Pázmány Law Review
4. 2016. • 183–210.

INSTITUTIONAL DESIGN OF ENFORCING

Public Interest Considerations in Merger Control

Aranka Nagy*
Pázmány Péter Catholic University

1. Introductory remarks

There is an on-going debate on whether or not competition policy should aim to achieve non-competition related goals. Thus, including considerations other than consumer welfare (i.e. pubic interest considerations) into the standard merger assessment is a controversial issue. Public interest considerations widen the horizon of such assessment,[1] but might also encourage political lobbying, which decreases the impartiality of the system and shifts the focus from competition related matters to other agendas.

Even though considerations, which extend beyond consumer welfare can also be found in relation to antitrust procedures,[2] this article will solely focus on public interest considerations in merger control, due to two main reasons. Firstly, more than ninety jurisdictions have merger control laws around the world, and a large-scale cross-border transaction can easily trigger obligation to notify in any of those regimes. Thus, multi-jurisdictional merger control analysis has become a commonplace element of today's cross-border transactions.[3] This feature requires a great level of harmonisation and legal certainty, both in terms of procedural and substantial issues.

---

* PhD student, Pázmány Péter Catholic University. The opinions expressed in this article are the author's own.

1 In C. Graham: Public Interest Mergers. *European Competition Journal*, Vol. 9., No. 2, (August 2013) 406.

2 See, for instance M. P. Schinkel – L. Toth: Balancing the public interest-defence in cartel offences. *Amsterdam Law School Legal Studies, Research Paper* No. 2016/05.

3 At the intersection of the global economy and national interests: foreign investment review and merger control meet, R. Schlossberg – C. Laciak: *Freshfields Bruckhaus Deringer.* http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insgight/At%20the%20intersection%20of%20the%20global%20economy%20and%20national%20interests_GTDT.pdf.

The existence of public interest considerations can create a significant obstacle in merger control procedures and make it considerably difficult for businesses to comply with diverging requirements and manage complex global mergers. Secondly, merger control had been recognised as a form of economic regulation which can be used as an interventionist tool by governments to influence the structure of markets.[4] Mergers between multinational and transnational corporations have the potential to have a significant impact on various national economies.[5] Political and economic consequences can make merger control especially prone to the inclusion of considerations going beyond the core goals of Competition Law.[6]

Many argue that the effective application of competition policy itself serves public interest,[7] and is capable of boosting innovation and economic growth and therefore, there is no need to attach further considerations to it.[8] Some jurisdictions do not consider non-competition factors in their antitrust analysis.[9] For instance, the US submission to the OECD (2016) refers to the keynote address of former Chairwoman Raminez where she points out that while such considerations *"may be appropriate policy objectives and worthy goals overall [...] integrating their consideration into a competition analysis [...] can lead to poor outcomes to the detriment of both businesses and consumers*."[10] These thoughts are largely shared by the business community that believes that introducing public interest considerations into merger

[4] L. MCGOWAN – M. CINI: Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance*, Vol. 12., No. 2., (April 1999) 176–200.

[5] J. OXENHAM: Considerations before sub-saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty. *US-China Law Review*, Vol. 9, 2011. 212.

[6] OECD: Public interest considerations in merger control. *Background paper*, 2016. 6.

[7] See for instance, UNCTAD, Roundtable on: The Benefit of Competition Policy for Consumers, 2014, *„[...]competition is not an end in itself. It contributes to an efficient use of society's scarce resources, technological development and innovation, a better choice of products and services, lower prices, higher quality and greater productivity in the economy as a whole. Fostering a competition culture in which consumers mak informed choices between products and services offered, businesses refrain from anti-competitive agreements or behaviour and public administrations realise how competition can contribute to addressing wider economic problems, directly contributes to making markets work better for the benefit of consumers and business".*

[8] *„[...] the existence of competitive markets benefits consumers in the sense that the competitive process should ensure, under standard economic theory, that competitive markets lead to the efficient allocation of scarce resources and deliver competitively priced goods and services. Public interest factors are more difficult to quantify and address in terms of how these can be achieved through market forces."* D. PODDAR – G. STOOKE: Consideration of Public Interest Factors in Antitrust Merger Control. *Competition Policy International,* 2.

[9] See the US's contribution to the OECD (2016, Public interest considerations in merger control).

[10] The US submission to the OECD (2016) also refers to academic literature (Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.vL. & ECON. 7, 1066) which argued that the Sherman Act was not intended *"to achieve [...] broad non-commercial goals"* and that the *"test of illegality was entirely the effect upon commerce, not an effect upon some other thing or condition, such as a supposed social or political evil".*

control is unnecessary and potentially counter-productive.[11] The ICN Recommended Practices for Merger Analysis also suggests that competition authorities should decide mergers, albeit on competition grounds.[12]

Nevertheless, there are certain countries that regard non-competition considerations as an integral part of their merger assessment. Including social, political or other economic goals in merger control allows competition authorities to apply a more holistic approach. For instance, South Africa underlines in its contribution to the OECD (2016) that *"[...] not only does the Competition Act incorporate features which reflect the unique challenges facing South Africa's economic development but it also performs a dual role in South Africa. In addition to stimulating competition and achieving market efficiency, it also aims to be an instrument of economic transformation and a tool (as part of a suite of economic development policy tools) to address the historical economic structure and encourage broad-based economic growth."* The latter approach is echoed by many developing countries, likely due to the greater role of industrial policies, and their efforts to align competition policy with broader government policies.[13] Additionally, public interest considerations may be used as tools for 'young' competition agencies, which still struggle to achieve credibility and legitimacy in their respective countries.[14]

The main focus of this paper will be on the institutional design in which these considerations are enforced. Before categorising existing examples, and demonstrating their advantages and disadvantages, the paper will briefly describe the most common types of public interest considerations. It will then present legislative and case law examples from all around the world.

2. Public interest considerations in MergerControl

It is almost impossible to list all the factors that could be qualified as serving 'public interest' in merger control. These considerations generally reflect the social, cultural, historical and political background of an individual state. In line with the recent work of the OECD[15] in this field, we would regard all the non-competition related considerations in merger control as public interest consideration.

---

[11] See the BIAC's contribution to the OECD (2016, Public interest considerations in merger control). BIAC points in its contribution that there are several disadvantages of introducing a separate public interest analysis in merger reviews: (a) unpredictability and uncertainty; (b) increasing susceptibility of competition agencies to political pressure and to depart from merger-specific analysis; and (c) the risk of outcomes which damage the long term public interest to the extent efficiency-enhancing mergers are prohibited or deterred.

[12] ICN Recommended Practices (n 1) 1, Comment 3.

[13] See A. Capobianco – A. Nagy: Public Interest Clauses in Developing Countries. *Journal of European Competition Law & Practice,* Vol. 7., Issue 1, (January 2016) 46–51.

[14] D. Lewis: The role of Public Interest in Merger Evaluation, International Competition Network. *Merger Working Group Naples*, September 2002. 2.

[15] OECD: Public interest considerations in merger control. *Background paper*, 2016. 6.

The most common considerations include, for instance, defence, security of supply, media plurality, employment, international competitiveness, exports & imports, or other public goods (i.e. environment). As it will be shown throughout the paper, the considerations might appear as integral parts of the standard merger assessment, as exemptions or exceptions under the general rule, a justification for clearing/blocking a merger or as a ground for action for external parties (e.g. politicians, regulators).

There are many different ways how these considerations can be categorised. The most notable difference probably relates to their form: some jurisdictions prefer to apply a broad, while others a more (sector) specific definition in their laws. This part of the paper will present examples of the 'broad' and 'more specific' considerations, and evaluate the pros and cons regarding their application.

On one hand, broad terms[16] going beyond pure competition considerations provide the relevant authority with a very flexible approach, which can be adjusted according to the circumstances. On the other side, broad terms can be easily stretched to reach distant policy goals which are not necessarily related to the transaction itself. Therefore, it is desirable to provide a very detailed reasoning to the decisions where the competition authority applies broad definitions. By doing so, countries can create a more business-friendly atmosphere, where the enforcement system serves legal certainty and is more predictable. In Australia,[17] for instance, the Australian Competition Tribunal's ('Tribunal')[18] interpreted 'public benefit' broadly. It held that anything of value to the community generally or any contribution to the aims pursued by society, including the achievement of the economic goals of efficiency and progress should be regarded as benefits to the public. In deciding whether to grant an authorisation, the Tribunal must be satisfied that the proposed merger is likely to result in such a 'benefit to the public' in order for a merger to be allowed to occur. As for interpreting what is to be considered as a 'benefit to the public', Australia's recent contribution to the OECD (2016) invokes an example by *AGL Energy/Macquaire Generation* case, where the competition authority ('ACCC') and the Tribunal disagreed on whether the conditions imposed by the Tribunal represent a substantial public benefit. The case points back to 2014, when AGL Energy, a publicly listed Australian energy company, applied to the Tribunal for authorisation to acquire the assets of Macquarie Generation, a State-owned electricity generator. AGL Energy's application for authorisation followed an announcement by the ACCC

[16] For instance, in *Chinese Taipei* the 'overall economic benefits' should be taken into consideration when reviewing merger cases. In practice, the scope of the overall economic benefits also encompass economic benefits not related to competition, such as industrial development, employment and national competitiveness that are associated with the overall economic benefits. See Chinese Taipei's contribution to the OECD (2016, Public interest considerations in merger control).

[17] See Australia's contribution to the OECD (2016, Public interest considerations in merger control).

[18] In Australia, as the statutory test is different from the competition authorities review process, parties may also apply for merger authorization to the Tribunal after the competition authority ('ACCC') has opposed a merger either informally or formally. If the Tribunal's authorization is granted, this provides statutory immunity for the transaction. See Australia's contribution to the OECD (2016, Public interest considerations in merger control).

that it would oppose the acquisition on the basis that it was likely to substantially lessening competition. On the contrary, the Tribunal granted authorisation to AGL Energy, subject to conditions. The Tribunal was satisfied that the acquisition was likely to result in significant benefits to the public from the payment of $1 billion to the State of New South Wales which was proposed to be used by the State of New South Wales to finance new infrastructure projects and by relieving the State of having to continue to operate the assets. The Tribunal accepted that the addition of $1 billion to the infrastructure fund would lead to its application to infrastructure development that would be a significant benefit to the public.

However, more specific merger tests may qualify as a more transparent and business-friendly than the application of the broad term of 'public interest'. Example for such more specific terms can be found in the United Kingdom. The list of considerations specified by the UK Enterprise Act 2002 ('the Enterprise Act')[19] that allows for intervention in mergers by the Secretary of State ('SoS') on certain public interest grounds was originally concerning 'national security' and 'media plurality'. The UK's example shows that a specified list equally does not serve as a guarantee that there will not be attempts to interpret the list of factors wider. Also, there have been attempts for an expansion of the list of public interest considerations. In practice, the only additional public interest consideration added since 2002 was the 'stability of the UK financial system', during the financial crisis and in the context of the *Lloyds/HBOS* merger.[20] Publicly available information suggested that the merger *"was truly exceptional in its scale and would not usually be allowed"*.[21] Thus, the SoS considered that the new public interest consideration – the stability of the UK financial system – overrode the competition concerns identified by the Office of Fair Trade[22] and decided – even before the addition of a new public interest consideration – that the merger should not be referred to further investigation.[23] The SoS' decision was challenged at court before the Competition Appeal Tribunal ('CAT'). Given that no evidence was raised to show that the decision maker had done anything other than balance the considerations of financial stability against the competition concerns and come down in the favour of the former, the application was dismissed by the CAT.[24]

[19] See UK's contribution to the OECD (2016, Public interest considerations in merger control).

[20] The merger created the fourth-biggest bank in Britain that also accounted for a third of the mortgage market.

[21] See Lloyds TSB seals £12bn HBOS deal, 17 September 2008. http://news.bbc.co.uk/2/hi/business/7622180.stm.

[22] The Office of Fair Trade ('OFT') is the predecessor of the Competition and Markets Authority ('CMA').

[23] On an other occasion the attempt to enlarge the list of considerations failed. Concerns were expressed in 2014 about the implications of any merger between AstraZeneca and Pfizer with specific regard to their R&D activity being carried out in the UK. As a consequence of this, the possibility of the inclusion of the protection of R&D as a public interest was raised, but that argument failed. OECD: Public interest considerations in merger control, *Background paper*, 2016. 12.

[24] C. Graham: Public Interest Mergers. *European Competition Journal*, Vol. 9., No. 2, (August 2013) 394.

Another example where more specified considerations can be found in the law is the European Union's relevant provisions in Regulation 139/2004/EC ('EUMR').[25] Article 21 (4) of the EUMR does allow Member States to adopt, with regard to concentrations of an European dimension, measures to protect certain interests other than competition, for as long as these measures are necessary and proportionate to their aim and are compatible with all aspects of Community law.[26] The three considerations are 'public security', 'plurality of the media' and 'prudential rules' which are regarded as compatible with EU law. Other considerations should be communicated to the European Commission that assesses the public interest consideration based on the general principles of EU law. The Court of Justice of the European Union ('ECJ') interpreted these considerations on several occasions. In *Commission v Belgium* and *Commission v Spain*[27] the ECJ specified that the requirement of public security, as a derogation from the fundamental principles of free movement of capital and freedom of establishment must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Thus, the public security exception may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[28]

As demonstrated by the above examples, interpreting public interest considerations is a challenge. Legal certainty and predictability can be better served by providing a detailed analysis on the interpretation of the public interest considerations, which can assure businesses that public interest considerations will not be misused. Other tools that serve legal certainty include issuing soft law or well-established case law. In South Africa, for instance, the Competition Commission's approach in respect of the assessment of public interest factors is set out in the 'Guidelines for the Assessment of Public Interest Factors in Merger Regulation'.[29] The recently released guidelines adopted a five-step approach to address public interest in mergers, namely i) the likely effect of the transaction on public interest, ii) whether the effect on the specific public interest is a result of the merger, iii) whether these effects are substantial, iv) whether the merging parties can justify the likely effect on the particular public interest and v) whether the concerns can be addressed with remedies. The business community welcomed[30] the effort to promote greater certainty in enforcing public interest considerations. This is a clear indication that there would be a need for soft

---

[25] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004. 1–22.

[26] See the European Union's contribution to the OECD (Public interest considerations in merger control. 2016).

[27] Case C-503/99, [2002] ECR I – 4809, Case C-463/00, [2003] ECR I-4581.

[28] EU Merger Control and the Public Interest, A Legal Mapping Report by the Lendület-HPOPs Research Group in Spring 2016, Hungarian Academy of Sciences, Centre for Social Sciences, 10.

[29] The guidelines are available at: http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf.

[30] South Africa: Competition Commission makes available draft guidelines for the assessment of the public interest criteria in merger control matters, *African Antitrust & Competition Law News & Analysis,* https://africanantitrust.com/2015/01/23/south-africa-competition-commission-makes-

law documents in this field. However, there are not many documents available with the purpose of clarifying how the relevant authorities will interpret and apply non-competition related considerations.

3. Institutional models

There are different ways how competition regimes can meet the public interest objectives through competition law. The available regimes differ considerably in terms of how, when and by whom public interest considerations are taken into account.[31]

This section will examine the various institutional models in which public interest considerations can be taken into consideration in merger procedures and eventually, establishes and institutional design system. While doing so, the article will use as a starting point the basic classification of the OECD background paper on 'Public interest considerations in merger control',[32] however, further develops it by taking into consideration recent developments, case law and the most notable examples of the country contributions and the discussion of the OECD roundtable.[33]

The institutional model developed in this section is demonstrated in the figure below:

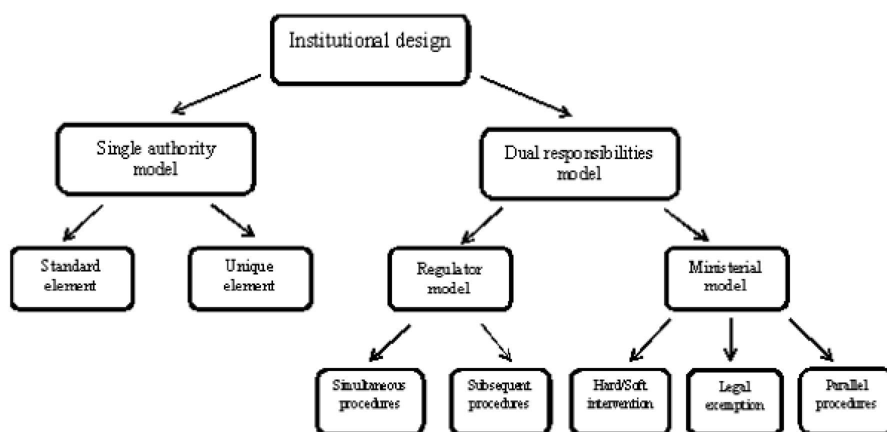

Figure 1 Institutional design of enforcing public interest considerations

available-draft-guidelines-for-the-assessment-of-the-public-interest-criteria-in-merger-control-matters/.

[31] Public Interest Regimes in the European Union – differences and similarities in approach, Final Report of the EU Merger Working Group (10 March 2016), http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf.

[32] The Background Paper is available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En. The author of this article also authored the Background paper referred to in this article.

[33] All country contributions are available at: http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm.

The OECD Background paper identifies two main models: the 'single authority' model and the 'dual responsibilities' model. In the former it is the competition authority that is entrusted to conduct the public interest test in merger review, regardless of the sector or industry concerned. In the latter model, competition authorities follow a standard competition assessment, while public interest considerations are assessed by a different body (e.g. a sectoral regulator or a political decision-making body). The paper will use the same distinction as a starting point of the categorisation.

3.1. The single authority model

The question whether or not to entrust the competition authority with the responsibility to enforce public interest considerations relates to the social, cultural and political environment of the country. As for the pros and cons, the single authority model provides the enforcer with the possibility to apply a more holistic approach; while at the same time, it can impose the authority to a greater political influence. Also, the single authority setting might cause serious internal conflict of interest in those jurisdictions where the competition authority is supervised by a ministry, which promotes or prioritises other public interest considerations than competition. An often raised criticism claims that competition authorities are not the best placed authorities to pursue public policy goals as they are technical and non-elected bodies.[34] Therefore, it is very likely that competition authorities lack the necessary expertise to assess public interest considerations. Companies also suggest that the assessment of public interest considerations can significantly slow down the time-sensitive merger procedures.[35] In contrast, other sources emphasise that it should rather be the competition authority than any other body, if public interest is enforced in Competition Law.[36]

One could argue that the single authority model might raise the level of uncertainty and unpredictability, thus it is more desirable to separate the responsibilities of the competition authority from the other body, which is responsible to enforce public interest in merger control. On the other side, the question whether it would be more efficient if the analysis would be conducted by one institution, instead of having a fragmented system, could equally be relevant to raise. Some countries' institutional setting suggests that it is easier to reconcile the different considerations within the framework of one review process, conducted by one authority. The Harper Review (a recently completed comprehensive independent review of Australian competition

---

[34] OECD: Global Forum on Responsible Business Conduct. *Competition Law and Responsible Business Conduct*, 2015. 17.

[35] D. PODDAR – G. STOOK: Consideration of Public Interest Factors in Antitrust Merger Control. *Competition Policy International,* 2014.

[36] V. HANE: *Public interest clauses may be a necessary evil, says OECD head, 13 March 2015.* http://globalcompetitionreview.com/article/1061787/public-interest-clauses-may-be-a-necessary-evil-says-oecd-head.

law and policy),[37] for instance, recommended replacing the current separate ACCC formal clearance process and the Tribunal authorization process and making the ACCC the first instance decision maker for the combined test.

Probably the greatest fear of businesses in this model is the clash of considerations. Mergers are largely driven by the private interest of businesses, whilst public interest considerations are rather motivated by political, social, cultural considerations.[38] Competition criteria might not point to the same direction as broader policy objectives, which make it very likely that these considerations will conflict one another. It is unpredictable how the competition authority would come to its conclusion, which considerations would it value more, and how it would establish the objective criteria to weigh these considerations against each other. This feature can make the system especially uncertain.

Some of the notable examples where competition authorities are also responsible to enforce public interest considerations include countries from all around the globe, from Chinese Taipei to New Zealand. In the following sections the paper will demonstrate through these examples how the single authority works in practice and which are the trade-offs in its operation.

3.1.1. Standard element of the merger assessment

First, the paper will look at a couple of examples where the assessment of the public interest considerations is integral part of finding whether the transaction leads to competition problems. In this model, public interest consideration – which is ideally interpreted in law/soft law and well-elaborated by case law – represents a question that the competition authority evaluates each and every case, regardless of the sector, industry, origin of the undertakings concerned.

The unique operation of South Africa's merger regime[39] has been a subject of ongoing discussion ever since its enactment of the law.[40] Article 12A (3) of the South African competition act specifies that the relevant South African competition authorities (the Commission or the Tribunal) must consider the effect that the merger will have on: i) a particular industry or sector; ii) employment; iii) the ability of businesses owned by historically disadvantaged persons to become competitive; and iv) the ability of national industries to compete in international markets. A recent

---

[37] The Competition Policy Review Final Report was released on 31 March 2015. See at: http://competitionpolicyreview.gov.au/

[38] http://www.compcom.co.za/wp-content/uploads/2014/09/The-incorporation-of-the-public-interest-test-in-the-assessment-of-prohibited-conduct-a-juggling-act.pdf.

[39] Other relevant case law examples are *Kansai/Freeworld* (2012), *Glencore/Xstrata* (2013), *Rio Tinto/IDC, Hebei, Mauritius SPV* (2013), *BB/Adcock Ingram* (2014).

[40] See, for instance S. Tavuyanago: Public Interest Considerations and their Impact on Merger. Regulation in South Africa. *Global Journal of Social-Human Science*, Vol 15, Issue 7, (2015); W. Spoelstra: *The Role of Public Interest in Merger Evaluation in South Africa.* University of Pretoria, April 2016.

example includes the transaction conditionally approved by the Tribunal in May 2011, between *Wal-Mart Stores Inc. of the United States ('Walmart') and South African retailer Massmart Holdings Limited ('Massmart').* The transaction did not raise any competition concerns. The imposed conditions related solely to public interest considerations, in particular employment and the potential displacement of small businesses in markets underserved by large retailers.[41] *AB InBev's recent acquisition over SABMiller* is also worth mentioning.[42] The mega merger that created the world's largest brewery was subject of merger clearances in several jurisdictions, including the European Union, China, United States and South Africa. South Africa gave green light to the transaction subject to several conditions.[43] Many of the conditions aimed at achieving public interest goals, for instance i) the creation of a fund which will be utilised for the development of the South African agricultural outputs for barley, hops and maize, as well as to promote entry and growth of emerging and black farmers in South Africa; ii) the undertaking that InBev will not retrench any employee in South Africa as a result of the merger; iii) merging parties also agreed to submit to the government and the Commission by no later than two years after closing the merger and outline its black economic empowerment plans setting out how the merged entity intends to maintain black participation in the company, including equity. These case examples clearly demonstrate that the uncertainty and unpredictability that accompany the interpretation of public interest clauses may also affect the final results of the case. Where non-competition goals are applicable, businesses should also be ready to offer remedies not based on the 'theory of harm' in merger control.

Many countries from the developing world followed South Africa's example and included public interest considerations into merger assessment (e.g. Kenya, Botswana, Mozambik, Zambia and Tansania). These considerations mainly aim to align the work of the competition authority with government policies. Most notably, and similarly to the ones which are applicable in South Africa, they put focus on social considerations (i.e. employment, protection of disadvantaged people). In Kenya, the competition authority applies both the 'competitive effects' test and the 'public interest' test to any proposed merger transaction. In determining the latter, the competition authority assesses whether the proposed merger conflicts with government policies.[44] Similarly to South Africa, Kenya dealt many times with labour-issues in merger cases, which is very likely part of the Government's responses to major unemployment rates in Africa. These cases involved imposing remedies, purely based on public interest ground. In the merger case *Shareholding British–American Investments Company ("Britam")/Real Insurance Company Limited("Real")*[45] the competition test showed

41 See South Africa's contribution to the OECD (Public interest considerations in merger control,2016).

42 Anheuser-Busch InBev Clinches $103 Billion SABMiller Deal, Bloomberg (28 September 2016).

43 See the Competition Commission's press release on the merger clearance at: http://www.compcom.co.za/wp-content/uploads/2016/01/SABMiller_AB-InBev_31May16_1530-3.pdf.

44 Getting the deal through – Merger control (2017), Kenya, 236.

45 See also *Art-Caff'e Coffee and Bakery Limited/7 Coffee Shops of Dormans Coffee Limited*. In Kenya's contribution to the OECD (*Does Competition Kill or Create Jobs?* 2015).

that the transaction will not lead to the significant lessening of effective competition, though problems were raised in relation to the possible future job losses due to the merger. Therefore, the merger was approved on the condition that Britam would retain at least 85% of the staff of Real.

Another example is the People's Republic of China, where according to the Anti-monopoly Law of China, the state must protect the legitimate operation of industries dominated by the state-owned economy that are vital to the national economy and national security.[46] Relevant guidance published by Ministry of Commerce ('MOFCOM')[47] also provides that specific explanations should be given in the filing notification if the concentration is related to national security, industrial policy, state owned assets, etc.[48] Some would argue that non-competition issues are a perfect fit to reach goals beyond consumer welfare in the Chinese merger regime, e.g. to both domestic consolidation, where industrial policy factors may be supportive, and to inbound investment where industrial policy factors may create additional challenges in securing merger clearance.[49] In some of its recent decisions, MOFCOM claimed that it had taken into account 'other factors' in the merger assessment it deemed relevant. For example, in the *Coca Cola/Huiyuan* merger, the only deal so far that was prohibited, MOFCOM took into account the harm the merger could have caused to China's domestic small and medium-sized manufacturers and the healthy development of the Chinese fruit-juice drink industry.[50] In the *Uralkali/Silvinit* merger which was conditionally approved MOFCOM shed light on the consideration of 'national economy' as a relevant factor. In that case, the potential adverse impact of the merger of the two entities on China's agriculture and the industries related to agriculture was referred to as a relevant consideration in MOFCOM's decision. Although the underlying analysis and reasoning leading to the relevance of this factor are not explained, publicly available information suggests that MOFCOM's concern possibly was the effect of the merger on the supply stability and price of the products in the Chinese agriculture, which has long been considered as a key sector in China's national economy.[51]

It is important to point out that this model is not only applicable in the developing world. Some of the developed countries also found this model of including public interest considerations appealing. For instance, the application of a public interest test in Poland is the sole responsibility of the competition authority[52]. Public interest test is a part of standard merger proceedings and is applied by the competition authority on a regular basis with no special rules. The so-called 'ministerial model' applies

---

[46] Getting the deal through – Merger control (2017), China, 106.

[47] MOFCOM is in charge of regulating and enforcing the merger control in China.

[48] Getting the deal through – Merger control (2017), China, 106.

[49] Getting the deal through – Merger control (2017), China, 106.

[50] Steven Wei SU: *China Releases New Rules Guiding Merger Control Review.* Available at: https://www.hg.org/article.asp?id=22237.

[51] Ibid.

[52] See in http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf .4.

mainly in Europe (3.2. of the paper), whilst interestingly, no ministerial intervention is required in Poland.

3.1.2. A unique element in merger assessment

The paper will assess those jurisdictions where public interest considerations come into play in case if the competition authority establishes that the transaction will likely lead to competition problems. In these situations public interest considerations can take a form of a 'modified efficiency' test, or serve as a justification to clear the transaction subsequently. This means that the competition authority conducts a standard merger assessment, while at the end of the process it is either obliged or recommended to measure the results of the competition assessment against the possible efficiencies driven by the transaction. In some situations referring to public interest considerations provides the opportunity to clear mergers that would have otherwise been found anticompetitive. The competition authority is not obliged to assess the public interest considerations in each and every case, but only under certain circumstances, for example, if it founds that the transactions leads to a significant lessening of effective competition.

When the Commerce Commission ('Commission') in New Zealand receives an authorization application for a merger, it first conducts a traditional, efficiency-based assessment. If the Commission came to the conclusion that the merger is likely to lead to a significant lessening of competition, then it must apply the 'public benefit' test. Section 67 of the Act requires the Commission to take into account public benefit considerations when assessing applications for merger authorisation. New Zealand's courts have defined a public benefit as: *"anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress."*[53] The unique efficiency defence applicable in Canada is also worth mentioning.[54] The Canadian model for considering efficiencies in merger review is unique when compared to most of the Competition Bureau's ('Bureau') international counterparts. As Canada pointed out to its contribution to the OECD (2016), instead of being one of many factors that may be considered in the assessment of whether a merger should proceed unopposed, gains in efficiency from a merger are assessed under 'the trade-off analysis' set out in section 96 of the Canadian Competition Act. Section 96 requires the Competition Tribunal ('Tribunal')[55] to allow an otherwise anti-competitive merger if it finds that the gains in efficiency brought about by the merger outweigh and offset its likely anti-competitive effects. Even though certain proposed legislation contained references

[53] See New Zealand's contribution to the OECD (Public interest considerations in merger control, 2016).

[54] See Canada's contribution to the OECD (Public interest considerations in merger control, 2016).

[55] The Tribunal is a separate adjudicative body that has jurisdiction to hear and dispose of all applications made by the Commissioner (the head of the Bureau) under certain sections of the Act, including mergers.

to requiring efficiencies gains to be 'passed on' to the public in the form of lower prices or better products, ultimately the Competition Act did not specify how the Tribunal should regard issues of wealth transfer. In the recently contested merger Canada (*Commissioner of Competition) v. Tervita Corp.*, the Canadian courts allowed to proceed on the basis of a section 96 defence, the Tribunal stated that the total surplus standard should be the starting point, but that the Tribunal will also *"determine whether there are likely to be any socially adverse effects associated with the merger"* if such arguments are put forth by the Commissioner and *"If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects…"*.[56]

In some jurisdictions public interest considerations can be referred to as a justification to clear transactions that could eventually lead to the significant lessening of effective competition. If it appears that the merger is likely to substantially prevent or lessen competition', the COMESA Competition Council ('CCC'[57]) must determine whether: i) the merger is likely to result in any technological, efficiency or other pro-competitive gain, greater than the anti-competitive effects, which would not likely be obtained if the merger is prevented; and ii) the merger can be justified on substantial public interest grounds. In determining whether a merger is or will be contrary to the public interest the CCC is required to take into account all matters that it considers relevant in the circumstances and have regard to the desirability of: maintaining and promoting effective competition between persons producing or distributing commodities in the region; promoting the interests of consumers, purchasers and other users in the region with regard to the prices, quality and variety of such commodities and services; and promoting, through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.[58] Similar rules are applicable in Nigeria, when after finding that the transaction likely leads to the lessening of effective competition, the competition authority has to determine whether or not the merger is likely to result in any technological efficiency or other pro-competitive advantage that will be greater than, and offset, the effects of any prevention or lessening of competition; and if the merger is justifiable on the grounds of substantial public interest.[59] Regarding the public interest the competition authority takes into account the following relevant considerations: the particular industrial sector or region; employment; the ability of small businesses to become competitive; and the ability of national industries to compete in international markets.

As already mentioned above, it is important to provide businesses with guidance on how the competition authority will likely interpret and enforce the public interest

---

[56] Based on Canada's contribution to the OECD (Public interest considerations in merger control, 2016).

[57] Common Market for Eastern and Southern Africa (COMESA).

[58] Getting the deal through – Merger control (2017), Comesa.

[59] Getting the deal through – Merger control (2017), Nigeria, 299.

criteria in practice.[60] Many jurisdictions aim to help businesses in understanding the competition authorities' assessment and guiding principles, in different ways. Taking the above examples, in New Zealand and Canada it is the Court that interprets the broad definition or the efficiency analysis, whilst in South Africa there is soft law guiding the public on the authorities' approach.

3.2. The dual responsibilities model

More frequently, we can see the model in which the competition authority is not the primer responsible authority for addressing public interest. Depending on the actual setting, the competition authority might be consulted, overruled or allowed to conduct a parallel assessment to the regulator/political branch.

One of the biggest advantages of this model is the clear distinction between the body which is responsible to assess competition related considerations (competition authority) and the external body entrusted with assessing public interest (sectoral regulator, minister or other political body). Therefore, it relieves the competition authority from the political pressure, while eventually, places the decision on a competition matter in the hands of a body which is not an expert on those matters. This model also clearly represents its own challenges. First, the public interest interventions tend to prioritise short term solutions,[61] serving the specific public interest, which might result in a serious competition problem on a long term. Second, interventions based on public interest considerations might ignore the need of linking the intervention to the effects caused by the concentration, i.e. to ensure that the intervention will be merger-specific. Third, it can be argued that cases of a larger scale are important to politicians[62] who might be too close to the parties or have a vested interest in the outcome, so that impartiality can be better guaranteed by an independent agency.

In the following sections the paper will make a distinction between those models where the 'other' institution is a regulator or a political branch (e.g. ministry).

[60] See for instance: Norton ROSE: *The World After Wal-mart – will South African mergers ever be the same again*?, available at: http://www.nortonrosefulbright.com/knowledge/publications/67936/the-world-after-wal-mart-will-south-african-mergers-ever-be-the-same-again. *„The Commission should issue guidelines on the information which merging parties are required to provide in their merger filings in order to speed up reviews. Until then, merging parties who need swift clearances will need to anticipate these issues well in advance of lodging their filings, and deal with them appropriately. This could include offering appropriate conditions at an early stage of the investigation."*

[61] See Graham's points in relation to the Lloyds/HBOS merger in the UK. C. GRAHAM: Public Interest Mergers. *European Competition Journal*, Vol. 9., No. 2, (August 2013) 394. It is also suggested by the Bolivian contribution to the GCR – Getting the deal through, Merger control (2016) where it is emphasised that the merger clearing process can be speeded up substantially if public interest considerations are present in the project.

[62] GRAHAM (2013) op. cit. 405.

3.2.1. Regulator model

The 'dual responsibilities' model is particular in certain sectors, for instance in transport, finance, media and broadcasting. In these sectors public interest considerations are channelled into the merger control procedure through the official position of the sectoral regulator, whose procedure is sometimes linked to the competition procedure in terms of timing and procedural rules, while sometimes it is completely distinct from that. In the latter situation the regulator's procedure goes in parallel to the competition authorities' procedure or follows it. Hereinafter the paper will refer to this model as the 'regulator model'.

The paper will first show examples of the regulator model that is linked to the competition procedure ('simultaneous procedures'), and the next part will focus on subsequent procedures by regulators.

3.2.1.1. Simultaneous procedures

A good example for the simultaneous regulator model is the Hungarian regime. The competition authority shall obtain the opinion of the NMHH's Media Council[63] for the approval of certain transactions where the participating undertakings bear editorial responsibility or distribute media content to the general public. The competition authority's task is to investigate a merger's effects on competition, while the NMHH is entrusted with assessing its effects on the plurality of the media. While the NMHH conducts its procedure, the competition authority suspends its merger assessment until the NMHH's professional opinion arrives. The Media Council refused to grant approval two times[64] in the past five years, decisions that were followed by heavy media coverage.[65]

In Ireland undertakings involved in media mergers are required to make two-stage notification process.[66] One notification is sent to the competition authority responsible for carrying out the substantive competition review to determine whether the merger is likely to give rise to a substantial lessening of competition. Another notification is then sent to the Minister for Communications ('Minister'). The Minister has a specified time period to consider the media merger. If the Minister is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, then requests the Broadcasting Authority of Ireland ('BAI') to carry out a 'Phase II' examination. An advisory panel may be set up to assist the BAI in its

[63] The decision-making body of the National Media and Infocommunications Authority, the "NMHH".

[64] In Axel Springer/Ringer merger in 2010, and in RTL/Central Mediacsoport merger in 2017.

[65] See, for instance http://bbj.hu/business/media-council-blocks-ringier-axel-springer-merger-in-hungary_57235; http://index.hu/kultur/media/2017/01/24/a_mediatanacs_nem_engedi_hogy_az_rtl_bevasarolja_magat_a_central_mediacsoportba/. Hungarian media merger blocked by competition and telecoms agencies, (20 February 2017), PaRR.

[66] Seven media mergers have been notified and cleared by the competition authority and the Minister for Communications. See Getting the deal through – Merger control (2017) 209.

review. The ultimate decision, however, is made by the Minister. The Department of Communications, Energy and Natural Resources facilitated the process with issuing guidelines regarding media mergers. The media plurality assessment introduced in 2014 is relatively new and so far the clearance determinations are generally limited to stating that the relevant transaction will not be contrary to the public interest in protecting media plurality in the state.[67]

We have already emphasised above the role that soft law might play in interpreting and enforcing public interest considerations in the 'single authority' model. The same applies to the dual responsibilities model. In the UK the Office of Communication ('Ofcom') published guidance on media mergers in public interest test.[68] Even in the absence of soft law, the relevant case law can provide businesses with the necessary information to comply with the requirements set forth by the law, but only if the decision contains a detailed reasoning. This can help businesses and media industry and practitioners to understand the basis for the determinations and the manner in which the regulator applies the media plurality test.

3.2.1.2. Subsequent procedures

As for the latter, there are many sectors where the regulator conducts a procedure parallel (before or after) to that of the competition authorities. Many of these subsequent procedures are motivated by national interest considerations.

One of the typical examples can be found in the banking industry: mergers in the banking sector are generally a subject of parallel scrutiny, especially if the acquirer is a foreign company. In the US, for instance, foreign banks that operate in the US and seek to acquire another bank operating in the US may need to notify a number of regulators of their transaction for antitrust review. In addition to the Department of Justice ('DOJ'), the Federal Reserve Board ('FRB'), the Federal Deposit Insurance Corporation ('FDIC') and the Office of the Controller of the Currency ('OCC') all have statutory authority to review the competitive effects of proposed bank.[69] Foreign corporations seeking to carry on banking in Australia are subject to the same requirements as domestic corporations - the corporation must apply to the Australian Prudential Regulation Authority ('APRA') to become an 'authorised deposit-taking institution'.[70]

Ideally, these procedures do not interfere with each other's jurisprudence. However, jurisdictional issues are sometimes unavoidable. In Brazil, the Brazilian Central Bank (Banco Central do Brasil – 'BACEN') has broad powers to regulate and oversee financial services. BACEN is involved in a long-standing litigation against

[67] See Getting the deal through – Merger control (2017) 211.

[68] "*The guidance on this specific role for Ofcom is now clearer and hopefully more useful for prospective buyers and sellers*." https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2004/ofcom-publishes-guidance-on-media-mergers-public-interest-test.

[69] ABA Report 63.

[70] ABA Report 68.

Banco de Crédito Nacional S.A. and Bradesco S.A. to decide whether BACEN or the competition authority, the 'CADE' has authority to review transactions in the financial market.[71] As a result of this ongoing tension between CADE and BACEN, financial institutions tend to file applications for review of transactions with both agencies.[72]

3.2.2. Ministerial model

The other type of the dual responsibilities model, to which we will refer as the 'ministerial model', involves three different types:

- The first allows the involvement of a political body (generally, the relevant ministry) either through a consultation process (the 'soft' version), or by overruling the competition authorities' decision (the 'hard' version).
- The second type of the ministerial model involves a situation where the Government or the relevant ministry exempts a certain transaction from the competition authorities' scrutiny.
- The last version concerns an independent and parallel procedure to the competition procedure (i.e. the foreign investment regime).

3.2.2.1. Ministerial intervention

In the soft scenario the competition authority is obliged, under certain circumstances, to consult with the relevant ministry. There can be differences in the soft model on whether the opinion of the minister is obligatory to the competition authority or not.

An example for the soft consultation model can be found in the Canadian legislation. In its contribution to the OECD Canada[73] reported on certain industries where the Competition Bureau ('Bureau') is obliged by law to consult with responsible ministries. One such sector is the transportation where due to reasons relating to Air Canada's acquisition of Canadian Airlines, ministerial jurisdiction for merger review was extended in 2000 to include airline mergers. It was extended again in 2007 to include any matter with a transportation undertaking (i.e., matters that relate to national transportation). As it stands today, under the Canada Transportation Act ('CTA'), parties to a merger that involves a transportation undertaking and that is the subject of a notification under the Act must also provide notice of the transaction to the Minister of Transport. Within 42 days of receiving such notice, *"If the Minister is of the opinion that the proposed transaction does not raise issues with respect to the public interest as it relates to national transportation,..."* the Minister will notify the parties that no further Ministerial review is conducted. However, *"If the Minister is of the opinion that the proposed transaction raises issues with respect to*

[71] ABA Report 70.

[72] ABA Report 70.

[73] See Canada's contribution to the OECD (Public interest considerations in merger control.2016).

the public interest as it relates to national transportation", the Minister may instruct that those issues to be examined and the parties be precluded from implementing their transaction unless it is approved by the Governor in Council. In assessing whether a merger involving a transportation undertaking raises issues or concerns with respect to the public interest as it relates to national transportation, economic, environmental, safety, security and social factors are taken into consideration.

The hard measures model, where consideration of public interest clauses are left to a minister or other political branch (non-regulator), and the outcome of the competition authority's assessment may be overruled on the basis of such other body's subsequent assessment, is a very common model in the European jurisdictions.[74] State interventions in merger procedures are in the spotlight in recent years in Europe.[75] In the following parts the article will briefly describe some of the notable European jurisdictions where the hard ministerial model applies.

As already mentioned before, the UK system allows the SoS to intervene in merger cases based on specific public interest factors specified by the law. The ministerial involvement is governed by a clear and transparent process, and the process followed to introduce new public interest grounds is subject to parliamentary and public scrutiny. The functioning of the UK's system provides sufficient checks and balances to ensure a reasonable level of transparency: intervention notices issued by the SoS must be published, a new public interest consideration requires approval from the Parliament, and there are limited duties on the SoS to explain his or her reasoning.[76] The UK system is also a model from the perspective of guaranteeing the independence of the Competition and Markets Authority ('CMA'), as the roles of the CMA and of the SoS are clearly delineated in the process.

Turning to the Netherlands, Section 47 of the Dutch Competition Act[77] provides merging parties the option to file a formal request to the Minister of Economic Affairs ('Minister') in order to clear the merger that has been blocked by the Authority for Consumers & Markets ('ACM'). The request should be done within 4 weeks after ACM has decided to block the merger. The Minister can clear the merger and grant a licence based on his assessment that certain public interests benefitted by the merger outweigh the impediment to competition. The Competition Act does not provide any specifications on what can be considered as a public interest nor how the assessment

---

[74] Though there are some interesting examples outside the EU, too. In Morocco copy of the decision is sent by the Chief of Government, or the delegated governmental authority, from the competition authority. Within 30 days the Chief of Government can exert its power and issue a decision on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation). The transaction is deemed to be authorised when this 30 day time limit has expired. Getting the deal through – Merger control (2017), Morocco, 277.

[75] See for instance: Almunia voices concern over rising protectionism, cites debate over GE-Alstom deal. MLex, 24 June 2014.

[76] GRAHAM (2013) op. cit. 390.

[77] See the Netherlands' contribution to the OECD (Public interest considerations in merger control, 2016).

by the Minister should take place. Even though such requests have been made on occasion, the Minister has never reversed a decision of the authority before.

In Spain, in those cases where the competition authority decides either to prohibit the merger or to clear it subject to commitments or conditions, the Ministry of the Economy may ask the government to decide on two aspects: whether to i) confirm the competition authorities' decisions; or ii) clear it, subject or not to commitments or conditions. In the second case, the government's decision must be based on certain specified public interest criteria other than competition. Should the Minister ask the government to intervene, the government has one month to decide on the transaction. The intervention of the government in merger control proceedings is informally known as 'Phase III' procedure. The *Antena 3/La Sexta* case (2012) is the only 'Phase III case' in Spain to date. The transaction was notified after the *Telecinco/Cuatro* merger, which had already reduced the number of private free-to-air television broadcaster from four to three; the Antena 3/La Sexta merger would leave only two such operators. The competition authority imposed more severe conditions that were accepted in Telecinco/Cuatro. The Ministry of the Economy decided to refer the case to the government, arguing that the decision concerned *"reasons of general interest related to the guarantee of an adequate maintenance of sector based regulation and the promotion of research and technological development"*. The government softened the conditions originally imposed by the competition authority and declared that the conditions should be in *"line with those [conditions applied to other operators] in the sector"*.[78] The Competition Act expressly states that such decision must be based on certain public interest criteria different from competition ones: national defence and security; the protection of public security and public health; free movement of goods and services within the national territory; protection of the environment; the promotion of technical research and development; and the maintenance of the sector regulation objectives.

As demonstrated above, the most frequent scenario in this model is that a transaction, having national significance is cleared on public interest grounds, although it raises competition problems. A rare example of the opposite (i.e. blocking a non-problematic merger on public interest ground) can be found until recently in Norwegian[79] legislation. The possibility to overturn the competition authorities' decision existed in their competition law since its enactments in 2004. In line with Section 21 in the Competition Act, the Norwegian government (or more formally: the King-in-Council) could approve a concentration that the Norwegian Competition Authority has intervened in cases *'involving questions of principle or interests of major significance to society'*. The government also had the legal power to block a merger the competition authority has decided not to intervene against based on the same grounds. This possibility has been used very rarely, only in two cases since 2004, once in the power production and once in the agricultural sector. A very

[78] Getting the deal through – Merger control (2017), Spain, 377–378.

[79] See Norway's contribution to the OECD (Public interest considerations in merger control, 2016).

similar possibility applies in France, where the Minister for the Economy ('Minister') holds residual powers in two circumstances: i) even if the concentration is cleared by the competition authority at the end of the first phase, the Minister can ask that the competition authority opens a second phase in-depth review of the concentration (although the competition authority has discretion to act upon this request or not), and in addition, ii) whatever the final decision of the Authority at the end of the second phase, the Minister can substitute his or her own decision based on public interest grounds.[80] The considerations on which the ministries' decision can be based may include industrial and technological progress, companies' competitiveness in an international context and social welfare. According to the available sources, this power has not been used by the Minister to date.[81]

Many argue that the independence of the competition authorities can be guaranteed through the clear separation of the agency responsible for competition and the agency responsible for public interest considerations. This can be evidenced by significant changes that took place recently in the Norwegian Competition Act.[82] As a measure to enhance the competition authority's independence, a recent proposal aimed to establish an independent competition complaints board. This complaints board is the first instance to assess complaints on the competition authorities' decisions in mergers as well as cartel and abuse cases. At the same time, the possibility to reverse the competition authorities' decisions based on public interest considerations was abolished. It was argued that public interest considerations are better served through general regulations rather than political intervention in individual cases as such interventions can be influenced by strong lobby interests, i.e. the intended balancing of public interests versus competition considerations may be skewed. The proposals were adopted by the Norwegian Parliament (Stortinget) in 2016, and were implemented 1st January 2017.

3.2.2.2. Legal exemption

The second type of the ministerial model involves situations where the law or the Government/relevant minister regard certain transaction of having strategic importance and therefore, exempts the deal from a competition scrutiny. These exemptions can concern strategically important market players or industries. In many of the relevant cases, the exemption is exerted by the relevant minister through issuing a piece of legislation (e.g. an injunction or decree).

The legal exemption is granted through a piece of legislation in Cyprus, Hungary and Singapore. In the former, the Minister of Energy, Commerce, Industry and Tourism can, by issuing a justified order, declare a concentration as being of major public interest with regard to the effects it might have on public security, pluralism of

[80] Getting the deal through – Merger Control (2017), France, 159.

[81] Getting the deal through – Merger Control (2017), France, 163.

[82] See Norway's contribution to the OECD (Public interest considerations in merger control, 2016).

the mass media and the principles of sound administration.[83] A very similar provision can be found in the Hungarian Competition Act that enables the Government to regard certain transactions on public interest grounds (particularly protecting workplaces or ensuring security of supply) of having national strategic importance.[84] These transactions are exempted under the mandatory notification system in Hungary. The modification of the Hungarian Competition Act was enacted at the end of 2013. In Israel, the Minister of Economy is authorised to exempt a merger from all or some provisions of the law, if he believes that it is necessary on the grounds of foreign policy or national security.[85]

Singapore operates a slightly different system from the above-mentioned examples, as the exemption does not apply from the beginning of the investigation (i.e. the exemption does not shield the merging parties from submitting an application to clear the merger). If the competition authority plans to make an unfavourable decision, the applicants who notified the merger to the competition authority for decision or, in the case of an investigation, the parties to the merger, may apply to the Minister for Trade and Industry ('Minister') the merger to be exempted from the merger provisions on the ground of any public interest consideration.[86] 'Public interest consideration' for the purposes of the Competition Act refers to 'national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe.'[87] A recent example includes the merger of *Greif International Holding B.V. & GEP Asia Holding Pte Ltd*. The merger concerned the creation of a joint venture company, Greif Eastern Packaging, in which the merging parties wanted to contribute their respective Singapore business in the manufacturing and selling of steel drums, bitumen drums and steel pails of various capacities. The competition authority wanted to prohibit the transaction, as its main concern was that the joint venture may substantially lessen competition in the supply of new large steel drums to Singapore, due to horizontal concentration between the two closest rivals in the market. The parties filed an application to the Minister and claimed that 'public interest' would be the 'wider economic progress and public benefits' that the joint venture would generate for the economy and society of Singapore. The Minister declined the parties' application for exemption on the basis that the grounds relied upon by the parties not fall within the existing definition of public interest considerations, which refers to matters of national or public security and defence.[88]

In other jurisdictions, like Serbia, exemption is also based on the law, while the exemption is granted by the competition authority or the relevant minister under certain circumstances. The competition act exempts companies performing activities in the public interest as well as official monetary institutions if the application of the

[83] Getting the deal through – Merger Control (2017) 126.

[84] Article 24/A of the Hungarian Competition Act.

[85] Getting the deal through – Merger Control (2017) 216.

[86] See Singapore's contribution to the OECD (Public interest considerations in merger control, 2016).

[87] Getting the deal through – Merger Control (2017), Singapore, 345.

[88] See Singapore's contribution to the OECD (Public interest considerations in merger control, 2016).

competition act could prevent them from performing activities in the public interest (i.e. from performing entrusted affairs). For instance, the competition agencies' report from 2009 points out that the competition authority rejected a merger notification regarding the acquisition of 51 per cent of the shares in the public Serbian petroleum company NIS owing to a lack of jurisdiction. The competition authority took the view that the Law on Confirming the Agreement in the Oil and Gas Sector, which required the Republic of Serbia to sell 51 per cent of the shares in NIS to the acquirer, constituted *lex specialis.* As a result, the competition authority did not have jurisdiction to assess this concentration.[89]

The most notable problem with this system is the lack of judicial review. Without the possibility to challenge the exemptions on court, the reasoning of these interventions remains untested. Hence, it is essential to provide sufficiently detailed reasoning to these exemptions or pieces of legislation, which clarify the underlying reasons and justify the application of public interest intervention. This is an essential part to avoid delivery of the bad message of intervening only for the sake of shielding the transaction from competition scrutiny. Moreover, providing sufficient reasoning serves legal certainty, which contributes keeping the economy desirable for investors.

3.2.2.3. Parallel procedures – Foreign investment regime

Mergers can also be assessed on public interest grounds, in separate and independent administrative procedure that goes parallel with the competition investigation. Even those jurisdictions that exclusively target competition-related goals in their competition assessment may subject the same transaction to public interest assessment. Out of the many possible scenarios, in this subsection we will primarily focus on the foreign investment regime.

This parallel procedure can be distinguished from the subsequent procedures described under the regulator model, as in this case, the scrutiny is not conducted by the regulator. When assessing the acquisition of a foreign investor, the EU Merger Working Group's survey points out that generally it is not the competition authority that is responsible for conducting the investigation, but political bodies (ministries).[90] Even though the paper lists the foreign investment regimes under the ministerial model, it is important to highlight that the foreign investment scrutiny is not always done by a Government or the ministry.[91]

---

89 Getting the deal through – Merger Control (2017), Serbia, 342.

90 Such a review is undertaken by relevant ministers, for example the Ministry for Employment and the Economy (FIN), Federal Ministry for Economic Affairs and Energy (GER), Ministry of Finance (FR), or Ministry of Treasury (PL). http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf, para 18.

91 Though it is the most common example, for instance, the Committee on Foreign Investment in the United States ("CFIUS") is chaired by the Department of the Treasury; in Australia it is the Treasurer of the Australian Government which examines proposals by foreign investors; a foreign investor seeking to invest in France is required to notify the Ministry of Economy, Finance and Employment; in Japan it is the Minister of Finance which has jurisdiction over foreign investment decisions.

Public interest considerations often play a role in the foreign investment regimes. Foreign investment regimes generally asses transactions from a different angle of that of Competition Law, e.g. assessing whether the foreign investment eliminates domestic competition, endangers security of supply or contains risk to public security. As a survey conducted by the EU Merger Working Group suggests, scrutiny of foreign investments is usually limited to strategic industries or companies.[92] Some would argue that foreign investment regimes can be used to support protectionist purposes.[93] For instance, as the French government was openly opposed to the *GE/Alstom* transaction, France has expanded its controls of foreign investments to energy supply, water supply, transport networks, electronic communication services and public health.[94] By doing so, the transaction has equally become a target of a foreign investment scrutiny. Due to the French States' involvement through the foreign investment regime, the deal was restructured to fit conditions set by the French government.[95]

The American Bar Association' Section of Antitrust Law recently released a report on foreign investment regimes around the world ('ABA Report').[96] The ABA report suggests[97] that there is an increasing number of large-scale international mergers that have been blocked or delayed due to the foreign investment regimes.

There are two interesting observations that this paper points out. First, as we could observe in the hard ministerial model, the more typical scenario is the clearance of an otherwise anti-competitive merger. In the foreign investment regime, however, we more often see the opposite: where the otherwise pro-competitive (or neutral) transaction is barred due to foreign investment scrutiny. Secondly and more interestingly, many examples raised by the ABA report come from developed countries. The ABA Report refers to transactions, including interim refusal of BHP Billiton's bid for Potash in Canada,[98] and the French government's intervention in the General Electric acquisition of Alstom.[99] The responsible agency in the US,

[92] Available at: http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf, para 18.

[93] See, for instance: Protectionism in M&A: A mixed picture, March 2015, Allen & Overy, http://www.allenovery.com/SiteCollectionDocuments/Protectionism%20in%20MA.pdf.

[94] In focus 'Protectionism' in M&A: A mixed picture, M&A Insights. Q1 2015, http://www.allenovery.com/SiteCollectionDocuments/Protectionism%20in%20MA%20A%20mixed%20picture.PDF.

[95] N. Petit: *State-Created Barriers to Exit? The Example of the Acquisition of Alstom by General Electric.* 2015. http://ssrn.com/abstract=2521378.

[96] American Bar Association, Section of Antitrust Law: Report of the Task Force on Foreign Investment Review (28 September 2015).

[97] ABA report 7.

[98] In 2010, the Australian BHP Billiton's (the world's largest fertilizer company) offer to acquire the Canadian Potash Corporation was blocked on the grounds that the sale of BHP Billiton would not provide a 'net benefit' to the country notwithstanding BHP's offer of undertakings in OECD: *Public interest considerations in merger control.* 2016. 14.

[99] After the publication of GE's initial offer to buy Alstom Energy, a new regulation was passed in France making foreign investment subject to ministerial authorisation. The deal was structured to fit conditions set by the French government. The merger was eventually cleared by the European

the CFIUS is also willing to make a firm stand if foreign undertakings are aiming to acquire US companies. This appeared to be the case in recent cases involving mergers with the participation of Chinese buyers.[100] It is also worth highlighting that contrary to the socio-cultural approach of developing countries, developed countries tend to prioritise considerations relating to strategic industries (i.e. national security – defence, security of supply – energy, plurality of media – media and broadcasting).

The result of the foreign investment assessment can easily block the whole deal to move forward, although the competition assessment and the foreign investment regime are not directly linked to each other. Archer Daniels Midland's failure to secure foreign investment approval for its bid for GrainCorp after clearing competition review in Australia[101] is a notable example from past years where competition and foreign investment investigation led to different outcomes. A very recent example from the US is Infineon's failed attempt to acquire Cree's Wolfspeed LED business. Publicly available information suggests that there are national security concerns behind Cree's cancellation of the deal.[102]

The ABA Report also revealed the substantial and procedural problems with parallel investigations. Therefore, many recommendations have been put forward. Parties to cross-border and multi-national mergers, acquisitions, joint ventures, and other transactions, and some reviewing agencies, have expressed an interest in fostering greater harmony, transparency, consistency, and predictability in conducting multiple reviews.[103] More precisely, i) creating more consistency in the timetables for reviews; ii) institutionalising communication with comparable agencies in other jurisdictions that review foreign investment; iii) more transparency with regard to the substantive criteria they apply; iv) encouraging the involvement of other entities (e.g. ICN, OECD) in seeking greater harmonization of foreign investment review among different jurisdictions.

In reality, it is worth highlighting that the number of cases in which governments have intervened and influenced deals on national security ground has been relatively small.

Commission (M. 7278 General Electric/Alstom), subject to remedies. In OECD: *Public interest considerations in merger control*. 2016. 13.

[100] See especially Shuanghui Holdings International Limited/ Smithfield, Anbang Insurance Group/ Waldorf Astoria hotel in New York City, ABA Report 10.

[101] The plan by Archer-Daniels-Midland Co., a US company to take over Australia's GrainCorp Ltd in 2013 was rejected by the Treasurer who noted that the proposal attracted concern from stakeholders and the broader community (Treasury, 2013) and determined that the acquisition was contrary to the national interest as there was not sufficient competition in grain handling following the deregulation of the industry five years earlier. In OECD: *Public interest considerations in merger control*. 2016. 14.

[102] See, for instance 'Cree cancels Wolfspeed deal with Infineon based on US government concerns' (22 February 2017), http://www.ledsmagazine.com/articles/2017/02/cree-cancels-wolfspeed-deal-with-infineon-based-on-us-government-concerns.html.

[103] ABA Report 10.

3.2.3. Possibilities to seek legal remedy

Ideally, all the other above-mentioned systems should provide a judicial review process for merging parties and interested third parties who are influenced/suffered damages by the decision based by public interest grounds. Possible trade-offs can be avoided if the process is followed by a full judicial review.

There are some models though where judicial review is not available. For instance, if the ministerial model takes a form of a piece of legislation, then there is generally no possibility for third parties to seek legal remedy.

However, there are several other models providing the possibility to seeking legal remedy. Taking the example of one of the jurisdictions where the responsible minister can overrule the competition authorities' decision, Germany is worth mentioning. The German Competition Law provides for the possibility of the so-called 'ministerial authorization'.[104] This means that companies, whose merger have been prohibited by the Bundeskartellamt ('BKart') may apply to the Federal Minister for Economic Affairs and Energy ('Minister') for authorization. The requirement for granting an authorization is that the restraint of competition in the particular case is outweighed by advantages to the economy as a whole resulting from the concentration, or that the concentration is justified by an overriding public interest. The survey conducted by the ECN Merger Working Group on public interest considerations underlines that *"in Germany, ministerial authorisations can be and have on some occasions been challenged in court. The judicial review of the procedure to be followed by the Ministry has been intense (and in one case also lead to the annulment of a ministerial authorisation and a part of the procedure had to be repeated). However, with regard to the interpretation of public interest grounds German law is generally understood to grant the minister a broad margin of appreciation"*.[105] The most recent example relates to Edeka's takeover of Kaiser's Tengelmann. The Bundeskartellamt aimed to block the merger as it was concerned that a takeover would further strengthen Edeka's market power with regard to producers. The ministerial authorization was preceded by broad discussions, including the advisory body to the BKart, the Monopolies Commission. The minister granted authorization to the deal, subject to the condition that Edeka agrees to safeguard the jobs of Kaiser Tengelmann's 16,000 workers for the next five years. Germany's Agriculture Minister, Christian Schmidt stated that whilst he respected the minister's decision, he believed that the takeover would give Edeka even more leverage with regard to negotiating prices with producers, putting them under even more pressure to produce cheaply.[106] Other companies

---

[104] See Germany's contribution to the OECD (Public interest considerations in merger control, 2016). Cases of ministerial authorisation being granted are rare. Since the introduction of merger control in 1973, a ministerial authorisation has only been granted without conditions in three cases and with conditions in six cases. In total, there have been only about 20 applications. See in Getting the deal through – Merger control (2017) 170.

[105] http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf. 4.

[106] http://www.dw.com/en/regulators-overruled-in-supermarket-takeover/a-19122420.

in the food retail sector (REWE, Normaand Markant) have appealed against the ministerial authorisation. In December 2016 the BKart cleared the divestment from EDEKA to REWE of 63 food retail outlets in Berlin and two outlets each in North Rhine-Westphalia and greater Munich. The BKart's assessment of the divestment followed after REWE had withdrawn its appeal against the ministerial authorisation and the relevant ministry had communicated that the conditions of the ministerial authorisation had been fulfilled.[107]

Very specific rules apply in those situations where the Member States violate the European Commission's exclusivity due to public interest purposes regarding to mergers having a community dimension. Due to the clear distinction between the jurisdiction of the European Commission and those of the Member States, the European Commission has an exclusive right to deal with concentrations with a community dimension (the "one-stop-shop" principle[108]). Article 21 (4) of the EUMR does, however, allow Member States to adopt, with regard to concentrations of an EU dimension, measures to protect certain interests other than competition, for as long as these measures are necessary and proportionate to their aim and are compatible with all aspects of Community Law.[109] As mentioned above, the three considerations are 'public security', 'plurality of the media' and 'prudential rules' that are regarded as compatible with EU law. Other considerations should be communicated to the European Commission, which assess the public interest consideration based on the general principles of the EU law. The European Commission is empowered to open infringement proceedings against national measures adopted in violation of Article 21 EUMR, pursuant to Article 258 of the Treaty on the Functioning of the European Union ("TFEU"). The European Commission's assessment is not only an empty threat. The *E.ON/Endesa*[110] case in the energy sector, which concerned the acquisition of Spain's electricity incumbent, involved a number of exchanges between the European Commission and Spain. Given the Spanish authorities' failure to comply with its decisions, the European Commission brought Spain before the European Court of Justice ('ECJ'), claiming that the broad discretion that national administrative authorities applied represented a serious threat to the free movement of capital. In March 2008, the ECJ concluded that Spain had failed to fulfil its obligations under the Treaty by not withdrawing the conditions as requested by the European Commission. A very similar intervention took place in the polish *Unicredit/ HVB merger,*[111] the Polish Treasury instructed Unicredit to sell its shares in the Polish

[107] See the BKArt's press release at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/08_12_2016_EDEKA_REWE_EN.pdf?__blob=publicationFile&v=3.

[108] See Articles 21 (2) and (3) of the EUMR.

[109] See the European Union's contribution to the OECD (Public interest considerations in merger control, 2016).

[110] Commission v Spain, C-196/07 [2008] ECR I-41.

[111] M.3894 Unicredit/HVB.

BPH, despite the Commission's approval of the merger.[112] The Commission launched an infringement procedure against Poland and concluded that Poland violated the free movement of capital and freedom of establishment rules. After this, the Polish government announced an agreement with Unicredit/HVB, allowing the merger of two Polish banks, subject to the divestment of almost half of BPH's branches and an agreement not to cut jobs at the merged bank until March 2008.[113]

4. Lack of empirical studies

One possible justification for the application of public interest considerations might be their positive effect on the market concerned and through that, the whole economy. For instance, given South Africa's high rate of unemployment, it is not surprising that the South African government is committing itself to rapidly accelerate the creation of employment opportunities.[114] It is very likely to be the reason that the impact of a proposed merger on employment has been the core public interest consideration and has received the greatest attention from the South African competition authorities.[115]

Some authors even point out that the most important issues regarding the justifiability of the public interest clause is whether the remedies imposed are effective.[116] Hence, it would be interesting to see how the intervention (or the lack of intervention) affects the macro-economy or the specific public interest that it aims to facilitate.

There are not many examples assessing the economic effect of the public interest interventions (or the lack of the interventions).[117] Therefore, one of the greatest shortfalls of these models is the lack of empirical evidence of the actual effect of the intervention. Without these empirical data, there is no actual evidence, and therefore concrete justification for the application of public interest considerations.

---

[112] EU Merger Control and the Public Interest, A Legal Mapping Report by the Lendület-HPOPs Research Group in Spring 2016, Hungarian Academy of Sciences, Centre for Social Sciences, 19.

[113] EU Merger Control and the Public Interest: A Legal Mapping Report by the Lendület-HPOPs Research Group in Spring 2016. Hungarian Academy of Sciences, Centre for Social Sciences, 19.

[114] J. Oxenham: Considerations before sub-saharan african competition jurisdictions with the quest for multi-jurisdcitional merger control certainty. *US–China Law Review*, Vol. 9, (2011) 218.

[115] Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10, at 21 *"Thus if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and the an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made."* Oxenham op. cit. 218.

[116] P. Beneke: Antitrust, Cheper Beer, And The First Global Brewery. *Developing Word Antitrust*, 3 June 2016.

[117] However, there are some examples to put forward. For instance, see T. Mandiriza et al.: An ex-post review of the Walmart/Massmart merger. *Working Paper*, CC2016/03. The paper evaluates the impact of the Massmart Supplier Development Fund which was established as a condition to the Wal-Mart /Massmart merger in 2012.

5. Conclusion

As the above examples suggest, there are surprisingly many jurisdictions around the globe which have considerations going beyond the traditional goals of merger control. Even those jurisdictions that take a firm position in focusing their merger control solely on competition criteria, witness attempts to put the inclusion of public interest considerations back to the agenda.[118]

Public interest considerations seem more frequent in developing countries, where socio-cultural reasons play a more important role in the merger assessment than in developed countries. However, examples show that developed countries also include public interest considerations in Competition Law. These considerations focus more on economic issues relating to industries like energy, media and finance.

The application of public interest considerations remains a challenge. One could argue that the application of public interest considerations is generally limited on a global scale, and are applied in exceptional circumstances. Some of the relevant cases certainly involve a one-in-a-generation situation (i.e. see the Lloyds/HBOS merger in the financial crisis) which might require very speedy solutions.[119] Even though cases invoking the application of public interest considerations are exceptional, and their number is limited (compared to the overall number of cases), it is worth underlining that these cases are very likely to have long-term effects, as they generally concern strategically important sectors, industries or undertakings. This feature keeps them in the spotlight even though the number of relevant cases is limited.[120]

As for the institutional design of enforcing public interest considerations, there is no universal solution on how to enforce public interest considerations in merger control, due to the special characteristic and political/historical background of the countries. The OECD discussion in 2016 confirmed that jurisdictions which have a public interest consideration applicable in Competition Law prefer a dual setting where the sectoral regulator or the political body channels the public interest angle into the process. This paper argues that the dual model has the clear advantage of relieving the competition authorities from political pressure. It is a great controversy though, that legal certainty and predictability might be better served by competition authorities (which might issue guidance or other soft law) than external figures (whose actions are not necessarily subject to judicial review).

---

[118] P. Feinstein GUNIGANTI: I fear the day. US FTC is asked to consider jobs. *GCR*, 3 February 2017. http://globalcompetitionreview.com/article/1080941/feinstein-%E2%80%9Ci-fear-the-day%E2%80%9D-us-ftc-is-asked-to-consider-jobs.

[119] GRAHAM (2013) op. cit. 406.

[120] *"[...]public interest based interventions that would be at odds with an economics-based competition assessment have generally been limited to a small number of cases that were characterised by exceptional circumstances"* http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf, para 20.