemption under Article 101(3) TFEU	230
IX. Ancillary Restraints	231
1. General Principles	231
2. Legal Standard	233
a) Directly related	233
b) Necessary	234
c) Proportionate	235
3. Specific Ancillary Restraints	235
a) Non-compete clauses related to an acquisition of control	235
b) Non-compete clauses related to a joint venture	236
c) Non-solicitation and confidentiality clauses	236
d) Licence agreements related to an acquisition of control	237
e) Licence agreements related to a joint venture	237
f) Purchase and supply obligations	237
D. Remedies	239
I. General Principles	240
1. Significance of Remedies	240
2. Forms of Remedies	241
a) The distinction between structural and behavioural remedies	241
b) Hierarchy of remedies	243
3. Third Parties	244
II. Specific Remedies	244
1. Divestitures	244
a) Overview	244
b) Viable competition on a lasting basis	245
c) “Stand-alone” business	246
aa) Independence	246
bb) Carve-outs	247
(1) Divestiture of a carved-out business or assets	247
(2) Carve-out of problematic business from the original transaction	248
cc) Divestiture of assets	248
d) Non-reacquisition clause	249
e) Uncertainties in divestitures: the “crown jewels” clause	250
f) “Suitable purchaser”	251
aa) Standard purchaser requirements	251
bb) Identification of a suitable purchaser	252
(1) The general rule	252
(2) Up-front buyer (divestiture prior to closing)	252
(3) Fix-it-first (divestiture prior to clearance)	254
g) Supply or purchasing relationships with a divested business	256
2. Severance of Links with Competitors	256
a) Structural links	256
b) Contractual links	258
3. Other Remedies with Structural Effects	258
a) Access remedies	259
aa) Access remedies to facilitate new market entry	259
bb) Access remedies to prevent foreclosure	260
cc) Access remedies in the form of interoperability commitments	260
dd) Licensing of IP rights	261
b) Changes to long-term or exclusive contracts	262
c) Supply of products or services to third parties	263
d) Purchasing from third parties	264
e) Separate management of assets	264
4. “Purely Behavioural” Remedies	265
III. Procedural Aspects of Submission of Commitments	267

Table of Contents

1. Timing.....	268
a) Timing in Phase I.....	268
b) Timing in Phase II.....	269
2. Form RM	270
IV. Legal Standard	271
1. General standard.....	271
2. Appraisal of commitments in Phase I.....	272
3. Appraisal of commitments in Phase II.....	272
4. The market test	272
V. Burden of Proof.....	273
VI. Implementation of Commitments.....	274
1. Implementation	275
a) General Principles.....	275
b) Implementation of divestiture commitments	275
aa) Time-limits and the divestiture trustee.....	275
bb) Commission approval of purchaser and purchase agreement	276
cc) Obligations between clearance and divestiture.....	276
c) Implementation of other commitments	277
2. Monitoring.....	277
3. Appointment and Powers of Trustees.....	278
a) Role and appointment of trustees	278
b) Powers	278
4. Modification (“Review Clause”).....	279
a) Deadline extensions.....	279
b) Other modifications	279
VII. Enforcement of Commitments	280
1. Breach of an Obligation	281
2. Breach of a Condition.....	281
VIII. Challenges to Commitments	281
E. Procedure.....	285
I. Pre-Notification Contacts	287
II. Notification	289
1. Timing.....	289
2. The Notifying Parties	289
3. Regular Notification: The Form CO	289
4. “Short Form” Notification and the Simplified Procedure	291
5. Completeness.....	294
6. Material Changes	295
7. Publication.....	296
8. Failure to Notify	296
III. The Suspension Obligation.....	297
1. General Principles	297
2. Concentrations Subject to the Suspension Obligation	298
a) Concentrations with a Community dimension.....	298
b) Pre-notification referral to Commission under the “3-plus rule”	298
c) Pre-notification referrals to a national competition authority	299
d) Post-notification referrals from a national competition authority.....	299
3. Scope of the Suspension Obligation	299
a) Minority shareholdings	300
b) Joint actions.....	301
c) Information exchange	301
d) Arm’s length transactions	302
e) Due diligence review	302
4. Public Bids and Securities Transactions.....	302
5. Derogations	303
a) Derogation to address serious financial difficulty of target company.....	304
b) Derogation in context of tender or auction process	304
c) Fulfilment of legal obligations.....	305

Table of Contents

d) Dissolution of joint venture	305
6. Sanctions and Enforcement	305
IV. Initial Examination: “Phase I”	306
1. General Principles	306
2. Decisions Ending Phase I	306
3. Time Limits	307
a) Phase I time limits	307
b) “Stopping the clock” and “resetting the clock”	308
aa) “Stopping the clock”	308
bb) “Resetting the clock”	309
4. The Review Process	310
5. Procedural Rights	311
a) Rights of the notifying parties	311
b) Rights of third parties	314
aa) “Sufficient interest”	314
bb) Timing	315
cc) Third party submissions	315
dd) Commission’s duty to respond to complaints	316
ee) Application for judicial review	316
6. Revocation	316
7. Withdrawal and Abandonment	317
8. Publication	318
V. In-Depth Investigation: “Phase II”	318
1. General Principles	318
2. Decisions Ending Phase II	319
3. Time Limits	319
4. The Review Process	320
5. Procedural Rights	321
a) Rights of the notifying parties	321
aa) Statement of Objections	321
bb) Access to the file and to key documents	323
cc) Formal oral hearing	325
dd) Consideration of remedies	326
ee) Protection from withdrawal or amendment	326
b) Rights of third parties	326
6. Revocation	327
7. Withdrawal and Abandonment	327
8. Publication	328
VI. Powers of Investigation and Sanctions	329
1. Requests for Information and Interviews (Article 11 EUMR)	329
a) Simple information request	329
b) Information decision	330
c) Judicial review	330
2. Inspections (“Dawn Raids”)	331
a) Inspection by the Commission	331
aa) Authorisation	331
bb) Powers of the Commission	331
b) Inspections in practice	332
c) Practical guidance	332
aa) First steps	332
bb) During the inspection	332
cc) After the inspection	333
3. Business Secrets and Legal Privilege	333
a) Legal protection of confidential information	333
b) Criteria for protection	334
c) Submission of confidential information to the Commission	334
d) Confidential information in Commission decisions	335
e) Use of information obtained through the EUMR process	335

Table of Contents

f) Legal privilege	335
4. Fines and Penalties	336
a) Fines	336
aa) Less serious violations	336
bb) More serious violations	337
cc) Fine decisions	337
(1) Nature of the infringement	338
(2) Gravity of the infringement	338
(3) Duration of the infringement	341
(4) Mitigating and aggravating circumstances	341
dd) Limitation periods	341
b) Periodic penalty payments	343
c) Judicial review	343
F. Judicial Review	345
I. General Principles	345
1. Judicial Review in EC Merger Control	345
2. Grounds of Jurisdiction	347
II. Article 263 TFEU: The Action for Annulment	348
1. Standing	348
2. Grounds for Annulment	351
3. Challengeable Acts	352
a) Review of compatibility decisions	353
aa) Burden of proof	353
bb) Error of law	353
(1) Standard of review in relation to Notices	353
(2) Standard of review in relation to economic matters	354
cc) Infringement of a procedural rule	357
(1) The Statement of Objections	357
(2) Failure to give reasons	358
(3) Respect for legitimate expectations	359
(4) Sufficient time to comment on proposed commitments	360
(5) Accepting commitments after formal deadline	360
dd) Lack of competence	360
b) Review of other decisions under Article 263 TFEU	361
aa) Finding as to jurisdiction	361
bb) Referral decisions	361
(1) Review of Article 4(4) EUMR referrals	361
(2) Review of Article 4(5) EUMR referrals	362
(3) Review of Article 9 EUMR referrals	362
(4) Review of Article 22 EUMR referrals	364
cc) Ancillary restraints	365
dd) Deemed clearances	365
ee) Decision revoking clearance	365
ff) Decision to open Phase II/Statement of Objections	366
gg) Findings of control/dominance	366
4. Procedure	367
a) Regular Procedure	367
b) Expedited procedure	368
c) Intervention by third parties	368
d) Interim measures	369
e) Appeal to the Court of Justice	370
5. Re-Examination Following Annulment	370
III. Damages	371
1. Overview	371
2. Legal Standard	372
a) “Sufficiently serious breach of a rule of law intended to confer rights on individuals”	373
b) Causal link	374

Table of Contents

Appendix	377
Appendix 1: Timelines.....	379
Appendix 2: EU Merger Regulation	382
Appendix 3: Implementing Regulation.....	412
Appendix 4: Jurisdictional Notice.....	464
Appendix 5: Referrals Notice	512
Appendix 6: Horizontal Merger Guidelines	534
Appendix 7: Non-Horizontal Merger Guidelines.....	554
Appendix 8: Market Definition Notice.....	576
Appendix 9: Ancillary Restraints Notice.....	586
Appendix 10: Remedies Notice	594
Appendix 11: Model Texts for Divestiture Commitments.....	626
Appendix 12: Model Texts for Trustee Mandates	636
Appendix 13: Best Practices.....	646
Appendix 14: Simplified Procedure Notice	655
Appendix 15: Access to File Notice	660
Appendix 16: Communication pursuant to Art. 3(2) of EC 802/2004.....	670
Appendix 17: Case Team Allocation Request	672
Appendix 18: Abandonment Notice	674
Appendix 19: Notice on the Distinction between Concentrative and Cooperative Joint Ventures.....	675
Appendix 20: Council Regulation 2988/74.....	681
Index	685