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SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

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More documentation related to this discussion can be found at: www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm

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SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

By the Secretariat

The Chair of Working Party No 3 (WP3), Mr **Frédéric Jenny**, opened the roundtable on public interest considerations in merger control, by highlighting that a number of jurisdictions include in their merger control regimes objectives which extend beyond the core economic goal of competition law, i.e. the achievement of total or consumer welfare. These secondary objectives are called "public interest considerations". The aim of the roundtable was to explore these considerations, how they are applied and by whom, and the relevant enforcement challenges for competition authorities.

The discussion focused on three main topics. The first part of the roundtable dealt with the definition of public interest considerations in merger control. The second part explored the various institutional settings in which public interest considerations are applied. The third part of the discussion addressed instances where competition authorities indirectly take public interest consideration into account in their merger assessment, sometimes without relying on a specific public interest provision.

The Chair introduced the two expert panellists: **Judge Dennis Davis**, President of the Competition Appeal Court of South Africa and **John Davies**, Partner at Freshfields Bruckhaus Deringer.

1. Definition of public interest considerations in merger control

Aranka Nagy, seconded to the OECD Secretariat, presented the Secretariat's background paper. She gave examples of public interest clauses in national laws, and explained that public interest is assessed by either the competition authority, which also conducts the substantive competition test (single authority model) or by another institution or body, like a sectoral regulator or a government department (dual responsibilities model). The different institutional settings lead to different enforcement challenges.

1.1 Debate regarding the inclusion of public interest considerations in merger control

The Chair opened the discussion pointing out that there is an ongoing debate about whether or not to include the concept of public interest in competition law, evidenced in examples from various jurisdictions. The Chair asked Judge Davis to set the scene for the discussion.

Judge Davis described public interest considerations in merger control in the 1998 South African competition act. The merger assessment framework includes specific public interest criteria. According to these criteria, when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on i) a particular industrial sector or region; ii) employment; iii) the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and iv) the ability of national industries to compete in international markets. Judge Davis indicated that these criteria reflect the historical, social and cultural background of South Africa and that, for instance, unemployment is especially high (30%) in the country, so protection of employment plays an important role in public policy.

Judge Davis explained that South Africa has chosen the single authority institutional model, i.e. the public interest test is entrusted to the competition bodies, to allow consistent application of the law and serve legal certainty.

Judge Davis then referred to the *Wal-Mart/Massmart* merger, which formed part of Wal-Mart's strategy to enter the African supermarket market. The merger did not raise any competition problems. The main concerns of the case related to public interest considerations. It was argued that the transaction could have led to job redundancies, an erosion of the trade union's rights, and, in particular, could have had a potentially harmful effect on small and medium sized suppliers owned by historically disadvantaged people. The merger was authorised, subject to the condition that no merger-specific redundancies could take place for two years, and that Wal-Mart would establish a development fund to assist, in money and skills, local producers to provide products to Wal-Mart. According to Judge Davis, the most difficult part in a case is to evaluate public interest considerations, and to measure public policy goals against one other. In the Wal-Mart/Massmart case the Competition Appeal Court asked for expert opinions to reach its assessment.

Judge Davis submitted that the South African system manages to successfully integrate the questions of public interest into the standard merger assessment weighing available evidence, and crafting appropriate remedies. He emphasised the importance of the guidelines recently released by the Competition Commission of South Africa, which adopt a five-step approach to determine the likely effect of a merger on public interest through an assessment of (i) likely effects on public interest; (ii) merger specificity of effects; (iii) whether effects are substantial; (iv) whether the parties can show positive effects on the public interest; and (v) available remedies. Judge Davis concluded that the mission of competition law is to ensure a more competitive process over the long term, and it serves the legitimacy of the system if competition law benefits the citizenry of that specific country as a whole.

The **Chair** turned to those jurisdictions which include the concept of public interest in their competition law. The Chair explained that some jurisdictions use a broad concept, while others have a narrow definition, or a very specific list of public interest considerations. An example of this latter approach is the United Kingdom (UK), where public interest grounds allowing intervention in mergers by the Secretary of State (SoS) are specified in the 2002 Enterprise Act (Act). The Chair asked the UK delegation to specify the criteria that allow the SoS to intervene and clarify whether the UK list of public interest considerations is subject to additions.

The delegates from the **UK** explained the background of introducing public interest in the law. Prior to the entry into force of the Enterprise Act, mergers in the UK were reviewed under a broad public interest test, which included competition considerations. With the adoption of the Act in 2002, two significant changes took place. Firstly, the primacy of a competition-based test was stated. Secondly, a list of public interest considerations that could be taken into account in merger assessment was included in the act.

The UK merger control regime allows for intervention in mergers by the SoS on national security and media plurality grounds; also, there is a safeguard procedure, under which ministers can give notice of an additional public interest ground, if it happens to arise in a particular case, and seek the approval of the parliament to use it. The UK delegate explained that public interest grounds are not often relied upon: since 2002, the UK has had six national security cases, three media plurality cases, and one case under the safeguard procedure (i.e. stability of the UK financial system). The public interest consideration under the safeguard procedure (stability of the UK financial system) was relied on in the context of the *Lloyds/HBOS* merger during the peak of the financial crisis. In that case, the SoS decided that the merger should be allowed and not be referred for further investigation to safeguard the stability of the UK financial system. The UK delegate also mentioned the *BSkyB/ITV* merger, where plurality of media considerations were raised, but ultimately rejected.

The UK added that the roles of the Competition and Markets Authority (CMA) and the SoS are clearly delineated in the process followed for a public interest intervention in the UK merger control system. CMA will apply the competition test and the SoS may intervene if a merger has an adverse effect on the public interest. The delegate also pointed out that the process to introduce new public interest grounds in the law is transparent and subject to parliamentary and public scrutiny.

The **Chair** then turned to the Netherlands, where, if the Authority for Consumers and Markets (ACM) blocks a merger, the legislation provides merging parties with the option to file a request with the Minister of Economic Affairs (Minister) to clear the merger. Unlike in the UK, the criteria on which the Minister might base this decision are not pre-specified.

The delegate from the **Netherlands** mentioned that merging parties may file a request to clear the merger which has been blocked by the ACM within four weeks from ACM's decision. The Minister can clear the merger based on an assessment that certain public interests benefitted by the merger outweigh the impediment to competition. The Competition Act does not specify what can be considered as a public interest, or how the assessment by the Minister should take place. Also, Dutch legislation does not allow the Minister, or any other public entity, to block a merger that has been cleared by ACM. The debate on whether or not to include the concept of public interest in the law has heated up recently in the Netherlands. In mergers in the health care market parties increasingly put forward public interest arguments. As Dutch law does not specify what public interest arguments may be, the ACM finds it difficult to assess them without impacting the credibility of the agency. Netherlands is of the opinion that a specified list of factors in the law would serve legal certainty and provide procedural legitimacy to the ACM.

The delegate from the **Federal Trade Commission** (FTC) then explained that United States (US) agencies do not consider public interest factors beyond the interest in the enforcement of the antitrust laws, and believe that enforcement decisions should be based solely on the competitive effects and consumer benefits of the transaction under review. The inclusion of other public interest goals might result in the distortion of competition, higher prices, and create an obstacle for international co-operation in merger control. Reaching consistent outcomes in multinational mergers is already challenging, and the addition of another set of variables could complicate the task even more. The US recognises that there may be appropriate public policy considerations to be taken into account; however competition agencies, whose expertise is limited to competition, ought not to examine public policy considerations, which should instead be assessed by sectoral regulators. The US **Department of Justice** (DOJ) added that, while the DOJ does not consider other factors outside of competition either, it coordinates closely with sectoral regulators, in particular in the telecommunication sector. This coordination covers sharing of evidence, information and analyses and is very beneficial, as sectoral regulators can help the DOJ understand the sector better.

In response to a question by the Chair, the FTC mentioned that there has been a discussion on adding a national security provision in the US competition law. The US agencies' position is that competition to a large extent addresses appropriately any concerns including those related to public interest, and they recently published a joint statement on mergers in the defence industry to make their approach clear.

The **Chair** turned to the Business and Industry Advisory Committee (BIAC) and John Davies, to explore the business community's and private practitioners' views on this topic.

BIAC highlighted that merger reviews should be focussed on core competition law principles, such as competitive pricing as well as static and dynamic efficiencies. Introducing public interest considerations into the merger review analysis is potentially counterproductive. The reason is that businesses contemplating transactions require substantive and procedural certainty, as well as transparency in the merger review process. Yet, the introduction of public interest considerations in merger control will likely lead to uncertainty and inconsistent decisions, especially in multi-jurisdictional cases, and this can have a significant chilling effect on investment decisions with an adverse impact on the level of economic investment, activity and growth. BIAC expressed the view that if however governments were to decide that public interest considerations should be introduced in merger review, notwithstanding risks to legal certainty, the assessment should be done by a separate entity, in a manner that ensures transparency and predictability, and freedom from political influence.

John Davies then shared his perspective based on his experience in leading multi-jurisdictional transactions. He outlined some public interest aspects associated with merger activity, such as the effect on national security, the effect on businesses of national strategic importance, and the impact on technical capabilities, jobs and exports. However, mergers can drive efficiency, productivity and technical innovation. Public interest considerations create risks of a) lack of legal certainty and predictability, b) increased complexity and c) questions as to whether the concerns are merger specific. Regarding certainty and predictability, John Davies pointed out that public interest goals are often expressed in broad terms, and, so far, there are few examples of soft law, guidelines and case law. Therefore, there is unpredictability in application, exacerbated by the fact that public interest goals can be subject to changing governmental objectives. Moreover, there is often a lack of effective judicial review. Regarding complexity, public interest goals are highly differentiated, thus they generate procedural and substantive complexity for parties and can lead to different decisions on the same transaction in different countries. As for merger specificity, there is a risk that the concerns and remedies to address them do not relate to the specific merger. He also offered some practical examples of the latter concerns:

- The Australian foreign investment review board has the power to restrict or prohibit foreign investments which are deemed to be contrary to the national interest. In the *Archer-Daniels-Midland* case of 2013, even though the competition authority, the Australian Competition and Consumer Commission (ACCC), had concluded that the transaction involving grain markets did not give rise to competition concerns, the Treasurer blocked the transaction saying that it gave rise to a lack of sufficient competition in the grain handling industry. According to John Davies, that is an example of unpredictability.
- In China, in the *InBev/Busch* merger in the brewing sector, the Ministry of Commerce (MOFCOM) imposed a condition requiring the merged party to obtain its approval before acquiring new interests or increasing existing interests in certain Chinese companies. This was not a merger specific concern but rather a concern relating to future transactions that might give rise to problems, and was effectively imposing an additional notification obligation on that particular entity.
- The 2011 Ecuadorian law requires the competition authority to consider the degree of employees' participation in the company and whether that should be broader. This provision seems to relate to broader equity ownership as opposed to a merger specifically.
- John Davies emphasised the importance of the new South African guidelines, which have been implemented in the last few months, allowing parties to predict to an extent the way in which the public interest test will be applied in South Africa. However, in the *Afgri/AgriGroupe* merger the Competition Commission concluded that there was no public interest concern, but the Competition Tribunal amended the clearance decision to impose terms to the approval of the transaction, thus reaching a different outcome from the one that had previously been reached by the Competition Commission.

- Under the US Exon-Florio provision, the President has the power to block foreign acquisitions where there is credible evidence that the foreign interest exercising control might take action that threatens to impair the national security. John Davies referred to a case (*Ralls Corporation*) involving the acquisition of a wind farm by a Chinese company, which was blocked because it was located geographically close to a naval weapons systems training facility.

- The European Commission focuses its merger review on competition factors only. However, under Article 21 (4) of the European merger regulation Member States can take measures at national level to protect public security, plurality of the media and prudential rules. Such national measures can be compatible with EU law, as long as they are proportionate and non-discriminatory. This system allows greater control of a potential application of public interest and increases predictability. The European Commission watches over the application of this provision and has intervened on a number of occasions in relation to actions by certain countries, like Portugal, Poland and Italy.

John Davies concluded that the national rules for considering public interest factors in merger control vary considerably across the globe and that this causes considerable complexity. Public interest goals are generally broadly defined and, absent clear guidelines on their application, can create uncertainty and unpredictability. Businesses would welcome mechanisms to minimise these concerns, such as soft law (for instance the South African guidelines) or imposing limitations on the discretion to consider and accept public interest grounds in merger assessment. Merger activity would benefit greatly from such steps being adopted more widely.

1.2 General public interest considerations and their interpretation

Moving forward, the **Chair** turned to other jurisdictions to explore the different ways in which public interest considerations are included in their law. Firstly, the Chair asked New Zealand to explain their public interest framework.

The delegate from **New Zealand** explained that under the Competition Act the Commerce Commission ("Commission") can consider the public benefit resulting from a transaction, when parties ask for the authorisation of the deal claiming offsetting public benefits. Public benefits can include efficiency considerations under a total welfare standard as well as broader public considerations. Parties do not apply for authorisation claiming public benefit frequently: since 2001 there have only been four applications, three of which were approved and one declined.

When the Commission receives an authorisation application, it must first assess whether the merger would likely substantially lessen competition. If the Commission is satisfied that the merger would not likely have that effect, then it must clear the merger. If it is not satisfied and cannot grant clearance, then it must apply the public benefit test to determine whether to authorise the merger. When applying the test, the Commission must quantify detriments and benefits linked to the transaction to the extent possible, rather than rely solely on a qualitative assessment. The detriments considered are potential harm in terms of allocative, productive and dynamic efficiency, and the benefits relate to efficiency gains. New Zealand courts have clarified that public benefits can go beyond efficiencies, however broader public benefit has not so far been applied in a merger case. Once all transaction-specific benefits and detriments have been identified, the Commission assesses, where practicable, the likely value or range of values of those benefits and detriments, often involving an estimate of prices post-merger. The Commission balances benefits and detriments and, if satisfied that the merger will likely result in a net public benefit, it must authorise the merger.

New Zealand briefly explained a recent example, the *Cavalier* merger. In 2014 Cavalier Wool Holdings Limited (Cavalier) submitted an application to the Commission, seeking authorisation for Cavalier to acquire control over New Zealand Wool Services International Limited's (NZWSI) wool scouring and wool grease business and assets (whether by way of acquiring shares in the wool scouring subsidiaries, or assets, or both). After determining that the acquisition would likely cause a substantial lessening of competition, the Commission concluded that the benefits would be likely to outweigh the detriments and cleared the merger.

Chinese Taipei then explained that their competition law specifies that the Fair Trade Commission (FTC) may not prohibit a merger if the overall economic benefit of the merger outweighs the competition harm. The general rule for merger review is the trade-off between anticompetitive effects and economic benefits. If the anticompetitive effects are higher than the economic benefits, the FTC will prohibit the merger. The FTC first assesses the anticompetitive effects (e.g. the potential price effect of the merger), before the economic benefits (e.g. economic efficiency due to cost reductions of merger; consumers' interests; one of the merging parties is a failing firm). The delegated explained the *Taiwain Depository and Cleaning Corporation ('TDCC')/Taiwan Integrated Shareholder Service Company ('TISSC')* merger on shareholders' electronic voting platform systems. The merger would have resulted in a monopoly: one of the merging parties accounted for 92% of the market and the other for the remaining 8%. The FTC consulted with the Financial Supervisory Commission, which considered that the merger would help achieve financial security targets through a safer voting platform, and that there existed sufficient price supervision mechanisms to prevent post-merger price increases. Therefore, the FTC concluded that the overall economic benefits would be greater than the competition harm and allowed the merger.

1.3 Specific public interest considerations and their interpretation

The **Chair** turned to jurisdictions that have specific public interest clauses. The Chair first called the EU, to comment on John Davies' presentation and discuss relevant case examples (for instance the *News Corp*/*BSKYB* case and the *E.ON/Endesa* cases), to provide a view on how the system works between the European Commission and the national authorities.

The delegate from the **European Commission** stressed that the objective of the European merger regulation (EUMR) is to ensure that competition is not distorted and that the EU internal market is preserved. When reviewing a transaction falling within its exclusive competence, the European Commission only assesses effects on competition. Article 21 of the EUMR allows Member States to adopt, with regard to concentrations of an EU dimension, measures to protect certain interests other than competition, as long as these measures are necessary and proportionate to their aim and compatible with Community law. Article 21 EUMR distinguishes between "recognised interests" (all of which are considered prima facie legitimate), namely security of supply, plurality of the media, prudential rules, and "other public interests", which require ex ante review by the Commission.

In the *News Corp/BSkyB* case the Commission had cleared the transaction, albeit with the clarification that its decision was without prejudice to the UK's review of the deal in accordance with its rules on media plurality. The transaction was finally prohibited by the UK authorities on the basis of the media plurality rules. The Commission clarified that this was a rare case. The *E.ON/Endesa* case in the energy sector, which concerned the acquisition of Spain's electricity incumbent, involved a number of exchanges between the Commission and Spain. Finally, the Commission brought Spain before the European Court of Justice (ECJ), requesting the strict application of the EUMR. The ECJ concluded that Spain had failed to fulfil its obligations under the Treaty, and Spain withdrew the harmful conditions.

Then, **Singapore** described their system. The substantive test for merger control is significant lessening of competition, but the law also details specific public interest considerations that can apply in merger control. The Competition Commission of Singapore (CCS) can only assess competition factors, while public interest is assessed by the Minister of Trade and Industry (Minister), so the institutional setting is one of dual responsibilities. Merging parties may apply to the Minister to clear the merger on public interest grounds. Under the Competition Act, public interest considerations are national or public security, defence and such other considerations as the Minister may, by order published in the gazette, prescribe. Therefore, the Singapore regime has an open list of public interest considerations, but there have not been instances where the Minister prescribed a public interest consideration which was not in the original list. The most recent example of a merger where public interest considerations were relied upon in Singapore is the *Grief International Holding/GEP Asia Holdings* deal, which concerned the creation of a joint venture company ("JV"). The CCS proposed to block the transaction as it was concerned that the JV may lessen competition in the supply of new large steel drums to Singapore, as the JV parties were close rivals in the market. The merging parties appealed to the Minister claiming that the JV would generate wider economic progress and public benefits for the Singapore economy and society. The Minister declined the parties' application for exemption on the basis that the grounds put forward did not fall within the existing list of public interest considerations, which only covers national or public security and defence. In the meantime, new information came to light which mitigated the competition concerns. Therefore, irrespectively from the Minister's procedure, the CCS concluded that the creation of the JV would not lead to a significant lessening of competition.

2. Institutional design

The second part of the discussion explored the various institutional settings to apply public interest considerations.

2.1 Enforcement challenges in the single authority model

First, the **Chair** called South Africa, which has a single authority model. In this model, the competition authority is entrusted to conduct the public interest test in merger review, regardless of the sector or industry concerned. The Chair asked the South African delegation to elaborate on its recent guidelines on the assessment of public interest provisions in merger regulation and whether they increase legal certainty and predictability regarding the reach of public interest considerations.

The delegate from **South Africa** confirmed that the guidelines provide detailed information on how the Competition Commission and the Tribunal evaluate public interest factors stated in the Competition Act. As mentioned by Judge Davis, the guidelines set forth a 5-step-analysis according to which the competition bodies should:

i) determine the likely effect of the transaction on the public interest

ii) determine whether the alleged effect on a specific public interest is a result of that merger

iii) determine whether these effects are substantial

iv) consider whether the merging parties can show a positive effect on the particular public interest

v) consider possible remedies to address any likely negative effect on the public interest.

The guidelines include information on what competition entities will request and how they approach every public interest factor listed in the law (like employment, the impact on a particular industrial sector and region, etc.), so they provide clarity for practitioners and businesses and advance the conceptual debate on this matter. The guidelines are public, available in the government gazette of South Africa and also on the competition agency's website. Between 2002 and 2016, the Competition Commission reviewed around 4500 transactions, out of which 247 were approved subject to conditions. Out of the 247 cases, 184 specifically addressed public interest concerns.

2.2 Enforcement challenges in the dual responsibilities model

The **Chair** turned to jurisdictions which have a dual institutional setting, in which the competition authorities conduct the standard competition assessment, and public interest considerations are assessed by a sectoral regulator or other decision-making body. The Chair first asked Australia to explain how agencies co-operate in competition cases involving public interest in Australia.

The delegate from **Australia** clarified that there are three decision making bodies that may review a merger in Australia: the Australian Competition and Consumer Commission (ACCC), the Australian Competition Tribunal (Tribunal) and, in limited circumstances, the Treasurer. Public interest considerations can only be assessed by the Tribunal and the Treasurer:

- The ACCC assesses consumer welfare and does not take into account public interest considerations: the test applied by the ACCC is whether a merger is likely to substantially lessen competition.

- Either as an alternative or additionally, parties may apply for authorisation from the Tribunal, which, if granted, provides statutory protection for a merger. This option has been available since 2007. The Tribunal considers whether a merger would lead to such a benefit to the public that it should be allowed. The Tribunal's approach is a modified total welfare test that balances the likely benefits to consumers, shareholders and producers and the detriments of a merger.

- Separately, in the case of acquisitions by foreign entities that exceed certain thresholds and necessitate approval, the Treasurer has the ability to make orders prohibiting a merger if it is considered to be contrary to the national interest. In this context 'national interest' is a general consideration which can include both economic and non-economic factors. Therefore, the Treasurer's role is limited to foreign investment and foreign takeovers and acquisitions.

The delegate from Australia added that the Tribunal interprets the concept of public interest very broadly and has been interpreted to be anything of value to the public, including efficiency and progress. The legislation requires consideration of the following factors: the increasing real value of exports, the substitution of domestic production for imports and the general international competitiveness of Australian industry.

The ACCC retains a statutory role of assisting the Tribunal in relation to merger authorisation applications. This role includes preparing a report for the Tribunal in relation to any matters specified by the presiding member of the Tribunal, and in relation to any matter the ACCC considers relevant to the application. The ACCC also assists the Tribunal by calling witnesses, reporting on statements of fact, examining or cross examining witnesses and making submissions to the Tribunal on issues relevant to the application.

There have only been three applications for authorisation of a merger from the Tribunal on public interest grounds since 2007 and only one application (the *AGL/Macquarie Generation* merger) has been heard all the way through to a decision. AGL Energy (a publicly listed Australian company, the largest electricity retailer in the state of New South Wales) applied to the Tribunal for authorisation to acquire the assets of Macquarie Generation (a State-owned electricity generator, the largest base load generator). AGL's application for authorisation followed an announcement by the ACCC that it would oppose the acquisition on the basis that it was likely to substantially lessening competition. The Tribunal was satisfied that the acquisition was likely to result in significant benefits to the public and granted authorisation to AGL subject to conditions.

The Chair asked Germany to comment on a recent case, the *EDEKA*/*Tengelmann* merger, where the Federal Minister for Economic Affairs and Energy ("Minister") authorised the merger, previously prohibited by the Bundeskartellamt.

Germany pointed out that the Bundeskartellamt conducts its merger analysis only on competition grounds. Companies can apply to the Minister for authorisation of a merger that has been prohibited by the Bundeskartellamt claiming public interest grounds. The Minister can authorise the merger if the restraint of competition in the particular case is outweighed by advantages to the economy as a whole resulting from the merger, or the merger is justified by an overriding public interest. German law has no list of possible public interest considerations, which provides the Minister broad room for manoeuvre. However, the law explicitly states that authorisation should be granted under exceptional circumstances only. Since the inception of the merger regime in Germany in 1973, only 22 undertakings have applied for such an authorisation. In six cases the application was denied, and in seven cases the application was withdrawn. Only in nine cases was authorisation granted: in one case it was a partial authorisation, in five cases the authorisation was granted under conditions and obligations, and in just three cases the ministerial authorisation was an unconditional approval.

In the *EDEKA / Kaiser's Tengelmann* a case the Minister decided to grant a ministerial authorisation with conditions for a merger in the German food retail sector which had been prohibited by the Bundeskartellamt. EDEKA, the leading supermarket chain in Germany, proposed to acquire 5 450 Kaiser's Tengelmann outlets. The food retail market in Germany is very concentrated: four companies together hold a market share of about 85%. The Bundeskartellamt decided to block the merger as firstly, it would have resulted in a limited choice for consumers on a local basis, and secondly, it could have led to further concentration on the demand side in the food procurement market. The German Monopolies Commission had advised the Minister not to clear the deal. Nevertheless, ministerial authorisation was granted and the merger was cleared under conditions based on welfare considerations like safeguarding jobs and the protection of workers' rights (collective agreements and operational co-determination). The case was under judicial review, as some companies challenged the ministerial authorisation in the high Regional Court in Düsseldorf[1]. This case has sparked intense discussion in Germany. The dual responsibilities model allowed the competition agency to focus its assessment on competition issues only, and left the broader objectives to the elected Minister.

The **Chair** turned to Norway which abolished the provision that allowed the government to intervene in mergers on public interest grounds. The Chair asked Norway to explain the context in which the repeal of the provision took place.

1 After all these companies withdrew their appeal against the ministerial authorisation, it has become final and effective.

The delegate from **Norway** explained that the possibility to overturn the competition authority's decision has existed in Norwegian competition law since its enactment in 2004. In line with Section 21 in the Competition Act, the Norwegian government may approve a concentration that the Norwegian Competition Authority (NCA) has blocked in cases of principle or interests of major significance to society. This option has been used very rarely, in only two cases since 2004, once in the electricity production and once in the agricultural sector.

Recently, the Competition Act was amended. An independent competition complaints board was established, empowered to hear complaints against merger decisions as well as cartel and abuse cases. Also, the possibility to reverse the NCA's decisions based on public interest considerations was abolished. It was argued that public interest considerations are better served through general regulations rather than intervention in individual cases as such interventions can be influenced by lobbying. The amendments were adopted by the Norwegian Parliament in 2016, and will be implemented as of 1 January 2017.

The Portuguese Competition Authority (PCA) conducts its merger assessment solely on competition considerations, and does not take into account public interest considerations. However, parties can file an appeal alleging public interest against a PCA decision prohibiting a merger, before the Council of Ministers. The Council of Ministers can allow the merger if fundamental strategic interests of the national economy specifically outweigh the detriment to competition stemming from the merger, so the public interest test is quite broad. A clearance decision cannot however be appealed.

This provision was inspired by the German system and was introduced in 2003. In 2014, three important amendments were adopted to improve the procedure:

- the decision to approve the merger is now taken by the Council of Ministers, and not only by the Ministry of Economy as established in 2003
- there is an obligation to publish the decision in the Official Journal, which was not foreseen in 2003
- the decision to reverse the PCA's prohibition must be accompanied by conditions to mitigate the merger's negative impact on competition, which, under the 2003 law, was only optional.

There was only been one case where a merger was cleared under the appeal procedure, in 2006, regarding the merger of two highway concessionaire companies (*BRISA/AEA*). In Portugal there are two parallel competing highways, connecting Lisbon and Porto. The concessionaires of the two highways proposed to merge. The PCA prohibited the merger, as it was likely to create or strengthen a dominant position in the highway markets between Lisbon and Leiria and Lisbon and Porto and price and quality competition would be eliminated. An appeal to the Minister of Economy was filed and he authorised the merger with conditions. The main factors considered by the Minister were:

- the relevance of the company, BRISA, to the national economy (BRISA was one of the biggest Portuguese firms, accounting for 0.4% of the GDP and one of the main tax payers in Portugal)
- the important contribution of BRISA in Portugal in terms of research and development and innovative services
- the size and experience of firms at national level, and their ability to successfully enter international highway markets
- the need to increase scale to be competitive in increasingly consolidated international markets
- the market share of the merged firm would be around 55%, which is below what similar firms have in other European Union Member States.

The delegate from Portugal emphasised that although the appeal can be perceived as weakening the PCA's independence, it can also be seen as allowing the clear separation of responsibilities between the PCA and the government: it allows PCA to assess mergers solely on competition criteria, and the Council of Ministers to evaluate the fundamental strategic interests of the national economy.

3. Other considerations indirectly related to public interest in merger control

In the third part of the discussion the roundtable explored some instances where competition authorities indirectly take into account public interest considerations in their merger assessment. The **Chair** asked Canada to describe its efficiency defence.

The Canadian Competition Act has a specific efficiencies defence, under which an otherwise anti-competitive merger will be allowed if the parties convincingly show that the merger will bring about efficiency gains which outweigh and offset the merger's anti-competitive effects, and that these efficiencies cannot be achieved through merger remedies. The delegate from Canada gave two examples, the *Superior Propane* and *Tervita* cases, where mergers, which were found likely to cause a substantial lessening of competition and result in or maintain domestic monopolies, were allowed to proceed on the basis of the efficiencies defence.

With regards to the application of the efficiency defence, the Competition Act did not specify the approach to wealth transfer between consumers and producers brought about by the anti-competitive merger. The Canadian courts have ruled on and clarified the treatment of the redistribution of income. The *Superior Propane* case in the early 2000s was the first challenged merger in Canada which was allowed on the basis of the efficiencies defence. The Tribunal initially allowed the merger to proceed on the basis of a successful efficiencies defence using a total surplus standard. The Federal Court of Appeal used a balancing weights approach which assigns a particular weight or value to the loss in consumer surplus relative to the gain in producer surplus, and sent the matter back to the Tribunal for redetermination. On redetermination, the Tribunal again allowed the merger to proceed, and indicated that redistribution effects can legitimately be considered neutral in some instances, but not in others. Fairness and equity require complete data on socio-economic profiles of consumers and shareholders of producers, to know whether the redistributive effects are socially neutral, positive or adverse.

The welfare standard was considered by the courts again more recently in *Tervita*. In this case the Tribunal stated that the total surplus standard should be the starting point, but that the Tribunal would also determine whether there are likely to be socially adverse effects associated with the merger, if such arguments are put forth by the Commissioner and if so, it would be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects. The Tribunal also noted, however, that it expects wealth transfer to be treated as neutral in most cases. Merging parties appealed the case before the Supreme Court of Canada, which confirmed that there was a substantial lessening of competition as a result of the transaction but that the efficiencies outweighed the anticompetitive effects and allowed the appeal. The Supreme Court also provided additional guidance on efficiencies, directing the Competition Bureau to quantify anticompetitive effects wherever reasonably possible, in cases where an efficiencies defence is raised by the parties, so that these quantified effects can be compared to the quantified efficiency claims put forward by the parties.

Belgium explained that it had a procedure similar to the Portuguese appeal procedure since 1991, which was never used and was subsequently abolished in 2013 in spite of initial resistance from the trade unions. The abolishment was based on a recommendation by the OECD.

BIAC added that a solid competition framework may help in itself to achieve sustainable development through poverty alleviation, job creation and economic growth. BIAC is of the position that the benefits of competition, such as lower prices, greater efficiency and innovation can lead to sustained and sustainable economic growth. The long-term consequences of merger activity may include economic growth through more competitiveness of the relevant business at issue, which in turn will create more jobs in the future.

4. Concluding remarks

The **Chair** briefly summarised the main findings of the roundtable.

Competition authorities tend to prefer to focus on the core economic goals of competition and not assess public interest considerations in merger review. The discussion showed that competition law reflects the historical and political background, and economic development of each jurisdiction. Therefore, the concept of public interest varies considerably from one jurisdiction to the other. There is wide diversity of what jurisdictions consider to be public interest, starting from a total welfare criteria to economic and non-economic (e.g. plurality of media, public security) considerations.

The concept of public interest differs from one legal system to the other: some jurisdictions use a very precise and narrow definition, while others use an open list of public interest considerations, or a broader, more flexible definition. The discussion revealed many examples where there was no exact definition of what public interest is, and, therefore, the interpretation was left to the relevant authority.

Equally, the institutional settings in which public interest is applied differ; in some jurisdictions the competition authority assesses the public interest, while in others a sectoral regulator or a government department are empowered to do so. Although there is no ideal model, country contributions from around the table indicated that there was no particular appetite on the part of competition authorities to take on this task.

From the perspective of businesses and private practitioners, the most important factors are predictability, decreasing the level of complexity and guaranteeing merger specificity. As far as predictability is concerned, there were attempts in many jurisdictions to increase it, one of the most notable examples being the recently published guidelines in South Africa. As for complexity, the Chair pointed out the fact that convergence cannot be envisaged in this field, as complexity stems from the differences in the legal systems of jurisdictions. In relation to merger specificity, the roundtable showed that several jurisdictions aim to assess harm to public interest resulting from the specific merger and accept merger-specific remedies to counter the harm.