

PUBLIC INTEREST IN MERGER CONTROL AS A POTENTIAL INSTRUMENT OF REALIZATION OF SOCIO-ENVIRONMENTAL GOALS

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The aim of this paper is to review the ongoing debate¹ on the goals of merger control in Europe. The article focuses on the existing national provisions allowing for recognition of public interest in the ambient of merger control in EU member states, with a particular focus on the aspects of socio-environmental goals together with the functioning models of public interest considerations and their application. The paper points out the weaknesses of the existing national regulations and suggests general solutions, which could eliminate the most prevalent problems.

1 INTRODUCTION

2.1 BACKGROUND – DISCUSSION ON EU MERGER REGULATION REFORM

The recent decisional practice of the European Commission sparked a lively debate on the goals of merger control in Europe. The turning point has been the Commission's decision to prohibit the Siemens and Alstom merger.² The decision provoked vivid criticism, putting significant pressure on the Commission's approach to merger control assessment and goals. In particular, the decision opened the way for the Franco-German proposal to overhaul the EU merger control rules in order to facilitate the creation of "European champions", capable of thriving in global markets.³ The specific solutions proposed in the Manifesto included *inter alia* the right of the Council to override Commission's decisions.

The Franco-German proposal faced strong opposition, including from the European Commission, national governments⁴ and antitrust practitioners, focusing on threats associated with the politicization of competition law. The critics of the call to overhaul the EU merger control rules emphasized that consideration of industrial policy goals would undermine the credibility and legal certainty of EU merger control. This opposition may have influenced the position of France and Germany, as the joint statement of France, Germany

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¹ The article was written in September 2019 and does not cover further discussion and developments regarding the debate on the goals of merger control in Europe.

² Siemens/Alstom (Case M.8677) Commission Decision C(2019) 921 final [2019].

³ Bundesministerium für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, 19.02.2019 <www.bmw.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf> accessed August 31, 2019.

⁴ eg., the Dutch government stated that "European champions should build on healthy competition", emphasizing that "bigger is not always better", see Government of Netherlands, Position Paper. Strengthening European competitiveness, 15.05.2019, <www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness> accessed August 31, 2019.

and Poland⁵ published in July 2019 does not include a proposal for a political veto of commission merger decisions.⁶

2.2 ALTERNATIVE GOALS

However, the ongoing debate is not deemed to remain within the field of industrial policy.⁷ The discussion on the revision of the merger control rules provokes also to take into consideration a broader look on competition law policy and goals. In fact, at the same time when the *Siemens/Alstom* decision was issued, the European Parliament adopted a resolution,⁸ in which it expressed its concerns about the Commission disregarding the goals such as food safety, protection of consumers, environment and climate.⁹ Furthermore, the European Parliament directly called the Commission to review the EU merger control rules to adopt measures to protect the rights and principles of the TFEU and EU Charter of Fundamental rights, including environmental protection.¹⁰

3 NATIONAL REGULATIONS

3.1 NATIONAL REGULATIONS: PROTECTED VALUES AND GOALS

Although the debate on the proposals of changing merger control goals at the EU level seems to be perceived as revolutionary, the general idea of considering the public interest in merger control is far from being a novelty at the national level. More than 10 EU Member States have already adopted rules allowing the recognition of public interest grounds in merger control, including national security, general interests of national economy, media plurality, employment protection and positive impact on the environment. Many of these criteria are common throughout different jurisdictions, however there are many differences in terms of the application of the relevant rules. The wide scope of national regulations and their application makes it clear that they should become an inspiration for further discussion on the EU merger control framework.

⁵ Bundesministerium für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, Ministerstwo Przedsiębiorczości i Technologii, *Modernising EU Competition Policy*, 04.07.2019 <www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf> accessed August 31, 2019.

⁶ However, as noted by A Stefanowicz-Barańska: “This in itself does not yet mean that Germany and France have entirely abandoned their own further-going agendas, which they could pursue independently”. See M Richards, *France and Germany tone down calls for political intervention*, (Global Competition Review, 05.07.2019) <<https://globalcompetitionreview.com/article/1194873/france-and-germany-tone-down-calls-for-political-intervention>> accessed August 31, 2019.

⁷ For example, one of the most discussed topics regarding the EU merger control framework is merger control in high-tech and pharma sectors, in particular the rising issue of so-called *killer acquisitions*.

⁸ European Parliament, *Resolution of 31 January 2019 on the Annual Report on Competition Policy*, P8_TA-PROV(2019)0062 <www.europarl.europa.eu/doceo/document/TA-8-2019-0062_EN.html> accessed August 31, 2019.

⁹ *ibid*, para 45.

¹⁰ *ibid*, para 47.

3.2 FUNCTIONING MODELS

In general, it is possible to distinguish two institutional models of application of the public interest in merger control. The first dual responsibility model separates the process between the competition authority, which is responsible for the main merger control assessment, and the authority in power to intervene on the public interest basis, e.g. to grant an authorization to the merger despite the competition's authority opposition. This model is prevalent in the EU. In most cases the extra powers within the merger control process are in hands of specific ministries.¹¹

In the second single authority model, all powers regarding the merger control process, including the application of the public interest exemptions, lie with the competition authority, which autonomously processes the proposed merger not only within the standard merger control framework, but also on the public interest grounds. An example of a country which adopted this model is Poland.¹²

It is also possible to distinguish a mixed model, where it is the competition authority that considers and applies the public interest grounds, but it does not proceed independently. This is the case in Italy,¹³ where the Council of Ministers, at the proposal of the Minister for Trade and Industry, lays down the general criteria to be used by the competition authority.¹⁴

In most jurisdictions the consideration of the public interest is connected only with the extraordinary power to approve the transaction, which was prohibited due to merger control assessment by the competition authority. In a few jurisdictions, public interest considerations can also lead to the prohibition of transactions that would have been cleared by the competition authorities.¹⁵

3.3 SOCIO-ENVIRONMENTAL GOALS

As mentioned before, the grounds for public interest considerations within the national merger control frameworks cover a vast scope of goals and values. At the same time the concepts of public interest adopted by particular countries differ – starting from the broad, open and general references to the public interest, to the precisely determined values and goals. Although the most common circumstances allowing the questionable concentration to be ultimately cleared is contribution to the protection of the national security or national economy, many jurisdictions recognize other aspects of the public interest. In the context of

¹¹ eg, in Germany it is the Minister of Economic Affairs and Energy, in the Netherlands – the Minister of Economic Affairs, in France – the Minister for the Economy.

¹² On the other hand, the Swedish competition authority takes into account public interest, meant as national security and supply interests, when deciding on issuing a prohibition decision. Namely, a prohibition decision may only be issued if no significant national security or supply interest is set aside. As a variation of a single authority model one could consider Austria, where public interest may be taken into account in judicial review of a prohibition decision.

¹³ Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art 25(1).

¹⁴ Also, the Polish Competition Authority in its decisional practice has taken the governmental policies into account, however, it was not obliged to do so. See eg DOK-163/06 [2006].

¹⁵ For example, in the UK the Secretary of the State may prohibit the realization of a transaction on public interest grounds such as national security and financial system's stability, whereas in Romania, the Romanian Supreme Council for National Defense may intervene and prohibit the transaction, if it raises national security risks.

the realization of the socio-environmental policy, notable examples are France (protection of employment) and Spain (protection of environment), whose regulations directly express specific socio-environmental values. Nevertheless, the general public interest clauses may also allow to take such values into consideration.¹⁶

Table: Public interest grounds for intervention in non-sector specific merger control context in EU Member States.¹⁷

#	EU Member State	Public interest grounds for intervention
1	Austria	International competitiveness ¹⁸ , advantages for national economy ¹⁹
2	Cyprus	public security, pluralism of the mass media, the principles of sound administration ²⁰
3	France	general interest other than maintenance of competition, in particular: industrial development, competitiveness of the companies concerned as regards international competition, creation or safeguarding of jobs ²¹
4	Germany	benefits to the economy as a whole, public interest ²²
5	Hungary	general public interest, in particular: preservation of jobs, security of supply ²³
6	Italy	major general interests of the national economy involved in the process of European integration ²⁴ , essential reasons of national economy ²⁵ or stability requirements in banking sector ²⁶

¹⁶ For example, in Poland the competition authority cleared two transactions, indicating that they will be beneficial for environmental protection, see RPZ-4/2004 [2004] and RPZ-9/2005 [2005].

¹⁷ The table does not include sector-specific regulations (eg mergers in media industry), which may take into consideration certain aspects of the public interest (eg media pluralism). For example, such solutions are implemented in Austria and Ireland.

¹⁸ Federal Act against Cartels and other Restrictions of Competition (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*), §12 (2). English version available at:

<https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>

¹⁹ In force since 01.01.2022. Federal Act against Cartels and other Restrictions of Competition (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen*), §12 (3). English version available at:

<https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>

²⁰ The Control of Concentrations Between Undertakings Law/Cypriot Competition Act (N.83(I)/2014), Art 35ff. English version available at:

<[http://www.competition.gov.cy/competition/competition.nsf/All/5937AB49B8B38080C2257FB2003A442B/\\$file/Law%2083\(I\)2014.pdf](http://www.competition.gov.cy/competition/competition.nsf/All/5937AB49B8B38080C2257FB2003A442B/$file/Law%2083(I)2014.pdf)>

²¹ French Commercial Code (*Code de commerce*), Art L430-7-1.

²² German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), §42. English version available at: <http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html>

²³ Hungarian Competition Act (1996 évi LVII Törvény a tisztességtelen piaci magatartás és a versenycorlátozás tilalmáról), Art 24/A. English version available at:

<https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpv_t_hataly_20190101_a&inline=true>

²⁴ Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art 25(1).

²⁵ In cases of acquisition of Italian undertakings by undertakings from the states, where the Italian undertakings are discriminated, Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art 25(2).

²⁶ Italian Competition Act (*Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato*), Art

#	EU Member State	Public interest grounds for intervention
7	the Netherlands	important reasons in the public interest ²⁷
8	Portugal	fundamental strategic interests of the national economy ²⁸
9	Poland	Justified cases, in particular: contribution to economic development or aiding technical progress, positive impact on the national economy ²⁹
10	Romania	national security ³⁰
11	Spain	general interest other than protecting competition, in particular: national defense and security, the protection of public security and public health, free movement of goods and services within the national territory, protection of the environment, the promotion of technical research and development, adequate maintenance of the sector regulation objectives ³¹
12	Sweden	significant national security or supply interests ³²

3.4 CASE LAW

As mentioned above, several EU Member States explicitly protect goals such as environment and employment. In practice there is a small number of cases³³ where these goals have been protected by taking into account the public interest in the merger control context. Interesting examples can be found in France, Germany and Poland.

The aim of protecting employment has been taken into consideration in France in 2018, where due to a ministerial intervention the parties to the merger were granted an unconditional clearance, as opposed to the French Competition Authority decision, which imposed an obligation to divest a brand and a production site.³⁴ In order to guarantee the protection of employment, the decision of the French Minister for the Economy included an obligation not to cut any job positions for two years.³⁵

20(5-bis)(b).

²⁷ Dutch Competition Act (*Mededingingswet*), Art 47(1).

²⁸ Portuguese Competition Authority statutes (*Decreto-Lei n.º 125/2014 de 18 de agosto - Estatutos da Autoridade da Concorrência*), Art 41.

²⁹ Polish Competition Act (*Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów*), Art 20 (2). English version available at: <<https://www.uokik.gov.pl/download.php?plik=7618>>

³⁰ Romanian Competition Act (*Lege nr. 21 din 10 aprilie 1996 a concurenței*), Art 47(9).

³¹ Spanish Competition Act (*Ley 15/2007, de 3 de julio, de Defensa de la Competencia*), Art 10(4). English version available at: <<https://www.cnmc.es/file/64176/download>>

³² Swedish Competition Act (*Konkurrenslag (2008:579)*), Chapter 4, Art 1. English version available at: <<https://www.konkurrensvverket.se/globalassets/english/publications-and-decisions/the-swedish-competition-act.pdf>>

³³ See EU Merger Working Group, Public Interest Regimes in European Union – differences and similarities in approach, March 10, 2016, para 14.

³⁴ n°18-DCC-95 [2018].

³⁵ Decision du ministre de l'économie et des finances du 19 juillet 2018 statuant sur la prise de contrôle exclusif d'une partie du pôle plats cuisinés ambiants du groupe Agripole par Financière Cofigeo, Bulletin Officiel de la Concurrence, de la Consommation, de la Répression des Fraudes n°7 du 7 août 2018 [2018].

The same reason was invoked by the German Minister of Economic Affairs and Energy, whose intervention³⁶ overruled the German Competition Authority decision³⁷, prohibiting the acquisition of control of Tengelmann by Edeka. The German Competition Authority prohibited the transaction as it could lead to lessening of competition on highly concentrated local markets and, consequently, diminish consumer choice. The German Minister of Economic Affairs and Energy stated that the failure to implement the deal would result in the loss of 16,000 jobs, while job security is the workers' right. The ministerial authorization was conditional on the obligation not to cut any job for five years.

The German ministerial intervention has been applied also with regard to the aim of the protection of the environment and the development of the SME sector. In January 2019 the German NCA prohibited³⁸ the creation of a joint venture by Zollern and Miba, main competitors in an already concentrated market for plain bearings. The Minister justified its authorization³⁹ by indicating that Zollern and Miba need to work jointly on development of bearings, in particular used in wind power plants. Thus, cooperation serving the development of green technologies would be in line with the country's general policy based on developing the renewable energy sources. The ministerial authorization was conditional, as the companies were obliged to invest EUR 50 million in research and development during an eight-year period and avoid any change in the joint venture structure for five years.

Environmental protection has been considered also in Poland, where the Polish Competition Authority cleared two transactions, despite its concerns on competition-related issues. In 2004 the Polish Competition Authority cleared a transaction which led to the creation of a strong dominant position in local markets for production and distribution of heat.⁴⁰ The Polish Competition Authority justified its decision by indicating that the acquiring party committed to invest in new energy sources, emission reduction and use of waste to produce energy. Similarly, in 2005 the Polish Competition Authority cleared a transaction which led to creation of a strong dominant position in local markets for sanitation and waste disposal.⁴¹ The authority noted the positive impact of the transaction on environmental protection, emphasizing that it was aligned with pro-ecological policy. The Polish Competition Authority indicated that the buyer had a plan of active participation in environmental protection projects, planned investments in recycling solutions, as well as distinctive know-how, allowing for the successful realization of these projects.

3.5 PUBLIC INTEREST AS AN INSTRUMENT FOR THE REALIZATION OF SOCIO-ENVIRONMENTAL GOALS

As it follows from the above considerations, the merger control procedure provides for the possibility to take into account non-competition goals and to protect socio-environmental values. Furthermore, it is not only a virtual possibility as it has already been applied in practice.

³⁶ Gesch-Z: I B 2 – 22 08 50/01 [2016].

³⁷ B2-96/14 [2015].

³⁸ B5-29/18 [2019].

³⁹ Gesch-Z: I B 2 – 20302/14–02 [2019].

⁴⁰ RPZ-4/2004 [2004].

⁴¹ RPZ-9/2005 [2005].

However, the realization of socio-environmental goals via merger control does not currently seem to be a viable instrument as it is applied rather scarcely and in exceptional circumstances only. Although the main reason for this could be the aversion to step beyond the more economic approach and competition-based assessment,⁴² there are many other factors that could impact the viability of consideration of non-competition goals within the merger control context.

Firstly, it should be noted that the existing regulations are predominantly vague and do not provide for clear and specific instructions with regard to the consideration of alternative values in the merger control context. The lack of clear regulations and procedures could in particular lead to an ambiguous and uncertain interpretation of the law, discouraging any interested parties to pursue problematic transactions, even if they could be hypothetically cleared based on the protection of socio-environmental goals. Looking from the perspective of the intervening authority, one must also take into account the difficulties related to the necessary balancing of the protected values. Furthermore, the application of such an instrument, in particular in the form of a ministerial intervention, is likely to be treated as a political decision. At the same time every use of this instrument could attract a fierce public opposition. Therefore, relevant authorities would rather take a conservative stance while considering public interest in the merger control context, as they would need to take into account the political aspects of making any decision. Finally, it is not certain that the application of the discussed instrument would effectively serve the socio-environmental goals, as clearing a controversial decision based solely on general justifications might not result in the desired effects in practice.

3.6 PROPOSED SOLUTIONS

Taking into account the above, it is possible to upgrade the existent regulations into a more effective model. Firstly, it would be beneficial to provide more precise law, e.g. by clarifying the general clauses with specific examples. Secondly, publishing guidelines or official statements would definitely bring more clarity on the application of the discussed rules in practice. In addition to this, the relevant regulations should allow the intervening authorities to impose behavioral commitments on the merging parties, guaranteeing the effective realization of the socio-environmental goals.

Finally, one should also consider the harmonization of the relevant rules at the EU level or even their introduction into EU merger control framework. Taking into account that less than half of the EU Member States adopted regulations allowing to consider the public interest in the merger control context, the sensitive nature of the protected goals and the importance of the more economic approach in EU competition law, such a solution would be considered as obviously controversial. However, it should be noted that the clarification of the rules at the supranational level could encourage the relevant national authorities to intervene on the basis of public interest grounds, making public interest considerations in the merger control context a potential, viable instrument for the realization of socio-environmental goals.

⁴² EU Merger Working Group, Public Interest Regimes in European Union – differences and similarities in approach, March 10, 2016, paras 20-21
<https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf> accessed August 31, 2019.

3.7 SUMMARY

The recent discussion on the EU merger control regulations brings an opportunity to consider a broader look at competition policy and goals, such as employment and environmental protection. Furthermore, this should not be treated as a novelty, as many EU Members States' regulations already provide for considering the public interest within merger control context. The national solutions differ with regard to the adopted institutional models and protected goals. In particular, some EU Member States provide for the protection of goals such as the environment and employment. There are interesting examples from France, Germany and Poland, in which the authorities considered the protection of environment and the employment as crucial for the merger control assessment.

The analysis of the relevant national regulations shows many weaknesses and issues related to the consideration of public interest within merger control context. The application of this kind of instruments is rather scarce and there is little case law that could facilitate the intervention of the relevant authorities. However, many of those problems could be fixed by adopting clear and precise procedures and issuing relevant guidelines, making public interest considerations in the merger control context a potential, viable instrument for the realization of socio-environmental goals, with a perspective to be implemented at the EU level.

LIST OF REFERENCES

Bundesministerium für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, 19.02.2019 <www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf> accessed August 31, 2019

Bundesministerium für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, Ministerstwo Przedsiębiorczości i Technologii, *Modernising EU Competition Policy*, 04.07.2019 <www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf> accessed August 31, 2019.

Government of Netherlands, Position Paper. Strengthening European competitiveness, 15.05.2019, <www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness> accessed August 31, 2019

EU Merger Working Group, Public Interest Regimes in European Union – differences and similarities in approach, March 10, 2016, paras 20-21. <https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf> accessed August 31, 2019.

Richards M, 'France and Germany tone down calls for political intervention' (Global Competition Review, 05.07.2019) <<https://globalcompetitionreview.com/article/france-and-germany-tone-down-calls-political-intervention>> accessed August 31, 2019