



Lessons from the management of public interest considerations in international merger control: a comparative analysis

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Abstract

In recent decades, advances in economic theory have prompted most national competition regimes to converge towards an economic effects-based approach to antitrust enforcement. As a consequence, competition authorities generally assess the legitimacy of collusive agreements, abuses of dominance and mergers on the basis of their impact on competition within the relevant market. Given the emphasis that is now attributed to competition criteria, the influence of wider ‘public interest’ considerations has become increasingly marginalised. Yet, despite this marginalisation, the majority of domestic merger control regimes continue to reserve a role for public interest criteria, albeit to a very limited degree in most cases.

By conducting a comparative analysis of five domestic merger regimes,¹ this article seeks to establish how different historical, economic and social conditions have influenced the role of public interest criteria under national merger control. In particular, the article considers how disparities between these national-specific variables may impact upon: (a) how public interest criteria are accommodated within the wider merger control regime, (b) the types of public interest criteria that are formally adopted, and (c) the individual or institution that is charged with making decisions in the public interest. The comparison enables conclusions to be drawn on the most effective methods in which domestic states are able to incorporate and manage public interest criteria within their domestic regimes.

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I would be happy to extend the scope of this analysis to allow for comment on the public interest defence for Dutch cartel offences.

Specifically, I would seek to establish whether the ACM can learn from the experience of other jurisdictions that utilise public interest criteria in merger control and broader competition policy. To do so would require an assessment of the historical, social and economic conditions underpinning the Dutch system which can then be compared to the five countries referred to in the main study. This should provide interesting insights on, for example, why *animal rights* and *green energy* should take precedent over competition in the Netherlands. It could also open a debate on what additional public interest criteria we are likely to see introduced in the future.