

# *Fordham International Law Journal*

---

*Volume 18, Issue 4*

1994

*Article 16*

---

## Roger J. Finbow & A. Nigel Parr, U.K. Merger Control: Law and Practice

Barry E. Hawk\*

\*

Copyright ©1994 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Roger J. Finbow & A. Nigel Parr, U.K. Merger Control: Law and Practice

Barry E. Hawk

## **Abstract**

The most striking aspect of international antitrust during the last several years has been the extraordinary proliferation of new statutes and strengthened enforcement of competition laws throughout the world. Today the great majority of industrialized and emergent economy countries have antitrust legislation both on the books and in actual practice. Formerly communist countries in Eastern Europe and the former Soviet Union have enacted antitrust laws as part of their shift to market-oriented economies. Latin American countries have also recently enacted or strengthened their antitrust laws and enforcement. Similarly, antitrust has mushroomed in the Pacific countries, where Japan has gradually been increasing its enforcement and several other countries have recently enacted or strengthened their antitrust laws, notably Korea and Taiwan. This new legislation complements the existing enforcement in Australia and New Zealand. Finally, the recent enactment of antitrust laws in Mexico and the strengthened enforcement of Canadian antitrust laws (after almost a century of relatively benign enforcement) now mark the 1589 North American continent as a completed bastion of antitrust enforcement.

U.K. MERGER CONTROL: LAW AND PRACTICE. By Roger J. Finbow & A. Nigel Parr. Sweet & Maxwell (London) 1995, 551 pp. ISBN 0-421-49710-6 hardback. £77.00 (suggested).

Barry E. Hawk\*

The most striking aspect of international antitrust during the last several years has been the extraordinary proliferation of new statutes and strengthened enforcement of competition laws throughout the world. Today the great majority of industrialized and emergent economy countries have antitrust legislation both on the books and in actual practice. Formerly communist countries in Eastern Europe and the former Soviet Union have enacted antitrust laws as part of their shift to market-oriented economies.<sup>1</sup> Latin American countries have also recently enacted or strengthened their antitrust laws and enforcement.<sup>2</sup> Similarly, antitrust has mushroomed in the Pacific countries, where Japan has gradually been increasing its enforcement<sup>3</sup> and several other countries have recently enacted or strengthened their antitrust laws, notably Korea and Taiwan. This new legislation complements the existing enforcement in Australia<sup>4</sup> and New Zealand.<sup>5</sup> Finally, the recent enactment of antitrust laws in Mexico and the strengthened enforcement of Canadian antitrust laws<sup>6</sup> (after almost a century of relatively benign enforcement) now mark the

---

\* Skadden, Arps, Slate, Meagher & Flom; Director, Fordham Corporate Law Institute. Member of the Advisory Board of the *Fordham International Law Journal*.

1. For a discussion of the role of competition in formerly communist countries, see Anna Fornalczyk, *Competition Policy During Transformation of A Centrally Planned Economy*, 1992 FORDHAM CORP. L. INST. 385 (B. Hawk ed. 1993).

2. See, e.g., Ana Jatar, *Implementing Competition Policy on Recently Liberalized Economies: The Case of Venezuela*, 1993 FORDHAM CORP. L. INST. 79 (B. Hawk ed. 1994).

3. Akinori Uesugi, *New Directions in Japanese Antitrust Enforcement*, 1994 FORDHAM CORP. L. INST. — (B. Hawk ed. forthcoming 1995).

4. See generally Maureen Brunt, *Australian and New Zealand Competition Law and Policy*, 1992 FORDHAM CORP. L. INST. 131 (B. Hawk ed. 1993).

5. See generally *id.*; COMPETITION LAW AND POLICY IN NEW ZEALAND (Rex Ahdar, ed. 1991).

6. See generally Calvin Goldman et al., *International Mergers and the Canadian Competition Act*, 1992 FORDHAM CORP. L. INST. 217 (B. Hawk ed. 1993); J. W. Rowley & Ann Campbell, *Commonality and Divergence in Canadian and Australian Competition Law*, 1992 FORDHAM CORP. L. INST. 261 (B. Hawk ed. 1993); Howard Wetston, *Developments and Emerging Challenges in Canadian Competition Law*, 1992 FORDHAM CORP. L. INST. 195 (B. Hawk ed. 1993).

North American continent as a completed bastion of antitrust enforcement.

Western Europe has not escaped this proliferation of antitrust statutes and increased enforcement. In the last ten years, newer or strengthened antitrust statutes have been enacted in Austria, Belgium, Finland, France, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden, and Switzerland.

Given this broad acceptance of antitrust principles and enforcement, it is fair to conclude that the United States is no longer the Lone Ranger in world antitrust enforcement. The United States, however, does remain the most vigorous jurisdiction in applying its own antitrust laws outside its territory.<sup>7</sup>

The proliferation of antitrust statutes and enforcement has also included merger control. The number of antitrust laws providing for notification and approval of mergers, acquisitions, and joint ventures has increased enormously during the last decade. Today, there are well over thirty different antitrust merger controls that might apply to a given transaction, depending upon the scope of the parties' international operations and the structure of the transaction, among other factors. These antitrust merger controls include not only jurisdictions with long-standing antitrust controls, such as Germany, the United Kingdom, and the United States, but also jurisdictions that have enacted merger regulations only in the last several years, such as Austria, Belgium, Bulgaria, the Czech Republic, the European Union, France, Greece, Hungary, Italy, Latvia, Poland, Portugal, Russia, Slovakia, Spain, Sweden, and the Ukraine, among others. In Western Europe alone, mandatory preclosing notification requirements now exist in nine jurisdictions:<sup>8</sup> Austria, Belgium, the European Union, Germany, Greece, Ireland, Italy, Portugal, and Sweden.<sup>9</sup> In Western Europe, voluntary preclosing notification requirements exist today in France, Spain, and the United Kingdom. Of the fifteen member states of the European Union,

---

7. *See, e.g.*, *Hartford Fire Insurance Co. v. California*, [1993] 1 Trade Cas. (CCH) ¶ 70,280 (U.S.). *See generally* 1 BARRY HAWK, UNITED STATES, COMMON MARKET & INTERNATIONAL ANTITRUST 96-152 (2d ed. Supp. 1993).

8. In Eastern Europe, mandatory preclosing notification requirements exist in at least a further seven jurisdictions, namely: the Czech Republic, Hungary, Latvia, Poland, Russia, Slovakia, and Ukraine.

9. *See generally* 3 HAWK, *supra* note 7, ch. 15.

only Denmark, Finland, Luxembourg, and the Netherlands do not have antitrust merger control laws.

Against this contemporary background of a world forest of antitrust merger controls, three jurisdictions stand tall as having several decades of actual enforcement of antitrust merger control: Germany, the United Kingdom, and the United States. In all three jurisdictions there is an extensive body of administrative practice or case law.

The United Kingdom, however, differs from Germany and the United States in two respects. First, the U.K. competition authorities have not issued substantive guidelines, unlike the merger guidelines issued by the Bundeskartellamt and the U.S. agencies. Second, there is no authoritative treatise devoted to U.K. antitrust merger control. Both of these differences make for greater uncertainty for antitrust and corporate advisers about U.K. merger control than is the case for German and U.S. merger control, where there are published substantive guidelines and many learned commentaries.

Very fortunately for lawyers and other advisers, the lack of substantive guidelines and comprehensive commentary on U.K. merger control has been remedied by the publication of what will unquestionably be the bible for U.K. merger control: Roger Finbow and Nigel Parr's *U.K. Merger Control: Law and Practice* ("*Finbow & Parr*"). *Finbow & Parr* certainly fills the need for a comprehensive analysis and description of the U.K. merger control system. *Finbow & Parr* also goes a long way in providing substantive guidelines, although obviously as private practitioners the authors cannot speak for the U.K. authorities.

*Finbow & Parr* describes comprehensively the rather byzantine institutional structure of U.K. merger control, which like Gaul, is divided into three parts: the Office of Fair Trading ("OFT"), the Secretary for Trade and Industry ("STI"), and the Monopolies and Mergers Commission ("MMC"). This very helpful description of the institutional structures complements the authors' analysis of the U.K. procedures, which also are more complex and multifarious than procedures in other jurisdictions. For example, the authors analyze the three types of voluntary notification procedures with considerable emphasis on the practical advantages and disadvantages among the three procedures. This analysis will be extremely helpful to parties and their

advisers, particularly as the authors have the considerable courage of providing specific advice and taking positions in recurrent hypothetical situations. Their pragmatism and sophisticated advice strikes at least this reviewer as perhaps exceptional in a world where often it appears that counsel take a more formalistic approach to the decision to notify a contemplated transaction. For example, the authors state that: "In practice, only a very small proportion of mergers qualifying for investigation are referred to the MMC" and "advisors may be unlikely to recommend [voluntarily] seeking clearance in advance of completion if in their opinion there is no risk in practice of a reference."<sup>10</sup>

This quotation should not distort, however, the general thrust of the authors' analysis. The book is truly superb in its discussion of the pros and cons of notification (and the different ways of notifying) in specific common situations. Indeed, this discussion, together with the analysis of the substantive criteria employed by the OFT and MMC, should prove to be the two most valuable sections of the book to practitioners and merger parties.

Another very interesting procedural analysis concerns the de facto time limits for decisions by the OFT/Department of Trade and Industry ("DTI") and the MMC. Finbow and Parr essentially advocate shortening the OFT/Secretary of State's time while maintaining the MMC's time to reach decisions. This seems correct given that the OFT/DTI have up to six months (proposed to be reduced to only four months) from the date of announcement or completion of a transaction to decide whether an MMC referral should be made, while the MMC has typically three to four months (and there is pressure to reduce this period) to complete its much more detailed investigation that might be roughly compared to a "second phase" EEC Merger Regulation proceeding. Certainly, the U.K. time periods are out of line with deadlines and time periods in other jurisdictions, especially the first phase period for the OFT/DTI.

The authors also score a number of good points in discussing notification fees. They find the U.K. fees burdensome. The U.K. fees, however, compared with the U.S. fees under Hart-Scott-Rodino (now US\$45,000 per notification), are quite mod-

---

10. ROGER J. FINBOW & A. NIGEL PARR, U.K. MERGER CONTROL: LAW AND PRACTICE 5, 7 (1995) [hereinafter FINBOW & PARR].

est. The unfortunate reality in the world today is that governments are beginning to appreciate the cash cow value of merger control notification fees which raise considerable revenues even though the great majority of transactions raise no competition concerns whatsoever.

*Finbow & Parr* also contains a helpful analysis of the kind of transactions that qualify under the U.K. legislation. For example, they devote considerable attention (and rightly so) to issues like control and material influence over the target such as to qualify a transaction as a "merger" under the U.K. legislation. In doing so, they compare the U.K. tests for acquisition of minority shareholdings with the approach under the EEC Merger Regulation. For example, they assert that "[t]he decisions taken by the Commission so far in relation to the concept of decisive influence suggest that a higher degree of involvement in an undertaking's affairs is required than that which would give rise to material influence under the Fair Trading Act."<sup>11</sup> Although this may have been true two years ago, more recent cases under the EEC Merger Regulation suggest that there has been a strong convergence between the U.K. approach to acquisition of minority shareholdings and the approach under the EEC Merger Regulation.<sup>12</sup>

In a somewhat similar vein, the authors' discussion of the concentrative-cooperative joint venture distinction under the EEC Merger Regulation reflects a two-year old perspective and does not take entirely into account more recent Commission practice nor the recently revised Commission notice on that subject.<sup>13</sup> Of course, these minor caveats detract in no way from the authors' principal goal of analyzing U.K. merger control, but only suggest some caution about their comparison of the U.K. system with the EEC Merger Regulation practice.

As mentioned above, the U.K. authorities have not seen fit to issue substantive merger guidelines, unlike their counterparts in Canada, Germany, and the United States. *Finbow & Parr* goes a long way, however, in providing the practitioner and merger

---

11. *Id.* at 39.

12. *See, e.g.*, Commission Decision, Case No. IV/M.526 (Eur. Comm'n Dec. 14, 1994) (DLJMB/UBS/Sappi/Warren) (not yet reported).

13. Commission Notice, O.J. C 385/1 (1994) (on distinction between concentrative and cooperative joint ventures under Council Regulation No. 4064/89/EEC of December 1989 on control of concentrations between undertakings).

adviser with a private substitute for official substantive U.K. guidelines. They note generally in the overview chapter that the U.K. voluntary notification system and enforcement history reflect the basic "presumption" underlying the Act that a merger should be allowed absent a "real expectation" of significant adverse effects on the public interest.<sup>14</sup> In later chapters they proceed to analyze in some detail the various facets of a substantive merger analysis.

There is an excellent summary of relevant product and geographic market definition. The authors first describe how the OFT largely follows the analytical framework set forth in the U.S. Merger Guidelines, despite acknowledged differences with the approach under the EEC Merger Regulation.<sup>15</sup> The analysis of relevant product and geographic market definition is again practitioner-oriented. The authors identify various factors and evidence typically taken into account by the OFT and MMC in their analysis of market definition<sup>16</sup> Market share and non-market share factors are also analyzed in considerable detail and one finishes the book with the strong impression that one has obtained intimate familiarity with the actual analysis employed by the U.K. competition authorities.

Theoreticians, as well as practitioners, also will benefit considerably from the authors' discussion of collusion/oligopoly coordination. Their suggested analytical framework for examining mergers in oligopolistic industries is exceptional in both its brevity and thoughtfulness.

In sum, *Finbow & Parr* should immediately become the indispensable treatise on U.K. merger control. It will prove invaluable to practitioners and business advisors, as well as providing provocative thoughts to academics and others interested in comparative merger control. No advisor to parties engaged in international transactions can afford not to have *Finbow & Parr* on their bookshelf close at hand.

---

14. FINBOW & PARR, *supra* note 10, at 1.

15. *See id.* at 174-78.

16. *See id.* at 178-201.