



The Interaction of Competition Policy and Other Government Policies – An ICN Steering Group’s Town Hall Conference Series¹

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Introduction

In February 2016 the ICN Steering Group kicked off the town hall series on the interaction of competition policy and other government policies with a session on public interest considerations in merger review. Alejandra Palacios Prieto, President of the Mexican Federal Economic Competition Commission, Hardin Ratshisusu, Deputy Commissioner and Head of the Mergers Division of the Competition Commission of South Africa, and Alex Chisholm, Chief Executive of the UK Competition and Markets Authority, shared their experience with public interest considerations in merger review. The call was moderated by Andreas Mundt, President of the Bundeskartellamt and ICN Chair.

Germany

The Bundeskartellamt bases its decisions solely on competitive criteria. However, on request by the parties concerned the Federal Minister for Economic Affairs can authorise mergers that have been prohibited by the Bundeskartellamt if the restraint of competition is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest. For example, in January 2016, the German Minister for Economic Affairs decided to overrule a merger prohibition decision in the food retail sector. The main reason for his decision: to safeguard jobs.

Mexico

The legal framework for merger review in Mexico focuses exclusively on identifying, preventing, or remedying anticompetitive mergers and does not include explicit public interest exceptions. From an economic perspective, merger policy in Mexico aims to avert structural changes that would damage incentives to compete. Hence, economic goals are the only ones that matter for the purposes of merger policy in Mexico. These goals, Ms Palacios Prieto argued, are ultimately public interest goals since competitive markets lead to the efficient allocation of scarce resources and deliver competitively priced goods and services. As a consequence, the merger review process in Mexico involves certainty, timeliness, and transparency for all stakeholders.

South Africa

In South Africa, the Competition Commission is responsible for considering the public interest effect of proposed mergers on a particular industrial sector or region, employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets. The Competition Commission can decide to block a merger based solely on the adverse affect on these public interest factors. In designing the South African competition law, the inclusion of public interest in merger assessment was premised on the need to address the socio-economic inequalities in society resulting from years of apartheid and the exclusion of the

majority of the population from the mainstream economy. To provide guidance on how public interest factors are considered, the Competition Commission has published draft guidelines.

UK

The UK merger regime historically allowed for broad public interest assessment, but has moved towards a competition-based assessment with limited exceptions allowing for public interest considerations to be taken into account. Under the current regime, the government may intervene only on certain specific public interest grounds: national security, media plurality, and, as introduced by an act of Parliament in 2008, the stability of the UK financial system. The process of a public interest intervention is carried out separately from the competition analysis. In essence, the Secretary of State can intervene on the specified grounds mentioned above and will ultimately take the final decision as to whether the merger operates against the public interest. In his presentation Alex Chisholm explained the evolution towards a competition-focused regime, highlighting the current regime's benefits in terms of legal certainty, predictability and business confidence. He also shared the practical experience of handling public interest considerations in UK merger cases over the last decade, also referring to the Lloyds/HBOS merger in 2008. This was the only case under the current regime, in force since 2003, where public interest considerations invoked by the Secretary of State were not aligned with the competition-based assessment put forward by the UK competition authorities.

Q&A Session

The presentations were followed by a lively Q&A session. The European Commission's DG COMP explained aspects of the European system; the Competition Commission of India got right to the heart of the discussion by asking a question about safeguarding jobs, probably the public interest that mobilizes people and politicians the most. In a reply, Hardin Ratshisusu outlined very practically the opportunities but also challenges his authority faces when balancing competition and public interest considerations in merger assessment and explained that clearly defined processes are required.

Conclusion

The teleconference revealed different approaches to handling public interest considerations when reviewing a merger, illustrating that there is not a one size fits all approach. However, it was clear that any system has to ensure transparency and predictability and that if both competition criteria and public interest considerations, are included in an assessment, safeguards are indispensable.

The second town hall teleconference will take place on March 8 at 2pm CET. It will deal with industrial policy considerations and feature Francis Kariuki, Director General of the Competition Authority of Kenya, Randolph Tritell, Director of the US FTC's Office of International Affairs, and Henk Don, Member of the Board of the Netherlands Authority for

Consumers and Markets. Information about the teleconference will be available on the ICN's website, www.internationalcompetitionnetwork.org, and the ICN blog, www.icnblog.org.

¹ The ICN Steering Group (SG) set up a town hall teleconference series to address issues raised by the interaction of competition policy and other government policies. The calls feature heads of agencies and senior officials, and are open to all ICN members and NGAs.