PUBLIC INTEREST AND NON-PRICE CONSIDERATIONS IN MERGER CONTROL

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There has been an increasing trend recently in subjecting merger control assessment to factors that are not merger specific per se. Such factors relate to public interest considerations, national security considerations, as well as other types of factors that competition authorities take into account in assessing a merger's competitive impact. In a number of cases, merger control has been used to introduce or complement wider industrial policy or other priorities that are unrelated to the economic impact of the mergers in question. This paper will examine the question of competition law objectives in regard to their theoretical coherence and consistency and will in that context investigate whether the introduction of a wide range of considerations could possibly have a detrimental effect and ultimately possibly be at the expense of transparency, practical applicability, predictability and justiciability. It undertakes in-depth analysis of the role of public interest considerations such as national security and media plurality in EU and UK merger control, as well as recent attempts to consider non-price considerations such as privacy under the guise of the competitive effects of the transaction in question in the EU, the UK, the US and elsewhere. Ultimately, the author concludes that in the interests of practicality, predictability and justiciability, merger control for competition law purposes should focus on the market impacts of the transaction, in both price and non-price dimensions, but that other factors that may well feature in conceptions of the "public interest" writ large ought to be addressed pursuant to separate legislation and by other law enforcement agencies.

On observe dernièrement une tendance croissante à soumettre l'évaluation du contrôle des fusions à des facteurs qui ne sont pas propres aux fusions en tant que telles. Ces facteurs sont liés à des considérations d'intérêt public, de sécurité nationale, ainsi qu'à d'autres types de facteurs que les autorités de la concurrence prennent en compte pour évaluer l'incidence d'une fusion sur la concurrence. Dans un certain nombre de cas, le contrôle des fusions a été utilisé pour introduire ou compléter une politique industrielle plus large ou d'autres priorités qui ne sont pas liées à l'incidence économique des fusions en question. L'auteur du présent article examine la question des objectifs du droit de la concurrence sous l'angle de leur cohérence théorique et, dans ce contexte, se demande si l'introduction d'un large éventail de considérations pourrait avoir un effet préjudiciable et, en fin de compte, se faire au détriment de la transparence, de l'applicabilité pratique, de la prévisibilité et de la justiciabilité. Il entreprend une analyse approfondie du rôle des considérations

d'intérêt public comme la sécurité nationale et la pluralité des médias dans le contrôle des fusions de l'UE et du Royaume-Uni, ainsi que de récentes tentatives de considérer des facteurs autres que le prix, comme la vie privée, sous le couvert des effets concurrentiels de la transaction en question dans l'UE, au Royaume-Uni, aux États-Unis et ailleurs. En fin de compte, l'auteur conclut que, dans l'intérêt de l'applicabilité pratique, de la prévisibilité et de la justiciabilité, le contrôle des fusions aux fins du droit de la concurrence devrait se concentrer sur les effets de la transaction sur le marché, tant en ce qui concerne les prix que les aspects non tarifaires, mais que d'autres facteurs susceptibles de figurer dans les conceptions de l'« intérêt public » au sens large devraient être traités dans le cadre d'une législation distincte et par d'autres organismes chargés de l'application de la loi.

1. Introduction

There has been an increasing trend recently in subjecting merger control assessment to factors that are not merger specific *per se*. Such factors relate to public interest considerations, national security considerations, as well as other types of factors that competition authorities take into account in merger assessment. This trend has been intensifying across many jurisdictions. From the perspective of businesses and their private legal practitioners, the desirability of this trend is to be assessed first and foremost by its impact on the transparency, practicability, predictability and justiciability of the merger control process. All of these factors are at risk under this increasing trend of focusing on non-economic issues when transactions are being assessed. In a number of cases, merger control has been used to introduce or complement wider industrial policy or other priorities that are unrelated to the impact of the merger in question on competition in the affected markets. Such priorities have given rise to complicated remedies, potentially exceeding the scope of the theory of harm.[2]

The analysis will consider whether a possible multiplicity of aims for competition law merger control would constitute a desirable state of affairs, and if so, how the hierarchy of objectives should be addressed in cases where they conflict. Analysis thereof should ideally demonstrate how multiple aims do/may coexist in and inform antitrust enforcement and provide valuable insights into whether the process and the resulting outcome(s) can be deemed satisfactory in terms of transparency, practicability, predictability and justiciability. For this purpose, the necessary contextualisation will focus on the European Union ("EU") and United Kingdom ("UK") landscape and further undertake some comparisons between United States ("US"), EU and other competition jurisdictions where appropriate.

The paper will examine the theoretical coherence and consistency of competition law objectives and investigate whether the introduction of a wide range of considerations could possibly be at the expense of the transparency, practicability, predictability and justiciability of competition law in the merger control context. The analysis will reflect on whether the widening of the scope of merger control to include non-price considerations such as privacy, and public interest considerations such as national security and media plurality could have an adverse impact on these factors. Ultimately, the author concludes that in the interests of transparency, practicality, predictability and justiciability, merger control for competition law purposes should focus on the market impacts of the transaction, in both price and non-price dimensions, but that other factors that may well feature in conceptions of the "public interest" writ large ought to be addressed pursuant to separate legislation and by other law enforcement agencies. If competition authorities are to be asked to address such conceptions, this needs to be done pursuant to appropriate legislative interventions and be kept to the necessary scope that a competition authority is equipped to address.

2. Competition law objectives

The consumer welfare paradigm, and its corollary focus on economic efficiency, has been gradually increasing in significance in EU competition law and policy. This has been manifested, for example, in the European Commission's application of a more economics-based approach ("MEA") to merger review since reforms announced in 2002,[3] which saw a turn away from structural presumptions and a rules-based approach toward an assessment of the economic impact on a case-by-case basis. The application of the MEA in Europe resulted in the introduction of a single economic goal—the consumer welfare (allocative efficiency) standard—and an increased reliance on econometric methods for determining whether to block a merger or to impose conditions. The debate over the suitability of that standard in the US therefore has implications for the recent EU debate over the appropriateness of the MEA, and the recent announcement in the EU of a swing back toward more rules-based and structural approaches to competition law enforcement.[4] Furthermore, the discussion is taking place in the light of the emergence of suggestions for a widening of the scope of relevant competition objectives and calls for taking into account considerations that were hitherto not included in what was traditionally perceived as the scope of EU competition law goals.

The debate about the definition and interplay of the current goal(s) in EU competition law and policy has never been a muted one. This had already

been so before the shift towards "economisation" that picked up speed in the aftermath of transatlantic divergence in dealing with prominent cases,[5] and before the rise to (apparent) prevalence of the consumer welfare standard. The particularity of EU competition law lay in its also being perceived as a means to achieve (internal EU-wide) market integration. This was explicitly reflected in primary EU law,[6] so that the common/internal market integration goal was considered prevalent compared to other objectives. The latter have for example included promoting the protection of small and medium-sized undertakings; safeguarding economic freedom (of market participants)[7] bearing the influence at least to a certain extent of the ordo-liberal school of thought; non-discrimination and fairness. In that sense it could be argued that the market integration goal was *ab initio* neither an exclusive goal nor a strictly economic one, certainly not in the sense of a fixation on price-related criteria similar to that prevailing in the US.

With the drive for an MEA, the European Commission seemed to have embraced the consumer welfare (allocative efficiency) paradigm in what appeared to be an effort to emulate *mutatis mutandis* the US antitrust approach that had been dominant for several years at that time.[8] As will be shown below, there are a number of concerns in relation to the adequacy of the consumer welfare test. Indeed, this discontent has been reflected most recently in the announcement by the EC[9] of a return to a more rules-based and structural approach to abuse of dominance law and one wonders whether merger control is next.

A) Roots of discontent with consumer welfare

Any examination of the consumer welfare criterion must first acknowledge a certain controversy surrounding its proper definition as an antitrust goal. The resulting lack of clarity regarding its meaning is accentuated through inconsistent judicial application both terminologically and substantively.[10]

B) Consumer Welfare capturing only price effects of a static nature?

There have been a significant number of criticisms of consumer welfare and its appropriateness as an antitrust goal.[11] Doubts have been expressed as to whether adequate solutions can be expected either from invoking consumer surplus to measure consumer welfare (in light of the limitations this would have in the case of industries characterised by dynamic rather than static price competition) or from seeking to "equate a reduction of consumer welfare with an increase in price or reduction in quality" (as in that

case other aspects of competition, such as variety or innovation, are not reflected).[12]

The critique relates to the perceived focus of consumer welfare on price as well as on detrimental conduct of a static rather than a dynamic nature. Seeking to identify quantifiable harm to consumers causes the focus to move towards harms of a static nature and away from dynamic issues such as, for example, innovation, quality and potential competition. The net effect of a focus on consumer welfare, according to critics, has been to distract competition law enforcers from addressing exclusionary conduct—including mergers - that ought to be at the forefront of antitrust enforcement.[13]

C) Consumer Welfare and 'indeterminacy'

A further recurring criticism regarding consumer welfare relates to what detractors of the paradigm refer to as its 'indeterminacy'.[14] The critique focuses on the link between consumer welfare and the enhanced certainty that it should ideally deliver, as argued by its proponents. According to critics, the certainty achieved by the reliance on the consumer welfare paradigm is below expectations in light of the particularly abstract nature of the key notions of 'welfare' and 'efficiency' that lie at the heart of the concept.[15]

The latter point, that is, the fashioning of the concept as an 'economic abstraction'[16] is further linked to the perception of consumer welfare as an exclusionary tool that allegedly does not allow for anyone else other than overwhelmingly economists to put forward convincing and credible consumer welfare arguments in the majority of (at least the demanding) cases. The projection of this argumentation extends to issues of legitimacy, exclusion and ultimately democracy[17] to the extent that the consumer welfare standard is perceived as ultimately allowing economists and lawyers to 'advanc[e] their own self-referential goals, free of political control and economic accountability'.[18] Referring to (US) antitrust enforcement in general, Wu states that the dominance of the consumer welfare standard 'has led enforcers to place an emphasis on price-fixing cases or horizontal mergers that can be shown to have clear price effects over more complex, but potentially much more important cases.'[19]

Irrespective of the discussion on the desirability of a widening of the range of the aims of competition law, and echoing critique on US antitrust policy in this regard—and most, if not all, proponents of alternative paradigms seem to agree on this, regardless of how intensive a broadening of antitrust objectives, to include non-economic ones, they may propose—the quest for economic efficiency (and its beneficial impact on citizens) in the author's

view remains and should remain the primary concern for antitrust policy across jurisdictions.

A possible benefit for both proponents of consumer welfare as the sole goal of EU competition law and policy, as well as possibly for the whole of the competition law community and the consumers themselves, could lie in the need to re-approach consumer welfare more rigorously. Consumer welfare has already been at the centre of a certain degree of controversy in EU law,[20] and current developments might contribute to seeking further and in-depth adjustment of the concept to the particularities and specific concerns of EU competition law and policy.

D) A move towards competition law embracing multiple objectives?

As EU competition law and policy has been applied against the backdrop of a multiplicity of goals for a considerable time, experience may prove to be beneficial in balancing possibly conflicting objectives. Nevertheless, in that regard, conceptual and terminological clarity of the paradigm, sound economics and legal analysis and awareness that the weighing process might bear implications on the degree of justiciability and the effectiveness of institutional design, are of the essence. This is even more so in light of the recurring criticism regarding the perceived inconsistency in enforcement generated by the multiplicity of aims in the past.

The discussion of the suitability of EU competition goals and the pursuit of non-economic goals in EU competition law can be fruitful as a means of both identifying misconceptions of the notion of consumer welfare as well as areas in need of clarification and improvement.[21] It will be interesting to observe which direction the discussion will take in the near future. One implication is already obvious: what could, in the recent past, be interpreted and criticised as an EU law-specific discussion against the backdrop of the creation of the internal market and away from focusing on solely economic objectives and the application of up-to-date economics, is now openly discussed on both sides of the Atlantic. Criticism and/or discomfort regarding the alleged "pollution" or "dilution" of EU competition law by to a greater or lesser extent "political", "social", "moral" or at least not "purely" economics-related (*stricto sensu*: price- and efficiency-related) considerations (such as the ones related to, *e.g.,* ordoliberal school of thought insights, internal market integration, protection of small- and medium-sized enterprises *etc.*) seems to originate rather more from a practical point of view than from a fixation on a so-called purity of EU competition law. The discussion about

the merits of and the problems associated with an approach towards competition law objectives that encompasses multiple goals will have to provide satisfactory answers to these criticisms.

Issues relating to the feasibility of a multi-faceted approach need to be addressed. For example, according to Lianos,[22] a shift (or more precisely, an examination of the possibility to shift) to a 'polycentric' competition law, *i.e.*, a competition law embracing more than a single aim and going beyond the boundaries and the constraints posed by the perceived reliance of 'monocentric' competition law on 'the price-based revealed preference approach of a representative consumer on a specific relevant market, without factoring in the analysis the action and interests of real individuals simultaneously active in various social spheres',[23] should not be considered as a call for an overextension of competition law objectives in the direction of an all-encompassing strive for covering a heterogeneous multitude of aim-related considerations. As Lianos correctly points out in reference to Judge Easterbrook, this would ultimately lead to a loss of relevance and of focus in the quest to identify what needs to be governed and taken into account by the law.[24] Lianos admits that the question as to whether the move from monocentric to polycentric competition law can be achieved is pretty much an open one at this stage. Whilst his main argument focuses on the stance and resistance to such a move to be expected from competition authorities and academic commentators, the main concern should rather be primarily linked to the feasibility and desirability of such an endeavour. The emergence of elements relating to various aims that are not necessarily optimally covered within the scope / under the consumer welfare paradigm and the price theory approach (and the perceived willingness of competition authorities in Europe to take the elements in question into account) is far from being straightforward and even less so from being tantamount to an affirmation of a perceived necessity to abandon the primary role that the orientation towards consumer welfare has played in competition law enforcement in Europe so far. Furthermore, enforcement in this context (cf. *e.g.*, the German Competition Authority—Bundeskartelamt or "BKA" - decision in *Facebook*)[25] is not necessarily uncontroversial and in some cases with good reason.

This is not to suggest that the discussion in question should be muted. It needs, however, to be framed in such a manner as to not be conducted in a way that can potentially jeopardize the predictability of enforcement for market participants.

3. Antitrust populism

The purpose of the present section is to shed some light on the concept of populism and how it has been manifested in the antitrust / competition law context. The discussion will take into account the current debate in US antitrust and seek to contextualise its relevance against the specific backdrop of EU competition law and the discourse on competition law objectives, particularly the suitability of the consumer welfare paradigm.

In terms of its historical background, the rise of populism in the US in an antitrust context has been widely associated with the prior or concurrent emergence or strengthening of—mostly politically influenced—populism.[26] The difficulty in defining populism has been manifest and does not necessarily point in a single direction: populist trends have been identified in both the left as well as the right part of the political spectrum and each has different implications for antitrust law generally, and for merger review in particular.

The main 'populist' trends in US antitrust result at the moment in calls against 'bigness' on the one hand, and against enforcement on the other.[27] As noted by Lao,[28] certain proponents of antitrust populism in the US seem to be critical of size as such. Reference seems to be usually made to new economy, digital and high-tech markets, with a view to advocating a move away from the consumer welfare standard to the extent that the latter does not accommodate an approach attacking the size of the undertakings in question *per se* and which could possibly consist in interventions of a structural kind without the need to demonstrate additional anti-competitive conduct or effects as identified by the current standard.[29]

Although the public discussion in Europe regarding the best way to address the challenges posed by tech giants and increased market power has been intense, it is rather doubtful whether the impact of similar thinking is nearly as significant as its US counterpart: populism in the EU-related/centered discussion, at least in an academic context, does not occupy centre stage (yet); it is, however, possible/conceivable that there is a surge of populist approaches in the EU as well, if the discussion on competition aims and policy in general is conducted along the lines of the US debate.

On the other hand, in light of the fact that to a certain extent the challenges posed by digital markets and platforms are largely *terra incognita* for competitive assessment, it is necessary cautiously to refrain from turning the discussion into a polarizing binary argument. Further caution is advisable against an overreach of attributing populist tendencies to parties and

practices concerned, as name-calling would in all likelihood have a stifling and counterproductive effect on the ongoing discussion.[30]

A) Caution should be exercised with regard to the potential emergence of populism in the present debate

In a sense, the recent intensification of the discussion on the widening of the scope of competition law objectives is not surprising: the financial and economic crisis and its effects as well as the continuing rise of global market players and new economy markets have also increased expectations—particularly of consumers and the public in general—with regard to more ample as well as more effective enforcement of competition rules. The recent resurgence of populism, particularly in the US, seems—despite the differences between the two major competition law regimes in the US and the EU respectively—to have led to a strengthening of a widely shared perception that competition rules and the enforcement thereof are or should be a panacea that should successfully address all concerns and issues that can be *prima facie* even remotely linked to the size and power of big enterprises: the chief implication of such a stance is a call for a wider perception of competition law aims.

As mentioned above, the discussion about the merits of a wider set of competition law objectives should not be considered concluded in light of the present challenges. It is also advisable to exercise caution with regard to the framing of the discussion in terms of populism, at least in the sense of the term employed in relation to the respective debate in US antitrust. However, it is far from certain that, should more extreme positions occupy the forefront of the debate, the risk of populist notions having an impact on the ongoing discussion could be successfully averted. In any case, as further discussed below, a complete move away from consumer welfare or a significant dilution thereof vis-à-vis other objectives might prove to be more disruptive than seeking to continue applying the standard in question and possibly supplementing enforcement through specific regulation regarding digital markets/platforms where appropriate.[31]

B) The discussion should not refrain from identifying possible areas for improvement

Consumer welfare has proven to be a rather flexible tool/standard and has—successfully—been employed to address anti-competitive practices in an EU context. The risks of abandoning or weakening the consumer welfare standard are considerable; in this author's view they should not be underestimated and they do not for the time being seem to offset the perceived/

expected advantages of such a shift. Furthermore, the widening of the range of competition law objectives entails certain risks and can lead to a dilution of competition enforcement that is not facilitated sufficiently by the tools traditionally considered to pertain to competition law. This is not to say that the particularities and challenges stemming from the emerging digital markets are to be overlooked: the economic analysis of these markets is far from having been concluded and it is hence advisable to refrain from engaging in drastic changes with regard to the identification of the optimal (in the case of multiple aims: balance of) competition law objective(s), particularly in light of the fact that the enforcement by the Commission does not seem to suffer greatly from dealing with the competitive issues under the consumer welfare paradigm. However, if the challenges in question are proven to be insurmountable, an entrenchment and opposition to a possible rethinking of the need to introduce specific legislative improvements and/or examine the approach to enforcement should not be ruled out.

We turn now to traditional facets of non-price competition before looking into public interest considerations such as national security and media plurality as well as privacy considerations. As we will see, the current consumer welfare paradigm seems ably to address traditional facets of non-price competition when viewed in a broader context that permits non-econometric evidence. That being said, the examination of national security, media plurality and privacy concerns appears to be at odds with the expertise of competition law enforcement agencies, and sometimes the goals of consumer welfare.

4. "Traditional" facets of non-price competition

A deterioration of a firm's competitive offer to consumers may take several forms. The most usual form will be an increase in the price of the relevant products. In addition to price, competitive harm as a result of a merger can arise in relation to relatively short-term non-price parameters such as the quantity sold, service quality, and geographic location, as well as relatively longer-term parameters such as product range,[32] product quality,[33] productive capacity and innovation.[34] The ability of firms to adjust these elements, and also the time within which they can do so, will depend upon the market concerned.[35]

The importance of non-price factors in the assessment of competitive effects can be pronounced. For example, in the assessment of coordinated effects in mergers, tacit collusion in cartels, and abuse of collective dominance, coordination is thought to be facilitated to the extent that the

products are homogenous, or where the level of differentiation between firms is stable. In such a context, there are limited non-price incentives for buyers to switch while price differentials are fixed and prices are raised. If the non-price (differentiation) factors are not immediately observable, then coordination using non-price focal points, combined with the required information gathering can be difficult to do tacitly. If there are too many non-price differentials that must be kept constant in a coordinated outcome it can be difficult to agree rules without explicit communication even if the features can be monitored.

Non-pricing factors of competition have been incorporated in legislative texts as well. On August 19, 2010, the US FTC and US DOJ issued their revised Horizontal Merger Guidelines. These updated Guidelines incorporated non-price considerations in merger analysis. The revised Guidelines stated at the outset that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence."[36] They also added that a merger that results in "a reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products" may constitute a substantial lessening of competition.[37]

While price is certainly an important factor for many consumers, a simple focus on price presents a number of problems. Consumers may face a non-price-related detriment such as access, poor quality, lack of information, reduced choice, or less innovation. Price may not be the primary factor in determining consumption decisions in all markets. Price may not be the main means of competition between the incumbents in the market. A single consumer may suffer different detriments in different markets.

Thus, alternative means of competition can range from entirely non-economic ones to those that retain focus on economic objectives without however focusing exclusively on the price criterion.

The UK merger guidelines have also incorporated consideration of both price and non-price parameters in their assessment of the competitive impact of a merger on customers:

- price and output—generally, it is thought to be easier for firms to adjust price than to adjust output;
- other non-price short-term decision variables such as service quality

and product range[38] (the authorities may often treat these as being determined simultaneously with price and output[39]);

- medium-term decision variables such as product quality; and
- long-term decision variables such as geographical location, capacity and innovation.[40]

Theories of harm may also set out the aspects of competition which the authorities expect to worsen as a result of the merger. A firm's competitive offer to consumers may take several forms: in addition to price, non-price parameters might include the quantity sold, service quality, product range,[41] product quality,[42] geographical location, productive capacity and innovation.[43] The ability of firms to adjust these elements, and also the time within which they can do so, will depend upon the market concerned.

Averitt and Lande illustrate the importance of non-price factors in competition assessment by giving the example of a merger in the book publishing sector. They note that, while such a concentration may not necessarily result in higher prices, it is likely to lead to a decrease in editorial diversity and 'thus, to a narrowing of the competing marketplace options expressed in terms of the types of titles offered' which can be challenged under the 'ordinary, universal standards of Section 7, once that Section has been properly construed to recognize the role of options and of non-price competition.'[44] Stucke and Grunes take the same position in discussing how US antitrust law can be modified so that it can include in the relevant analyses the marketplace of ideas.[45] These arguments, which suggest a change in approach and thus a different interpretation of the relevant legislative instruments in order to assess the impact of a concentration on editorial competition, are equally valid for the Commission's relevant decision-making.

The Commission itself acknowledges in its Guidelines on the assessment of horizontal and non-horizontal mergers the non-price dimensions of effective competition such as high quality, a wide selection of goods and services, and innovation, and takes the stance that its mission is to prevent mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An increase in market power in that regard refers to 'the ability of one or more undertakings to profitably increase prices, *reduce output, choice or quality of goods and services or diminish innovation*' [emphasis added].[46] It has convincingly been argued that these dimensions of competition are 'of particular importance in the Internet, broadcast television, and radio industries, where the competition extends beyond advertising prices.'[47] In that respect, considering the

inclusion in a merger analysis of markets in which the quality rather than the price of the products offered is relevant and examining the impact of a concentration on non-price competition are legitimate subjects for competition law inquiries.

A focus on non-price factors of competition as essential in assessing consumer harm has also been incorporated in the debate regarding the aims of competition law. The proponents of the "consumer choice" standard (as opposed to the consumer welfare standard), for example, argue that it would better accommodate medium term aspects such as variety and long term aspects such as innovation that seem to pose difficulties when assessed by means of the consumer welfare standard.[48] Proponents have referred to particular cases in which the "consumer choice" criterion would seem to be crucial, such as *Microsoft*,[49] where in its media player tying decision the European Commission focused on the anti-competitive effect stemming from preventing customers to base their choices on their non-price preferences, hence taking into account factors the consideration of which would be rendered easier if a consumer choice paradigm were explicitly introduced. Similar traits are detected by the proponents of the switch to a consumer choice goal in EU[50] and US cases.[51]

Because the consumer welfare standard encompasses both price and non-price elements, the two standards diverge when there is a deterioration of the quality of the post-merger product, even if there is no price increase.

In another alternative to the consumer welfare standard (which effectively ignores any improvement to the welfare of producers), we could consider also producer surplus, and would assign weights to the benefits to consumers and producers respectively, with each effect weighted according to its impact on the social welfare. Benefits to consumers are generally weighted more heavily than benefits to producers.[52] This so-called "balancing weights" approach was adopted, for example, by the Competition Tribunal in Canada in its re-consideration of the *Superior Propane* case in 2002.[53]

5. Public interest as non-price competition consideration

The concept of public interest varies considerably from one jurisdiction to the other. There is wide diversity of what jurisdictions consider to be relevant to the public interest, starting from total welfare criteria to economic and non-economic (*e.g.*, plurality of media, public security) considerations. The concept of public interest differs from one legal system to the other: some jurisdictions use a very precise and narrow definition, while others

use an open list of public interest considerations, or a broader, more flexible definition. There is no exact definition of what public interest is, and, therefore, the interpretation is left to the relevant authority.

Pursuant to an OECD report,[54] the public interest is assessed by either the competition authority, which also conducts the substantive competition test (single authority model) or by another institution or body, like a sectoral regulator or a government department (dual responsibilities model). The different institutional settings lead to different enforcement challenges.

To illustrate these challenges, we provide below a brief account of the approaches that some of the main regimes take in relation to national security and media plurality.

6. Proliferation of National Security Considerations

A) European Union

In the EU regime, Article 21 of the EU *Merger Regulation* ("EUMR") allows Member States to adopt, with regard to concentrations with an EU dimension, measures to protect certain interests other than competition, as long as these measures are necessary and proportionate to their aim and compatible with EU law. Article 21 EUMR distinguishes between "recognised interests" (all of which are considered *prima facie* legitimate), namely security of supply, plurality of the media and prudential rules, and "other public interests", which require *ex ante* review by the Commission.

Examples of Member States attempting to intervene under Article 21 in the Commission's review of a proposed merger include the following:

- Spain cited Article 21 as justification for imposing certain conditions on E.ON's bid for Endesa (*Case COMP/M.4110*), as well as on Enel and Acciona's bid for Endesa (*Case COMP/M.4685*), although both transactions had already been cleared unconditionally on competition law grounds by the Commission.

- Poland imposed divestment conditions on the *Unicredito/HVB* merger (*Case COMP/M.3894*) under Article 21, despite the fact that the full transaction had already been authorised by the Commission on competition law grounds.

- Italy cited Article 21 as justification for refusing to authorise the *Albertis/Autostrade* merger (*Case COMP/M.4249*), based on public concerns

unrelated to competition law. This occurred during the Commission's review of the transaction, which was subsequently cleared.

Furthermore, nearly half of the Member States[55] have screening mechanisms in place to assess non-competition law considerations of concentrations focusing on national security aspects. That being said, the existing screening mechanisms are characterised by differences in scope and procedure: ex-ante/ex-post; voluntary/mandatory notification general/sectoral coverage; companies/assets; applicable to investments from other Member States and third countries or third countries only, *etc*.[56]

The Commission has suggested taking further measures as regards those investments from third countries that may raise security and public order concerns. First, an EU Communication has suggested further concrete steps for Member States and, where relevant, the Commission, to screen certain foreign direct investments into the EU.[57] The Commission recently issued a Regulation[58] in order to establish a framework for the Member States, and in certain cases the Commission, to screen foreign direct investments in the European Union, while allowing Member States to take into account their individual situations and national circumstances.[59] The Regulation provides that the Commission may carry out a screening on the grounds of security and public order, in cases where a foreign direct investment may affect projects or programmes of Union interest. It also establishes essential elements of the procedural framework for the screening of such foreign direct investments by Member States, including transparency obligations and the obligation to ensure adequate redress possibilities with regard to decisions adopted under these screening mechanisms. At the same time, it maintains the necessary flexibility for Member States in screening foreign direct investments, allowing them to adapt to changing circumstances and their specific national context. Finally, the Regulation sets up a mechanism for cooperation between Member States, notably for the cases where foreign direct investment in one or more Member States may affect the security or public order of another Member State.

These changes may introduce an additional roadblock in the approval of concentrations and risk predictability, increasing the level of complexity and causing legal uncertainty. While beyond the scope of this paper, future research could assess the impact of the Regulation and also incorporate all assessments made under the new regime. In addition, such research could analyse all decisions under Article 21, whether based on security of supply, plurality of the media, prudential rules, or "other public interests." It will be interesting to determine what facets of the public interest, beyond

competition, will come to be protected, as well as the extent to which political and other subjective concerns may (or may not) creep into the analysis.

B) United Kingdom

In the UK, prior to the entry into force of the *Enterprise Act 2002*, mergers were reviewed under a broad public interest test, which included competition considerations. With the adoption of the *Enterprise Act 2002*, two significant changes took place. Firstly, the primacy of a competition-based test was stated. Secondly, a list of public interest considerations that could be taken into account in merger assessment was included in the Act. The UK merger control regime thus explicitly allows for intervention in mergers by the Secretary of State on national security and media plurality grounds; also, there is a safeguard procedure, under which ministers can give notice of an additional public interest ground, if it happens to arise in a particular case, and seek the approval of Parliament to use it. The Secretary of State can also intervene in a very limited number of cases on public interest grounds where the jurisdictional thresholds for merger review are not met.

A recent case, Hytera's proposed acquisition of digital radio manufacturer Sepura, invoked a public interest intervention notice on national security grounds. There have been six other such interventions on national security grounds, including defence mergers *General Dynamics/ Alvis*,[60] *Finmeccanica/ AgustaWestland*,[61] *Finmeccanica/ BAE Systems*,[62] *Lockheed Martin/ Insys*[63] and *General Electric/ Smiths Aerospace*.[64] Those transactions were ultimately cleared by the Office of Fair Trading after the parties offered remedies.

The current UK merger control system does not apply, however, to:

- Mergers involving most small businesses;
- Investments in new projects, such as new-build nuclear power stations—until they begin operation; or
- Transfers of "bare assets", such as machinery or intellectual property, which do not amount to an "enterprise".

In a recent significant legislative development,[65] the UK government addressed these gaps in the applicability of the regime and amended the turnover threshold and share of supply tests within the *Enterprise Act 2002*.[66] This is to allow the government to examine and potentially intervene in mergers that currently fall outside the thresholds in two areas: (i) the dual use and military use sector, and (ii) parts of the advanced technology

sector. For these areas only, the Government proposes to lower the turnover threshold from £70 million to £1 million and to remove the current requirement for the merger to increase the share of supply to or over 25%.[67]

In the longer term, the government intends to follow the example of other developed countries and make more substantive changes to how it scrutinises the national security implications of foreign investment. The reforms have a particular focus on ensuring adequate scrutiny of whether significant foreign investment in critical businesses raises any national security concerns and providing the ability to act in circumstances where this might be the case. The expectation is that the need to act would be relatively rare, but the risk that this can turn into a tool to implement industrial policy and other political considerations does exist.

The proposals are concerned only with national security, and arguably are designed to be focused and proportionate in their scope and application. The potential reforms in the UK regime include:

- an expanded version of the 'call-in' power, modeled on the existing power within the *Enterprise Act 2002*, to allow the government to scrutinise a broader range of transactions for national security concerns within a voluntary notification regime and/or;

- a mandatory notification regime for foreign investment into the provision of a focused set of 'essential functions' in key parts of the economy. Mandatory notification could also be required for new projects that could reasonably be expected in future to provide essential functions and/or foreign investment in specific businesses or assets.

A research project as mentioned above would assess these proposals and all assessments made under the new regime. The impact of Brexit could also have a bearing on the approach of the Competition and Markets Authority in the UK (responsible for merger control) and the government under the new regime and the research project could endeavour to assess whether Brexit is contributing to a more insular and protectionist approach by the UK regime, or to divergence from EU and other international norms. Already, the proposals put forward for the proliferation of grounds upon which a merger can be reviewed have led to uncertainty in those areas—clear guidance as to the grounds upon which additional discretion will be exercised will be important in order to ensure that such reviews remain practicable (to the extent possible), predictable and capable of judicial review.

C) USA

United States agencies do not consider public interest factors beyond the interest in the enforcement of the antitrust laws, and believe that enforcement decisions should be based solely on the competitive effects and consumer benefits of the transaction under review.

However, the Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee authorized to review transactions that could result in the control of a U.S. business by a foreign person in order to determine the effect of such transactions on the national security of the United States. During the review period, CFIUS members examine the transaction in order to identify and address, as appropriate, any national security concerns that arise as a result of the transaction. CFIUS can decide within an initial 30-day review period but in certain circumstances CFIUS may initiate a subsequent investigation, which must be completed within 45 days (or within 60 days if complex), but only once the formal notice has been accepted.[68] These deadlines affect the timing of the approval of transactions and can be extended by questions and in practice the process can take several months.

If CFIUS finds that the covered transaction does not present any national security risks or that other provisions of law provide adequate and appropriate authority to address the risks, then CFIUS will advise the parties in writing. If CFIUS finds that a covered transaction presents national security risks and that other provisions of law do not provide adequate authority to address the risks, then CFIUS may enter into an agreement with, or impose conditions on, parties to mitigate such risks or may refer the case to the President for action.

Where CFIUS has completed all action with respect to a covered transaction or the President has announced a decision not to exercise his authority with respect to the covered transaction, then the parties receive a "safe harbour" with respect to that transaction.

Again, a potential research project could discuss the cases that have been assessed by CFIUS as well as by FTC/DOJ and analyse the approach they took. It could focus on CFIUS assessments and the implications they can have for consolidation in various industries. and discuss recent caselaw with a view to assessing whether the US regime is unduly protectionist when it comes to merger control, or if the CFIUS process is transparent, practicable, predictable and capable of judicial review.

D) China

Since the *Anti Monopoly Law* (AML) [69] of the People's Republic of China came into force in 2008, China's competition law authority, the State Administration for Market Regulation ("SAMR"), has reviewed over 750 merger cases. It is noteworthy that there have been a number of merger cases that show the use of antitrust law for political or other extraneous purposes. In 2013, the competition authority at the time,[70] the Ministry of Commerce ("MOFCOM") published four conditional clearance decisions: *Glencore/Xstrata*, *Marubeni/Gavilon*, *Baxter/Gambro* and *MediaTek/MStar*. Each decision turns on its own facts but recurring themes have been identified:[71]

- SAMR has shown itself prepared to find market power notwithstanding relatively low market shares;
- there is a continued attraction for the imposition of elaborate and onerous hold-separate arrangements as a condition for clearance;
- as a precondition to clearance, SAMR has sought commitments to supply key products to the Chinese market on favourable terms;
- SAMR will not shy away from imposing extraterritorial remedies even where the competition economics basis for seeking the commitment might not be that clear-cut; and
- coordinated-effects theories of harm arise with some regularity in the published decisions.

All foreign investment in China is subject to discretionary approval by SAMR or one of its local branches. In some sectors, special regulatory approvals may be required by other administrative agencies as well. Foreign investment is also regulated on a sector-by-sector basis by SAMR as outlined in the Foreign Investment Industrial Guidance Catalogue, which has periodically been revised in recent years. Under the Foreign Investment Industrial Guidance Catalogue, some sectors are closed to foreign investment or subject to foreign ownership restrictions, while foreign investment in certain industries is encouraged through preferential policies.[72]

China also has a national security review regime, which is relevant if the transaction will result in the acquisition of "actual control" by the foreign investor of a Chinese domestic business involved in the military sector (including enterprises located near key and sensitive military facilities and other enterprises active in connection with national defence), key

agricultural products, as well as sectors involving key energy infrastructure, transport, technology and equipment manufacturing. If a transaction needs to be reviewed on national security grounds, it will be conducted by an inter-ministerial committee, which will be led by the NDRC as well as SAMR.

In addition, the *Rules on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors* (the M&A Rules) also require a notification to SAMR where a transaction will result in a foreign investor obtaining a controlling equity interest in a domestic Chinese enterprise under any of the following circumstances:

- the domestic target operates in a 'key industry';
- the transaction has an impact on state 'economic security'; or
- the domestic target possesses a well-known trademark or established Chinese brand.

Under the *Security Review Circular*, whether a proposed M&A transaction constitutes a threat to national security will be determined by looking at its potential impact on:

- The production and supply of products and services and the relevant facilities necessary for national defence within China;
- National economic stability;
- Order within society;
- China's ability to research and develop key technologies relating to national security.[73]

The national security review is conducted in two phases: a 'general review' (Phase I), which lasts up to 30 working days and a 'special review' (Phase II), which lasts up to 60 working days. Where the Committee cannot reach consensus, the transaction may be referred to the State Council for final determination, for which there is no time limit for a decision. Where the Committee determines that a transaction gives rise to national security concerns, parties may be required to abandon or (in cases where completion has already occurred) unwind the transaction, or to put in place remedial measures to address the concern.

MOFCOM's[74] decision in *Maersk/MSC Mediterranean Shipping/CMA CGM* is an example of industrial strategy infiltrating merger control

decision making. In June 2014, MOFCOM declared its decision to block the network centre jointly established by A.P. Møller—Maersk A/S, MSC Mediterranean Shipping Company SA and CMA CGM SA.[75] This was the second prohibited case[76] since the *Anti-Monopoly Law of the PRC* came into effect in 2008. MOFCOM argued that the network centre constituted a merger under China's anti-monopoly law.[77]

MOFCOM was concerned that the establishment of the network centre would eliminate or restrict competition in the Asia-Europe Route container liner shipping service market.[78] More specifically, MOFCOM observed that the transaction would strengthen the merged entity's controlling power over the market, significantly increase market concentration, and further raise entry barriers, to the detriment of rivals, consignors, port operators and other stakeholders.[79]

The US Federal Maritime Commission (FMC)[80] had approved that same transaction, however, in March 2014, holding that the agreement would neither reduce competition, unreasonably increase transportation costs nor reduce transportation services.[81] In June 2014, the EC decided not to open an investigation into the proposed alliance.[82] Under European competition law, shipping alliances, such as those discussed in this case, do not qualify as mergers but are subject to Article 101 of the *Treaty on the Functioning of the European Union*. Besides, certain consortium activities benefit from a block exemption.[83]

There have been criticisms that MOFCOM's decision to block the transaction was largely motivated by industrial policy.[84] Competition concerns played an important but not necessarily a decisive role in MOFCOM's review process. The China Shipowners' Association proactively lobbied MOFCOM to block the deal.[85] Before making the final decision, MOFCOM consulted with the Ministry of Transportation and the NDRC.[86] The lack of transparency in the rationale of MOFCOM to block this transaction can fuel concerns of industrial policy inappropriately influencing merger control decisions. This in turn impacts adversely on the transparency, predictability and justiciability of merger review.

Globally, there is therefore potentially a degree of overlap between national security reviews and review under the competition law regimes, and the relationship between these potentially overlapping review regimes is yet to be clarified in a number of jurisdictions. What is clear, however, is that national security reviews are typically not undertaken solely—or in some cases at all—by the competition law enforcement agencies that

are typically responsible for merger review, and that the criteria on which national security is judged are not related to competitive effects.

We turn now to media plurality as a non-price competition element that is taken into account in merger assessment under the public interest umbrella. As media plurality assessment is quite jurisdiction specific, we will discuss the approach in the UK regime.

7. Media plurality as a public interest consideration in the UK

As noted above, prior to the entry into force of the *Enterprise Act 2002*,[87] mergers were reviewed in the UK under a broad public interest test, which included competition considerations. With the adoption of the Act in 2002, the primacy of a competition-based test was made explicit, but a list of public interest considerations that could be taken into account in merger assessment includes media plurality grounds. In the case of a media merger for which a public interest intervention notice is issued, the Office of Communications (OFCOM) should provide a report to the Secretary of State on "the effect of the consideration or considerations concerned on the case."[88]

The public interest regime created by the 2002 act represents a paradigm shift in several respects. Firstly, the notion of public interest under the 2002 act basically excludes the competition law-based 'substantial lessening of competition' (SLC) test from its scope. In other words, the Act draws a clear distinction between competition law considerations and other 'public interest considerations' in merger control, instead of an overarching notion of public interest. Secondly, from an institutional point of view, while the Act leaves no room for political intervention with respect to SLC-based merger assessments, it mainly preserves the former institutional approach regarding public interest assessments. Arguably, the earlier institutional setting "protects" the competition law regime from political interventions.[89] However, it also strengthens the idea that public interest interventions are mainly political, thereby not objective.[90] Finally, the Act sets public interest criteria as an exceptional intervention mechanism. The latter is two-folded. Firstly, the Act limits its public interest considerations to particular concerns specifically listed under the Act. Secondly, it confers an exceptional power on the Secretary of State to seek subsequent parliamentary approval in order to add a new public interest criteria to the list. [91]

The considerations currently listed under section 58 of the 2002 act consist of national security, media plurality and the stability of the UK financial system. Originally, national security was the only public interest

consideration listed in the act. Subsequently, media plurality was added as a public interest consideration by the *Communications Act* in 2003. Finally, the stability of the financial system was added by order as a public interest concern during the *Lloyds/HBOs* merger in 2008.[92]

Media plurality is not a pre-defined concept under the *Enterprise Act 2002*. The term is mostly described in statutory texts, court decisions, reports and policy papers with reference to its attributes and functions. In its lexical meaning, it is simply the state of being "more than one".[93] However, in the context of media plurality, the term also resonates with 'pluralism' which is defined as 'the existence of different types of people, who have different beliefs and opinions, within the same society'.[94] In that sense, it can be said that media pluralism is more than just counting the number of media owners but is also about a variety of other factors which come into play such as diversity of sources and range of content available to society.[95]

Media plurality assessment in the UK is essentially equivalent to what is meant by "*media pluralism*".[96] Nevertheless -surprisingly - the distinction between the terminology (namely, between "pluralism" and "plurality") has not been greatly debated in the decisions of UK courts and enforcement authorities.[97] Instead, media plurality has been understood as a very broad concept. For example, Lord McIntosh[98], during the parliamentary debates of the *Communications Act* in 2003, interpreted the term as follows:

> "Plurality is a very subjective notion. It is not susceptible to the same kind of economic analysis as competition issues. It is very much a matter of judgment of what "feels" right. For this Bill, our approach has been to examine each media audience, including cross-media audiences, and to judge the level of plurality that we consider necessary. It is important to recognise that setting artificial limits on markets can make them economically less efficient. But we need to protect plurality and recognise that there is a minimum level of plurality below which we must never go."[99]

Protecting media plurality is clearly associated with preserving the democratic process and the functioning of political institutions,[100] including protecting and promoting diversity within and amongst media enterprises.[101] In its 2015 Framework, OFCOM stated that "plurality is not a goal in itself, but a means to an end."[102] Taking these points together, media plurality in the legal context can be defined as the existence of a sufficient number of different types of people who have different beliefs and opinions in control of media enterprises with a view to ensure diversity within and amongst media enterprises and to prevent too much influence of a person on public opinion and the political agenda.

8. Measuring Plurality

In *BskyB/ITV*, the UK Competition Commission (CC), one of the predecessor competition authorities to the Competition and Markets Authority,[103] took the concept of 'plurality' as referring to both the range and the number of persons in control of media enterprises.[104] Significantly, as stated above, CC made a distinction between 'internal' and 'external' plurality.[105] 'External plurality' was defined as plurality which could be described by the range of information and views across different media groups, while 'internal plurality' was defined as plurality which could be described by the range within individual media groups.[106]

CC measured plurality of news in three steps. Firstly, it attempted to analyse the existing level of plurality by using certain indicators such as market shares and surveys.[107] Secondly, it tried to identify the contribution of merging parties (as distinct entities) to that level of plurality. In its analysis, CC gave particular regard to the combined market shares of the parties in the market for 'television news viewing' and cross-media ownership. Finally, it accounted for the degree of internal plurality, particularly editorial independence in media enterprises under common ownership.[108]

In *Fox/Sky,* OFCOM's 2015 Framework was used as the principal framework to define substantial quantitative and qualitative criteria. Quantitative criteria were listed as availability, consumption and impact.[109] In its decision, CMA referred to availability as meaning "the number of providers at the relevant consumption point." Consumption was used in reference to the "frequency with which these sources are used and the time spent using them". Lastly, impact referred to the way the content of the news affected the "formation of people's opinions" (*e.g.*, trust). As stated in *Fox/Sky,* the problem with quantitative metrics is that they are not sufficient in themselves to establish a theory of harm.[110] CMA, in that regard, made a distinction between the "contextual factors that provide background to inform the availability, consumption and impact metrics" and "qualitative evidence, being evidence that is relevant to our assessment and is not easily quantifiable."[111]

CMA's detailed analysis on the assessment of diversity in the viewpoints that are available and consumed basically takes account of availability, reach, consumption and multi-sourcing pre- and post-transaction.[112] As for availability, CMA decided that there were a significant range of news sources available. However, it also pointed out that merely counting numbers would not give any insight on influence.[113] As for reach, CMA concluded that Sky

reached 9 percent of the population in the UK. Its primary competitors were BBC (62%) and ITN (43%). Significantly, the CMA employed a cross-platform reach metric, allowing it to measure the total Fox, News Corp and Sky reach of 31 percent of the UK population.[114] According to that metric, the combined entity would be the third biggest in terms of reach, coming after BBC (77%) and ITV (39%).[115] CMA defined consumption as "frequency with which they access [a particular media source] and the length of time [viewers] spend reading or viewing it."[116] In terms of consumption criteria, CMA stated that Sky was only slightly less consumed than ITV. The CMA said that it noted "Sky News has been seen by third parties as a positive competitive force in the provision of news."[117] According to share of reference for consumption criteria, BBC accounted for 42 percent of the population, followed by ITN (11%) and Sky (6%) in 2016.

Internal plurality issues were also discussed in detail for the first time in *Fox/Sky*. The discussion in the decision provided an in-depth view of the content of internal plurality. In its analysis, CMA firstly discussed a board resolution adopted by Fox that aimed to prevent editorial influence on Sky News by Fox.[118] CMA stated that such a board resolution would be insufficient to prevent a reduction of internal plurality because the board resolution could be easily revoked, there were unclear procedures on appointing the head of Sky News (who might therefore be worried about having to please Fox), and the body which would have enforced such rules was inexperienced.[119]

In the second place, CMA looked into the culture of editorial independence at Sky News.[120] The Authority, while admitting the existence of such a culture, pointed out that as the appointment of the senior staff could be influenced by the Murdoch Family Trust (MFT) the said culture could be changed over time.[121] Thirdly, CMA assessed audience expectations and commercial incentives. The parties put forward the idea that a change in editorial matters did not make sense from an economical point of view because customers would switch upon such change.[122] However, CMA concluded that influence as such may be subtly exercised in a way that it would not change viewers' perception of the channel's impartiality, because, it asserted, the channel could attract other viewers following a change in editorial matters.[123] Finally, the Authority considered regulatory restrictions which would preserve internal plurality within the organization. However, it found that protection against editorial alignment was limited, as the Broadcasting Code allowed for a significant margin of discretion in editorial matters.[124] The Authority, in particular, underlined the indirect ways Fox could influence Sky News on editorial matters.[125]

The common criticism for the assignment of the CMA to media plurality cases is that the CMA does not have extensive expertise in such cases.[126] On the other hand, CMA's media merger inquiries are examples of CMA's ability to assimilate and analyse extensive amounts of data. The 411-page *Fox/Sky* final report in particular, illustrates CMA's maturity in conducting a Phase-2 public interest inquiry as well as its ability to build upon insights from the previous case-law in media mergers. A second criticism is that the CMA's role in media plurality cases contradicts its statutory duty to promote competition.[127] The balancing act of competition concerns and media plurality considerations is not a straightforward task.[128]

However, it must be emphasised that the CMA does not make the final decision on such considerations. It is for the Secretary of the State to balance the various public interests at stake. The Secretary of State's decision-making role in media plurality cases can also be criticised on multiple grounds.[129] The first and the most obvious problem is the high risk of politically biased decision making. NewsCorp's bid to acquire the full control of BskyB in 2010 was highly illustrative of that point. The immediate comments after the announcement of NewsCorp's bid to acquire 60.9% of BskyB shares[130] suggested that the bid was problematic, at least on political grounds.[131] The initial concern for the regulators was on cross-media ownership issues. This was mainly because NewsCorp was then the biggest newspaper company in the UK, accounting for one third of the whole market, and Sky was the biggest broadcaster. However, eventually, two other incidents determined the fate of the case. Firstly, the then-Secretary of State Vincent Cable stepped down because of a statement to some reporters, indicating that he had "declared war on Rupert Murdoch"[132] just after he issued a European Intervention Notice[133] on 4 November 2010. Secondly, a phone-hacking scandal within the "News of the World", a subsidiary of NewsCorp, was uncovered during the investigation which eventually led to the withdrawal of the bid.[134] The latter also provoked a public inquiry led by the Lord Justice Leveson ("Leveson Inquiry").[135]

To a certain degree, the appointment of the CMA to assess the public interest in media cases creates a measure of consistency and continuity,[136] and therefore alleviates somewhat the extent of concerns of unpredictability in political decision making.[137]

After discussing the approach taken to media plurality in the UK, we turn below to the approach competition authorities take to privacy considerations in merger assessment.

9. Privacy as a non-price competition parameter

Privacy considerations as a competition assessment factor are a recent development in the substantive assessment of mergers, and one that is likely to become increasingly relevant as a non-price consideration.

The incorporation of data privacy into a competition assessment usually follows two approaches. The first approach is based on the theory of considering privacy as a fundamental right and how privacy can constitute a unilateral theory of harm in merger assessment by focusing on the impact of the merger on privacy.[138] On this theory, the competition authorities can restrict and block mergers on the basis that they threaten the data privacy of individuals and refuse to allow the merger until the parties ensure the implementation of data safeguards. That is, the competition authorities themselves would protect privacy rights in personal data.

A second, more common, approach has been the incorporation of data privacy into the competition effects analysis. This approach looks at the protection of personal data as one of the parameters of competition: will the merger lead to reduced privacy protection as a form of quality and is this relevant as a choice criterion for consumers?[139] To the extent that privacy concerns motivate consumer behaviour, this approach fits privacy into the traditional competitive effects framework.

The OECD report on 'Data-Driven Innovation: Big Data for Growth and Well-Being' highlighted a significant uptick in data-driven mergers.[140] Prime examples of such mergers include *Google/Double Click*, *Facebook/Whatsapp*, and the recent acquisition of LinkedIn by Microsoft.[141] Such mergers are partly driven by the desire to acquire and combine new data assets viewed as a key source of competitive advantage in developing and providing digital services.[142]

10. The role of 'privacy' in merger control proceedings

The European Commission considers that 'price' is not the sole criterion of merger review but on the other hand, there are inclusions of some 'non-price competitive' parameters that need careful consideration while reviewing any merger.[143]

In the data-driven economy, where the products are often free (*e.g.*, Internet searches), then the competition effects analysis shifts necessarily towards non-pricing parameters. However, the competition authorities seem to lack the tools and methodologies to assess privacy as a non-price parameter of

competition. This is because the dominance of 'neoclassical price theory' for the normative understanding and methodological tools of competition analysis focuses only on price.[144]

The assessment of non-pricing parameters especially 'privacy' in mergers seems well accepted theoretically, but there are practical impediments to its application. Firstly, how to measure a reduction in privacy is uncertain. Secondly, even if such measures would exist, it is not for a competition authority to define an optimal level of privacy or to judge what reduction in privacy is acceptable. Thirdly, the linkages between data-sets would mean that other efficiencies would have to be balanced against any intrusion on privacy. Fourthly, the potential remedies companies would offer to relieve the competition concerns, or to safeguard a specific level of privacy, could lead to uneven restrictions on privacy on actors in the same market, thus itself distorting competition.[145] For this reason, some jurisdictions such as Canada, for example, have established a separate authority responsible for data protection as such, while the competition authorities examine privacy only insofar as it is seen as a parameter of competition.

The inclusion of privacy and protection of personal data in the current merger review framework as a non-price parameter of quality is very much in consonance with the consumer welfare goal. The devaluation of quality is readily understood as a factor that lowers consumer welfare. That being said, there exists an issue of evaluating and assessing competition based on non-price factors such as quality, which differ according to different consumers. How to measure the market's collective perception of quality, when money is not changing hands?

When a merger is price-centric the competition authorities can readily formulate a theory of harm, but the same has been difficult where the merger is found to be non-price-centric.

The earlier formed and tested theories of harm, in the Commission's decisions, usually focus on the customer side of the multi-sided market. Privacy considerations arise in data markets which frequently relate to two-sided markets (*e.g.,* platform-based markets), however. Any harm to consumers on that side comes about indirectly through the raised prices of the customers to the merged entity.[146] In a number of two-sided markets, consumers do not face a monetary payment (*e.g.,* the online marketplace).[147] If it is possible to come to terms with the notion that access to personal data can be seen as the price the consumer pays to access a zero price service, and not just an aspect of the quality of that service, as has been traditionally the

analytical perspective of non-price considerations, a theory of harm can then be formulated.[148]

The assessment of privacy in merger control seems acceptable as a matter of principle but no success has yet been achieved in assessing privacy as a theory of harm in a merger case. Firstly, how to measure a reduction in privacy is uncertain. Secondly, even if such measurement techniques were to exist, a competition authority has no expertise to define an optimal level of privacy or to judge what reduction in privacy is acceptable. Thirdly, the potential remedies companies would offer to address the competition concerns from merged data, or to safeguard a specific level of privacy, could pose significant implementation challenges as a remedy.[149] The latter challenge could be addressed through the requirements imposed on a number of companies in the big tech sector by the recent regulatory initiatives in the EU and elsewhere.[150] Competition authorities will need to address these challenges in order to incorporate privacy considerations in merger assessment in a way that will be transparent and will not adversely affect legal certainty.

11. Conclusion

There are increasing calls for the expansion of merger analysis beyond price, to take into account non-price aspects of competition, as well as non-competition related considerations such as national security and media plurality. It is important to assess whether such considerations are indeed competition law concerns or present an opportunity to achieve other policy aims by using the merger control regime. In some cases (*e.g.*, data privacy) this approach is justified on the basis of "traditional" competition/merger control analysis. In some cases, the legislation mandates the competition authorities to consider factors outside of the competition sphere (*e.g.*, issues of media plurality). Finally, there are some cases where merger control has been used as a pretension for achieving or contributing to other policy aims (*e.g.,* industrial policy such as the *Maersk/MSC Mediterranean Shipping/ CMA CGM* case in China).

It is unclear whether at this stage of the development of competition law and policy in the EU the question of identifying the central objective of competition law matters [that much] in terms of the actual enforcement and if it does so, to what extent this is the case.[151] A possible answer to this query needs to take into account institutional aspects and identify possible repercussions and from adding non-competition related factors into the competitive analysis. Ultimately, in the interests of transparency,

practicality, predictability and justiciability of competition laws, I have concluded that merger control for competition law purposes should focus on the market impacts of the transaction, in both price and non-price dimensions, and that other factors that may well feature in conceptions of the "public interest" writ large, such as national security or media plurality or privacy as a fundamental right, ought to be addressed pursuant to separate legislation and by other law enforcement agencies.

ENDNOTES

[1] Chair, Competition Law and Economics, and Director of the Centre for Commercial Law Studies at Queen Mary University in London, England. The views expressed in this paper are those of the author alone.

[2] See *e.g.* MOFCOMS's assessment of Seagate/Samsung (Seagate Technology/Hard Disk Drive Business of Samsung MOFCOM Conditional Clearance Notice [2011] No 90 of 12/12/2011, online: <fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml> accessed 15 September 2023> and Western Digital/Hitachi (MOFCOM Conditional Clearance Notice [2012] No 9 of 02/03/2012, online: <fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml> accessed 15 September 2023).

[3] Mario Monti, Merger control in the European Union: a radical reform (Speech delivered at European Commission/IBA Conference on EU Merger Control, 7 November 2002), online (pdf): <ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_02_545/SPEECH_02_545_EN.pdf>.

[4] Communication for the Commission, "Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", C(2023) 1923 final.

[5] See *e.g. GE/Honeywell*, COMP/M.2220.

[6] *Cf* former Art. 3 g) EC—despite the omission of the explicit reference to the aim of ensuring undistorted competition from the TFEU treaty post-Lisbon it is suggested that no significant change has occurred regarding the relevance of this goal as a means to achieve market integration.

[7] *Cf* in this respect Laura Parret, "Do we (still) know what we are protecting?" (2009), TILEC Discussion Paper No 2009-010 at 14ff.

[8] US, Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Washington DC: US Government Printing Office, 1992).

[9] Communication for the Commission, "Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", C(2023) 1923 final.

[10] *Cf* Maurice E. Stucke, "Reconsidering Antitrust's Goals" (2012) 53:2 Boston College L Rev 551, at 571.

[11] See *e.g.* Eleanor Fox, "The Modernization of Antitrust: A New Equilibrium" (1981) 66 Cornell L Rev 1140 at 1173; Herbert Hovenkamp, *The Antitrust Enterprise* (Cambridge, MA: Harvard University Press, 2005) at 35-36.

[12] Stucke, *supra* note 10.

[13] *Cf* in a US context, Jonathan B. Baker, "Exclusion as a Core Competition Concern" (2012) 78 Antitrust LJ 527.

[14] Tim Wu, "After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice" (2018) CPI Antitrust Chronicle at 5.

[15] *Ibid* at 3.

[16] *Ibid* at 6.

[17] *Ibid.*

[18] Harry First & Spencer Weber Waller, "Antitrust's Democracy Deficit" (2013) 81:5 Fordham L Rev 2543.

[19] Wu, *supra* note 14 at 6.

[20] As highlighted above in this section.

[21] The caveat to this statement would lie in a possible takeover of the discussion by populist discourse.

[22] See Ioannis Lianos, "Polycentric Competition Law" (2018) Centre for Law, Economics and Society Research Paper Series 4/2018 at 43.

[23] *Ibid.*

[24] *Cf* Lianos' reference to the position of Judge Easterbrook in this respect: 'When everything is relevant, nothing is dispositive.' (Frank H. Easterbrook, "Limits of Antitrust" (1984) 63 Tex L Rev 1.)

[25] B6-22/16, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, online: <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html;jsessionid=AF36596BA38A737406752C1250C13FD8.1_cid389?nn=3591568>.

[26] See *e.g.* Barak Orbach, "Antitrust Populism" (2017) 14 New York University Journal of L & Business 1. For the EU context see Joshua Wright & Aurelien Portuese, "Antitrust Populism: Towards a Taxonomy" (2020) 21:1 Stan JL Bus & Fin.

[27] *Cf* Orbach, *supra* note 26 at 108.

[28] Marina Lao, "Strengthening Antitrust Enforcement within the Consumer Welfare Rubric", (2019) CPI Antitrust Chronicle at 7.

[29] *Cf e.g.* suggestions to embrace divestiture/structural separation vis-à-vis tech/digital giants on the sole basis of the latter's size. See *e.g.* Elizabeth Warren, 'Here's How We Can Break Up Big Tech' (8 March 2019), online: *Medium* <medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>, with a particular focus on the US digital giants. For a rejection of arguments involving structural separation remedies in the *Google Search (Shopping)* case—albeit in relation to an affirmation of abusive conduct by Google and not on the sole grounds of its sheer size, see *e.g.* Daniel Zimmer, "Google zerschlagen?" (2014) 10 *Wirtschaft und Wettbewerb* 923.

[30] *Cf e.g.* Wright & Portuese, *supra* note 26.

[31] Lao, *supra* note 28 at 7. Consider also Podszun arguing in favour of a so-called 'more technological approach' (Rupprecht Podszun, "The More Technological Approach: Competition Law in the Digital Economy" in Gintare Surblytė, (ed) *Competition on the Internet: MPI Studies on Intellectual Property and Competition Law, vol 23*, (Heildelberg/New York: Springer, 2015).

[32] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006, and Anticipated acquisition by Boots Group plc of Alliance UniChem plc, OFT decision ME/2134/05, May 2006.

[33] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006.

[34] See *e.g.* Carl Zeiss Jena GmbH and Bio-Rad Laboratories Inc: a report on the

proposed acquisition of the microscope business of Bio-Rad Laboratories Inc, CC, May 2004.

[35] Government of the United Kingdom Competition & Markets Authority, Merger Assessment Guidelines (18 March 2021), online (pdf): <assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_--_.pdf.>.

[36] *Supra* note 8.

[37] *Ibid.*

[38] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006, and Anticipated acquisition by Boots Group plc of Alliance UniChem plc, OFT decision ME/2134/05, May 2006.

[39] See *e.g.* Somerfield plc/Wm Morrison Supermarkets plc: a report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc, CC, September 2005.

[40] See *e.g.* Carl Zeiss Jena GmbH and Bio-Rad Laboratories Inc: a report on the proposed acquisition of the microscope business of Bio-Rad Laboratories Inc, CC, May 2004.

[41] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, CC, May 2006, and Anticipated acquisition by Boots Group plc of Alliance UniChem plc, OFT decision ME/2134/05, May 2006.

[42] See *e.g.* Proposed acquisition of Ottakar's plc by HMV Group plc through Waterstone's Booksellers Ltd, May 2006.

[43] See *e.g.* Carl Zeiss Jena GmbH and Bio-Rad Laboratories Inc: a report on the proposed acquisition of the microscope business of Bio-Rad Laboratories Inc, CC, May 2004.

[44] *Ibid*, at 753.

[45] Stucke & Grunes, *Big Data and Competition Policy* 1st ed., (Oxford, UK: Oxford University Press, 2016), at 15, 298.

[46] EU, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* [2004] OJ C 31/3, at para. 8 and EU *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* [2008] OJ C 265/7, at para. 10.

[47] Stucke & Grunes, *op cit* note 45, at 279.

[48] Neil W. Averitt, Robert H, Lande & Paul Nihoul, "'Consumer choice' is Where We Are All Going—So Let's Go Together" (2011) University of Baltimore Law 1; Neil W. Averitt & Robert H, Lande., "Using the 'Consumer Choice' Approach to Antitrust Law" (2007) 74 Antitrust LJ 175.

[49] COMP/C-3/37.792.

[50] See *e.g.* France Telecom (C-202/07 P [2009]; T-340/03 [2007]); Wanadoo (COMP/38.223); and Paul Nihoul, "Freedom of choice: The Emergence of a Powerful Concept in European Competition Law" (2012) SSRN Electronic Journal, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2077694>.

[51] See *Realcomp II, Ltd, Petitioner, v. Federal Trade Commission* (US 6th Circ 2010).

[52] Charles Luescher, "Efficiency Considerations in European Merger Control—Just Another Battle Ground for the European Commission, Economists and Competition Lawyers" (2004) European Competition LR 72.

[53] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, aff'd [2003] FCJ No. 151, 2003 FCA 53, [2003] 3 FCR 529 (FCA).

[54] OECD, Summary of Discussion of the Roundtable on Public Interest Considerations in Merger Control (2017), online (pdf): <one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf>.

[55] EU *Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union*, [2019] OJ, L 79.

[56] *Ibid.*

[57] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Welcoming Foreign Direct Investment while Protecting Essential Interests, (2017), online (pdf): <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0494>.

[58] *Supra* note 55.

[59] The specific objectives to be achieved are the following:

- provide a coherent framework to screen foreign direct investment in the EU on grounds of security or public order, without impinging on Member States' national prerogatives.
- facilitate close and systematic cooperation among Member States and between Member States and the Commission with regard to the screening of certain foreign direct investment when these raise security or public order concerns, including strengthened exchange of information.
- increase transparency of foreign direct investment that may have an impact on security or public order.
- effectively address cases of foreign direct investment raising security or public order concerns in relation to projects or programmes of Union interest.
- prevent circumvention of national foreign direct investment screening mechanisms.

[60] ME/1029/04.

[61] ME/1235/04.

[62] ME/1531/05.

[63] ME/1472/05.

[64] ME/2940/07.

[65] Government of the United Kingdom Department for Business, Energy & Industrial Strategy, National Security and Infrastructure Investment Review (October 2017), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf>.

[66] See *e.g.* European Commission, Consultation on Evaluation of procedural

and jurisdictional aspects of EU merger control (2017), online: <ec.europa.eu/competition/consultations/2016_merger_control/index_en.html>.The EU Commission issued a Consultation in 2017. The scope of the evaluation focused inter alia on the effectiveness of the turnover-based jurisdictional thresholds of the EU Merger Regulation. A debate has recently emerged on the effectiveness of the purely turnover-based jurisdictional thresholds, specifically on whether they allow to capture all transactions which can potentially have an impact in the internal market. This may be particularly significant in certain sectors, such as the digital and pharmaceutical industries, where the acquired company, while having generated little turnover as yet, may play a competitive role, hold commercially valuable data, or have a considerable market potential for other reasons.

[67] *Supra* note 65.

[68] CFIUS may also refer a transaction to the President for decision and the President has to announce a decision with respect to a transaction within 15 days of CFIUS's completion of the investigation.

[69] Standing Committee of the National People's Congress (NPCSC), *Anti-Monopoly Law of the PRC* (AML), effective as of 1 August 2008 and amended in June 2022.

[70] Prior to 2008, the Chinese competition regime was administered by three different agencies/ministries: Ministry of Commerce or MOFCOM (for mergers), the State Administration for Industry and Commerce (the SAIC), the National Development Reform Commission (the NDRC). Their competition law powers were allotted to the State Administration for Market Regulation, or SAMR, in 2008.

[71] See *e.g.* Charles McConnell, "Glencore/Teck would face significant foreign investment scrutiny" (4 May 2023), online: </globalcompetitionreview.com/gcr-fic/article/glencoreteck-would-face-significant-foreign-investment-scrutiny>. This note also adds that although neither Glencore nor Xstrata own or operate productive assets in the relevant markets in China, MOFCOM took great interest in the transaction, focusing on the importance of China as a major market for the parties and China's reliance on imports of raw materials of central importance to the wider Chinese economy.

[72] Qian Zhou, "China Further Expands the Encouraged Catalogue to Boost Foreign Investment" (1 November 2022), online:<www.china-briefing.com/news/china-2022-encouraged-catalogue-updated-implementation-from-january-1-2023/>.

[73] Lehman Brown, "China's New National Security Review Procedures for Mergers and Acquisitions Involving Foreign Investors" (2011), online (pdf): <www.lehmanbrown.com/wp-content/uploads/2014/12/Insights-2011-4.pdf>.

[74] As noted above (*supra* note 69), the Ministry of Commerce (MOFCOM) was one of three predecessors to the State Administration for Market Regulation (SAMR), in charge of merger control.

[75] *Maersk/MSC Mediterranean Shipping/CMA* CGM MOFCOM Block Notice [2014] No 46 (2014), online: <fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml>.

[76] The first merger blocked by MOFCOM was *Coca-Cola/Hui Yuan* MOFCOM Block Notice [2009] No. 22 (2009), online: <fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>.

[77] *Supra* note 75, see Substantive Competition Analysis—(1) The Transaction Constitutes a Close Joint Venture, Essentially Different from Traditional Shipping Alliance.

[78] *Ibid.*

[79] *Supra* note 75, see sec 4 Substantive Competition Analysis—(2)~(5).

[80] See *e.g.* Federal Maritime Commission, "About the Federal Maritime Commission", online: <www.fmc.gov/about-the-fmc/>. The FMC's Mission Statement is to ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices. It ensures competitive and efficient ocean transportation services by:

- Reviewing and monitoring agreements among ocean common carriers and marine terminal operators (MTOs) serving the U.S. foreign ocean borne trades to ensure that they do not cause substantial increases in transportation costs or decreases in transportation services
- Maintaining and reviewing confidentially filed service contracts to guard against detrimental effects to shipping
- Providing a forum for exporters, importers, and other members of the shipping public to obtain relief from ocean shipping practices or disputes that impede the flow of commerce
- Ensuring common carriers' tariff rates and charges are published in automated tariff systems and electronically available to the public
- Monitoring rates, charges, and rules of government-owned or controlled carriers to ensure they are just and reasonable
- Taking action to address unfavorable conditions caused by foreign governments or business practices in U.S.-foreign shipping trades

[81] Federal Maritime Commission, , "P3 Agreement Clears FMC Regulatory Review" (20 March 2014), online: <www.fmc.gov/p3-agreement-clears-fmc-regulatory-review/>.

[82] Chris Dupin, "No Challenge to P3 in Europe" (4 June 2014), online: <www.freightwaves.com/news/no-challenge-to-p3-in-europe>.

[83] EU, *Regulation No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies* [2009] OJ, L 256.

[84] Hill Dickinson, "Proposed P3 Alliance between the Maersk Line, CMA CGM and MSC Mediterranean Shipping has been prohibited" (19 June 2014), online: *Lexology* <www.lexology.com/library/detail.aspx?g=6c99651b-0c2f-47bc-845a-8ee96ba3c00b>.

[85] Carlos Tejada, "China Shows Regulatory Heft by Sinking Shipping Deal" (17 June 2014), online: *Wall Street Journal* <www.wsj.com/articles/china-shows-regulatory-heft-by-sinking-shipping-deal-1403033524>.

[86] Frederic Depoortere, Andrew Foster & Ingrid Vandenborre, "Navigating

Chinese Merger Control: MOFCOM Prohibits P3 Shipping Alliance" (20 June 2014), online: *JDSUPRA* <www.jdsupra.com/legalnews/navigating-chinese-merger-control-mofc-63495/>.

[87] *Enterprise Act* 2002, C. 40.

[88] *Supra* note 35 at para 16.7. Federico Mor & Steve Browning, "Contested Mergers and Takeovers" (October 2018) Briefing Paper 5374,7, online (pdf): *House of Commons* Library <researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05374>; John Fingleton, "Mergers and the Public Interest: A Wolf in Sheep's Clothing?" (2018) 3-4, online (pdf): *Fingleton associates* <www.fingletonassociates.com/publications/mergers-and-the-public-interest-a-wolf-in-sheeps-clothing/>, ; Andreas Stephan, "Did Lloyds/HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?" 62:4 (2020) Northern Ireland Legal Quarterly, online (pdf): <papers.ssrn.com/abstract=1931007>; David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished] at 93.

[89] Federico Mor & Steve Browning, "Contested Mergers and Takeovers" (October 2018) Briefing Paper 5374,7, online (pdf): *House of Commons Library* <researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05374>; John Fingleton, "Mergers and the Public Interest: A Wolf in Sheep's Clothing?" (2018) 3-4, online (pdf): *Fingleton associates* <www.fingletonassociates.com/publications/mergers-and-the-public-interest-a-wolf-in-sheeps-clothing/>; Andreas Stephan, "Did Lloyds/HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?" 62:4 (2020) Northern Ireland Legal Quarterly, online (pdf): <papers.ssrn.com/abstract=1931007>; David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished], at 93.

[90] David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished] at 106.

[91] *Ibid* at 96.

[92] Office of Fair Trading, *Lloyds TSB plc / HBOS plc Final Report* (2008), online: *Government of the United Kingdom* <www.gov.uk/cma-cases/lloyds-tsb-plc-hbos-plc>.

[93] "Plurality", online: *Cambridge Dictionary* <dictionary.cambridge.org/dictionary/english/pluralism>.

[94] *Ibid.*

[95] European Commission, "'Media Pluralism in the Member States of the European Union" (2007) Commission of the European Communities, Commission Staff Working Document SEC (2007) 32 5, online (pdf): <https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf>. Zrinjka Peruško, "The Link That Matters: Media Concentration and Diversity of Content" in Beata Klimkiewicz, *Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe* (Central European University Press 2013) at 17.

[96] Craig Arnott, "Media Mergers and the Meaning of Sufficient Plurality: A Tale of Two Acts" (2010) 2 J of Media L 245, 263.

[97] The debate mostly revolved around the meaning of plurality, rather than a comparison. In *BskyB/ITV* judgement, Court of Appeal confirmed that Competition Commission's assessment of plurality could not depend on a mere quantitative criteria or a simple headcount. (See *British Sky Broadcasting Group Plc v The Competition Commission* (Court of Appeal) [114]).

[98] The then Parliamentary Under Secretary for the Department for Digital, Culture, Media and Sport.

[99] Parliament of the United Kingdom, Hansard Volume (2 July 2003), Col 913, online: <publications.parliament.uk/pa/ld/ldse0203.htm>.

[100] Competition Commission, Final Report on the Acquisition by British Sky Broadcasting Group plc of 17.9 Per Cent of the Shares in/ ITV plc [2007] at para 5.9, online: </webarchive.nationalarchives.gov.uk/ukgwa/20140402192942/http://www.competition commission.org.uk/our-work/directory-of-all-inquiries/bskyb-itv/final-report-and-appendices-glossary>.

[101] OFCOM, "Measurement Framework for Media Plurality Ofcom's Advice to the SoS for Culture, Media and Sport" (2015), online (pdf): <www.ofcom.org.uk/__data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf>.

[102] *Ibid.*

[103] Office of Fair Trading was the "first phase" authority for merger assessment and the Competition Commission was the "second phase" authority. The two authorities were merged to form the Competition and Markets Authority.

[104] *Supra* note 100.

[105] *Ibid* at para 5.11.

[106] *Ibid.*

[107] *Ibid* at para 5.45.

[108] *Ibid* at para 5.39.

[109] See *e.g.,* para 6.57 in Competition & Markets Authority, "21st Century Fox, Inc and Sky Plc", online (pdf): *Government of the United Kingdom* <www.gov.uk/government/publications/cma-phase-2-report>.

[110] *Ibid* at para 6.58.

[111] *Ibid* at para 6.63.

[112] *Ibid* at para 10.6.

[113] *Ibid* at para 10.14.

[114] *Ibid* at para 10.25.

[115] *Ibid* at para 10.5.

[116] *Ibid* at para 10.27

[117] *Ibid* at para 10.31.

[118] *Ibid* at para 8.6.

[119] *Ibid* at para 8.5.

[120] *Ibid*, at para 8.13.

[121] *Ibid* at para 8.20.

[122] *Ibid* at para 8.24.

[123] *Ibid* at para 8.25.

[124] *Ibid* at para 8.41.

[125] *Ibid* at para 8.46.
[126] Bruce Lyons, David Reader &Andreas Stephan, "UK Competition Policy Post-Brexit: In the Public Interest?" (2016) Centre for Competition Policy Working Paper 16-12.
[127] *Ibid.*
[128] The *Lloyds/HBOs* case illustrates the difficulties associated with the mentioned balancing exercise.
[129] Ioannis Kokkoris, "Media Plurality Assessment as a Public Interest Concern in UK Merger Control" (2023), Competition and Regulation in Network Industries.
[130] At the time of the bid, R. Murdoch had already owned 39.1 percent of the BskyB shares and 40 percent of the NewsCorp shares.
[131] See *e.g.* "Murdoch unveils plan to take full control of BskyB" in Daily Mail Reporter (16 June 2010), online: *Daily Mail* <www.dailymail.co.uk/news/article-1286957/Murdoch-unveils-plan-control-BSkyB.html>; "Murdoch's News Corporation in BSkyB takeover bid", BBC (15 June 2010), online: *BBC News* <www.bbc.com/news/10316087>; Helia Ebrahimi et al, "BSkyB takeover: Rupert Murdoch moves towards full BSkyB takeover" (14 June 2010), online: *The Telegraph* <www.telegraph.co.uk/finance/newsbysector/epic/bsy/7827991/BSkyB-takeover-Rupert-Murdoch-moves-towards-full-BSkyB-takeover.html>. For example, BBC editor's opinion on the bid was as following: "… any agreed deal between News Corporation and BSkyB may cause problems for the UK's coalition government. … because while the Conservatives had benefited from the support of News Corporation's newspapers during the general election, the Liberal Democrats were far more hostile to Mr Murdoch's media empire."
[132] BBC News, "Cable: I have declared war on Murdoch" (21 December 2010), online: *BBC News* <www.bbc.com/news/av/business-12053175/cable-i-have-declared-war-on-murdoch>.
[133] See *e.g.* European Intervention Notice in Government of the United Kingdom, Notice: European Intervention Notice, online: </www.gov.uk/government/publications/european-intervention-notice>.
[134] BBC News, "News Corp withdraws bid for BskyB" (13 July 2011), online: BBC News <www.bbc.com/news/business-14142307>.
[135] "The Levenson Inquiry: Culture, Practice and Ethics of the Press" (archived on 22 January 2014), online: *The Leveson Inquiry* <webarchive.nationalarchives.gov.uk/20140122144906/http://www.levesoninquiry.org.uk/>.
[136] David Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights" (2016) SSRN Electronic Journal 45, online: <papers.ssrn.com/abstract=2736917>.
[137] David Reader, 'Revisiting the Role of the Public Interest in Merger Control' (Doctoral Thesis, University of East Anglia 2015) [unpublished] at 105.
[138] Complaint and Request for Injunction by EPIC to the US Federal Trade Commission, April 20 2007, Request for Investigation and Other Relief in the Matter of Google and Double Click, online (pdf0:<epic.org/wp-content/uploads/privacy/ftc/google/epic_complaint.pdf>).
[139] See *e.g.* Testimony of Peter Swire, Submission to the Federal Trade

Commission Behavioural Advertising Town Hall on Google/DoubleClic', (18 October 2007). Pamela Harbour and Tara Koslov, "Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets" (2010) 76:3 Antitrust LJ, 769. See also EDPS Preliminary Opinion, "Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy" (26 March 2014).

[140] OECD Report, Data-Driven Innovation, 2015, online (<www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm>).

[141] See *e.g.* the proposed merger of Microsoft/Yahoo!, the merging parties put forth efficiency gains resulting from access to large pools of search data, which was accepted by the European Commission. See Case M 5727 Microsoft/Yahoo! Search Business decision of 18 Feb 2010, at para 163.

[142] *Ibid.*

[143] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertaking, [2004] OJ C 31, 5.2.2004, at p. 5–18.

[144] Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* 1st ed., (Oxford, UK: Oxford University Press, 2016), at 15.

[145] Nils-Peter Schepp & Achim Wambach "On Big Data and Its Relevance for Market Power Assessment" (2015) 7:2 Journal of European Competition L & Practice 120 at 121.

[146] Oskar Törngren, Mergers in big data-driven markets - Is the dimension of privacy and protection of personal data something to consider in the merger review? (Thesis in EU Law, Stockholm University, 2017) [unpublished].

[147] OECD, Consumer Protection and Competition committees, Quality considerations in the zero-price economy, online: <www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm> (2019).

[148] *Ibid.*

[149] Schepp & Wamback, *supra* note 145 at 121.

[150] See *e.g. Digital Markets Act*, Regulation (EU) 2022/1925.

[151] For a perspective introducing an element of relativization with regard to the aims question as such see *e.g.* Pablo Ibanez Colomo & Alfonso Lamadrid, , "'Forget about consumer welfare: it's the law vs discretion divide that will mark the future of competition law (my presentation at the IEE in Brussels)", (14 September 2019), online (blog): Chillin' Competition <chillingcompetition.com/2018/09/13/forget-about-consumer-welfare-its-the-law-vs-discretion-divide-that-will-mark-the-future-of-competition-law-my-presentation-at-the-iee-in-brussels/>.