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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Summaries of contributions --

14-15 June 2016

This document contains summaries of contributions received for the discussion on Public Interest Considerations in Merger Control (123rd Meeting of Working Party No 3 on Co-operation and Enforcement on 14-15 June 2016.

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

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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- *Summaries of Contributions* --

This document contains summaries of the various written contributions received for the discussion on Public Interest Considerations in Merger Control (123rd Meeting of Working Party No 3 on Co-operation and Enforcement, 14-15 June 2016). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the cotribution. Summaries by the OECD Secretariat are indicated by an *.

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AUSTRALIA

In Australia there are certain circumstances in which public interest factors may be considered in merger control under the competition law and/or under the foreign investment and banking laws. The nature and consideration of these factors vary according to the law administered by each decision making body.

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 are only applicable to the tests determined by the Tribunal and the Treasurer.

Each of these bodies has a separate and independent role. The ACCC and the Tribunal are both first instance decision making bodies responsible for undertaking competition assessments but with different tests to be applied. The Treasurer's role in reviewing mergers is in relation to acquisitions by foreign entities that exceed certain thresholds, or any merger involving a deposit taking institution (i.e. a bank).

The test applied by the ACCC is whether a merger is likely to substantially lessen competition in breach of section 50 of the Competition & Consumer Act 2010. This is effectively a consumer welfare standard model and does not take into account any public interest considerations.

The test applied by the Tribunal considers whether a merger would lead to such a benefit to the public that it should be allowed to occur. The Tribunal's approach has been to apply a modified total welfare standard that balances the likely benefits to consumers, shareholders and producers and the detriments of a merger. While the Tribunal may consider anything of value to the community as a benefit, in most cases the Tribunal has focused on economic considerations.

The test applied by the Treasurer is whether an acquisition by a foreign entity is in the national interest. In this context 'national interest' is a general consideration which can include both economic and non-economic factors. The powers of the Treasurer operate independently of the merger review processes conducted by the ACCC and the Tribunal.

BIAC *

BIAC believes that merger reviews should be focused on core competition law principles such as competitive pricing as well as static and dynamic efficiency, including innovation. A merger review based on these principles generally promotes public interest considerations such as employment and equity, because strengthening the financial and market position of businesses can ensure enhanced job security and productivity in the long term.

According to BIAC, introducing public interest considerations into the merger review analysis is unnecessary and potentially counter-productive. 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.

If public interest considerations are to be taken into account independently from the core competition analysis, BIAC recommends a specifically identified and closed list of public interest grounds to be taken into consideration, which will be examined secondary to the primary step of merger review focused on competition law principles.

If public interest considerations are to be introduced in merger review notwithstanding their concerns, BIAC is of the view that this should be done by a separate entity and in a manner that supports the principles of transparency and predictability and in a manner that is, to the greatest extent possible, free from political interference.

CANADA

In reviewing mergers under the Competition Act (the "Act") the Competition Bureau (the "Bureau") focusses on what the Secretariat describes as the core economic goal of competition law – namely, considering a merger's effects on economic welfare and efficiency. The Commissioner of Competition (the "Commissioner") is responsible for the administration and enforcement of the Act. In carrying out his mandate, the courts and tribunals have recognized that the Commissioner has a duty to act in good faith in carrying out his "public interest" mandate as defined by the Act. In this manner, the Commissioner administers the merger provisions of the Act in accordance with the public interests underlying competition law. However, broader public interest considerations are taken into account by other federal agencies that have concurrent or overriding jurisdiction to review mergers in Canada, consistent with their respective mandates and legislation. Such reviews occur in respect of foreign acquisitions of Canadian businesses and certain regulated sectors, such as finance, transportation, telecommunications and broadcasting.

In merger review, broader public interests may be a consideration in assessing both the effects of a proposed transaction and the efficiencies that may be realized by the proposed transaction. For example, if innovation in a life-saving treatment or drug would be negatively affected, the public interest in ensuring such treatments are available would be part of the assessment of the non-price effects of the proposed transaction and may inform the exercise of the Commissioner's enforcement discretion of whether to challenge a proposed transaction. The Act also sets out a specific efficiencies defence that applies to mergers that could be interpreted as giving rise to certain public interest considerations. Generally speaking, the efficiencies defence requires the Competition Tribunal to allow an anti-competitive merger that can be justified on efficiency grounds. Canada's unique framework for considering efficiencies in merger review – namely, the trade-off analysis established by section 96 of the Act – was established with consideration for distinctive characteristics of the Canadian economy (e.g., its relative small size as compared to other jurisdictions) that rendered overall economic efficiency an important objective of Canadian competition policy. While the efficiencies defense is not per se a public interest consideration, public interest issues do arise under the efficiencies defence because the Act is silent on how the courts should regard the redistribution of income between consumers and producers brought about by an anti-competitive merger. The Act, therefore, requires the courts (and in turn the Bureau and merging parties relying on the defence) to consider the appropriate welfare standard to apply in its determination of whether a merger is contrary to the Act.

This submission first discusses the Canadian framework for merger review. Then it describes various public interest reviews in Canadian merger control, with specific reference to the interaction between these public interest reviews and competition law enforcement. Lastly, it discusses the efficiencies defence in Canada, including its relevant history and Canadian case law regarding the appropriate welfare standard in merger review.

EUROPEAN UNION *

According to the European Merger Regulation ("EUMR"), public interest considerations other than competition policy are not to be taken into account in the assessment by the European Commission of a concentration.

However, Member States may take appropriate measures to protect other legitimate interests with regard to such transactions, under strict conditions. Article 21 EUMR distinguishes between "recognised interests", namely public security, plurality of the media and prudential rules, all of which are considered prima facie legitimate, and "other public interests", which require ex ante review by the European Commission. In that context, Article 21 EUMR serves the double purpose of protecting the European Commission's exclusive competence for the review of mergers of an EU dimension and of providing an internal-market function preventing Member States from exercising undue interferences with cross-border transactions, without however precluding them from adopting proportionate measures aimed at protecting legitimate interests.

Attempts by Member States to interfere with transactions of a Community dimension in diverse sectors (e.g. energy, financial institutions, public infrastructure) have been investigated and where appropriate challenged by the European Commission. 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"). Alternatively (and in practice more frequently), the European Commission may issue a decision concerning the legality of the national measure on the basis of Article 21 EUMR itself and, if necessary, order the Member State concerned to withdraw the contested measure. Should the Member State fail to comply with the European Commission's decision, the European Commission may start an infringement action under Article 258 TFEU and bring the Member State before the European Court of Justice (ECJ).

GERMANY

German competition law strictly separates competition and non-competition aspects in a two-staged merger review process. When reviewing a merger the Bundeskartellamt bases its decisions solely on competition aspects. German competition law, however, provides for the possibility of the so-called “ministerial authorization”. This means that companies, whose merger projects have been prohibited by the Bundeskartellamt, can apply to the Federal Minister for Economic Affairs and Energy 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 ministerial authorization of mergers that have previously been prohibited by the Bundeskartellamt due to competition concerns is only granted in exceptional cases. The criteria laid down in the law set a high standard. The Minister conducts a transparent procedure involving third parties, a public hearing and an opinion by an expert committee on competition matters, the German Monopolies Commission. Finally, a fully reasoned decision is published and the parties to the procedure may appeal against the decision in court.

Since the ministerial authorization was introduced in 1973, 22 undertakings have applied for a ministerial authorization. This underlines the exceptional character of ministerial authorizations, in particular compared to the total number of reviewed mergers (some 45,000) and prohibition decisions (approximately 200). In nine cases the Minister granted an authorization. In one case the authorization granted was only partial and in another five cases was granted under certain conditions and obligations. Only three ministerial authorizations were unconditional approvals.

INDONESIA *

Government Regulation No. 57/2010 concerning Merger and Acquisition established the merger review system in Indonesia. The regulation stipulates that any mergers meeting the threshold requirement must be notified to the Indonesia Commission for the Supervision of Business Competition ('KPPU') within 30 days after the merger is effective by law. To further regulate the implementation of such regulation, KPPU issued a technical guidance on the assessment of merger and acquisition transaction, namely the KPPU Regulation No. 13 Year 2010 on the Guidance for the Implementation of Merger and Acquisition.

Elements use by KPPU in merger assessment includes market structure (calculation of market share and concentration, and changes in market structure following the mergers transaction), entry barrier (absolute and structural barrier), unfair business competition (unilateral conduct, coordinated conduct, and unilateral effect), efficiency, and failing firm defence.

Indonesia points that public interest is not a primary factor in the merger assessment at KPPU's procedures. The analysis mostly based on the impact of such merger to the concentration and its potential impact to competition from their competitors. Currently there is no case investigated by KPPU which would require measuring public interest criteria against competition factors.

JAPAN

The Chapter 4 of Japanese Antimonopoly Act (hereinafter referred to as ‘AMA’) prohibits business combinations (mergers) that may be substantially to restrain competition in any particular field of trade, and “the public interest consideration” is not a constituent requirement for finding violation in this chapter. In addition, the guidelines which explain the method of market definition and factors to consider in the competition analysis do not describe factors relevant to “the public interest”.

Furthermore, on the occasion of making decision in the review of the business combination, the Japan Fair Trade Commission (hereinafter referred to as ‘JFTC’) is not obligated to consult with other administrative agencies, nor is there an administrative agency which has the authority that can override the JFTC’s decision. This shows that the JFTC has the independence of its authority in making its decision with regard to the AMA.

KOREA *

Public interest element is not considered by the Korea Fair Trade Commission ('KFTC') when reviewing anti-competitiveness of mergers. Pursuant to the Act 7 (2), 'efficiency enhancing effect' or 'business combination of the companies that are not viable' are provided as the exception to anti-competitiveness. The exception has been in place since 1981, when the law was first enacted.

According to the 'Guidelines for the Combination of Enterprises'

- the efficiency enhancing effect in the national economy covers increase in employment, regional economy, development of downstream and upstream market, stable supply of energy and improvement of environmental pollution;

- when determining whether the company is not viable, the following factors are considered: whether the company has impaired capital for a considerable period of time, whether ordinary income or loss records a deficit for a considerable period of time, whether the revival process has been initiated or bankruptcy has been filed pursuant to the Debtor Rehabilitation and Bankruptcy Act, and whether the creditor financial institution is managing the company in order to manage non-performing bond.

Also, public interest element is considered when reviewing business combination in specific industries. The KFTC shares competences with the regulator in finance, communications and broadcasting industry. The regulator considers not only the anti-competitiveness, but also the public interest element comprehensively in its procedure. Pursuant to the relevant act, the regulator is obliged to consult with the KFTC in order to determine anti-competitiveness while reviewing mergers.

LATVIA *

According to Competition law, the Competition Commission ('CC') must consider actual or potential effect of the merger according to SLC and dominance test.

Latvian Merger regulation does not include any criteria for non-competition issues such as industrial policy, public interests, total welfare. These criteria, traditionally, are not factored also into review process by competition authority. Other governmental bodies also cannot intervene in the merger control analysis or overturn the decision of the CC.

However, it is not uncommon that CC receives opinion from ministries other public bodies that supervises certain market/sector what contains concerns on public interests grounds. In these rare cases CC takes into account considerations that are based on non-competition criteria. Examples include mergers in the telecommunications and health care industry.

NETHERLANDS

To aid the discussion on if, how and by whom public interests should be taken into account in merger control, ACM describes two areas within its merger control role where public interest issues frequently arise.

Firstly, undertakings increasingly put forward public interest arguments when applying, under section 40 of the Dutch Competition Act, for permission to proceed conditionally with their merger prior to ACM's decision. Section 40 allows an exemption from the obligation to refrain from gaining any form of control over the target until ACM has decided on the merger. ACM has not (yet) needed to answer the question whether it should take public interest into account in these assessments. Decisions so far, have been based only on arguments relating to effective competition.

Secondly, ACM sees increasing numbers of public interest arguments brought forward in efficiency defences. Both examples demonstrate the renewed interest in the role of public interest issues in merger control in the Netherlands. This is in addition to the already extensive discussion on the role of public interests in antitrust enforcement. For competition agencies this brings new strategic questions and challenges. As such, the OECD roundtable is a welcome initiative to further share experiences and thoughts on this topic.

NEW ZEALAND

The New Zealand Commerce Commission is the sole decision maker on mergers clearances and authorisations. Section 67 of the Commerce Act allows the Commission to authorise mergers that substantially lessen competition if the harm to competition is outweighed by the public benefits.

When the Commission receives an authorisation application for a merger, it must first assess whether the merger would be likely to substantially lessen competition in a market. If the Commission is satisfied that the merger would not be likely to 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. If the Commission is satisfied that the merger will be likely to result in such a benefit to the public that it should be permitted, then it must authorise the merger.

A public benefit is regarded as any gain to the public of New Zealand that would result from the proposed transaction, regardless of the market in which that benefit occurs or whom in New Zealand it benefits. The Commission will take into account any costs incurred in achieving benefits. In contrast, in assessing detriments the Commission will only consider anti-competitive detriments that arise in the market(s) where there is a lessening of competition.

The Commission is required to quantify benefits and detriments to the extent that it is practicable, rather than relying solely on qualitative judgement.

Appeals on Commission authorisation determinations may only be made by three classes of party:

- the person who sought the authorisation;
- any person whose assets, or the shares in which, are proposed to be acquired pursuant to the clearance or authorisation; and
- any person who participated in any conference held by the Commission under section 69B in relation to the authorisation.

In one example, Air New Zealand and Qantas, the Commission declined to authorise the transaction. The detriments were found to outweigh the benefits by $195 Million to $40.5 Million a net detriment of $154.5 Million. This decision was upheld by the High Court of New Zealand.

In another example, Cavalier Wool and New Zealand Wool Services, the Commission authorised the transaction. Detriments were expected to be in the range of $4.75 Million to $23.98 Million, with benefits expected to be in the range of $24.71- $28.23 Million. This decision is currently under appeal.

NORWAY

When the current Norwegian Competition Act was enacted in 2004, one of the features implemented was that the Norwegian Competition Authority's (NCA) decisions to intervene in mergers could be reversed by the government based on public interest considerations.

As a measure to enhance the NCA's independence, the Ministry of Industry, Trade and Fisheries recently proposed to establish an independent competition complaints board. At the same time, the possibility to reverse the NCA's decisions based on public interest considerations was abolished. The proposals were adopted by the Parliament (Stortinget) in 2016 and will be implemented 1st of January 2017.

In this contribution, the background and the features of the 2004 law will be described before alluding in more detail on the background for the latest revision of the Competition Act in this respect.

PORTUGAL

The substantive assessment of mergers carried out by the Portuguese Competition Authority is guided solely by competition considerations. However, other public interest considerations may play a role in the outcome of the merger by the intervention of other public bodies, through legally defined mechanisms.

In terms of the substantive assessment of the merger, there are two instances in which other considerations may outweigh the competition-based assessment carried out by the PCA: (i) the case of a negative opinion against the merger by the Regulatory Authority for the Media to protect freedom and pluralism of the media, which is binding to the PCA; or (ii) if a PCA's prohibition decision is reversed by Government on the grounds of fundamental strategic interests of the national economy, which specifically outweigh the detriment to competition stemming from the merger, following an extraordinary appeal by the parties.

SINGAPORE *

Public interest factors do not play a role in Competition Commission of Singapore’s (‘CCS’) competition assessment of a merger which focuses on the SLC test. Singapore also reports that the net economic efficiency defence does not appear to afford an element of public interest to be read into it, unless that aspect of public interest can be translated into an economic efficiency argument. To date, no mergers have been exempted on grounds of net economic efficiencies.

However, under Section 2(1) of the Act, public interest considerations refer to: “national or public security, defence and such other considerations as the Minister may, by order published in the gazette prescribe”. The Minister referred to in the Act is the Minister of Trade and Industry (‘Minister’). Though provided for in the Act, there have been no other public interest considerations gazetted to date.

There has only been one instance where merging parties appealed to the Minister for a merger to be exempted on the ground of public interest considerations. The Minister declined the parties’ application for exemption on the basis that the grounds relied upon by the parties did not fall within the existing definition of ‘public interest considerations’, which only refers to matters of national or public security and defence. However, irrespectively from the Minister’s procedure, CCS came to the conclusion that the merger will not lead to SLC.

SOUTH AFRICA *

The legislative framework for merger review in South Africa provides for the consideration of competition and public interest considerations. Section 12A(3) of the Competition Act states that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission ('Commission') or the Competition Tribunal ('Tribunal') must consider the effect that the merger will have on – i) 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.

The South African view is that the public interest factors as contained in the Competition Act are interlinked with the competition analysis conducted in merger review which was articulated by Tribunal in the merger of *Harmony Gold/Gold Fields*. Between the period of 2002 – 2016, the total number of mergers that were finalized was 4529. Of the finalized mergers, 247 were approved with conditions and 134 of these specifically addressed public interest concerns (less than 3% of the total number of mergers finalized).

The 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', initially published as draft in 2015 and adopted in 2016.

The submission also briefly summarises some of the key cases that turned on public interest considerations in South Africa (e.g. *Walmart/Massmart*, *Kansai/Freeworld* and *Media24/Natal Witness*).

CHINESE TAIPEI *

The standards the Fair Trade Commission (‘FTC’) applies in its review of merger notifications are different from the ‘substantial lessening of competition test’ or ‘significant impediment to effective competition test’ applied by the competitive authorities in the US and the EU. They are closer to the ‘public interest test’.

For this reason, besides assessing likely disadvantages from competition restraint, the FTC also takes into account the overall economic benefits when reviewing merger cases. In practice, the scope of the overall economic benefits to be assessed not only includes economic efficiency directly resulting from competition, consumer interests, one of the merging parties originally being a weaker competitor and one of the merging parties being a failing firm, but also encompasses economic benefits not related to competition, such as industrial development, employment and national competitiveness that are associated with the overall economic benefits.

In addition to the adoption of whether the overall economic benefits outweigh the disadvantages resulting from competition restraint, the FTC has also established administrative rules for special industries. When merger cases involve the jurisdiction of other competent authorities, the FTC will act according to the Federal Trade Act (‘FTA’) and only decide by taking into consideration the overall economic benefits and disadvantages resulting from competition restraint according to the market structure, market concentration, entry barriers, countervailing power in the upstream, midstream and downstream sectors, and other competition factors in order to avoid confusion over jurisdictions between the FTC and other competent authorities.

UNITED KINGDOM

Merger control in the United Kingdom (UK) is performed primarily by the Competition and Market Authority (CMA). The CMA currently conducts an economics-based competition assessment and the question before it is whether the merger has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.

The UK merger control regime allows for intervention in mergers by the Secretary of State (SoS) on certain public interest grounds, specified in the Enterprise Act 2002 (the Enterprise Act): (i) national security, (ii) media plurality, and (iii) the stability of the UK financial system. When the SoS considers one or more public interest considerations to be present in a particular merger, the SoS can issue an intervention notice. The majority of intervention notices in public interest cases have been issued in respect of national security considerations.

The SoS can only add a public interest consideration through a clear parliamentary process. On several occasions there have been calls for an expansion of the list of public interest considerations or a greater reliance on such considerations to intervene. However, 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. This was the only time since the introduction of the Enterprise Act that a public interest consideration has overridden the CMA's competition assessment.

Any ministerial involvement based on public interest grounds is governed by a clear and transparent process and, although the CMA advises on public interest considerations, it is up to the SoS to make the final decision as to whether a merger operates against the public interest.

The UK's regime governing public interest considerations is in line with international evolution of merger control policy. It has been tried and tested for more than a decade and has proven capable of being able to deal even with extraordinary circumstances.

Broadening the UK public interest tests would likely have a negative impact on foreign investment and the UK economy overall, as it would risk fragmenting the UK merger control system to the detriment of the legal certainty, predictability and therefore business confidence.

UNITED STATES

The U.S. antitrust agencies review mergers under a statutory standard focusing exclusively on competitive consequences. The agencies do not consider public interest factors beyond the public 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 agencies' actions are not subject to review under a general public interest standard by any other agency or government body, including the courts. However, certain mergers may also be subject to a separate review by a specialized or sector-specific government agency or body that considers public interest or national security grounds.

In short, U.S. antitrust law and policy, including merger review, are implemented based on the belief, borne out by our economic history, that the public interest is best served by focusing exclusively on competition considerations.