

Public Interest Regimes in the European Union – differences and similarities in approach

Final Report of the EU Merger Working Group 10 March 2016

Introduction

1. The EU Merger Working Group (**EUMWG**) decided at its meeting of 13 June 2014 to undertake a review aimed at comparing how public interest considerations influence merger control systems in each Member State. A short questionnaire was circulated covering procedural, substantive and institutional issues concerning public interest considerations in merger control.¹
2. Interim findings were discussed during a session on 5 June 2015 and provisional conclusions were accepted during a meeting on 11 September 2015.
3. This report aims to draw out themes from the responses and, in particular, considers similarities and differences in the public interest regimes.
4. The report and the findings, as set out in the conclusion below, were approved and adopted by the EUMWG at its meeting on 17 June 2016.

Background

5. The EUMWG considered that the role of public interest considerations in the context of merger control proceedings was a current and relevant issue, both with regard to the EUMWG's work streams and in the context of wider concerns around potentially protectionist tendencies resurfacing in the aftermath of the financial crisis. It therefore decided to conduct a review of public interest regimes in Member States to better understand and compare the individual Member States' regimes.

Public interest considerations in different national systems

6. Several national competition regimes across the EU provide for the possibility to

¹ The Member States which responded are BE, BG, CRO, CY, CZ, DK, GER, EE, ES, FIN, FRA, EL, HU, IE, ITA, LT, LV, MT, NL, NO, PL, PT, RO, SI, SK, SWE and UK.

take account of public interest considerations going beyond the protection of competition in exceptional circumstances.² This may mean that mergers that cause competitive harm can proceed or that mergers that do not raise competition concerns cannot proceed on the basis of wider public interest considerations in specific cases. Although interventions on that basis may be legitimate in certain circumstances, it should be limited to exceptional circumstances. Objective and precise criteria, applied in a non-discriminatory and proportionate manner can help limit the scope for such interventions. Procedural rules that provide for a high level of transparency can also play an important role.

7. There are different means by virtue of which competition regimes can meet these objectives. Each regime, and the way in which public interest considerations are taken account of, will likely be designed to operate most effectively within its particular institutional and political framework.
8. Merger cases that raise public interest concerns can be limited to one Member State or have their main impact on one Member State. If cross-border mergers are concerned, it may be useful to seek convergent outcomes.

Wider context for review of public interest considerations

9. Recent developments have also lead to concerns regarding the resurfacing of protectionist tendencies with potentially unfavourable implications for cross-border transactions that may be competitively benign or even pro-competitive. By way of example, the acquisition by General Electric of Alstom, which was originally opposed by the French government on grounds of Alstom being strategically important to France, as well as the proposed acquisition by Pfizer of Astra Zeneca gave rise to wide-ranging debates regarding the circumstances in which governments should be able to intervene to prevent or re-shape foreign acquisitions based on considerations claimed to be in the 'public interest', including the protection of certain industries or jobs. In a recent national merger case, the German Minister for Economic Affairs and Energy decided to grant a ministerial authorisation with conditions for a merger in the German food retail sector. The merger had been prohibited by the Bundeskartellamt. The ministerial authorisation was based on the public interest considerations to safeguard jobs and protect workers' rights (collective agreements and operational co-determination).

² A report prepared by the French competition authority in 2013 considered the implications of national competition authorities' approaches to public interest in merger control: see 'Making merger control simpler and more consistent in Europe – a "win-win" agenda in support of competitiveness, 16 December 2013', F. Zivy. A detailed discussion of public interest exemptions in German law is provided for example in: Monopolkommission, Politischer Einfluss auf Wettbewerbsentscheidungen, Wissenschaftliches Symposium anlässlich des 40-jährigen Bestehens der Monopolkommission am 11. September 2014 in der Rheinischen Friedrich-Wilhelms-Universität Bonn, 2015.

Summary of findings

Recognition of public interest grounds in merger control – how are they taken into account?

10. The majority of jurisdictions do not explicitly provide for public interest considerations to be taken into account in the assessment of mergers. There are 12 jurisdictions where wider public interest considerations can either form part of the merger control assessment or can otherwise feature in the overall decision making process.³ However, the regimes differ considerably in terms of how, when and by whom public interest considerations are taken into account as what grounds can be relied upon. Certain regimes include public interest as part of the merger control assessment, whereas others have developed separate frameworks which are activated only in certain, specified circumstances⁴ and others again take public interest into account on an ad hoc basis.
11. There are jurisdictions where public interest may lead to the exemption of certain transactions from the scrutiny of the competition authority (HUN) or enable the establishment of separate rules for review of particular mergers (ITA). Other jurisdictions provide for specific rules regarding mergers in particular sectors which is driven by public interest considerations. For example, such rules exist for media mergers in EL.
12. Some Member States noted that even if there is no official or explicit recognition of public interest considerations in statutory merger control rules, such considerations may informally influence the assessment of the particular merger.⁵

Grounds for public interest intervention – what is taken into account?

13. To the extent that national merger control regimes allow for public interest based considerations to be taken into account, grounds that are regarded as being “in the public interest” appear to be different across Member States. Certain criteria, however, are common for many jurisdictions, for example national security or the plurality of the media are recognised in many Member States. A number of criteria we identified are mentioned expressly only in the legislation of certain jurisdictions, including the stability of the financial system (UK), rules of sound administration (CY), contribution to economic development or aiding technical progress (PL) and significant national security or supply interests (SWE). On the

³ CY, GER, ES, NL, ITA, NO, PL, PT, RO, SWE, UK, FR.

⁴ The German system is an example of a separate framework. Public interest considerations can only be taken into account in a separate procedure in an authorisation by the Minister of Economic Affairs and Energy. The assessment concerns exclusively public interest grounds and whether they outweigh the competitive harm that was determined in the decision of the competition authority that prohibited the merger.

⁵ BE, EE, LV, SI.

other hand, some regimes do not define any specific criteria for public interest considerations and instead provide general principles or rules (GER) which may or may not be supplemented by further specific legislation.⁶

14. We are not aware of any jurisdiction offering any further guidelines by the administrative authorities on the interpretation of public interest based grounds for departing from a competition based analysis. Any guidance to that effect therefore stems from administrative decisions of the relevant authority and to a lesser extent from court judgments.⁷ Given that the number of cases where public interest served as a ground for the decision is limited, it appears that the interpretation must usually rest within administrative discretion of the relevant authority.

Institutional arrangements relating to public interest considerations in merger control

15. Differences in institutional arrangements exist across Member States as to which authority or government body may apply public interest considerations to merger control. In the majority of cases there are designated ministries (for example the Minister of Energy, Commerce, Industry and Tourism (CY), In ES Minister of Economy and Competitiveness can do the same after the Spanish NCA Decision. Minister of Economic Affairs (NL), Minister of Economic Affairs and Energy (GER) or Secretary of State (UK) or the cabinet of ministers)⁸ who are able to make an intervention or to grant an authorisation on public interest grounds. Some jurisdictions emphasised that although ministerial intervention remains a theoretical option, this has never occurred in practice.⁹
16. PL is the only jurisdiction where the application of a public interest test is the sole responsibility of the competition authority and no ministerial intervention is required.

Procedural differences in enforcing public interest interventions

17. Procedural arrangements differ substantially from jurisdiction to jurisdiction. In PL, the public interest test is a part of usual merger proceedings and is applied by the competition authority on a regular basis with no special rules or process for the purpose. In the UK, the Secretary of State may issue a public interest

⁶ For example, in Germany, the law refers to advantages to the economy as a whole that outweigh restraints of competition or an overriding public interest that justifies restraints of competition. For example, in the German system past decisions provide some guidance on the interpretation of these principles. Among other reasons, these decisions were based on securing technological progress, supporting international competitiveness, safeguarding energy supply and securing employment and workers' rights. It is also clear that media plurality and national security count as relevant public interest considerations in the context of the German framework.

⁷ In Germany, ministerial authorisations can be and have on some occasions been challenged in court. The judicial review of the procedure to be followed by the Ministry has been intense (and in one case also lead to the annulment of a ministerial authorisation and a part of the procedure had to be repeated). However, with regard to the interpretation of public interest grounds German law is generally understood to grant the minister a broad margin of appreciation.

⁸ NO, RO, ES.

⁹ CY, FRA, NL.

intervention notice under which he assumes responsibility for the decision. Ministerial intervention is also foreseen in FRA where the Minister of the Economy may intervene after a phase 2 decision has been adopted by the French Competition Authority and adopt a decision based on public interest considerations. Similarly, in NL the Minister of Economic Affairs may reverse the prohibiting decision of the Dutch NCA and grant a license to a concentration. In CY, the Minister of Energy, Commerce, Industry and Tourism, prior to the decision of the Cypriot NCA, may declare by a reasoned order that the notified concentration is considered to be of major public interest which may lead to the transfer of the case to the cabinet of ministers. In ES Minister of Economy and Competitiveness can do the same after the Spanish NCA Decision. Alternatively, a public interest intervention may be sought by merging parties by virtue of an appeal which is handled by the relevant minister (PT). In GER merging parties may seek a ministerial authorisation only after a merger has been prohibited by the competition authority. Before the Minister for Economic Affairs and Energy takes a decision a number of procedural steps have to be followed that guarantee a high degree of transparency and facilitate a public debate on the public interest issues at stake in the particular case.¹⁰

Other types of public interest interventions outside of competition enforcement

18. Outside of merger control there are often separate rules applicable to the control of foreign investments. However, scrutiny of foreign investments is usually limited to strategic industries¹¹ or companies¹². In all jurisdictions across the EU, it is not the competition authority carrying out a foreign investment control assessment. Instead, such a review is undertaken by relevant ministers, for example the Ministry for Employment and the Economy (FIN), Federal Ministry for Economic Affairs and Energy (GER), Ministry of Finance (FR), or Ministry of Treasury (PL).
19. Separate rules for the control of mergers may also exist for certain sectors and be applicable in parallel to competition enforcement. This is the case for media mergers in SI where anyone intending to acquire more 20% shares in any media (radio, TV or press) is obliged to obtain an authorisation from the relevant minister. In GER, the acquisition of ownership interests in private broadcasters of television services in Germany are reviewed by the Commission for the appraisal of concentration in the media (KEK) on media plurality grounds.

¹⁰ The procedural steps are the following: (i) an independent body of experts (Monopolkommission) provides its own assessment of the public interest considerations in a report that is submitted to the Minister and published; (ii) a public hearing takes place, which allows the applicant to argue for its case and third parties to express their views; (iii) the minister makes its own assessment of the public interest considerations and may combine the decision obligations and conditions in order to ensure that the public interest goals are achieved.

¹¹ FIN, FRA, GER.

¹² PL.

Conclusion

20. The review showed that public interest considerations do not play a prominent role in the vast majority of merger control regimes across EU Member States. These considerations do remain relevant, however, and there are significant differences in terms of how public interest may be taken into account and what public interest grounds can validly be relied upon. However, the EUMWG also found some commonality in approach insofar as public interest based interventions that would be at odds with an economics-based competition assessment have generally been limited to a small number of cases that were characterised by exceptional circumstances.
21. All members of the EUMWG agree that government intervention based on public interest grounds should be reserved for exceptional circumstances and operate on the basis of objective criteria, applied in a non-discriminatory manner and should not restrict competition more than necessary to achieve the public interest objective. Having examined the regimes across Member States, the EUMWG notes that there are differences both in terms of the procedure and the substance relating to the taking account of public interest considerations in the context of merger control reviews. It would appear to be neither necessary nor practicable, at this stage, to strive for a harmonised approach in this regard. In so concluding, the EUMWG neither foresees nor excludes that such harmonisation would become desirable or achievable as circumstances evolve. The EUMWG considers that, given the lessons Member States have learnt from the past, a competition-based assessment should be at the heart of merger control reviews across all Member States.