Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights

David Reader

KEYWORDS:

Merger control; Public interest criteria; Competition law; Global convergence; Institutions.

BACKGROUND

- With the introduction of international best practice guidance and the development of economic evaluation techniques, most countries generally assess mergers according to the impact they have on *competition*, rather than any wider *public interest* effects.
- However, many countries continue to incorporate some form of public interest criteria within their merger control legislation, which raises a number of intriguing questions regarding (i) the feasibility of harmonising cross-border merger procedure, and (ii) the perceived role that the public interest plays in modern-day merger control.
- To address these questions, it is important to identify how different countries have accommodated public interest criteria in practice and to consider which socio-economic factors may influence these design choices.

METHODOLOGY

- The paper conducts an extensive legal empirical study of merger control laws in 75 countries. In particular, the dataset records: (i) how each country has framed public interest criteria in its merger control legislation, and (ii) who is appointed as the decision-maker to rule on this criteria.
- Statistical tests are performed to identify possible links between socio-economic variables and how countries choose to accommodate public interest criteria.

KEY FINDINGS

- The study estimates that 88% of domestic merger regimes incorporate some form of public interest criteria, which indicates that the public interest has the potential to influence merger decisions in most countries.
- Out of 21 possible approaches that countries can adopt to accommodate public interest criteria, 15 of these approaches have been adopted in practice. This signals a lack of convergence regarding the perceived 'best' method to accommodate the public interest.
- The vast majority of states that adopt public interest criteria have chosen to frame this criteria *narrowly* within their merger laws, i.e. as an 'exception' to a substantive competition-based test, or as part of parallel sector-specific policy.
- National competition authorities and politicians are equally popular choices when appointing a public interest decision-maker (just under two-thirds of countries have chosen to appoint one or the other as a standalone decision-maker).
- African countries have been more willing to assign an extensive role to the public interest.
- Although economic development is not fully representative of how countries accommodate public interest criteria, states that afford an extensive role to the public interest are twice as likely to be developing countries.

W: www.competitionpolicy.ac.uk
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

CENTRE FOR COMPETITION POLICY

Working Paper 16-3

February 2016

Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights

CCP Policy Briefing

working paper 16-3

University of East Anglia

POLICY ISSUES

- The wide variety of approaches that states have adopted signals a lack of substantive and institutional convergence in this aspect of merger control. This may suggest a change of tact is necessary before further harmonisation of cross-border merger procedure can take place.
- If the epistemic communities (e.g. the ICN, OECD, UNCTAD, etc) believe that states that adopt an 'extensive public interest role' pose an obstacle to effective cross-border merger control, these communities should — when drafting 'International Best Practice Guidelines' — be mindful of the importance that developing countries attribute to development goals. To be effective, such guidelines may need to reflect a compromise between a strict competition-based assessment regime and one that considers public interest criteria routinely.

SUGGESTED CITATION

David Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) CCP Working Paper 16-3. Available at: http://competitionpolicy.ac.uk/publications/working-papers.

THE CCP

The Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

More information about CCP and its research is available from our website: www.competitionpolicy.ac.uk

ABOUT THE AUTHOR

- David Reader is a Research Associate at the Centre for Competition Policy and a PhD Researcher at the UEA Law School, University of East Anglia.

W: www.competitionpolicy.ac.uk
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

CENTRE FOR COMPETITION POLICY

Working Paper 16-3

February 2016

Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights

CCP Policy Briefing

working paper 16-3

University of East Anglia