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5 March 2015

Mr. Tembinkosi Bonakele
Commissioner
Competition Commission of South Africa
77 Meintjies Street
Pretoria, 0002, South Africa

By email: SeemaN@ compcom.co.za

Dear Commisisoner Bonakele

Guidelines for the Assessment of Public Interest Provisions in Mergers for Public Comment

We have pleasure in enclosing a submission which has been prepared by a Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with representatives of the Commission.

Yours sincerely

Dave Poddar Co-Chair Antitrust Committee	Andrea Appella Co-Chair Antitrust Committee

cc Pieter Steyn
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INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

MERGERS WORKING GROUP SUBMISSION TO THE COMPETITION COMMISSION OF SOUTH AFRICA REGARDING THE GUIDELINES FOR THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGERS

1 INTRODUCTION

1.1 The Mergers Working Group of the International Bar Association Antitrust Committee (the "**Working Group**") sets out below its submission on the draft Guidelines for the Assessment of Public Interest Provisions in Mergers that was issued for public consultation on 23 January 2015 (the "**Guidelines**").

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at www.ibanet.org.

1.3 Accordingly, the IBA Working Group welcomes the opportunity to comment on a number of aspects of the Guidelines. The IBA Working Group commends the Competition Commission of South Africa (the "**Commission**") for issuing guidelines on the important topic of the assessment of public interest provisions in mergers. The Guidelines will be an important aid for understanding the Commission's approach to enforcement of the Competition Act No. 89 of 1998 (the "**Act**") in merger cases.

1.4 The Working Group particularly refers to the Commission's Background Note to the Public Interest Guidelines ("**Notes**") which stated as follows:

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

While the Working Group welcomes the opportunity to comment on the Guidelines, it has some reservations that the Notes themselves (which are the foundation for the Guidelines) dealing with previous cases were not themselves expressed to be subject to comment. In order to provide

constructive comments on the Guidelines themselves, the Working Group has also reflected upon the Notes in this submission.

2 EXECUTIVE SUMMARY

2.1 The Working Group believes that competition concerns should be the central consideration for merger control. When other policy objectives or public interest issues are incorporated into a merger control regime, they should be clearly identified and articulated and considered separately to competition analysis to ensure competition outcomes are predictable, transparent and timely.

2.2 The Working Group commends the Commission for providing such detailed guidance as to its approach to the consideration of public interest consideration which will facilitate certainty, transparency and the expeditious assessment of proposed mergers. However, the Working Group suggests that the Commission may be assisted by reference to the best practice principles identified by the International Competition Network ("**ICN**").

3 BEST PRACTICE PRINCIPLES

3.1 The Working Group believes that best practice in merger assessments should involve, for all stakeholders, certainty and transparency in processes of treatment as well as timeliness of the merger review. The Working Group does not take any issue with merger policy including other public interest factors, but believes that the core policy of merger control should be that mergers "*do not jeopardise conditions for competition*".[1] Any other goals or public interest issues should be clearly articulated and differentiated so that their consideration does not affect a transparent (and quantifiable if necessary), consideration of competition conditions.

3.2 If other less quantifiable or discretionary public interest factors are included, particularly those that involve arguably political factors, they should be clearly articulated and separated from the competition analysis, so that the outcomes from a competition perspective remain predictable, transparent and timely. We note the Guidelines contemplate the inclusion of broad and potentially discretionary consideration of public interest factors, for example in 7.3.3.1 which outlines factors the Commission will consider when assessing the effect a proposed merger will have on an industrial sector or region. The Working Group suggests that in this respect, the Guidelines may be improved by reference to the ICN Recommended Practices for Merger Analysis.[2]

3.3 To the extent merger control policy goes beyond serving the economic objectives of efficient resource allocation and enhancing consumer welfare to include other public interest criteria, the Working Group believes that they should be clearly articulated consistent with the intention behind the Guidelines. However, when these considerations of broader public interest issues arise, a relevant question is how are these public interest considerations actually balanced out

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1 ICN Merger Working Group: Analytical Framework Sub-Group: The Analytical Framework for Merger Control – Final paper for ICN annual conference: Office of Fair Trading, London.

2 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf

against the assessment of competition issues and what is the relevant weighting to apply? This question is not dealt with in the Guidelines or Notes.

3.4 Further, a legitimate question arises as to whether a competition authority such as the Competition Commission of South Africa is really best placed to assess weighting of non-competition issues. By way of example, in the UK, the Secretary of State initiates and undertakes the consideration of public interest in mergers.[3] The Working Group recognizes that the Commission is obliged by the South African Competition Act to assess four specified public interest grounds. In doing so, it may be useful to obtain input from other relevant government agencies or department, particularly if they may be subject to political or qualitative factors.

3.5 These issues should also be considered against the extensive work that the ICN has undertaken in relation to merger remedies. Remedies should be *focussed on the area of harm* from a particular merger and those remedies should be subject to *proportionality* as to the harm arising from the proposed merger remedy. Remedies in relation to broader public interest issues can be problematic in relation to these types of issues, in particular transparency and accountability which links into the merging parties' appeal rights. We note the broad remedies set out in 8.2.5.2. of the Guidelines and refer the Commission to ICN Merger Working Group: Analytical Framework Subgroup's Merger Remedies Review Project.[4]

3.6 The Working Group commends the Commission for confirming that the effect of the merger on the four specified public interest grounds in the Competition Act must be merger specific and substantial. This is in line with international best practice and promotes certainty and transparency.

3.7 Finally the Working Group reiterates that as far as possible, merger control reviews should be transparent, predictable, subject to proper due process and be timely.

4 SPECIFIC DRAFTING COMMENTS

4.1 The Working Group has the following specific drafting suggestions for the Commission's consideration:

Overlap

4.2 The factors enumerated in subsections (a)-(f) of 7.3.3.1 potentially have significant overlaps. For example the "*strategic nature of the product to the sector*", which the Commission will consider under (a)bears a striking similarity to the "*importance of the product to the affected sector*" in (b). This overlap in subject matter may make it uncertain for merging parties as to what is required to satisfy the Commission that the proposed merger will not have a substantial effect on the industrial sector or region.

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3 See "Mergers: Guidance on the CMA's Policy and Procedure" (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf) at para. 6.14,

4 Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf.

Undefined public interest or policy goals

4.3 At 7.3.3.2.(a) and 7.3.4.2 the Guidelines refer to "*public policy goals*" and "*public interest argument*" respectively. The inclusion of an undefined public interest component, as discussed above, hinders transparency and certainty for the merging parties. This concern is particularly acute given that the general approach to assessing public interest provisions set out in section 6 states (at section 6.1.4) that the merging parties will have to "*justify the likely effect on the **particular** public interest*" (emphasis added) which is incongruous with the inclusion of an at large public interest component as seems to be the case in sections 7.3.3.2.(a) and 7.3.4.2. Given that the Competition Act limits the Commission's public interest jurisdiction in merger review, the Working Group recommends that these references be clarified.

4.4 The Working Group notes in respect of section 8.2.4.4, which outlines the countervailing public interest arguments which the Commission may accept when assessing a public interest justification for job losses, the Guidelines clearly set out the factors relevant to the public interest but these factors pertain exclusively to the subject matter of the section. We believe that the Guidelines may be improved by the inclusion of analogous, more specific guidance on countervailing public interest arguments in respect of sections 7.3.3.2 and 7.3.4.2.

Onus of proof on the merging parties

4.5 At section 7.3.4.1. the Guidelines place the onus on the merging parties to justify "*any substantial negative or positive effects arising as a result of the merger on an industry or sector or region*". Sections 8.2.2.4, 8.2.4.1 and 9.2.1.4 also provide for situations where the onus of proof is placed on the merging parties. It is unclear how the parties would discharge this onus and what information the Commission would require. For example, What standard of proof is required? What is meant by "justify"? What does the Commission consider relevant (e.g., is the private interests of the merging parties a relevant factor)? The Note does not provide any further guidance or precedential support for this aspect of the Guidelines.

Assessing the effect of the merger on employment

4.6 Section 8.2.3.2 of the Guidelines states that the Commission may "exclude management employees from the affected number of employees should it view these employees as having short term employment prospects". It would be helpful if this was clarified. Who does the Commission consider to be management employees? Why should they be excluded if they have short term employment prospects? What is the approach towards management employees with medium or long term employment prospects? What is meant by short term, medium term and long term?

4.7 Section 8.2.3.3 of the Guidelines states that the Commission will consider as substantial "a large number of job losses". It is not clear what a "large number" would be and it is recommended that the Commission set out its approach in this regard in more detail.

4.8 Sections 8.2.4.2(a) and 8.2.4.6 of the Guidelines refer to a "rational process" to arrive at retrenchment figures and section 8.2.4.2(a) also refers to a "rational link" between the jobs lost

and the reasons for the losses. It is not clear, however what the Commission would consider to be rational and it is recommended that this be clarified in the Guidelines to assist merging parties in applying the Guidelines and promoting certainty and transparency. In practice, it is often difficult in multijurisdictional mergers (where the South African businesses of the merging parties may be tangential and not significant to the offshore commercial rationale for the merger) for the merging parties to estimate retrenchment figures with a fair degree of certainty. The Commission has in practice generally requested the parties to estimate a "worst case scenario" on possible job losses but it is not clear from the Guidelines what rational process should be followed to arrive at such an estimate. The Working Group recommends that the Commission provide specific guidance on the type of rational process it expects the merging parties in such multijurisdictional mergers to take.

4.9 Section 8.2.4.2(c) of the Guidelines refers to the provision of "full and complete information" to employees with regard to possible job losses. The Merger Notice (Form CC4(1)) requires the effect of the merger on employment to be set out in a schedule and this schedule is (as required by the Competition Act) provided (together with a non-confidential version of the merger filing) to trade unions and (where there are no unions) employee representatives. It is not clear if the Commission is requiring any further information to be provided and this should be clarified, as the Act does not oblige the merging parties to provide additional information to unions or employees. The Competition Act also does not oblige the merging parties to consult with unions or employees (although it may be prudent to do so depending on the circumstances) and (having regard to the existing South African labour laws) it is submitted that the Commission should not be involved in or facilitate discussions or communications between the merging parties and unions/employees. The reference in section 8.2.4.2(c) to providing information to enable "full consultations" should accordingly be removed. Any retrenchments will have to be implemented in compliance with the required consultation and other processes under existing labour laws. The position is especially difficult in practice for the multijurisdictional mergers referred to in section 4.8 above.

4.10 In section 8.2.4.4 of the Guidelines the Commission helpfully indicates three countervailing public interest arguments it may accept. It is submitted that a fourth such argument would be where the merger is (notwithstanding the job losses resulting from the merger) likely to result in a net gain in employment.

Clarifying when remedies will be considered

4.11 The Working Group recommends that the references to Step 5 in sections 6.1.5, 7.3, 7.3.5, 8.2, 8.2.5, 9.2 and 9.2.5 of the Guidelines clearly state that remedies will only be considered if the effect of the merger on the relevant public interest ground is adverse and such adverse effect is substantial and cannot be justified. This will bring certainty to the question as to when the Commission will consider remedies and is in line with section 6.2 of the Guidelines which states that if the effect is not substantial, the enquiry will stop.

Clarifying the minimum required information requirements on public interest grounds in merger filings

4.12 Section 4.1 of the Guidelines states that the Guidelines set out the types of information the "Commission may require". It is not clear from the Guidelines (other than section 8.2.1.1) what minimum information on public interest considerations (in addition to the schedule on the effect of the merger on employment annexed to the Form CC4(1), is required to be included in merger filings. It would be helpful if this was clarified in the Guidelines to provide certainty and transparency as to the Commission's expectations with regard to the minimum information required from merger parties. This would save time in the Commission's merger review process. Such minimum information requirements should also be limited to information readily in the merging parties' possession and not be too onerous so as to add undue costs and time delays to the merger filing preparation process.

5 PUBLIC INTEREST CONSIDERATIONS IN OTHER JURISDICTIONS

5.1 The Working Group considers it useful to highlight how public interest considerations are considered in various other jurisdictions which have considerable experience in this area.

European Union

5.2 The EU Merger Regulation (**EUMR**) creates a one-stop shop for review of mergers that fall within its scope. The European Commission has exclusive competence to review such mergers for the whole of the EU to the exclusion of the national laws of EU Member States. This exclusive power is only subject to limited exceptions under Article 9 EUMR which allows the European Commission to refer a case to an EU Member State for examination under national competition law where the case raises competition concerns confined within that Member State.

5.3 The EUMR contains a pure competition test (the "significant impediment to effective competition" test, or SIEC, set out in Article 2 EUMR) whereby the European Commission has to assess whether a merger results in a significant impediment to effective competition or not. If it does not, it must clear the merger. If it does, and there are no remedies available, it must prohibit the merger. The European Commission cannot take into account non-competition considerations such as the nationality of the companies concerned, employment or other public interest type issues.

5.4 Article 21(3) EUMR provides that, unless the case is referred to them, Member States may not apply their domestic competition legislation to any concentration with an EU dimension.

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

5.6 Three types of **public interests** that may trigger Member State intervention in mergers are expressly specified in Article 21(4) EUMR:

- **Public security:** Member States are permitted to take measures based on public security grounds (including interests related to defence policy);[5]
- **Plurality of the media:** measures may be taken to ensure plurality of the media to allow Member States to ensure diversity of opinion; [6]
- **Prudential rules:** rule to protect "*prudential interests*" are of relevance in the area of financial services.[7]

5.7 In addition to the expressly specified legitimate interests, the European Commission may permit national intervention on other legitimate interest grounds, where appropriate. However, for this to occur a Member State must seek the European Commission's prior approval in accordance with its own procedural rules. The European Commission examines the compatibility of those grounds with EU law and informs the Member State concerned of its decision within 25 working days of that communication.

5.8 Article 21(4) EUMR has been invoked only very rarely to date in relation to interests other than those expressly set out above.[8] The European Commission is very keen to avoid the use of Article 21(4) EUMR as a means of national governments intervening in ways that artificially protect inefficient industries and thereby create consumer harm. In the past, the European Commission has launched infringement proceedings against Member States under Article 21 EUMR on the basis that the adopted measures did not fall within the expressly available exceptions and were not otherwise justifiable, making it clear that it will not accept any interventions by Member States constituting purely protectionist measures. Protectionist measures such as safeguarding employment in a particular country or region will regularly be rejected as measures incompatible with EU rules.

5.9 A number of EU Member States have laws which allow intervention on a much wider range of factors. The Working Group sets out below some additional information regarding France, the UK and Germany by way of example.

France

5.10 France has a law (*Décret* 2014-479) which provides for extensive intervention powers. These were recently extended (on 14 May 2014, in the wake of the Alstom/GE/Siemens matter). A new paragraph 12 was included in Article R153-2 *Code monétaire et financier*. It provides that the following activities are covered by the requirement to obtain prior authorisation from the Minister for the Economy:

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[5] See *e.g.* case COMP/M.1858 - *Thomson-CSF/Racal (II).*

[6] See *e.g.* case COMP/M.5932 - *News Corp/BSkyB.*

[7] For instance, a national authority could prevent a bank within the Member State from being acquired by a business which does not meet acceptable capital adequacy requirements. See *e.g.* Case COMP/M.759 - *Sun Alliance/Royal Insurance.*

[8] See *e.g.* Case COMP/M.567 - *Lyonnaise des Eaux/Northumbrian Water* where the Commission accepted as a legitimate interest the UK regulatory framework for the water industry requiring a sufficient number of independent water enterprises; by contrast, see Case COMP/M.1346 - *EDF/London Electricity* where a request under Article 21(4) EUMR was refused because the UK public interest issues could legitimately be protected under its electricity regulatory system and were not directed at the concentration itself.

"Other activities relating to materials, products or services, including activities relating to the security and functioning of installations and equipment, which are essential to the preservation of the country's interests in respect of public order, public security or national defence, as listed below:

(a) Integrity, security and continuity of supply in electricity, gas, hydrocarbons or other energy sources;

(b) Integrity, security and continuity of water supply in compliance with the rules defined in the interest of public health;

(c) Integrity, security and continuity of exploitation of the transport networks and services;

(d) Integrity, security and continuity of exploitation of the electronic communications networks and services;

(e) Integrity, security and continuity of exploitation of an establishment, an installation or a facility of vital importance within the meaning of Articles L. 1332-1 et L. 1332-2 Code de la défense; and

(f) Protection of public health."

5.11 Article R153-2 *Code monétaire et financier* specifically applies to investments by non-EEA investors. However, most of its provisions (including its paragraph 12) also apply to investments by EEA investors pursuant to Articles R153-4 and R-153-5 *Code monétaire et financier.*

Review by the European Commission of Décret 2014-479

5.12 Shortly after *Décret* 2014-479 was adopted, the Commissioner for the Internal Market informed France that the European Commission would review *Décret* 2014-479 to ensure that it did not constitute an obstacle to the free movement of capital.

5.13 By way of a letter dated 19 June 2014, the European Commission stated that Décret 2014-479 constitutes a restriction to the free movement of capital and to the freedom of establishment; however, its objectives were justified under Articles 52,[9] 65[10] and 346[11] TFEU. The European

[9] Article 52 TFEU provides as follows: "*1. The provisions of this Chapter* [Chapter 2 – Right of Establishment] *and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. 2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions*".

[10] Article 65 TFEU provides as follows: "1. *The provisions of Article 63* [regarding Capital and Payments] *shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security. 2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties. 3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63. 4. In the*

Commission also warned France that *Décret* 2014-479 would have to be applied in an appropriate and proportionate manner, otherwise sanctions could be imposed.[12]

5.14 Even though the European Commission has not condemned *Décret* 2014-479 outright, it intends to monitor closely the application of the law by the French authorities in practice on a case-by-case basis.

5.15 On 5 November 2014, the French Minister for the Economy approved the acquisition by GE of Alstom subject to conditions on the basis of *Décret* 2014-479.[13] There does not appear to be any public statement by the European Commission in respect of this transaction. The European Commission opened a Phase II investigation into the GE/Alstom case under the EUMR on 23 February 2015 and has until 8 July 2015 to take a final decision.[14]

United Kingdom

5.16 The UK merger control regime is governed by the provisions set out in the Enterprise Act 2002. The Competition and Markets Authority (CMA) has jurisdiction over "relevant merger situations" which do not fall within the jurisdiction of the European Commission under the EU Merger Regulation. The assessment of mergers in the UK consists of a two-phase process.

5.17 At Phase 1, the CMA has a duty to refer a relevant merger situation for a detailed Phase 2 investigation if it believes that it has resulted or may be expected to result in a substantial lessening of competition (SLC) in any market for goods or services in the UK. Following a Phase 2 reference the CMA carries out a detailed analysis to determine whether there is a relevant merger situation, whether that relevant merger situation has resulted or may be expected to result in an SLC and what action is necessary to remedy any SLC. The CMA must also advise the Secretary of State on any mergers which may fall within the scope of the public interest provisions of the Enterprise Act.

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absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State".

[11] Article 349 TFEU provides as follows: "*1. The provisions of the Treaties shall not preclude the application of the following rules: (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes. 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply*".

[12] See the article "*Décret "Montebourg" – La défense des intérêts nationaux français face aux capitaux étrangers*", Anne Biache, *Revue Sorbonne OFIS*, November 2014 (available at: http://www.univ-paris1.fr/fileadmin/diplome_M2OFIS/OFIS_2014-2015/Articles/_4_2014_Article_Revue_OFIS_-_D%C3%A9cemnbre_2014_-__D%C3%A9cret___Montebourg__.pdf).

[13] Press release No. 159 of 5 November 2014 "*Emmanuel MACRON autorise l'investissement de General Electric avec Alstom*" (available at: http://www.economie.gouv.fr/files/files/directions_services/agence-participations-etat/Documents/Communiques/Emmanuel_MACRON_autorise_l'investissement_de_General_Electric_avec_Alstom.pdf).

[14] Case COMP/M.7278 – *General Electric/Alstom* (Thermal Power – Renewable Power and Grid Business). See the Commission press release available at: http://europa.eu/rapid/press-release_IP-15-4478_en.htm.

5.18 Like the EUMR, the Enterprise Act contains a pure competition test to be applied by the CMA. The CMA is under a statutory duty to make a Phase 2 reference if it believes that a relevant merger situation has resulted in an SLC or may be expected to do so. The test for reference will be met if the CMA has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially. Alternatively, undertakings can be accepted to solve the competition concerns and avoid a reference. Following a Phase 2 reference, the CMA is also required to assess whether a transaction is a relevant merger situation and, if so, whether the SLC test is met.

5.19 In addition to the competition test to be applied by the CMA, the Secretary of State can intervene in a merger situation on public interest grounds, by means of giving an intervention notice to the CMA if s/he believes that it is or may be the case that public interest considerations are relevant to the merger in question. Currently, the public interest considerations identified for these purposes are national security, media public interest considerations and stability of the financial system, but the Secretary of State can seek approval from Parliament for the recognition of further categories of public interest consideration. In such cases, the Secretary of State can intervene and impose additional conditions in order to address public interest concerns, or s/he can also clear a merger if s/he decides this is in the public interest, even if the merger has been identified as potentially anti-competitive. Specialist merger control regimes are retained for transactions in the water and newspaper industries.

5.20 When it comes to mergers under the jurisdiction of the EU (i.e. mergers falling within the scope of the EUMR), as explained above, unless there is a referral to the CMA under Article 9 EUMR, the European Commission has exclusive competence to review the merger under the EUMR competition test. However, the UK can intervene on public interest grounds through the Secretary of State issuing an intervention notice. The relevant public interest grounds differ slightly from the ones for UK mergers given that the interest of maintaining the stability of the UK financial system is not a relevant consideration for intervention in European mergers or when a merger is referred back to the CMA under Article 4(4) or 9 EUMR.[15] National security, plurality and other considerations relating to newspapers and other media are however relevant considerations for intervention in mergers with an EU dimension.

5.21 Recently, there has been debate in the UK as to whether a public interest test should be included in UK legislation to enable the UK authorities to invoke broader legitimate public interests including in particular in relation to EU mergers (in addition to the three interests expressly recognised in Article 21 EUMR. This arose in the context of a bid by Pfizer (a US pharma company) for Astra Zeneca (a UK pharma company). There was a fear that the merger would result in research activities being taken out of the UK and that this would be detrimental to the UK's science/research and development base more generally. UK legislation did not, however, permit the UK government to intervene on such grounds. The bid was abandoned but the debate

[15] See Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2, January 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf.

continues as to whether the UK should introduce a more general test enabling intervention in such cases. [16]

Germany

5.22 In Germany, Section 36(1) of the Act against Restraints of Competition ("ARC") limits the Federal Cartel Office's ("FCO") review to an analysis that is purely related to the impact a transaction has on competition. Where a transaction raises competitive concerns, the undertakings concerned are given an opportunity to show that the transaction will produce pro-competitive effects in some markets that will outweigh the negative effects that are expected to occur in other markets. However, the FCO must not take into account non-competition related considerations when making its decision. In particular, it must not base a prohibition decision on effects which a transaction may have on other non-competition-related considerations.

5.23 The ARC acknowledges that a transaction that is expected to negatively impact competition (the subject matter of the law) may also give rise to beneficial economic effects. Where the FCO prohibits a transaction (on competition grounds) it thus allows the parties to the transaction to apply to the Federal Minister for Economics and Technology to grant an extraordinary ministerial authorisation pursuant to Section 42(1) ARC. The political nature of the Minister's decision is underscored by the fact that his/her assessment of the advantages to the economy as a whole cannot be reviewed by the courts (see Section 71(5) ARC, although other aspects of his decision are subject to judicial control). According to the legislative intent, allocation of this task to the Minister aims to prevent political pressure from being applied to the FCO during its review process thereby ensuring its independent application of the law. [17]

5.24 Such an authorisation may be granted if the restraint of competition which is expected to occur following the completion of the transaction is outweighed by advantages to the economy as a whole which result from the same transaction. The Minister may also authorise the transaction under this provision if it is justified by an overriding public interest. When deciding the matter, the Minister may also take into account the effects which the transaction would have on the competitiveness of the participating undertakings in markets outside the scope of application of the ARC.

5.25 Importantly, the Minister cannot prohibit a transaction for non-competition related reasons.

United States

5.26 The history of competition law enforcement in the United States began with a long period in which the competition laws were used to further various social and political objectives. At first, the Sherman Act was generally viewed as a protecting small businesses and low market concentration for their own sake. The U.S. Supreme Court even famously remarked that it

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[16] See a recent Parliamentary paper dated 16 January 2015 discussing these issues, available at http://www.parliament.uk/briefing-papers/SN05374.pdf.

[17] See BT-Drucks 17/9852 at p.20.

"cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[18]

5.27 Over time, however, the courts and the enforcement agencies increasingly realized that mixing social and political objectives with competition analysis and consumer welfare undermines the clarity and predictability of competition law and its enforcement. Beginning with the *Philadelphia National Bank*[19] case in the 1960s, the courts and the enforcement agencies refocused their analysis on maximizing consumer welfare by encouraging competition while constraining "a relatively small set of practices that pose a threat to allocative efficiency."[20] American academics, courts, and enforcers ultimately agreed that "neither the antitrust statutes nor the antitrust tribunal is in any sense a substitute for the legislative body addressing questions of maldistribution of wealth or of economic dislocation caused by new innovation or consolidation."[21]

5.28 Today, the U.S. Department of Justice, Antitrust Division (DOJ) and the Federal Trade Commission (FTC) share responsibility for analysing the competitive effects of mergers and acquisitions. The agencies' focus on enforcement actions against transactions that "may . . . substantially . . . lessen competition, or to tend to create a monopoly."[22] To this end, the agencies' Horizontal Merger Guidelines "seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[23]

5.29 Transactions involving certain regulated industries are also subject to reviews by other U.S. agencies charged with broader public policy responsibilities. The Federal Communications Commission (FCC) reviews communications industry transactions involving licenses and authorizations to determine whether the transaction would serve "the public interest, convenience, and necessity."[24] As the FCC recently noted, the "public interest" standard may encompass a wide range of policy goals including competition, deployment of advanced communications services, "ensuring a diversity of information services," and "generally managing spectrum in the public interest."[25] Likewise, the Federal Energy Regulatory Commission (FERC) is empowered to review and approve mergers involving certain public utilities (under the Federal Power Act) and to certify transactions involving interstate gas pipelines (under the Natural Gas

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[18] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

[19] *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 371-72 (1963).

[20] Daniel Crane, « the Tempting of Antitrust : Robert Bork and the Goals of Antitrust Policy, » 79 Antitrust Law Journal No. 3 at 835 (2014).

[21] I Areeda and Hovenkamp, Antitrust Law ¶ 100 at 6(4th ed. 2013).

[22] 15 U.S.C. § 18.

[23] U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 1.

[24] 47 U.S.C. §§ 214(a), 310(d).

[25] Jon Sallet, FCC General Counsel, *FCC Transaction Review: Competition and the Public Interest* (Aug. 12, 2014).

Act).[26] The Surface Transportation Board (STB) is responsible for reviewing certain transactions involving the railroad industry under "public interest" criteria.[27] And the Federal Reserve and Federal Deposit Insurance Corporation (FDIC) are responsible for reviewing transactions involving banks, bank holding companies, savings and loan institutions, and other financial and depository entities. Insurance and health care transactions may also be reviewable by state agencies.

5.30 Thus, a merger in the United States may be reviewed by a competition regulator (DOJ or FTC) and a sector or industry regulator. The DOJ and FTC focus solely on the impact the transaction will have on competition, whereas industry-specific regulators may account for a wider range of public interest concerns specific to a particular industry. In such cases, even though there is shared responsibility for enforcing mergers, there is a clear delineation of oversight for public interest matters. Because the competition agencies do not analyse a given transaction's impact on the public interest, an independent "specialist" agency can develop its own rules, guidelines, and precedents applicable to non-competition policy concerns relevant to particular industries. This structure promotes transparency and accountability by separating competition from non-competition decision-making. Although in practice there can be some overlap, the DOJ and FTC are in frequent communication with other agencies reviewing a merger to ensure that any remedies or enforcement actions are consistent and do not conflict with their distinct policy goals.

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[26] 15 U.S.C. § 717(f).

[27] 49 U.S.C. § 11324 (criteria for mergers between "Class I" railroads include the effect of the transaction on "the adequacy of transportation to the public;" "other rail carriers;" "rail carrier employees;" and "competition among rail carriers.").