Consideration of Public Interest Factors in Antitrust Merger Control

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Introduction

At a time when the International Competition Network's ("**ICN"**) widely acclaimed Recommended Practices for Mergers are approaching their 10 year anniversary, it is worthwhile reflecting on an increased focus by some jurisdictions on public interest factors in merger reviews. The question of whether and to what extent public interest policy considerations play a legitimate role in merger review is a vexed one. As a general proposition, the merger review process should involve certainty, timeliness, and transparency in merger review processes for all stakeholders. Can the consideration of public interest be consistent with such a merger review process?

Merger Control Processes

Mergers are not inherently bad for the economy or consumers. Mergers often facilitate the efficient use of scarce resources, thus maximising welfare. From an economic perspective merger control is focused on mergers that are likely to harm competition by creating or enhancing the merged firm's ability or incentives to exercise market power – either unilaterally or through coordination with rivals – resulting in price increases above competitive levels for a significant period of time, reductions in quality, or a slowing of innovation. The ICN's Recommended Practices for Merger Analysis state:

> *"The legal framework for competition law merger review should focus exclusively on identifying and preventing or remedying anticompetitive mergers. A merger review law should not be used to pursue other goals".*[2]

In almost all circumstances, the existence of competitive markets benefits consumers in the sense that the competitive process should ensure, under standard economic theory, that competitive markets lead to the efficient allocation of scarce resources and deliver competitively priced goods and services. Public interest factors are more difficult to quantify and address in terms of how these can be achieved through market forces. Examples of such public interest factors include social and welfare outcomes, defence and national security considerations as well as media diversity for social or indeed political reasons. Each of these types of considerations involves complex public policy assessments that may vary over time.

Notwithstanding their difficulty of application, non-competition public interest factors are incorporated into merger review processes in many jurisdictions. Against this background of questionable desirability and application of such policies, it is important that if public interests factors are taken into account, they are clearly

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[1] The views expressed in this article are the authors' and not necessarily those of their firm or clients.

[2] ICN Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis.

articulated and differentiated in a manner that does not affect a transparent and timely consideration of competition conditions.

The relevant question is then whether the inclusion of public interest factors in merger reviews are able to remain consistent with the core policy of merger control - namely that mergers "*do not jeopardize conditions for competition*"[3]. Indeed, the ICN Recommended Practices for Merger Notification Procedures state:

> *"If a jurisdiction's merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent."*[4]

The increasing intrusion of broad public interest considerations in merger control

To the extent merger control goes beyond serving the economic objectives of efficient resource allocation and enhancing consumer welfare so as to include other public interest factors, these other factors should be clearly articulated so that they can be considered alongside the core of competition policy.

Under Article 21(4) of the EU Merger Regulations ("**EUMR**"), EU Member States are permitted to take appropriate measures to protect "legitimate public interests" that are not taken into consideration under the EUMR, provided those measures are compatible with the general principles and other provisions of EU law; that is that they remain non-protectionist and do not undermine principles such as the operation of the EU internal market and freedom of movement of capital.

Article 21(4) EUMR provides that the three legitimate public interests are public security[5], plurality of the media[6] and prudential rules (of relevance in the area of financial services).[7]

Similarly, the *Enterprise Act 2002* (UK) (as amended) permits the UK Secretary of State to intervene in a mergers which do not fall within the jurisdiction of EUMR where an "*exceptional public interest"* such as national security, media plurality or the stability of the UK financial system may be adversely affected. Recently, in relation to some high profile international mergers in the pharmaceutical sector, a debate has arisen whether a public interest test should be included in UK legislation to enable the UK Competition and Markets Authority to invoke broader legitimate public interests in relation to EU mergers (in addition to the three interests expressly recognised in Article 21 EUMR).

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[3] ICN Merger Working Group: Analytical Framework Subgroup: The Analytical Framework for Merger Control – Final paper for ICN annual conference: Office of Fair Trading, London.
[4] ICN Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis.
[5] See *e.g.* case COMP/M.1858 - *Thomson-CSF/Racal (II)*.
[6] See *e.g.* case COMP/M.5932 - *News Corp/BSkyB*.
[7] See *e.g.* case COMP/M.5932 - *News Corp/BSkyB*.

In South Africa, the Competition Act of South Africa, Act no. 89 of 1998 provides, in relation to the assessment of mergers, for the consideration of employment, the ability of small businesses or those owned by previously disadvantaged individuals to compete, international competitiveness of domestic firms and the impact of a merger on an industrial sector or region. The Competition Commission of South Africa has recently released draft Guidelines for the Assessment of Public Interest Provisions in Mergers ("**Draft Guidelines**"). The Background Note to the Draft Guidelines stated as follows:

> *"There is a surge of competition authorities, particularly on the African continent, with a public interest mandate in merger regulation; South Africa is not alone on this path. It is therefore imperative to determine the contours of the public interest in merger regulation for policy certainty."*

The South African Draft Guidelines provide useful commentary on how the Competition Commission of South Africa may address employment considerations and in particular, the data to be provided to consider this factor. However, perhaps understandably, the Draft Guidelines provide limited guidance on weighting or balancing public interest considerations as a whole.

The prominence of these jurisdictions and the resurfacing of public debate in some of these jurisdictions in relation to high profile mergers highlight the significance of broader public interest considerations for merger reviews.

Leaving international comparisons aside, when the consideration of broader public interest issues arises, a relevant question is how these public interest considerations actually balance against competition based factors. That is, determining what weight should be given to particular public interest factors and how to assess them against competition factors - both the positive and negative effects of a merger. These are very difficult issues to quantify and assess. For example, how do you weigh positive or negative employment factors against competition factors, in particular efficiency considerations? The challenge becomes acute when remedies are sought to be imposed given the heavy focus on remedies in merger matters on competition issues rather than any other public interest considerations. For example, should such remedies for public interest considerations be structural or behavioural or limited in time, and how can the economic impact of such considerations be assessed?

Further, questions arise whether competition authorities are best placed to assess non-competition issues. Should these best be done by other government agencies or departments, such as in the UK where the Secretary of State initiates and undertakes the consideration of public interest in mergers? This issue is particularly important if the relevant public interest consideration involves the express consideration of political or qualitative factors in terms of views as to the impact on a particular society of aspects of a merger, rather than the economic factors typically considered by independent competition regulators who engage in merger review.

Despite the inherent tension of including public interest factors in competition based merger review, this is a relatively common element of merger control regimes. In

these circumstances it is important to continue to seek to ensure that the consideration of public interest is transparent and clearly articulated. This is particularly imperative with the increasingly cross border nature of merger transactions, with competition practitioners required to consider the operation of public interest in multiple jurisdictions. If public interest considerations are transparent and well-articulated, that will provide a degree of accountability and therefore arguably assist in timely and appropriate merger assessment consistent with the overarching economic objective of merger control

Conclusion

The consideration of broad public interest factors in merger review processes creates uncertainties in the assessment of merger control processes as to how these other "non economic" factors are taken into account. In the context of best practices for merger reviews having regard to a focus on timely, efficient, and transparent merger assessments, the ICN Merger Recommended Practices continue to provide useful guidance and touchstones for competition agencies and governments alike.