



## ‘Public Interest’ Issues In Competition Analysis

*‘Public interest’ considerations can be used as the grounds upon which a potentially anti-competitive situation can be allowed to prevail in the market. Many competition laws specifically provide for protection of public interest as part of their objectives.*

*This briefing paper tries to define ‘public interest’ and highlight issues that are normally regarded as relating to ‘public interest’. The paper will also highlight how select Competition Authorities, using different competition laws, deal with public interest issues in their respective countries, and make recommendations on ways of dealing with public interest issues in competition law.*

### Background

The objectives of competition policy have varied from jurisdiction to jurisdiction across the globe. Traditionally, maintaining and encouraging competition in order to promote efficient utilisation of resources and welfare of the consumers could be identified as some of the main objectives of competition policy. However, also in the realm of competition policy are ‘public interest’ issues. Competition Authorities are also required to consider public interest issues when examining mergers and acquisitions (M&As) or when handling allegations of restrictive and unfair trade practices (UTPs). This need is explicitly provided for in most of the competition laws of both developed and developing countries.

‘Public interest’ can be defined as referring to the ‘common well-being’ or ‘general welfare’.<sup>1</sup> While there could be an agreement that aiding the common well-being or general welfare is positive, there is little, if any, consensus on what exactly constitutes the public interest. Public interest can be looked at as the aggregation of the individual interests of the persons affected by a policy or action under consideration<sup>2</sup>. This may be considered as the ‘cost-benefit’ approach to the public interest. Adherents of this version argue that the question of whether or not a policy is in the public interest is settled by assessing the potential gains and losses which predictably will follow from its adoption. This makes sense if it is taken into consideration that the objective of companies is to generate returns to shareholders, who also happen to be members of the public, and they would also be losers if policy decisions are made against them.

Under merger analysis, there are some common issues among the different legislative provisions of competition laws that can fall under public interest considerations. The definition comprises issues of equity/fairness, protection of small business, equality of opportunity, freedom of economic action, decentralisation of economic decision making/power, involvement of economically disadvantaged groups and so on. This is achieved by including employment, regional development and growth of small and medium-sized enterprises (SMEs) etc., as areas of analysis.

In general, efficiency, consumer welfare and at times, fairness are seen as the key objectives of public interest considerations.<sup>3</sup> Although some of these can be addressed by competition analysis, it can be established that an industry can remain unconcentrated after the merger even if issues, such as employment, prices and quality may not be in the interest of the public.

### ‘Public Interest’ in Various Competition Laws

Models of competition law incorporating public interest consideration envisages Competition Authorities to take into account the balance of various interests, namely those of workers and consumers when adjudicating competition matters. Here the regulation of competition is considered as an instrument for economic development which seeks to correct the socio-economic imbalances of a particular country as a result of its peculiar history and development. However, most of these laws do not have a specific definition as to what can be regarded as public interest. A few examples may help establish this.

### **South Africa**

The Competition Act, 1998 of South Africa has specific provisions regarding public interest, without necessarily providing a definition of ‘public interest’. Section 12A of the Act on consideration of mergers provides that whenever the Commission or the Tribunal is considering a merger, they must initially determine whether or not the merger will result in substantial lessening of competition, and if it does, they must also look at whether the merger can be justified on substantial public interest grounds. Conversely, if the merger does not result in substantial lessening of competition, they should also assess whether the merger can be justified on public interest grounds. The implication of this is that there are two equally important tests that a merger can be subjected to – public interest and competition grounds – such that each of them has to be fulfilled before a merger is authorised.

In terms of section 12A(3) of the Act, when determining whether or not a merger can or cannot be justified on the grounds of public interest, the Competition Commission or the Competition Tribunal must consider the merger will have on: (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive; and (d) the ability of national industries to compete in international markets. Factors (a) to (d) above therefore constitute public interest issues as far as the Competition Act of South Africa is concerned.

### **Zimbabwe**

The Competition Act, [Chapter 14:28] of Zimbabwe has some provisions that can result in a merger, restrictive practice and monopoly situation being prohibited on the grounds of public interest, without necessarily giving a definition of public interest. In terms of section 32 of the Act, in determining whether or not a merger, restrictive practice or monopoly situation is contrary to public interest, the Commission shall take into account everything that it considers relevant in the circumstances, and shall have regard to the desirability of: (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; (b) promoting the interest of consumers, purchasers and other users of commodities in

Zimbabwe, in regard to prices, quality and variety of such commodities and services.

In addition, any restrictive practice that is an unfair business practice shall be deemed to be contrary to public interest. Unfair business practices are listed in the First Schedule to the Competition Act [Chapter 14:28] and these include misleading advertising, false bargaining, bid-rigging, predatory pricing and exclusive dealings.

### **Australia**

The Trade Practices Act 1974 of Australia also does have explicit provisions that deal with public interest considerations. Part VII of the Act specifies that the Australian Competition and Consumer Commission (ACCC) may authorise anti-competitive conduct where it considers that the public benefit will outweigh the competitive detriment<sup>4</sup>. For example, section 88 grants the ACCC the power to authorise contracts, arrangements or understandings that substantially lessen competition (in breach of section 45) where it considers the public benefits, where they outweigh the competitive harm.

However, conduct that would breach the misuse of market power provision of the Act (section 46) cannot be authorised. In relation to mergers, the Act (section 50) prohibits transactions that would be likely to substantially lessen competition in a market. That is, the mergers provision is not subject to a public benefit test as such. Nevertheless, where the parties to the merger consider that such public benefits outweigh the competitive detriment of a proposed merger, the Act enables them to apply to Australian Competition Tribunal (ACT) for a review (section 95). The ACCC has a formal role in these proceedings and must provide a report to the Tribunal on matters that the Tribunal specifies. The ACCC is also able to call and cross-examine witnesses and make submissions on any issue it considers to be relevant.

Public benefit is not defined in the Act (Australia). However, the tribunal has defined it to be: ... “anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic

#### **Box 1: Treatment of Efficiencies as Public Benefits**

The ACCC considers all efficiency gains constitute public benefits. In determining how much weight to place on particular efficiency gains in assessing an application for authorisation, the ACCC will take account of the following:

- Has the applicant provided sufficient evidence to support a claim that efficiency gains are of a particular size?
- Is the achievement of the efficiency gains sufficiently certain? In particular, gains expected to be achieved a number of years after the conduct starts would be given less weight to reflect the inherent and underlying uncertainty?
- Are the efficiency gains likely to be offset (partially or even fully) by efficiency losses – for example, from productive efficiency losses, flowing from a reduction in competitive pressures in the market (i.e. ‘x-inefficiency’)?
- Should the efficiency gains be given less weight due to the limited breadth, scope or the nature of beneficiaries?

Source: *The Australian Competition and Consumer Commission, “Guide to Authorisation”, March 2007, pp 31*

goals of efficiency and progress. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress'; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency"<sup>5</sup>.

In terms of section 9A of the Trade Practices Act, in determining what amounts to a benefit to the public the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

- (i) a significant increase in the real value of exports; and
- (ii) a significant substitution of domestic products for imported goods<sup>6</sup>.

Section 9A also provides that without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry in determining benefits to the public.

### **UK**

In the UK, the Office of Fair Trade (OFT), the Competition Commission, the Secretary of State, the European Commission (EC) and even the UK Government are involved one way or the other in merger assessment. The Competition Act 1998, assigns specific roles to the OFT, the Competition Commission and the Secretary of State. The Act permits intervention by the Secretary of State in public interest cases. In these cases, the Secretary of State may take public interest factors into account in deciding whether to clear, refer or remedy a merger while the OFT and the Competition Commission look at the competition assessment<sup>7</sup>.

The Secretary of State is also able to intervene in special public interest cases where the standard jurisdictional thresholds relating to share of supply and turnover need not be satisfied. There will be no competition assessment in such cases. The public interest considerations that the Secretary of State may take into account are limited by the Act. At present, only national and public security have been specified as public interest considerations, although the Secretary of State retains power to add further public interest considerations by a statutory instrument.

The procedure in the US is slightly different as far as public interest issues are concerned. In terms of section 2(b) of the Antitrust Procedures and Penalties Act, 15 USC ("APPA"), the US has to prepare and file a Competitive Impact Assessment relating to the proposed Final Judgment before submitting it for entry into the civil antitrust proceeding. This happens after the US Department of Justice (DoJ), Antitrust Division reaches a conclusion on its analysis and has reached agreements

with the parties to the merger. It would then be required to file documents with the court including a complaint, a final judgment, a 'hold separate stipulation and order' and a competitive impact statement. The competitive impact statement (CIS) offers an explanation of the antitrust proceeding and how the proposed settlement remedies the harm that is alleged to occur as a result of the merger. In the CIS, the DoJ explains how the entry of the settlement is in the 'public interest'.

The APPA provides for at least 60 days from the effective date of the proposed judgment within which any person can submit written representations regarding the proposed final judgment. All comments received during this period will be considered by the DoJ in light with its earlier recommendations. After the expiry of the deadline, the district court in which the CIS has been filed will then determine whether the decision by the DoJ is 'within the interest of the public'. The court's role in protecting public interest is one of ensuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is one which will best serve society, but whether the settlement is within reaches of public interest.<sup>8</sup> This will be done through assessing the representations from the public within the stipulated 60 days against the proposed judgment.

### **Namibia**

The Competition Act, 2003 of Namibia has provisions enshrined in merger analysis procedure that are intended to safeguard the interest of the public. According to subsection 2 of Section 47 of the Act, the Competition Commission is empowered to base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, and factors to consider include the public interest provisions such as: (i) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment that would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market; (ii) the extent to which the proposed merger would be likely to affect employment; (iii) the extent to which the proposed merger would be likely to affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market.

### **India**

In India, restrictive trade practices (RTPs) are actionable only when they harm public interest. One such case, which came before the Monopolies and Restrictive Trade Practices Commission (MRTPC) way back in 1984, was that of Shyam Gas Company which is the sole distributor to Bharat Petroleum Corporation Ltd (BPCL), for cooking gas cylinders at Hathras (Uttar Pradesh), and which was

## Box 2: Merger between British American Tobacco Plc and Rothmans International

In 2000, the Competition and Tariff Commission concluded the analysis of a merger involving British American Tobacco (BAT) and Rothmans of Pall Mall (Zimbabwe) Limited. The case was evaluated as a horizontal merger falling within the terms of section 2 of the Competition Act [Chapter 14:28]. The Commission noted that the merger would result in a creation of a monopoly situation would also create economies of scale resulting in more efficient use of resources, the generation of foreign currency through exports, and the stabilisation of cigarette prices on the local market. The failing firm defence put forward by the merging parties was considered a strong point as BAT was facing challenges and was likely to close shop. The merger was approved subject to two conditions – one being that the merged entity should dispose excess equipment to a third party at market prices and the second being that prices should not be increased after the merger, and if the parties intended to increase prices, they would seek approval from the Commission.

The second condition was imposed with the aim of protecting the public against monopoly pricing, given that competition had been totally eliminated by the merger. However the Commission did not give any condition in relation to employment. In their application, the parties had indicated that no employee would lose their jobs as a result of the merger except a few managerial positions as the merged institution would have to be restructured. However, a post impact assessment exercise carried out in 2006 indicated that immediately after the merger, about 115 employees lost their jobs, and the majority of those affected were in non-managerial positions. All the lost jobs were in a period of one year, immediately after the merger. Given that there was a monopoly, the affected employees could not find any alternative employment related to their experience until new players had entered the industry.

*Source: 'Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe', November 2006, Competition and Tariff Commission, Harare (not published)*

allegedly engaged in the RTP such as giving gas connections to customer only when he/she purchased a gas stove or a hot plate and charging customers for the supply of fittings and appliances at twice the market place. The MRTPC held that the company was indulging in an RTP that was prejudicial to public interest. When charged, Shyam Gas Company agreed to stop the RTP and the MRTPC directed the company to abide by the undertaking.

### Need for Separate 'Public Interest' Issues

The cases where public interest issues are not fully addressed by competition issues are more common in merger analysis, particularly in horizontal mergers. Vertical or conglomerate mergers may also be susceptible to the same effects, but this may not be too substantial. The most common public interest issue in this case is the issue of employment.

If two companies in the same business are merging, then there would be a lot of duplication of effort and roles such that the merged organisation would need to restructure. If a small company, whose market share is not significant in the relevant market, is taken over by a significantly bigger company, then it is likely that such a merger would be approved on competition grounds, as it is likely to pass all the major competition assessment tests it can be subjected to. The post merger situation in terms of concentration and market shares would not be significantly different than the pre-merger, and coordinated and unilateral effects, the major candidate theories of harm, will also not likely to result. Thus, the merger would not result in any substantial lessening of competition.

However, it is not likely that the acquiring firm would be in need of the supporting staff (receptionist, messengers, drivers, documentation officers etc), some of the

professional staff (like accountants, given that the books would be consolidated) and even the managerial staff. It is unavoidable that a horizontal merger would result in some staff being laid off. In the extreme, where labour costs are substantial, the bigger company may even find it more cost effective to lay off all the staff of the smaller firm. The same situation can also happen in conglomerate and vertical mergers as well, where duplication of roles is always unavoidable. This creates the need for specific provisions aimed at addressing such public interest.

Horizontal mergers can also result in the removal of competition to an extent that the merged entity will be able to charge inordinate prices, especially where it has managed to gain market power. This is typical in situations where the Competition Authority would have accepted the merger due to other factors even though there is a possibility that the merger can substantially lessen competition.<sup>9</sup> The merged entity can also get away with compromise of quality, as the choices for the public would be limited. In such situations, it is almost mandatory that the Competition Authority should devise conditions to safeguard the interest of the public. It may also be the government policy that the historically disadvantaged groups should also take part in the economic process, and the Competition Authority may also have to look at the shareholding structure of the merging parties, and issues that can not be addressed by competition analysis.

There are different ways in which the Competition Authorities can effectively deal with situations where there is a clash of decisions from public interest analysis and those of competition analysis. The important thing, is however, that they should always weigh the benefits of the merger, in respect to other areas (efficiency, economies of scale, price stability, etc) with the other undesirable public interest issues (unemployment,

excessive pricing, quality compromise etc) and try to maintain a balance between the two objectives. It can be argued that it is quite easier for conditions of a public interest nature to be accepted by the parties than those of competition nature, as public interest conditions are largely behavioural while competition remedies can be structural. Conditions of a public interest nature are also easier to enforce compared to those aimed to address competition problems.

Examples of conditions aimed at addressing public interest issues include restricting the number or tolerable levels of staff dismissal or price hikes following the merger, or requiring the parties to the merger to seek authority to the Competition Authority before they increase prices or fire any staff, giving their justifications for doing so.

### Competition vs ‘Public Interest’ Test

In July 2001, the UK Government published the White Paper, ‘Productivity and Enterprise: A World Class Competition Regime’ which set out a number of proposals for the reform of UK competition law.<sup>10</sup> The paper focused on the introduction of a new merger regime where decisions would be taken by independent competition authorities against a substantial lessening of competition (SLC) based test rather than the current public interest test.<sup>11</sup> However, a public interest element would be retained under the Enterprise Act but only apply in very exceptional circumstances where the Secretary of State decides that there is a national security, public security or defence interest issue.

One of the reasons for the change was that it would introduce a SLC test in place of the existing public interest test which would make the regime more competition focused. Although in recent years it has been rare for merger cases to be decided on anything other than competition grounds, such a change would help to reduce strategic uncertainty and that the business community would have a clearer idea as to the issues that would be taken into consideration at the time of an investigation.

A greater competition focus should also reduce uncertainty for competitors and investors in assessing the regulatory issues in the development of market. A merger control regime that is more focused on competition will benefit consumers by promoting the maintenance of open and competitive markets. This would ensure a wide choice of goods and value for money; it would also reinforce the position of consumer interests at the heart of the merger regime.

In merger reform, there is also an intention to take ministers out of merger control same in exceptional circumstances which will be tightly circumscribed. The only so called Exceptional Public Interest (EPI) gateway

through which the minister will be able to re-enter the process would relate to defence or national security matters.<sup>12</sup> The Irish Competition Act also made similar changes as made by the UK Competition Act. The Act replaced public interest basis for review with a substantive competition based test. The Irish Competition Authorities evaluate whether or not the merger would result in a SLC in the relevant market when deciding on merger cases.

### Conclusion

There is a growing need for Competition Authorities to take the issue of public interest seriously in their assessment of competition cases. Public interest considerations need not necessarily clash with competition based assessments, as the long term intended objective of the two is the same, which is economic growth and hence public welfare enhancement. However, in most instances, competition based tests and public interest tests, normally, result in different requirements relating to competition cases, given that economic issues can not be divorced from other social and cultural variables in any country. In order to effectively achieve desired objectives with minimum controversy, measures that can be used include:

- (a) The public interest tests or competition tests should both be applied keeping in mind the different social and economic variables that normally give rise to the clash of principles between the two tests. There is, therefore, a need for competition authorities to try and strike a balance between the two objectives, with the intention of reaching a compromise that will be to the interest of the major stakeholders. This can best be achieved by making some concessions, such as making minimum sacrifices for the achievement of a major goal, e.g. allowing minimum loss to employment so as to achieve efficiency;
- (b) The clash of objectives can be avoided by making public interest issues explicitly defined in the Competition Act, as the issue is not as straightforward as stakeholders may want to believe. The competition law should make an attempt at defining what public interest means, or at least list factors that are to be taken into account in determining whether or not a merger or restrictive practice is contrary to the public interest, just as the case on determining substantial lessening of competition;
- (c) Public interest issues and competition issues need not be handled by different institutions, as this is the major source of clashes. Allowing political organisations or other public institutions to handle public interest issues may unnecessarily result in competition issues being totally ignored out of the equation. Given the power that these organisations may have compared to the competition authority, this is more likely to result in competition issues being sacrificed;

- (d) There should be a standard to be followed in the event that competition based test and public interest tests have given conflicting results. In most instances, competition reasons are given more importance than public interest reasons, such that if a choice has to be made, competition reasons should take precedence. However, some effort would have been made at capturing the public interest issue concerned to the maximum possible level; and
- (e) It is important that for policy makers or authorities applying public interest test, they should apply it a manner which is independent from political influence and is transparent. It is also essential to engage the community and keep their confidence that public interest considerations have been objectively examined before a decision is made.

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- World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy*, 1998

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## Endnotes

- 1 Definition from Wikipedia online.
- 2 The Concise Oxford Dictionary of Politics.
- 3 See the World Bank and OECD, “*A Framework for the Design and Implementation of Competition Law and Policy*”, 1998.
- 4 ACCC Merger Guidelines, June 1999.
- 5 Quoted in “*Guide to Authorisation*”, the ACCC, March 2007.
- 6 Trade Practices Act 1974 Act No. 51 of 1974 as amended.
- 7 Office of Fair Trading, Merger Procedural Guidance.
- 8 US DoJ file documents, Case:1:07-cv-02044 Vulcan Materials Company and Florida Rock Industries, received through e-mail correspondence.
- 9 Examples include situations where the owners of one company are disinvesting in the country and no other taker has been able to be identified for some significant time length. This can also happen where there is a high likelihood that one of the parties to the merger will fail (the failing firm argument) and the transaction is the only one that can save it. The other reasons also include efficiency arguments and any other issue that can result in a potentially anti-competitive merger being approved.
- 10 DTI, “*Regulatory Impact Assessment for competition reforms in Enterprise Act 2002*”, available on DTI’s website at: <http://www.dti.gov.uk/ccp/enterpriseact/pdfs/ria-competition.pdf>
- 11 Examples of OECD jurisdictions that have moved away from public interest oriented tests include Canada, the Czech Republic, Ireland, Sweden and the UK.
- 12 Morris, D. (2001), *Developments in Competition Policy: Mergers and Oligopolies*, International Competition Policy Conference, [http://www.competition-commission.org.uk/our\\_peop/members/chair\\_speeches/pdf/rpicconf.pdf](http://www.competition-commission.org.uk/our_peop/members/chair_speeches/pdf/rpicconf.pdf).

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