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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Background Paper by the Secretariat --

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Abstract

Although efficiency is central to competition law and policy in all OECD Members, the competition laws of some jurisdictions also include objectives which extend beyond the core economic goal of competition law, so-called 'public interest considerations'. Merger control is likely to have political and economic consequences, so such considerations are particularly prevalent.

Public interest considerations in merger control vary considerably across jurisdictions and take various forms. One such form are public interest clauses which be included as merger assessment criteria or in other provisions of the law (e.g. as an exemption from the competition authority's assessment). The methods for accommodating public interest clauses (e.g. framing public interest considerations in the law, institutional design) are subject to debate and differences can be observed across OECD Members and non-members. OECD Members interpret public interest clauses narrowly and apply them only under exceptional circumstances, while many non-Members use them more frequently. Competition authorities might face a difficult balancing exercise in weighing public interest criteria against competition factors, as they do not necessarily point to the same direction.

Apart from clauses in the law, there are some other exceptional and rare circumstances (e.g. financial crisis) where merger assessment indirectly takes into account the public interest through factors like broad efficiency claims or failing firm defence. Competition authorities are not obliged by law to address these considerations in every case and competition law generally does not include public interest in them explicitly. Competition authorities may, however, apply the same balancing exercise in these situations as when measuring competition factors against public interest clauses.

[*] This background paper was prepared by Aranka Nagy on secondment to the OECD Competition Division from the Hungarian Competition Authority, with comments from Federica Maiorano and Despina Pachnou, OECD Competition Division. All references are cited in full in the bibliography at the end of this background paper.

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1. Background

1. Public interest considerations in merger control are not entirely new to the OECD's agenda. In preparation for the Global Forum on Competition (2003a), the OECD asked for country submissions concerning the objectives of competition policy. The responses were analysed in a note (OECD, 2003a) that identified 'supplementary' goals going beyond the 'core', economic goal of competition law, which we will call in this paper 'public interest considerations'. Since then, the OECD has held several roundtables which have touched upon the question of how public interest considerations appear in competition laws (e.g. OECD, 2009a, 2009b, 2009c, 2009d, 2011, 2012 and 2013). However, no roundtable so far has specifically addressed public interest considerations in merger control.

2. Some OECD jurisdictions exclude public interest policy considerations from merger control. Others consider public interest factors, such as financial stability, public security and plurality of media in their merger assessments. The paper gives an overview of whether public interest considerations, and other non-competition challenges faced by jurisdictions, are accommodated by competition law, and particularly by merger control rules. In doing so, it addresses a number of questions, including: what is the form that public interest considerations take in the law? What are the most common institutional solutions to enforce them? What is the weight that is given to public interest considerations in merger control? What are the most common forms of state's participation on public interest grounds in mergers? Apart from clauses in the law, in which other situations could public interest considerations apply in merger control?

3. The paper explores options and examples across OECD Members, as well as some non-Members.

4. The paper is structured as follows: Section 2 provides a brief overview of the goals competition laws pursue and describes the core economic ('competition') and supplementary ('non-competition') goals of competition law. Section 3 provides a description of public interest considerations in merger control as they appear in law ('public interest clauses'). Section 4 addresses other channels through which public interest can be taken into consideration in merger control.

2. Competition and non-competition goals

5. There is a '*general consensus that the basic objective of competition law is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources in free market economies. While countries differ somewhat in defining efficient market outcomes, there is general agreement that the concept is manifested by lower consumer prices, higher quality products and better product choice*' (OECD, 1994). Thus, the core mission of competition law is to promote allocative efficiency by ensuring that markets are competitive, and that firms do not face unreasonable obstacles to attaining productive efficiency (Hovenkamp, 2013).

6. While the core mission of competition laws is similar across countries, such laws vary in their substantive and institutional aspects, and their specific goals can go beyond the core economic goal of competition (Gal and Fox, 2014) or change over time (Blair and Sokol, 2013). The International Competition Network ('ICN') identified various goals of competition law across the world, such as ensuring an effective competitive process, promoting consumer welfare, maximising efficiency, ensuring economic freedom, ensuring a level playing field for small and medium sized enterprises, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatisation and market liberalisation, and promoting competitiveness in international markets (ICN, 2007).

7. Although efficiency is central to competition law and policy in all OECD Members (OECD, 1995), the competition laws of some jurisdictions include other objectives, so-called 'public interest considerations' (OECD, 1994). The following subsections will provide a brief overview of the core competition and public interest goals of competition law.

2.1 *The core competition goal*

8. A long standing debate concerns the welfare standard that jurisdictions ought to apply in achieving efficiency (Harker, 2011): total welfare or consumer welfare (Blair and Sokol, 2013). We do not deal in detail here with the pros and cons of different approaches in this debate, but it is necessary to set out the options before going on to consider public interest departures and additions to the goals.

9. Total welfare is generally defined as the overall surplus from producers and consumers, while consumer welfare seeks to maximise the consumer surplus, even if in doing so total welfare decreases (Harker, 2011).

10. In the total welfare model, competition policy is only concerned with total efficiency (including producer efficiencies), not with the distribution of benefits (Lao, 2014). Many antitrust analysts (Motta, 2004, Posner, 2001, Carlton, 2007, Elzinga, 1977, Farell and Katz, 2006, Blair and Sokol, 2013) believe that total welfare, rather than consumer welfare, should drive competition law. These scholars – especially those associated with the Chicago School – argue that competition law is not suited to deal with income distribution and that other public policies are better placed to deal with such goals (Cseres, 2007). This approach does not value the wealth transfer from consumers to producers or the protection of consumer interests (Cseres, 2007).

11. Most jurisdictions use the consumer welfare model as competition law's organising principle: banning practices that reduce such welfare and subjecting all other conduct to market discipline (Meese, 2013). The consumer welfare model argues that the ultimate goal of competition law is to increase overall economic efficiency while providing consumers with a fair share of total wealth (Cseres, 2007). Thus all reductions in consumer welfare, including price increases, are harmful (Meese, 2013). Of course, the consumer welfare standard can lead to different enforcement decisions in different circumstances.[1]

2.2 *Public interest considerations in competition law*

12. A solid competition policy framework may help in itself achieve sustainable development objectives, such as poverty alleviation (e.g. by lowering prices and increasing consumer choice) and economic growth (e.g. by creating firm rivalry and stimulating productivity (Davies and Thiemann, 2015)). Competition law can also expressly pursue a number of additional public interest goals (OECD, 2003a). These additional goals may sometimes conflict with the core competition goal: a public interest test may permit an anti-competitive merger or restrictive trade practice to proceed or a pro-competitive merger or trade practice to be blocked or remedied, in order to serve the public interest (OECD, 2003a).

13. OECD work on competition law and responsible business conduct suggests that most OECD competition authorities do not normally consider factors which go beyond the core competition objectives (OECD, 2015a). Competition authorities in OECD jurisdictions that have public interest considerations usually interpret and apply them narrowly (OECD, 2015a). Public interest considerations weigh more heavily in emerging economies (Lewis, 2002) and consequently, non-Members typically use public interest considerations more (OECD, 2003a)[2]. UNCTAD indicates that effective competition can be considered as an important element of economic development strategy in emerging economies which motivates these economies to include in competition laws policy objectives going beyond efficiency (UNCTAD, 2011). For instance, unemployment can be high in emerging economies; therefore, governments prioritise job creation as one of the considerations in merger control (Oxenham, 2012).[3]

14. The debate for including, or not, the concept of public interest in competition law is on-going[4]:

- Public interest goals are generally broad and thus difficult to interpret and apply in an objective, transparent and consistent manner. Their inclusion therefore creates risks of legal uncertainty and unpredictability in the enforcement of competition law. It has been argued that public policy matters (like plurality of media, employment) can be pursued better by direct policies (ICN, 2002) or sectoral regulation (Cheng et al., 2014). Incorporating the assessment of public interest considerations in merger control might undermine the primary competition analysis in mergers, thus harming the broad 'public interest' that competition policy aims to promote (Balkin and Mbikiwa, 2014).
- Commentators who argue in favour of competition law and policy going further than the core competition goal point out that competition cannot exist in a vacuum (Banda et al., 2015). Competition authorities are accountable to governments which pursue policies in addition to the promotion of market competition (UNCTAD, 2011). The inclusion of non-competition criteria allows countries to design their competition law to fit their socio-economic characteristics (Gal and Fox, 2014) and may also, in some cases, enhance the credibility of the competition authority.[5]

15. To the knowledge of the Secretariat there are no impact assessments of the effects of competition enforcement decisions based solely on public interest grounds, probably due to methodological difficulties, such as the lack of clear and comparable assumptions and results. Hence, whether the inclusion of public interest goals in competition laws counterbalances anti-competitive effects in the market has not been assessed empirically.

3. Public interest clauses in merger control

16. Business decisions including mergers are likely to have political and economic consequences and this, in some cases, prompts the inclusion of public interest in merger control laws. A recent survey confirms that public interest considerations are present in many merger control regimes around the world, though not primarily in OECD Members (Reader, 2016).[6]

17. Public interest clauses in merger control law take various forms, such as explicit requirements to consider the public interest in merger assessments, exempting mergers from the competition authority's assessment or allowing other public bodies' merger-related decisions to override that of the competition authority.

18. The first part of section 3 focuses on the definition of public interest in merger control laws and the most common types of clauses. We present institutional models to enforce public interest clauses. The second part of section 3 explores some of the challenges that competition authorities may face in enforcing such clauses. The third part describes how states apply public interest considerations in merger control in practice.

3.1 Definition and institutional design

3.1.1 Definition of public interest in merger control

19. There is no universal definition of public interest. For the purposes of this paper, public interest considerations are non-competition factors taken into account in merger control. Public interest clauses vary considerably from one jurisdiction to the other, depending on the social, cultural and political context, and may change over time to reflect the developments of the society (Jolly, 2007).

20. Public interest may be included in competition law in:

- the general objectives/principles or in the preamble of the law;
- the merger assessment criteria;
- any other provisions/exception of the competition law which allow mergers to be assessed by public bodies other than the competition authorities.

21. It is not clear in many countries whether the preamble or the objective of the law should be taken into consideration while assessing a merger (Buthelezi and Njisane, 2015). Therefore, this section focuses on public interest clauses in merger assessment criteria and clauses allowing intervention by public bodies other than the competition authorities.

Box 1. Examples of public interest clauses in OECD Members and non-Members

In the *European Union* Article 21 (4) of the Merger Regulation ('EUMR') allows the EU Member States to take appropriate measures to protect legitimate (non-competition) public interests, including public security, plurality of media and prudential rules. Many OECD Members have clauses permitting the state to intervene in merger control on various public policy grounds, such as:

- industrial development, protecting employment, promoting the competiveness of the undertakings in international competition in *France;*
- benefits to the economy as a whole or an overriding public interest in *Germany;*
- relevant general interests of national economy, within the context of European integration in *Italy;*
- general interest reasons in the *Netherlands;*
- questions of principle or interest of major significance to society in *Norway;*
- the benefits to fundamental strategic interest of the national economy in *Portugal;*
- national defence and security, protection of public security and public health, free movement of goods and services within the national territory, protection of environment, promotion of technical research and development and the maintenance of the sector regulation objectives in *Spain;*
- exceptional public interests, such as national security, media plurality, or the stability of the financial system in the *United Kingdom*.

In *Korea* factors such as increase of employment, economic development of non-metropolitan areas, the stable provision of energy and improvement of environmental pollution should be considered.

The New Zealand and Australian competition regimes, which are structured in a similar way, both include non-competition related criteria. In *New Zealand,* public benefits (typically economic efficiencies) in New Zealand and the economic policies of the government should be considered. In *Australia*, a significant increase in the real value of exports, import replacement, and all other matters relating to the international competitiveness of the Australian industry must be taken into account.

In the *People's Republic of China* public interest clauses include assessing a merger's effect on national security and a proposed merger's effect on the development of the national economy.

22. Public interest clauses in merger assessment criteria can take the form of a non-exhaustive list of factors (e.g. Poland) or a closed list specifying certain factors which should be protected (e.g. Spain). Usually competition law requires competition authorities to balance the public interest criteria against the envisaged competition harm (e.g. Germany, Italy and Portugal).

23. The form that public interest takes in the law matters (Mariniello et al., 2015, Hodge et al., 2009):

- General wording or a broad definition provides competition authorities with greater flexibility and strengthens their discretion in enforcement. This avoids the risk of applying strictly defined public interest criteria (Hodge et al., 2009) which, over time, may no longer reflect public policy objectives.

- A very wide ‘catch-all’ definition may undermine competition law (Chisholm and Jung, 2014). If the concept of public interest is not clearly defined and there are no soft law documents to clarify its meaning, competition authorities will need to interpret the concept on a case-by-case basis. This can increase legal uncertainty and unpredictability (Capobianco and Nagy, 2015) and may expose competition authorities to political influence and pressure (Mariniello et al., 2015).

3.1.2 Classification of public interest clauses

24. There is no exhaustive list of public interest clauses as public policy goals significantly differ from one jurisdiction to the other. Distinction can be drawn between general and specific considerations; and economic and non-economic considerations:

- *General – specific considerations*: The concept of public interest can be either general (e.g. ‘legitimate public interest’, ‘overriding public interest’, weighting the ‘public benefits’)[7] or specific and narrower, reflecting the social, political and economic needs of the country. Specific considerations can refer to a certain sector or industry, and are particularly common in energy (e.g. ‘security of supply’, ‘stable provision of energy’), media (‘plurality of the media’), finance (‘prudential rules’, ‘stability of the financial system’) and defence (‘national security’, ‘national defence’)[8].

- *Economic – non-economic considerations*: A distinction can be drawn between considerations that relate to economic matters (e.g. ‘protection of small and medium enterprises’, ‘international competitiveness of domestic firms’, ‘economic development of non-metropolitan areas’)[9] and considerations which target other goals (e.g. social ‘protection of employment’, ‘public health’ or the ‘protection of environment’).[10]

Box 2. Public interest tests in non-Member jurisdictions

The South African example

Public interest objectives in merger control are more widespread in non-Members (OECD, 2003a). The reasons why these objectives play a stronger role in the merger control of non-Members is the greater use of industrial policies and the wish to align competition policy to the broader government policies (Lewis, 2002, Omphemetse and Sibanda, 2015, Hodge et al., 2009). The most frequent public interest clauses are socio-economic or socio-political considerations, such as 'employment', 'international competitiveness', 'exports' and 'promoting stability' (See the jurisdictions of South Africa, Botswana, Zambia, Kenya and Namibia. Oxenham, 2012, Machine, 2014, Smith and Swan, 2014).

In South Africa Article 12A (3) of the competition act specifies that the relevant competition authorities (the Commission or the Tribunal) must consider the effect that the merger will have on: i) a particular industry or sector; ii) employment; iii) the ability of businesses owned by historically disadvantaged persons to become competitive; and iv) the ability of national industries to compete in international markets. The public interest test is separate from the competition test (this was confirmed in the *Harmony Gold mining Co/Gold Fields Ltd* case (Tavuyanago, 2015)). Even if the merger passes the traditional competition test, public interest considerations still have to be assessed (Machine, 2014).

South Africa recently released guidelines to frame its approach in evaluating public interest considerations ('Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act 89 of 1998' published for public consultation by the Competition Commission on 23 January 2015). They set forth a 5-step-analysis according to which the competition authorities should:

- determine the likely effect of the transaction on the public interest;
- determine whether the alleged effect on a specific public interest is a result of that merger;
- determine whether these effects are substantial;
- consider whether the merging parties can justify the likely effect on the particular public interest; and
- consider possible remedies to address any likely negative effect on the public interest.

In the *Wal-Mart/Massmart* merger (Wal-Mart Stores Inc. and Massmart Holdings Limited 73/LM/Nov10), the world's largest retailer Wal-Mart aimed to acquire control over Massmart, a South African wholesaler and retailer of groceries and general merchandise. As Wal-Mart had no presence in South Africa before the merger, the transaction did not raise competition problems. However there were concerns based on public interest grounds, particularly employment (potential job losses as a result of the merger) and industry (increased imports and harmful impact on domestic production levels). The Competition Appeal Court ('CAC') authorised the merger, subject to the conditions that no merger-specific redundancies could take place for two years and the parties must establish a development fund to assist local producers to compete with foreign competitors (Banda et al., 2015).

3.1.3 Institutional design to enforce public interest considerations

25. The various institutional ways of enforcing public interest considerations can be summarised in two categories, namely i) the single authority model and ii) the dual responsibilities model.

26. Single authority model. Certain jurisdictions entrust the public interest test in merger review to the competition authority, regardless of the sector or industry concerned (e.g. People's Republic of China, South Africa).

27. The single authority concept allows consistent and coherent application of the law (Capobianco and Nagy, 2015) and therefore can serve legal certainty. This approach enables competition authorities to conduct a holistic analysis that takes into account both competition and non-competition criteria. As competition authorities are generally independent from the government and stakeholder groups, they may be less susceptible to external pressure (Machine, 2014).

28. However, public interest considerations involve more subjective factors than the economic factors typically considered by competition authorities in merger control (Poddar and Stooke, 2014). This could expose competition authorities to political pressure and affect their independence and impartiality (Capobianco and Nagy, 2015). Enforcing public interest considerations may create an internal conflict of interest, particularly in those competition authorities which are overseen by a political body (e.g. ministry), as the competition assessment might require a different solution than the public interest consideration which the political body aims to promote. Additionally, competition authorities may lack the necessary expertise. Also, the fact that competition authorities are not elected bodies can lead to an argument that they lack democratic legitimacy to assess the public interest, especially if that assessment involves trading off one public objective against another, or adjudicating between the interests of different groups.

29. *Dual responsibilities model*. In this model, competition authorities follow a standard competition assessment, while public interest considerations are assessed by a sectoral regulator or a political decision-making body (e.g. a ministry). The following combinations can be found:

- *Shared competences*. Public interest considerations are channelled into the merger control procedure through the official position of the sectoral regulator or other public decision-making body. Shared competences are frequent in media mergers.[11] The procedures conducted by the competition authority and the sectoral regulator are usually linked to each other in terms of timing and procedural rules. Domestic regulation specifies whether the regulator' or other body's decision has a binding effect on the competition authority. [12]

  Due to the involvement of two separate institutions, there is more clarity in the procedure. Competition authorities are less exposed to political pressure and concerns about conflict of interest. However, aligning the procedures of the separate institutions may be challenging: the principles of co-operation should be clearly set by law in order to avoid overlapping responsibilities. Shared competences may also lead to time-consuming procedures.

- *External intervention.* The consideration of public interest clauses is left to a minister or other public decision-making body (non-regulator), and the outcome of the competition authority's assessment may be overruled on the basis of such other body's subsequent assessment. In this model, the application of the public interest clause is an exception. The external intervention is typically not restricted to certain sectors or industries. The external model - as a specific form of the states' participation in assessing mergers on public interest grounds - is described in more detail under section 3.3.2.).

  The external model carries the same advantages as the shared competences model (e.g. the competition authority focuses only on competition-related criteria, there is more clarity in the decision-making process, there is no democratic legitimacy question). Nevertheless, one could argue that it exposes merger control to political influence and, therefore, detracts from independent competition law enforcement (Hodge, 2009). Also, ministers or other public decision-making bodies may be unfamiliar with competition considerations (Machine, 2014), while competition authorities may be more skilled to apply non-competition related issues in their assessment (Vane, 2015).

- *Concurrent competences*. Mergers in certain sectors are assessed both by the competition authority and the sectoral regulator or other agency, in separate and independent administrative procedures (whereas, in the shared competences model, procedures are linked in time and rules). In this model the assessment of public interest considerations lies with the sectoral regulator or other specialised decision-maker. Responsible agencies do not take each other's views into account when they conduct their assessment. Concurrent competences are frequently used for the assessment of mergers in the financial and banking markets.[13]

3.2 Application of public interest clauses

30. It has been argued by business that '*in general, non-competition factors should not be applied in antitrust merger review*' (ICC/BIAC, 2000, OECD, 2015a) in order to protect legal certainty and predictability (Poddar and Stooke, 2014). The ICN Recommended Practices for Merger Analysis recommend that 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'* (ICN, 2008, Poddar and Stooke, 2014). The application of public interest considerations may interfere with commercial decisions to merge (or not) which hinge upon the parties' ability to predict the outcome of the competition authorities' assessment (Reader, 2016).[14]

31. In the following sections the paper will address some of the challenges that countries face in interpreting and applying public interest clauses, and particularly, how competition authorities balance competition and public interest under general and exceptional circumstances and how they ensure consistency in the review of cross-border mergers.

3.2.1 Balancing competition and public interest considerations in general circumstances

32. Striking the right balance between competition and public interest criteria is not always easy: the assessments of the same merger on the basis of both competition criteria, and the public interest, which includes political and socio-economic considerations (Buthelezi and Njisane, 2015), may not always reach the same conclusions. This may lead to an anti-competitive merger being cleared, or a pro-competitive merger being blocked on public interest grounds.[15] The Secretariat's research indicates that there are more examples of public interest grounds resulting in an anti-competitive merger being cleared than of a merger cleared by the competition authority being prohibited.

33. In the single competence model, the relevant authorities might face a difficult balancing exercise in weighing public interest criteria against competition related factors (Poddar and Stooke, 2014):

- *Interpreting public interest clauses*: Public policy objectives may be wide, varied and change over time, which makes the interpretation of public interest clauses challenging. Such clauses are sometimes relied on in unpredictable circumstances like a financial crisis, which makes it even harder to define, delimit and apply them (Chisholm and Jung, 2014). Clearly identified and articulated clauses (IBA, 2015) may assist transparency and predictability of their interpretation. Also, the interpretation of public interest clauses can be made more objective, transparent and predictable through soft law documents (guidance, notes, etc.)[16]. One example of soft law is the South African guideline referred to in Box 2. Also, to allow judicial review of decisions, their reasoning and the interpretation of public interest in the specific case needs to be concrete, detailed and in writing.
- *Time horizon of the impact of the merger assessment:* Competition authorities mainly follow a forward-looking approach in merger control, meaning that assessments aim to determine the likely impact of a merger on competition in the medium to long term. Merger assessments based on public interest grounds generally reflect current public policy considerations, and might seek to remedy short-term concerns. An intervention which may appear a good solution in the short term could result in detrimental consequences for competition and consumer welfare in the long term. OECD work suggests that mergers that lead to very concentrated markets in particular are almost impossible to reverse (OECD, 2009d). The balance between short-term gains and the long-term benefits of sustaining competitive markets is not easy (Claudia, 2012).
- *Merger-specificity:* Merger specificity is a principle of merger control enforcement that requires a sufficient causal nexus between the merger and its alleged effect before a competition authority

intervenes. Arguably, public interest considerations should also be merger-specific; that is, in case a merger is cleared or blocked on public interest grounds, these grounds need to be firmly linked to the likely effects of the specific merger (Njisane, 2011). However, when applying public interest clauses, relevant authorities may address policy objectives going beyond the specific merger.

3.2.2 Balancing competition and public interest considerations under exceptional circumstances

34. Even if public interest considerations are clearly defined, not all situations in which public interest is invoked can be covered by law or soft law. OECD work assessing the role of competition law in times of financial crises shows that there have been arguments for suspending competition rules for the duration of the crisis (OECD, 2009d).

Box 3. Balancing competition and public interest considerations in exceptional circumstances

Stability of the financial system in the UK (Lloyds/HBOS merger)

In the United Kingdom, Article 42 of the Enterprise Act 2002 enables the Secretary of State to issue an 'intervention notice' to the competition authority, the Competition and Markets Authority ('CMA'), if there are public interest considerations to be taken into account in a proposed merger. The public interest considerations specified by Article 58 of the Enterprise Act 2002, as amended in 2008,are i) national security, ii) media plurality and iii) stability of the financial system.

The majority of intervention notices up to this point have concerned national security criteria (Chisholm and Jung, 2014). In relation to the *Pfizer/AstraZeneca* merger, the possibility of including the protection of R&D activities as a public interest consideration was raised, but that argument failed (Chisholm and Jung, 2014).

The 'stability of the financial system' factor was included in the Enterprise Act in connection with the *Lloyds/HBOS* merger. In September 2008, the share price of Britain's largest mortgage bank, Halifax Bank of Scotland ('HBOS'), fell significantly. Following public debate on whether Britain's largest mortgage bank could be allowed to fail, Lloyds and HBOS announced that they had reached agreement on the terms of an acquisition of HBOS by Lloyds (Smith, 2008).

The Secretary of State issued an intervention notice based on the stability of the financial system, a public interest consideration which was not at that time included in the Enterprise Act. On the day that the amended Enterprise Act came into force adding 'the stability of the financial system' as a public interest factor to be considered in merger control, the Office of Fair Trading ('OFT') concluded in its report that that the merger would result in significant lessening of competition in relation to personal current accounts, banking services for small and medium sized enterprises, and mortgages (OFT report, 2008). Nevertheless, the merger was not referred to the Competition Commission as the Secretary of State decided that the competition concerns identified by the OFT were outweighed by significant benefits to the public interest in ensuring the stability of the financial system (Smith, 2008).

3.2.3 Ensuring consistency in the review of cross-border mergers

35. The increased interconnection of the global economy and trade has led to more cross-border mergers (Brandenburger and Jones, 2014, Capobianco et al., 2016). The potential for conflicting decisions on the same merger in different countries is magnified when public interest considerations come into play[17].

36. This section gives a brief overview of the complications that might arise from the application of public interest considerations in mergers under investigation in more than one jurisdiction:

- *Increasing unpredictability in cross-border mergers*. Public interest clauses are jurisdiction-specific and, thus, more likely than core competition goals to differ in their conception, interpretation and application across countries, increasing the likelihood of different outcomes being reached (Oxenham, 2012). In its recent White Paper, the European Commission emphasised that national laws that allow a government to overrule a competition authority's decision and authorise an anti-competitive merger on the basis of public interest considerations (European Commission, 2014) can cause divergences in outcomes.

- *Additional requirements.* Cross-border mergers require multiple filings and co-ordination among the parties. Public interest clauses may require parties to meet additional filing requirements in certain jurisdictions. For instance in the People's Republic of China, guidance by the Ministry of Commerce sets forth that specific explanations should be given in the notification of a merger if it is related to public interest, particularly national security, industrial policy, state-owned assets, etc. (GTDT, 2015).
- *Remedies*. The imposition of remedies in cross-border mergers raises difficulties of consistency across jurisdictions (OECD, 2015b). Consultation and co-ordination among competition authorities are crucial[18] for designing and enforcing effective remedies (OECD, 2015b), particularly when public interest clauses are involved, as they raise the level of difficulty.

3.3 The state's participation in assessing mergers on public interest grounds

37. The debate over potential conflicts between ensuring efficiency and achieving wider public policy objectives through competition has intensified in recent years (Geradin and Girgenson, 2011) as governments sometimes intervene in markets of significant national importance through a variety of tools, including arranged mergers and foreign investment rules.

38. In the first part of this section, we provide a brief overview of the state's involvement in assessing foreign takeovers, particularly through domestic measures and review mechanisms which fall outside the scope of merger control. The second part of the section presents the state's involvement in merger control (usually ex post), based on public interest clauses.

3.3.1 State's involvement in assessing foreign takeovers

39. States have at times introduced measures targeting takeovers by foreign companies, which may consist of the following acts (MLex, 2014, ABA, 2015):[19]

- *Blocking the deal.* Sectoral regulation can block or disrupt a foreign takeover. An example is E.ON's failed attempt to acquire control over the Spanish energy company Endesa (Milner, 2007).[20]
- *Influencing the structure of the deal*. The state can influence the structure of the deal or the remedies imposed on the parties. The takeover of the French company Alstom by the United States conglomerate General Electric was structured to fit conditions set by the French government (Petit, 2015)[21].
- *Foreign investment regimes.* Cross-border mergers often require not only antitrust review, but also national interest or national security reviews (ABA, 2015). The purposes of these reviews are to provide an assessment framework for significant foreign investments in a manner that encourages investment and economic growth, as well as to review foreign investments which may be harmful to national interest or national security. OECD Members that have rules on foreign investment include Australia, Canada, France, Germany, Italy, Japan, Korea, New Zealand, Portugal, Spain, Switzerland,[22] United Kingdom and the United States. The foreign investment assessment, i.e. the assessment to examine proposals by foreign investors having regard to the national interest or national security, is rarely conducted by the competition authority[23]. A number of jurisdictions have a separate body to assess foreign takeovers[24]. Competition authorities are sometimes consulted by these bodies (e.g. in Canada).

Box 4. Foreign investment regimes

Examples of Canada and Australia

Competition procedures and foreign investment assessments might conflict: competition law is ownership-and nationality-neutral. In addition to encouraging investment and economic growth, the assessment of foreign investment may consider the protection of domestic business from foreign competition (Chisholm and Jung, 2014).

Net benefit test in Canada

In Canada, the Investment Canada Act is the law which governs foreign investment reviews (Frigon, 2011). Foreign investments are reviewable under the so-called 'net-benefit test' if they exceed the monetary thresholds stipulated by the Act. Investments can be approved only if the Minister of Industry is satisfied that the transaction is likely to be of 'net benefit' to Canada (Frigon, 2011). The factors considered in the test include, for instance, the effect of the investment on economic activity, productivity, efficiency, technological development, product innovation and competition in Canada; the compatibility of the investment with national industrial, economic and cultural policies and its contribution to Canada's ability to compete globally ('An Overview of the Investment Canada Act' (FAQs). While evaluating these factors, the minister consults with provincial governments, other federal departments, and the Competition Bureau.

In 2010, the Australian BHP Billiton's (the world's largest fertilizer company) offer to acquire the Canadian Potash Corporation was blocked on the grounds that the sale of BHP Billiton would not provide a 'net benefit' to the country (Bloomberg, 2010), notwithstanding BHP's offer of undertakings (Kwinter, 2014). The province of Saskatchewan argued that Potash Corporation's sale would cut jobs and tax revenue and surrender control of an important resource (Bloomberg, 2010).

National interest test in Australia

In Australia, the Foreign Acquisitions and Takeovers Act 1975 empowers the Treasurer to make orders prohibiting certain foreign investments if the Treasury considers them contrary to the national interest. Deals which exceed the monetary threshold stipulated by law are subject to mandatory notification. Notifications must be submitted to the Foreign Investment Review Board, which is a non-statutory body advising the Treasury. The 'national interest' test is based on a wide concept which was created by law and elaborated by case law. Factors which shall be taken into consideration include, for instance, national security; taxes and other government policies such as environment; the impact of the investment on the economy, including an analysis of Australian participation and the interests of employees, creditors and other stakeholders (Bath, 2012).

The plan by Archer-Daniels-Midland Co., a US company to take over Australia's GrainCorp Ltd in 2013 was rejected by the Treasurer. The Treasurer noted that the proposal attracted concern from stakeholders and the broader community (Treasury, 2013) and determined that the acquisition was contrary to the national interest as there was not sufficient competition in grain handling following the deregulation of the industry five years earlier (Kwinter, 2014). This case shows the differences between foreign investment regimes and merger control: although rejected by the Treasurer, the deal had been previously cleared by the Australian competition authority ('ACCC to not oppose Archer Daniels Midland Acquisition of Graincorp', ACCC press release 27 June, 2013).

3.3.2 State's involvement in merger control

40. In many jurisdictions (for example France, Germany, Italy, Netherlands, Spain, Portugal, the United Kingdom), the government (usually the minister of the economy) has the power to intervene in merger control. Such intervention is often *ex* post (i.e. it follows the competition authority's own assessment) based on public interest clauses which allow the competition authorities' decision to be overruled. There are a few examples among the OECD Members (e.g. Canada, Hungary and Israel) where intervention does not take a form of an ex post decision. In these jurisdictions, certain transactions can be exempted from the competition authorities' assessment ('ex ante exemptions').

41. The factors on which the state's intervention can be based vary significantly, including considerations that go from general ('overriding public interest', 'economic policies of the government', 'interest of major significance to society', 'benefits to fundamental strategic interests', 'industrial

development', 'international competitiveness',) to more sector specific (e.g. 'media plurality', 'stability of the financial system', 'employment', 'national security', 'protection of public health', 'protection of the environment', 'promotion of technical research').

42. In some jurisdictions (e.g. Germany, France and Portugal) the responsible minister may also attach conditions and obligations to the exceptional authorisation in order to minimise the negative effects on competition.

43. Merging parties and interested third parties (but not the competition authorities) have the right to challenge the overruling decisions in court. For instance, in Germany and Spain persons whose legitimate rights or interests can be affected by the decision can challenge the decision.

44. Countries which allow such intervention in law do not always use this power in practice (OECD, 2015c). The case-related practice in OECD Members suggests that external intervention in mergers is exceptional[25] and limited to certain sectors and markets. In Germany for instance, where state intervention in merger control has been possible since 1973, there are only 9 such cases which mostly included conditions to limit harm to competition.[26]

45. The application of public interest clauses may distort the level playing field in merger control if they are used to prohibit mergers which harm the economic activity of the state-owned domestic players (Njisane, 2011).[27] Experiences show that OECD Members are more likely to introduce public interest clauses limited to certain strategically important sectors, especially defence, media, energy and financial markets.[28] Energy markets have been particularly prone to intervention (Botta, 2011), as examples in Box 5 show.

Box 5. National champions in energy markets

It has been argued (Geradin and Girgenson, 2011) that some EU Member States have relied on state intervention in merger control to relax competition assessment and support national champions in energy markets. Some examples are provided in this box.

Germany

In line with Article 42 (1) of the German competition Act, the Federal Minister of Economics and Labour may authorise in exceptional cases a concentration prohibited by the German competition authority ('Bundeskartellamt') if the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest.

In 2002 the Bundeskartellamt prohibited the proposed acquisition of the majority shareholding in Ruhrgas by E.ON, as it established that the transaction would have strengthened dominant positions in the gas and electricity sales markets.

Following the application of the parties for ministerial authorisation, the transaction was cleared by the minister subject to conditions. The ministerial authorisation was based on the fact that this would increase Ruhrgas's international competitiveness and improve the security of supply in Germany (Bkart report, 2001-2002).

Spain

The Spanish Council of Ministers is allowed to authorise a merger on public interest grounds with or without conditions.

In the Gas Natural/Endesa merger the Spanish competition authority (Tribunal de Defensa de la Competencia 'TDC', which is a predecessor of the Spanish competition authority, the Comisión Nacional de los Mercados y la Competencia) suggested blocking the transaction as it identified serious horizontal and vertical competition concerns.

Despite the TDC's position, the transaction received clearance from the Council of Ministers (Muñoz, 2006), subject to several substantive and procedural conditions. The Spanish Finance Minister pointed out that approving the deal with conditions would be the best option after such a complicated process, and that this decision would lead to more competition in the energy sector (Hogan, 2006).

46. In order to address the potential anti-competitive results stemming from governmental intervention, such as the lack of predictability of the overall merger assessment, jurisdictions can consider adopting checks and balances into their procedures, such as:

- Governmental intervention should be exercised under exceptional circumstances, in a transparent manner; and

- Effective judicial review of how the (merger-specific) public interest concerns outweigh the drawbacks in competition should be available.

4. Other considerations in merger control that relate to public interest

47. In exceptional and rare circumstances, competition authorities may indirectly take into account, in their merger assessment, non-competition considerations which are distinct from the public interest clauses we reviewed in section 3. These are considerations which do not intend, in the first instance, to protect public interest objectives, but to enhance the flexibility and completeness of the competition-based merger assessment. Competition authorities are not obliged by law to address these considerations in every case. If they do use them, however:

- The competition authority's assessment is based on competition criteria. Under specified, exceptional circumstances (e.g. financial distress) the traditional competition test may be stretched to also cover non-competition goals, which relate to public interest.

- Competition authorities may need to conduct the same balancing exercise in their assessment as when they weigh public interest considerations against competition-based criteria.

- As the circumstances under which these considerations emerge are exceptional, their application remains relatively rare.

48. The section will provide a brief description of these considerations and show how they may relate to the concept of public interest. The paper provides case examples of application of these considerations but is not intended to be exhaustive.

49. The considerations we examine in this section call for differentiated or exceptional treatment of mergers, due to the wider economic situation or the financial state of the undertakings concerned. They often take the form of defences such as the failing firm defence and broad efficiency claims.

4.1 Derogation from the standstill obligation

50. In many jurisdictions[29] the implementation of the notifiable mergers must be suspended before the competition authority grants its approval to the deal ('standstill obligation'). Failure to suspend the merger ('gun jumping') can result in the imposition of significant fines.

51. Some countries allow derogations from the automatic suspension rule. Procedural rules differ from one jurisdiction to the other; however, derogation is generally granted: i) upon the reasoned application of the parties where ii) there is urgency and iii) no competition concerns arise in principle. For example, the Greek competition law[30] provides that a derogation can be granted in order to prevent 'serious losses' to one or more undertakings affected by the concentration or to a third party. Hungary also allows derogation from standstill obligations, if the concentration results in the acquisition of a 'major undertaking with preferential status'.[31]

52. Derogation from the standstill obligation is granted on an exceptional basis. Parties are more likely to obtain the derogation if they may justify their claim (partly at least) on the basis of their own financial stability or, more often, that of the target company or of third parties, or of the adverse impact on the wider financial system or the entire economy (New frontiers of antitrust, 2014); thus elements of public interest can reinforce a claim for derogation.

53. The European Commission has also granted standstill derogations for different reasons, including the protection of workers' insurance rights, the financial situation of the target, and allowing a new entrant into the market (Anderson and Ward, 2015). The European Commission has shown more flexibility in granting derogations during the financial crisis: it granted six derogations concerning financial markets in 2008, including allowing the *Santander/Bradford & Bingley* transaction to close immediately (Reynolds et al., 2011). In this transaction[32] the European Commission accepted that the 'suspension obligation could seriously affect the financial interest of the parties and financial stability generally' which outweighed any competition harm associated with the transaction. The European Commission also underlined that there would be a significant risk for the public if the acquisition did not take place rapidly.

4.2 Failing firm defence

54. To accept the failing firm defence ('FFD') competition authorities[33] generally require three cumulative conditions: i) absent the merger, the failing firm will exit the market in the near future as a result of its financial difficulties; ii) there is no feasible alternative transaction or reorganisation that is less anti-competitive than the proposed merger; and iii) absent the merger, the assets of the failing firm would inevitably exit the market (OECD, 2009b).

55. OECD work suggests that the FFD may have helped address individual distress situations in the context of the global financial crisis (OECD, 2009d)[34]. During the crisis, it was debated whether it would be appropriate to relax the FFD requirements. '*While there is no theoretical or empirical basis for departing from the basic principles of competition policy during general economic downturns, financial distress at the industry or company level is certainly relevant to antitrust analysis. Antitrust enforcement should take account of real-world economic conditions*.' (Shapiro, 2009, p 12). Although most jurisdictions did not officially deviate from the general criteria and methodology[35], a FFD application is more likely to be accepted in a financial crisis.

56. The most notable example of the acceptance of FFD in a difficult financial situation is the unconditional clearance of the *Aegean/Olympic* merger.[36] The merger consisted of the acquisition of the Greek airline Olympic Air by its main domestic rival Aegean Airlines. The European Commission's assessment revealed that the transaction was likely to significantly impede effective competition due to the parties' horizontal overlap on various domestic airline routes. However, as the investigation confirmed that, without the proposed merger, Olympic would likely exit the market and that there was no other credible potential purchaser, the European Commission accepted that the FFD requirements were met. For this assessment, the European Commission also took into consideration '*the particular and exceptional circumstances of the present case, which is characterised by the protracted adverse economic conditions in Greece*'.[37] The parties had already unsuccessfully applied for clearance of the same deal two years before the FFD decision,[38] and the first FFD application was rejected by the European Commission.

57. In the Netherlands, the *Ziekenhuis Walcheren/Oosterscheldeziekenhuizen* transaction in 2009 involved two hospitals in Zeeland which were both in a difficult financial situation. The parties were each other's closest competitors and new entry was unlikely on the market. Although the Dutch competition authority did not explicitly refer to FFD in this case, it established most of the conditions necessary for its application and cleared the deal (MacGregor, 2012). The transaction was supported by the Dutch Healthcare Inspectorate which expressed its concerns that absent the merger a state intervention would be required to preserve at least one hospital in the Zeeland region (MacGregor, 2012).

58. Some cases from the United States suggest that i) FFD could be more easily applied in the financial (banking) sector (Kokkoris, 2007) than in other sectors and that ii) non-competition goals, such as financial stability, could play a significant role in considering FFD arguments (OECD, 2009b). The *United States v Philadelphia National Bank*[39] case involved a horizontal merger between a national bank and a state bank, the second and third largest banks respectively in the area of Philadelphia. The consolidation of the banks resulted in a significant increase in the concentration of commercial banking facilities that would have likely resulted in a substantial lessening of competition. Therefore, the Department of Justice challenged the merger in court. The case addressed various interesting issues, including whether the FFD applies to the merger. The Supreme Court concluded that the failing company doctrine applied to the banking sector '*due to the greater public impact of a bank failure compared with ordinary business failure*' (Zwiska, 2003, p 17-18). The doctrine was successfully applied in the *Granader v Public Bank*[40] case. The transaction involved the sale of all the assets of Public Bank, a Michigan banking corporation, to the Bank of the Commonwealth, another Michigan banking corporation. In its reasoning the Court recognised that '*The confidence of the general public in a sound banking system is essential to the conduct of our highly technological and sensitive economic system.* […] *The public interest, directed to maintain fiscal stability and to protect depositors, should prevail over the limited interests of bank stockholders and directors*'[41] and ruled that '[…] *the action of the Court by effectuating an immediate sale by the receiver to Commonwealth was necessary and in the public interest*.'[42]

4.3 Broad efficiency claims

59. In some cases efficiencies[43] are considered to counterbalance anti-competitive effects in a two-stage process: first, there is a finding that a merger is anti-competitive, and secondly, it is examined whether the merger can be justified on efficiency grounds (OECD, 2012).[44]

60. Merger guidelines in several countries[45] suggest that, in order to be accepted, efficiency claims should i) benefit consumers, ii) be merger-specific iii) be verifiable and iv) not form an obstacle to competition.

61. The following examples suggest that factors such as benefits for the wider economy or development of the national economy are often referred by parties in efficiency claims, particularly in merger in financial markets, and are sometimes taken into account by authorities:

- In Korea, the Supreme Court overturned the Seoul High Court ruling in the Samic Musical Instrument-Young Chang (2004) case based on the ground that while reaching a decision regarding efficiency gains, a company's production, sales, research and development as well as the '*balanced development of the national economy'* should all be considered in a comprehensive manner.[46]

- In Japan, parties argued that the 'business combination' of the Tokyo Stock Exchange Group, Inc. and Osaka Securities Exchange Co could improve efficiency given that an annual cost reduction of around seven billion yen is expected 'in all fields of trade'. As the Japanese competition authority found the parties' explanation on merger-specificity, and the mechanisms for increasing user's welfare insufficient, it decided that efficiency improvement could not be taken into consideration in the case.[47]

- In New Zealand, the High Court noted in *Air New Zealand Ltd. v. Commerce Commission*[48] that '[b]enefits include efficiency gains and anything of value to the community generally' (Berry, 2012, p 33.). The *Godfrey Hirst N.Z. Ltd. v Commerce Commission* case clarified that mergers that cannot be cleared on competition grounds may be still authorised on the grounds that they may result 'in such a benefit to the public that it should be permitted'. [49]

- During the European Commission's investigation of the *Deutsche Börse/NYSE Euronext* merger[50], the parties argued that the liquidity effects of the notified transaction would have significant benefits on the 'wider economy', including by facilitating the access of small and medium sized enterprises and larger businesses to equity finance. The European Commission considered that the claimed economy-wide efficiencies were not verifiable as the parties had not demonstrated how the claimed liquidity effects would arise or how the mechanism of such efficiencies might work, nor did they provide any detail or substantiation of any kind to support such claims.[51] The European Commission did not exclude that such claims could be considered within the context of its merger control rules.

4.4 Remedies on public interest grounds

62. Under certain circumstances, the competition concerns identified by the competition authority may be remedied with structural or behavioural undertakings by the parties. A suitable remedy has to i) resolve the identified competition problem, ii) be accurate and proportionate and iii) easily and effectively implemented and monitored.[52]

63. Jurisdictions which include public interest clauses into their law may impose remedies which are based on the application of those clauses.[53]

64. However, even if the law does not include public interest clauses, competition authorities may in a few cases ask for remedies that outweigh the potential competitive harm identified in the merger or which are unrelated to that harm (Harrison and Mordaunt, 2012). These remedies are generally aimed at supporting strategically selected sectors or industries, as Box 6 shows.

Box 6. Extensive remedy packages in strategically important industries

Recent examples from the People's Republic of China

The Chinese merger control rules allow the Ministry of Commerce (MOFCOM) to impose structural, behavioural and 'hybrid' remedies. MOFCOM has introduced extensive remedy packages to protect domestic companies from the merged entities' potential increase in competitiveness. These remedies are generally behavioural in nature, such as the prohibition of the market expansion of the merged undertakings (e.g. *InBev/Busch, Mitsubishi/Lucite, Novartis/Alcan* mergers) or certain market behaviour (*Walmart/Haven Holding* merger (Jenny, 2015)).

In two conditional clearances (*Marubeni/Gavilon* and *Xstrata/Glencore* mergers) in 2013 the MOFCOM relied on remedies that some scholars have suggested were aimed at protecting key industries (e.g. agriculture, commodities) and important raw materials (Jenny, 2015). MOFCOM did not explicitly refer to concerns over China's reliance on imports in these cases (GTDT, 2015).

The merger of *Xstrata/Glencore* created the world's fourth-largest mining company. Although the parties did not own or operate assets in China and their combined market shares were relatively low (7.6 per cent and 9.3 per cent, for global copper concentrate production and supply, and 12 per cent for supply in China), MOFCOM concluded that the proposed merger may have the effect of eliminating competition on the concerned markets. MOFCOM imposed an extraterritorial structural remedy, to divest Xstrata's Las Bambas copper mine project in Peru. MOFCOM also attached behavioural remedies to the decision, relating to the pricing and volumes of copper, zinc and lead concentrates supplied to Chinese customers.

According to some commentators (Taylor, 2013), MOFCOM required a significant divestiture despite the parties' relatively low combined market shares to stand by the country's national industrial interests.

5. Conclusion

65. The Secretariat's research suggests that the way public interest considerations are set forth in the law has practical consequences and that, in order to protect legal certainty, public interest considerations should be clearly spelt out in law or soft law. As it is difficult to balance competition and public interest criteria guidance would help authorities to interpret and apply public interest considerations in an objective, transparent and predictable manner.

66. Public interest considerations are enforced in two main models, presented in the paper: the single authority and the dual responsibilities models. Each has advantages and challenges. However, a clear advantage of the dual responsibilities model is that it relieves competition authorities from political pressure and internal conflicts of interest.

67. We have not found any impact assessments which evaluate how merger assessments which take into account public interest considerations have affected the specific public policy goal (e.g. employment) and the market, and how the potentially anti-competitive effects were counterbalanced. Therefore, it would be useful for authorities or scholars to conduct such assessments. Possibly, the OECD could hold a discussion to assist in the design of such studies.

68. The paper also describes ways in which the state may get involved in assessing mergers. Such participation can take various forms, such as the introduction of domestic (mainly regulatory) measures, review mechanisms of foreign takeovers or the state's ex post intervention in merger control. Governmental intervention in merger control should be exercised only under exceptional circumstances, in a transparent manner. Decisions to intervene should also be detailed, merger specific, and susceptible to judicial review brought by interested parties.

ENDNOTES

1 In the *GE/Honeywell* merger the companies obtained approval from the U.S. Department of Justice, but the transaction was prohibited by the European Commission (*General Electric/Honeywell*, COMP/M.2220) although both authorities applied the consumer welfare standard.

2 At the time of the OECD questionnaire in 2003, many non-OECD Members stated that public interest objectives were included in their laws or at least promoted in some cases (OECD, 2003a). These countries or economies included for instance, Brazil, Cameroon, Jamaica, Kenya, Morocco, Pakistan, Russian Federation, Chinese Taipei, Ukraine and Zambia.

3 Apart from the South African example in Box 2., there are cases from Namibia (*Guinea Fowl Investments/ Navachab, DCD-Dorbyl/Elgin Brown & Hamer Group*) and Brazil (*AmBev*) (Smith and Swan, 2014) addressing employment in merger control.

4 For example, there is a debate in the United States about whether to add 'national security' provisions to the current legislation following the recently cleared merger of *Lockheed Martin Corp/Sikorsky Aircraft* in the weapon industry (Shalal, 2015).

5 '*By contrast, delegates from competition authorities in some developing countries explained that […]the political credibility of the competition policy authorities depends to a large extent on how they are seen as contributing to poverty reduction and employment creation. It would be risky for them to state that their only target is combating harm to competition by producers, and that the impact of their efforts on poverty or inequality is irrelevant*.' (OECD, 2013, p 7.)

6 Recently, the Centre for Competition Policy at the University of East Anglia evaluated public interest considerations in merger control ('CCP survey'). The CCP survey used the example of 75 jurisdictions from all around the world, including both OECD-Members (for instance Australia, Austria, Canada, Chile, Italy, Japan, Mexico, Spain, United Kingdom, United States) and non-Members (for instance Argentina, Bolivia, Brazil, Colombia, Croatia, India, Kenya, Namibia, Russian Federation, Ukraine, Zambia). The CCP survey confirmed that out of 75 countries, 47 give some role to public interests other than competition in their merger control (Reader, 2016).

7 See for instance the examples of Australia, Germany, Italy, Netherlands and New Zealand.

8 For instance in the European Union, Iceland, Israel, People's Republic of China, Sweden and the United Kingdom.

9 For instance in Austria, France, Poland and Portugal.

10 For instance in Korea, South Africa and Spain.

11 For instance, in France, Hungary, Ireland, Italy, Japan, Portugal and Slovenia. In Japan, the transfer of a communication business licence as a result of a merger is subject to approval by the ministry of internal affairs (GTDT, 2015). In Portugal transactions in the media sector meeting the relevant legal criteria must be notified both to the competition authority and the sectoral regulator. The opinion of the sectoral regulator has a binding effect on the competition authority; the sectoral regulator is effectively permitted to block the deal if it is deemed to threaten the 'freedom of speech' or the 'plurality of the media' (ICLG, 2016).

12 For instance the *Ongoing/Prisa/Media Capital* (case 41/2009, 2010) merger in Portugal did not raise competition concerns, but was opposed due to a negative binding opinion issued by the sectoral regulator (ICLG, 2016). In the *Axel Springer/Ringier* (Vj/42/2010) case, the Hungarian competition authorities' procedure was terminated, following a negative binding opinion of the media regulator which refused to grant approval to the transaction on the ground that it would jeopardise the public's 'right to diverse information'.

13 For instance in Australia, Brazil, Italy and Serbia. In Australia the competition authority ('ACCC') analyses the competition effects, while the regulatory authority ('APRA') reviews the prudential aspects of the merger. Both agencies report their findings to the Treasurer, who then makes a final national interest decision, evaluating both the competition and prudential issues (Goddard and Walker, 2002). In Brazil financial institutions are not only obliged to submit a filing before the competition authority ('CADE'), but also before the Central Bank (GTDT, 2015).

14 The mere existence of public interest clauses may have that effect, as parties may integrate it in their analysis of whether and how to merge.

15 In the South African *Harmony Gold mining Co/ Gold Fields Ltd* case the Tribunal stated that '*A merger that has failed in the competition test can still be passed on the public interest test and hence be approved. Conversely, that a merger that has passed the competition test could still fail the public interest test and hence be prohibited*.' (Tavuyanago, 2015, p 27).

16 Soft law documents increase the overall transparency and coherence of the system (Poddar and Stooke, 2014).

17 The OECD 2005 Council Recommendation on Merger Review, the ICN's Guiding Principles and Recommended Practices on Merger Notification and Review Procedures, and the ICN's Recommended Practices on Merger Analysis all recommend consistent, or at least non-conflicting, outcomes.

18 In the *GE/Alstom* merger co-ordination between the US Department of Justice and the European Commission advanced the investigation, and it enabled each jurisdiction to remedy the threats the acquisition posed for its respective market, while allowing the non-problematic aspects of the deal to go forward. In the United States, this meant that GE had to divest an Alstom subsidiary that competes to service GE turbines. In Europe, the European Commission required the merging parties to divest the most technologically advanced parts of Alstom's heavy duty gas turbine business (Baer, 2015).

19 '*Almunia voices concern over rising protectionism*', MLex (24 June 2014), ABA Report of the Task Force on Foreign Investment Regime (2015), p (i)

20 Despite the European Commission's clearance decision (*M.4110 – E.ON/ Endesa*), the Spanish Government undertook several domestic measures (e.g. Spanish Energy Regulator subjected E.ON's bid for Endesa to a number of conditions) which resulted in E.ON revoking its bid to acquire control of Endesa in 2007. See also Poland's intervention into a merger (*M. 3894 – UniCredito/HVB*) where Polish banks were acquired by an Italian bank UniCredito (Day, 2014, Geradin and Girgenson, 2011). In these cases the state measures aiming to disrupt deals already cleared by the European Commission were regarded as a breach of Article 21 of EUMR and led to infringement procedures.

21 See M. 7278 *General Electric/Alstom*. After the publication of General Electric's ('GE') initial offer to buy Alstom Energy, a new regulation was passed in France making foreign investment subject to ministerial authorisation. In order to obtain the authorisation, GE entered into negotiations with the French Government regarding the planned transaction. In line with the protocol signed by the parties and the French Government, GE acquired Alstom Energy and set up an alliance with Alstom through three joint ventures. GE also accepted conditions like selling its transportation's signalling business to Alstom. The restructured deal was approved by the French Minister of Economy on 5 November 2014 (Petit, 2015).

[22] Switzerland only exceptionally foresees investment reviews, in particular in case of mergers involving banks or real estate companies.

[23] In the People's Republic of China, the Ministry of Commerce is responsible for merger control as well as foreign investment.

[24] In the United States, the responsible body is the Committee on Foreign Investment, while in Australia the decision is made by the Treasury, following the advice of the Foreign Investment Review Board. In France and Germany foreign investment is assessed by the ministry responsible for economic matters.

[25] The European Commission's white paper also confirms that such interventions are rare in general (European Commission, 2014).

[26] Out of which one took place in 2016. See 'Comment: Politics trumps antitrust in German minister's nod for Edeka, Tengelmann deal', MLex (12 January 2016)

[27] Competitive neutrality requires that all enterprises, public or private, domestic or foreign, face the same set of rules, and that the government's involvement in the marketplace does not confer an undue competitive advantage on any market participant (OECD, 2015d).

[28] In rarer instances competition authorities in OECD Members may also address socio-economic or socio-political considerations, for instance a merger's effect on jobs. In the U.S. *AT&T/T-Mobile* merger case the parties and some labour unions had contended that the merger would add jobs by increasing broadband access. Though public interest considerations did not explicitly play a role in the U.S. Department of Justice's (DOJ) lawsuit, while announcing the DOJ's decision to oppose the merger the Deputy Attorney General issued a statement replying to the employment argument, stating that '*Mergers usually reduce jobs through the elimination of redundancies,' so we see this as a move that will help protect jobs in the economy, not a move that is going in any way to reduce them*.' (First and Fox, 2015, p 2.)

[29] The majority of jurisdictions with a merger control system have opted for a mandatory pre-merger notification system. In this system, a transaction that meets certain criteria (i.e. the notification thresholds) has to be reported to the competition authority before it is consummated. According to information from the ICN Merger Notification and Procedures Template, of the 58 jurisdictions that provided information on their merger system to the ICN, 42 have pre-merger mandatory notification systems (OECD, 2014). In the OECD, only Australia, Chile, New Zealand and the United Kingdom have a voluntary merger notification system.

[30] Article 9 (3) of the Greek Competition Act Law (3959/2011 – 'Protection of Free Competition').

[31] These are undertakings created in the course of the liquidation of an undertaking which is granted preferential status due to its strategic importance as defined in Article 65 of Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings (article 29/A (5) of the Hungarian Competition Act, Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices).

[32] COMP/M.5363 *Santander/Bradford & Bingley Assets* (28.09. 2008)

[33] OECD Members included FFD to their merger control in different ways. FFD is explicitly discussed in guidelines in the European Union, Japan, United Kingdom and the United States. Other countries, such as Australia do not formally incorporate FFD in their competition laws, but evaluate such arguments as part of their standard review process (OECD, 2009b).

[34] Although OECD work also emphasised that these policies are mainly meant to deal with individual distress situations more than with a generalised crisis (OECD, 2009d).

[35] For example, in the United Kingdom the OFT published a restatement of its treatment of failing firm in merger cases, in response to the financial crisis in December 2008 (OFT 1047). The principles of the restatement were applicable regardless of the economic climate and thus, the 2008 restatement did not signal the softening of the criteria or evidentiary burden required (MacGregor, 2012). The restatement is superseded by the UK Merger Guidelines.

[36] M.6796 *Aegean Airlines / Olympic Air* II.

[37] M.6796 *Aegean Airlines / Olympic Air* II., para 833.

[38] M. 5830 *Aegean Airlines / Olympic Air* I.

[39] *United States v Philadelphia National Bank* 374 U.S. 321 (1963)

[40] *Granader v. Public Bank*, 281 F. Supp. 120 (E.D. Mich. 1967)

[41] Ibid, Issue NO. V.

[42] Ibid, Issue NO. VI.

[43] Here we do not refer to the basic objective of competition law, but rather to a claim to justify potentially anti-competitive conduct on 'efficiency' grounds. There are static and dynamic efficiencies, and the key difference between the two concepts is the relevant time horizon over which these efficiencies display their effects. The OECD also identifies an additional and possibly broader category of efficiencies, the transactional efficiencies. (OECD, 2012)

[44] Jurisdictions which allow efficiency defence in competition laws (or soft law) include for instance the European Union, Japan, Korea and the United States.

[45] See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [Official Journal C 31 of 05.02.2004], VII. Efficiencies, U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010) § 10.

[46] See Korea's contribution to the OECD (2012)

[47] See Japan's contribution to the OECD (2012)

[48] *Air New Zealand Ltd.v. Commerce Commission* (No. 6)(2004) 11 T.C.L.R. 347, [42].

[49] *Godfrey Hirst N.Z. Ltd. v. Commerce Commission*, High Court, Wellington, CIV 2011-485-1257, 23 November 2011 (Berry, 2012).

[50] M. 6166 *Deutsche Börse/ NYSE Euronext*

[51] The European Commission's decision on the case M. 6166 *Deutsche Börse/ NYSE Euronext* 12.3.5. Economy-wide efficiencies

[52] See for instance the US Antitrust Division Policy Guide to Merger Remedies (2011), the European Commission's notice on remedies acceptable under Council Regulation (EC) No 139/2004 and the UK Competition Commissions 'Merger Remedies, Competition Commission Guidelines' (2008).

[53] See for instance the *Metropolitan Holdings Limited/Momentum Group Limited* merger (Njisane, 2011) and *Tiger Brands Ltd/Ashton Canning Company Ltd and Others* merger (Tavuyanago, 2015) in South Africa, the *Coca-Cola/Cadbury-Schweppes* merger in Zimbabwe (Machine, 2014).

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