Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

27-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2016)9
Unclassified

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by the United Kingdom --

14-15 June 2016

This document reproduces a written contribution from the United Kingdom submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

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

JT03396810

English - Or. English

UNITED KINGDOM*

1. The evolution of public interest tests in UK merger control: Towards greater predictability

1. Historically, prior to the entry into force of the Enterprise Act, mergers in the UK were reviewed on a broad public interest test under the Fair Trading Act 1973.[1] Under this regime, the concept of public interest was carried over from the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. Guidance on the interpretation of public interest in that legislation has been described as being "expressed at such level of generality as to amount to an invitation to take into account anything that might seem relevant."[2]

2. The impact on competition as a key factor in the assessment of mergers was given more prominence in 1984 when the then SoS, Norman Tebbit, announced that "references to the Monopolies and Mergers Commission (MMC) would be made primarily, but not exclusively, on competition grounds, taking into account the international dimension of competition."[3]

3. Despite the incremental move towards free market policies and the promotion of competition as the main feature of merger control, a small proportion of mergers were referred to the MMC on non-competition grounds - including of acquisitions of British companies by foreign state-owned companies - and it remained difficult for firms to predict with certainty when a merger would be blocked.[4] However, in October 1991, the UK Government stated that, "the fact that a company is state-owned or directed by a state will not per se justify a referral to the MMC; unless, exceptionally, other public interest issues (such as security interests) arise, a referral would only be envisaged insofar as competition aspects were at stake."[5]

4. About ten years on, in 2002, the primacy of a competition-based test was codified in the Enterprise Act, which has been described as having put an end to "substantial room for the exercise of political preferences."[6]

---

* The contribution of the CMA is based on the article by Chisholm, A. and Jung, N. (2014), 'The public interest and Competition-based Scrutiny of Mergers: Lessons from the Evolution of Merger Control in the United Kingdom', CPI Antitrust Chronicle. Alex Chisholm is the Chief Executive Officer of the Competition and Markets Authority ("CMA") in the United Kingdom. Nelson Jung is the Director of the Mergers Group at the CMA.

1 Under s84 of the Fair Trading Act 1973, the Competition Commission (CC), and its predecessor, the Monopolies & Mergers Commission, were required to take into account "all matters which appear to them in the particular circumstances to be relevant*"* with regard to the desirability of certain factors.

2 A. Scott, M. Hvvid, & B. Lyons, *Merger Control in the United Kingdom*, OUP 2006, page 5.

3 First report: Takeovers and mergers, 27 November 1991 HC 1991-2 ¶ 223.

4 *See* Andreas Stephan, *Did Lloyds/HBOS mark the failure of an enduring economics based system of merger regulation?*, Northern Ireland Legal Q., 4 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007.

5 *See* Stephan supra note 4 at 9

6 S. Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission*, MUP, 228 (1999).

5. The use of an economics-based competition assessment of mergers brought the UK in line with international evolution of merger control policy. [7] The trend towards narrower, economics-based criteria, a more technical assessment, and fuller reported analysis was observed across many jurisdictions.

6. This development coincided with competition authorities responsible for merger control becoming more independent and the process as a whole becoming more transparent and predictable for businesses.

2. Merger control and the public interest - The existing legal framework and key precedents

2.1 The Framework for Assessing Mergers within the UK's Jurisdiction

7. Merger control in the UK is currently performed primarily by the CMA[8] under the Enterprise Act[9]. Where the relevant jurisdictional thresholds are met, and the transaction is not subject to the EU Merger Regulation, the CMA has the power to investigate mergers and acquisitions irrespective of the (corporate) nationality of the acquirer.[10] In examining mergers, the CMA conducts an economics-based competition assessment. The question before it is whether the merger has resulted, or may be expected to result, in a SLC within any market or markets in the UK for goods or services.[11]

2.2 The Role of the SoS - Public Interest Grounds

2.2.1 Public interest considerations

8. Provision is made under the Enterprise Act allowing for intervention in mergers by the SoS on certain specified public interest grounds.[12] The SoS may issue an "intervention notice" [13] to the CMA if the SoS considers one or more public interest considerations to be present in a particular

---

7 The United States, for example, has long since relied on an economics-based competition assessment (*see* the Clayton Act 1914, as subsequently amended, among others, such as the 1992 Horizontal Merger Guidelines) and the EU had adopted its Merger Regulation in September 1989: Council regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ [1989] L 395/1. Note that the EU's test at the time was the "creation or strengthening of a dominant position," which has since been amended to a "significant impediment to competition" test.

8 The CMA is responsible for merger control across all industries and has decision-making power, although certain sectoral regulators such as Ofcom or Monitor also have statutory roles in examining mergers. The CMA was established on October 1, 2013. By virtue of the Enterprise and Regulatory Reform Act 2013 and the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order, No 416 of 2014, the Office of Fair Trading's (OFT) and CC's merger control functions were transferred to the CMA on April 1, 2014.

9 As amended by the Enterprise and Regulatory Reform Act 2013.

10 The CMA's primary duty is to seek to promote competition, both within and outside the UK, for the benefit of consumers, *see CMA Mergers: Guidance on the CMA's jurisdiction and procedure*, ¶ 2.5 (Jan. 2014).

11 The decision at first phase is based on a "realistic prospect" threshold in determining whether it is or may be the case that a SLC will arise from the merger whereas the second phase decision is made on a "balance of probabilities" threshold.

12 The SoS may intervene where he or she considers that one or more so-called "specified considerations" is relevant to the merger in question. Under the Enterprise Act 2002, these specified considerations may apply to three types of mergers, namely public interest mergers, special public interest mergers, and European relevant merger situations. *See* J. Parker & A. Majumdar, *UK merger control*, 143 et seq. (2011).

13 *See* section 42 of the Enterprise Act.

merger.[14] Currently, in public interest cases, these considerations are specified in the Enterprise Act[15] as being (i) national security, (ii) media plurality, and (iii) the stability of the UK financial system. The majority of intervention notices in public interest cases have been issued in respect of national security considerations.[16]

9. The Enterprise Act recognizes the possibility that, exceptionally, these grounds for intervention could be supplemented. Any proposal to do so, however, is governed by a procedure ensuring careful scrutiny. The SoS can only add a public interest consideration by way of adopting a statutory instrument if it is approved by Parliament through an affirmative procedure.

2.2.2 Process for intervention based on public interest considerations in the UK merger control regime

10. CMA has an obligation to inform the SoS where it is investigating a merger that it believes raises material public interest considerations. The SoS may then decide to issue an intervention notice.

11. If the SoS issues a public intervention notice to the CMA based on public interest considerations, the CMA must then make a report to the SoS advising whether a relevant merger situation has been or will be created and whether that has resulted or may be expected to result in a SLC. The CMA's report also contains a summary of any representations received by the CMA relating to any public interest consideration mentioned in the intervention notice. The CMA does not, however, advise on whether or the extent to which public interests considerations are relevant. It is then for the SoS (and not the CMA) to take a decision on whether to refer the merger for a more in-depth second phase investigation by the CMA based on public interest considerations.

12. If a merger is referred to a second phase investigation, the CMA will report to the SoS about whether the merger operates or may be expected to operate against the public interest. Under the Enterprise Act, an anti-competitive outcome is to be treated as being adverse to the public interest unless it is justified by one or more public interest. The SoS will then make the final decision as to whether the merger has an adverse effect on the public interest and the SoS may take the enforcement action considered reasonable and practicable to remedy any adverse effects identified, including prohibiting the merger.

2.2.3 Observations on the operation of public interest considerations in practice

13. 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.[17] However, in practice, the

14 The SoS may also issue: (i) an European Intervention Notice under section 67 of the Enterprise Act to impose undertakings on mergers that have been cleared by the European Commission; (ii) a 'Special Public Interest Intervention Notice' under section 59 (1) of the Enterprise Act where the CMA may not have jurisdiction to assess the merger on competition grounds. European intervention notices and special public interest intervention notices are rare. There have been only five European intervention notices and two special public interest intervention notices under the Enterprise Act. *See* J. Parker & A. Majumdar, *UK merger control*, 143 et seq. (2011).

15 *See* section 58 of the Enterprise Act.

16 Under the Enterprise Act, the SoS has issued: (i) six intervention notices based on national security grounds, including Alvis Plc/General Dynamics Corporation (2004), Finmeccanica/AgustaWestland 2004, Finmeccania/ BAE Systems 2005, Lockheed Martin UK Holdings Limited/Insys Group Limited 2005, General Electric/Smiths Aerospace Division 2007, and Atlas Elektronik/QinetiQ 2009; (ii) three intervention notices on media plurality grounds, including BSkyB/ITV 2007, Global/GMG Radio 2012, Newscorp/BskyB 2010; and (iii) one intervention notice in the interest of maintaining the stability of UK financial system (Lloyds/HBOS, 2008).

17 When a possible acquisition of Centrica by Gazprom was rumored in 2006, for instance, the UK Government ruled out the possibility that UK ministers might actively seek to block a future bid by Russia's Gazprom for Centrica, the gas supplier.

only additional public interest consideration added since 2002 is the stability of the UK financial system, during the financial crisis and in the context of the Lloyds/HBOS merger. [18]

14. In that case, the SoS considered that the new public interest consideration—the stability of the UK financial system—overrode the competition concerns identified by the OFT and decided - even before the addition of a new public interest consideration[19] - that the merger should not be referred for further investigation.

15. The intervention of the SoS in the Lloyds/HBOS and others, such as BSkyB/ITV[20] and News International/BskyB[21], have been characterised as "a cautionary tale" for those who see a bigger role for non-competition considerations within competition law and has been seen as encouraging lobbying by those who want to support particular interests.[22]

16. On the other hand, the Lloyds/HBOS case demonstrated that even such exceptional events did not require a disapplication of the UK merger control regime altogether, but could be dealt with on the basis of the existing legal structure under the Enterprise Act, which allows for narrowly defined public interest exceptions.[23]

17. The BSkyB/ITV merger has also shown that, where public interest considerations have been invoked, the current system does provide for appropriate mechanisms allowing for good outcomes for consumers even if there are differences in opinion of the authorities involved.[24]

---

18 Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (SI 2008/2645).

19 In this case, the SoS issued an intervention notice based on a public interest consideration that had not yet been included in the Enterprise Act. On the same day the order introducing the new public interest consideration came into force (24 October 2008) the OFT issued its report on the transaction concluding that it may be expected to result in an SLC, meaning that the competition-based test for reference was met.

20 In November 2008 BSkyB acquired a 17.9 percent stake in ITV. Both companies were active in television production and broadcasting. The SoS issued a public interest intervention notice requesting the OFT and Ofcom to examine whether the merger gave rise to competition and media plurality concerns. The OFT and Ofcom found the merger gave rise to concerns on both counts, and the merger was referred to the CC. The CC's report concluded that the merger did result in a SLC, but did not operate against the public interest of media plurality. The CC recommended undertakings to reduce the shareholding in ITV down to 7.5 percent. BSkyB appealed unsuccessfully to the CAT and then the Court of Appeal, and finally entered into the undertakings in 2010.

21 In November 2010, Newscorp notified the European Commission of its intention to acquire the remaining 61 percent shareholding in BSkyB. Given that both companies were active in media in the UK, and Newscorp already owned 39 percent of BSkyB, the SoS issued a European Intervention Notice citing media plurality concerns. The competition review remained with the Commission, and Ofcom was tasked with investigating the public interest concerns. The European Commission cleared the merger on competition grounds but Ofcom found that it may operate against the public interest and recommended the SoS refer it to the CC. Newscorp and the SoS entered into discussions over undertakings in lieu, and two public consultations on the same were launched. Before the final consultation finished, news of the "phone hacking" scandal broke. Shortly after, Newscorp withdrew its undertakings, and the SoS referred the transaction to the CC. Two days later Newscorp announced it had abandoned the transaction.

22 Graham, *Public interest mergers* (March 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233822.

23 *See* also Martin McElwee, who contrasts the approach taken in Lloyds/HBOS with a statutory provision relating to the Bradford & Bingley case which, in effect, disapplied the UK merger control regime in its entirety, *Politics and the UK merger control process: the public interest exceptions and other collision points*, COMPETITION L., 82 (2010).

24 *See* note 21, *supra*.

18. It should also not be assumed without assessment of the merger-specific facts that public interest implications of a merger would not be taken into account in any event by an economics-based competition assessment. For instance, 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 were raised.[25] However, the CMA could take into account the impact of the merger in R&D as part of its competition assessment without the need to rely on a specified public interest consideration, and its predecessors, the OFT and CC, did so in certain cases.[26]

19. Finally, as the UK merger control regime sets out clearly the grounds and the process for public interest intervention, the CMA assessment of the competition effects of a merger is exclusively economics-based and the CMA does not indirectly take into account public interest consideration, including in its assessment of efficiency claims or failing firm defences.

20. In summary, in the process followed for a public interest intervention in the UK merger control system, the roles of the CMA and of the SoS are clearly delineated. Any ministerial involvement is governed by a clear and transparent process, which ensures the CMA's independence, and, although the CMA does advise on public considerations, it is up to the SoS to make the final decision as to whether the merger has an adverse effect on the public interest.

21. It seems fair to observe that the process followed to introduce new public interest grounds is transparent and subject to parliamentary and public scrutiny. Overall, the UK's regime governing public interest considerations has been tried and tested for more than a decade and, despite the "cautionary tale" in Lloyds/HBOS, has proven capable of being able to deal even with extraordinary circumstances, such as in a global financial crisis.[27]

3. The interface between UK and EU Law

22. From the perspective of the UK or any other EU Member State, the scope for intervention based on public interest considerations is subject to EU law requirements. If the transaction in question meets the relevant turnover thresholds, and is not referred back for examination at Member State level, it will be considered under the EU Merger Regulation ("EUMR") by the European Commission ("EC").[28] In such circumstances, the transaction falls within the EC's exclusive jurisdiction under Article 21 EUMR. Regardless of whether or not a transaction falls to be considered under the EUMR, measures preventing cross-border transactions in the European Union may be caught by the free movement rules.[29]

23. In terms of the substantive assessment carried out by the EC, similar to the UK's SLC test, the EC's significant impediment of effective competition ("SIEC") test under the EUMR is based on an economic assessment and allows for consideration of consumer benefits and efficiencies, but not considerations of industrial policy such as the protection of jobs. However, Article 21(4) EUMR

25 *See* Antony Seely, Takeovers: the public interest, House of Commons Library, 7 (June 3, 2014) at 25-27.

26 *See*, for instance, the OFT decision on ME/6167/13 Completed acquisition by Motorola Mobility Holding (Google, inc.) of Waze Mobile Limited, published 12 December 2013, *see* in particular, 26-28 and on ME/4136/09 Anticipated joint venture between GlasxoSmithKline plc and Pfizer Inc in relation to their respective HIV businesses, published 21 July 2009. See also the CC decision on the Anticipated acquisition by AkzoNobel of Metlac Holding (December 2012).

27 Peter Freeman, *Merging is Such Sweet Sorrow*, Speech to the British Institute of International and Comparative Law (BIICL) Mergers Conference, (November 13, 2008).

28 Under either Articles 4(5) or 9 of the EUMR.

29 In particular Article 63 (free movement of capital) and Article 49 (freedom of establishment) of the Treaty on the Functioning of the European Union.

specifically recognizes public security, plurality of the media, and prudential rules as legitimate public interests justifying intervention.[30] These three public interest exceptions enshrined in the EUMR have been interpreted narrowly.[31]

4. Risks of wider or new public interest exceptions

24. There would be significant risks in a hypothetical shift of the current UK merger control regime towards a broader public interest test in merger control, including through the introduction of additional public interest considerations or a broad definition of public interest.

4.1 Risk of closing of markets

25. The evidence cited above suggests that the UK benefits greatly from its open approach to foreign investment and an open market for corporate control.

26. Broadening the UK public interest tests may therefore damage the UK's ability to attract investment from overseas, and damage the UK's reputation internationally as an open, competitive place to do business.

4.2 Weakened Credibility of Regime and Damaged Business Confidence

27. Reintroducing political involvement in the assessment of mergers may encourage a belief that decisions on mergers could be influenced by political or lobbying considerations that could undermine the credibility of the regime and hurt business confidence. This means that, with a more open-ended public interest test a government's judgment and intervention could be too exposed to political lobbying and short-term populist pressures which are unable to make an assessment of long-term growth and value that might come from a merger.

28. It can also lead to a loss of transparency and a loss of the predictability which at the moment makes the current UK regime open to investors.[32]

4.3 Defining the Public Interest—Policy Challenges and Risk of Intervention Creep

29. From a practical perspective, one of the main risks of resorting to a greater reliance on public interest considerations is the difficulty in defining them. The observation has been made that the unpredictable circumstances in which a public interest intervention might be perceived as necessary make it difficult, if not impossible, to provide a satisfactory definition of public interest.[33]

---

30 *See* discussion of cases involving the interpretation of these provisions in M. FURSE, THE LAW OF MERGER CONTROL IN THE EC AND THE UK, 58-61(2007) and C.M. Borges, *The Legitimate Interests of Member States in EC Merger Law*, 9 EUR. PUBLIC L. 345 (2003).

31 There have been only a few cases in which Member States have intervened in transactions under Article 21(4) EUMR. Although Member States are not required to seek formal approval, there have been cases where the Commission has specifically stated that Article 21(4) applies. *See* for example: M.423 Newspaper Publishing, M.759 Sun Alliance/Royal Insurance, M.1858 Thomson/Racal (II). Any intervention on these grounds must be no more than is necessary and proportionate to achieve these goals. It is also worth noting that any intervention must be specifically justified on these grounds: thus, for example, an intervention cannot be made on one ground for a collateral reason, e.g. to preserve a media outlet because of the employment opportunities it offers.

32 The work of the Department for Business, Innovation and Skills: Evidence given by Rt Hon Lord Mandelson, First SoS, 19 January 2010, 10 March 2010 HC 299-i 2009-10 Q13, *see* also Antony Seely, *supra* note 25 at 14.

33 *See* Stephan, citing the Lloyds/HBOS mergers as an example, *supra* note 4.

30. Adding to this difficulty is that many mergers can take years to deliver their full potential, which can be contrasted with the very much shorter term that characterizes the modern media-political axis. In this context, it is challenging to a competition authority to identify in advance welfare-enhancing mergers that are in the public interest, which argues for a policy stance of studied neutrality and for a focus on removing anticompetitive features rather than second-guessing the whole rationale underlying merger transactions.

31. Furthermore, the concept of public interest is inherently elusive: however it might be defined, it is unlikely to cover precisely the next situation where intervention is considered an option. As such, there is a risk of either (i) a very wide exemption, operating as a catch-all, completely undermining the overarching structure of the existing framework, or (ii) the piecemeal addition of exceptions, risking fragmentation of the regime. Further fragmentation of the UK merger control system could result in inconsistencies, less transparency, and uncertainty for businesses.[34]

4.4 Legal Risks

32. From the perspective of EU Member States, given the limitations arising from the legal framework within which policy choices can be made, there is a risk that the measures preventing foreign takeovers on public interest grounds were to be found to contravene EU law. In that situation, there is also a further risk of affected parties bringing potentially costly damages claims against the relevant Member State given the direct effect of the free movement provisions.

5. Conclusion

33. In summary, the UK merger control regime has evolved favourably towards an economics-based competition assessment and in the way it takes into account public interest considerations and is capable of dealing even with extraordinary circumstances. Through a consistent and transparent decision-making process by which public considerations are taken into account by the SoS, it ensures the independence of the CMA and provides legal certainty, inspiring business confidence.

34. Any hypothetical shift towards a broadening of public interest tests would not only appear to be at odds with a rules-based merger control system and with the international evolution of merger control policy, but would also risk fragmenting the UK merger control regime and sit uncomfortably with the business, consumer, and public confidence that legal certainty and predictability inspire.

[34] *See* Stephan, *supra* note 4 at 15.