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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by BIAC --

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*More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>*

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1. Introduction

1. The Business and Industry Advisory Committee (“BIAC”) of the Organization for Economic Cooperation and Development (“OECD”) is pleased to submit this paper to assist in Working Party 3’s discussion on the important issue of the links and drivers between merger review and public interest considerations. This paper builds on BIAC’s prior contributions, specifically *BIAC Submission to OECD Roundtable on Changes in Institutional Design* (“Institutional Design”)¹ and *Does Competition Kill or Create Jobs?* (“Jobs”)².

2. Around the globe competition and merger control laws have never developed in a political vacuum but were introduced to contribute to attaining public interest goals such as a competitive market economy or the promotion of scientific and technological advancement for the benefit of the population.

3. BIAC believes that merger reviews should be focused on core competition law principles such as competitive pricing as well as static and dynamic efficiency, including innovation. A merger review based on these principles generally promotes public interest considerations such as employment and equity, because strengthening the financial and market position of businesses can ensure enhanced job security and productivity in the long term.

4. BIAC believes that introducing public interest considerations into the merger review analysis is unnecessary and potentially counter-productive.

5. The ongoing debate about the inclusion of public interest considerations in merger review may reflect increasing public debate about the current analytical framework and economic analysis in the course of merger review. To the extent it is deemed necessary by some jurisdictions to take account of potential distortions of competition in a globalized economy deriving from public market interventions including state aid (such as dumping) or diverging regulatory regimes³, BIAC suggests that in order to avoid the implementation of countervailing public interest considerations into the merger review process of those jurisdictions, further analysis of the distortions of global competition due to diverging regulatory regimes would be timely. Issues are evolving and further ongoing analysis may be very useful to ensure normative competition principles are maintained to the extent possible. The OECD is invited to consider how best to include any analysis of (potential) competition from

¹ Submitted June 2015.

² Submitted October 2015. Some of these issues were also considered in BIAC’s *Submission on Competition Policy, Industrial Policy and National Champions* to the OECD Global Forum, February 2009.

³ For example this issue has been identified by a recent study commissioned by the European Parliament entitled “Challenges for Competition Policy in a Digitized Economy”, July 2015, page 69: “Competition Authorities should have a cautious attitude towards competition problems and to trust in the self-correcting powers of the market, provided that certain public values such as taxation, privacy and security are protected by other policy frameworks. If the latter is not the case and this causes competition problems, competition policy instruments can sometimes be used to temporarily fix the problem”.

companies operating under different legal, regulatory and trade regimes in the economic assessment of a given merger.

6. Businesses contemplating pro-competitive transactions require substantive and procedural certainty and transparency in the merger review process. No matter how well-intentioned, the introduction of public interest considerations into this process can create undesirable uncertainty and lead to inconsistent decisions in multijurisdictional cases, which can have a significant “chilling” effect on investment decisions, with an adverse impact on levels of economic activity. In extreme cases, this uncertainty can hold back vital economic development.

7. If public interest considerations are to be introduced in merger review notwithstanding these concerns, BIAC is of the view that this should be done by a separate entity and in a manner that supports the principles of transparency and predictability and in a manner that is, to the greatest extent possible, free from political interference. BIAC believes that this view is largely consistent with the position set out in the paper issued by the Secretariat (“Background Paper”)⁴.

8. Against this background, BIAC will first discuss the objectives of merger review, as well as the public interest benefits that accrue to economies as a result of the application of core competition law principles in that process. In Part III, BIAC will address its recommendations for promoting transparency, predictability and evidence-based adjudication in merger reviews.

2. Application of Competition Law Principles

2.1 *The Core Mandate of Competition Law: Efficiency and Consumer Welfare*

9. The OECD has noted there is a “general consensus that the basic objective of competition law is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources in free market economies”⁵. A survey of competition law by the International Competition Network in 2007 found a majority of competition authorities around the world pursue the goal of consumer welfare and promotion of a free market economy through efficiency⁶.

10. Efficiency has multiple dimensions, such as allocative efficiency (when goods are priced at a marginal or incremental cost) and production efficiency (when goods are produced at the lowest cost)⁷. Efficiency also has a temporal dimension and can be either static or dynamic (the latter when new innovations are introduced in a timely manner). In the United States, the rise of the Chicago School led to a belief that non-efficiency objectives should not play a role in competition law at all⁸. Certain academic commentators observe that competition law should only serve the “pure” goals of efficiency and nothing more, because the inclusion of non-efficiency considerations will ultimately harm consumers⁹.

⁴ *Public Interest Considerations in Merger Control*, OECD Working Party No. 3 on Co-Operation and Enforcement, June 14-15, 2015. DAF/COMP/WP3/(2016) 3.

⁵ OECD, *Interim Report on Convergence of Competition Policies*, (1994) OECD/GD(94)64, Annex, at p 8.

⁶ International Competition Network, “Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies” (2007) 6th Annual Conference of the ICN, Moscow at 32.

⁷ Joseph F. Brodley, “The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress” (1987) 62 NYU L Rev 1020 at 1027.

⁸ Diane R. Hazel, “Competition in Context: The Limitation of Using Competition Law as a Vehicle for Social Policy in the Developing World” (2015) 37 Hous J Int’l L 275 at 292.

⁹ Albert Foer, “The goals of antitrust: thoughts on consumer welfare in the U.S.” in *Handbook of Research in Trans-Atlantic Antitrust*, ed. Phillip Marsden (Cheltenham: Edward Elgar, 2014) at 579.

11. Without going into a detailed discussion of the appropriate welfare standard¹⁰, it is fair to say that many economists generally favour a total welfare standard¹¹. After all, it is not only common sense but most economists agree that investment, innovation and more generally dynamic efficiencies are of significant importance for the development of a sustainable economy.

12. Therefore, dynamic efficiencies, including investment and innovation, are another objective of competition law, which is sometimes subsumed or defined as another type of efficiency, where invention, development and diffusion of new products increase social wealth as a whole¹².

2.2 Distinguishing between Public Interest Considerations and Core Competition Law Principles

13. BIAC notes that in the Background Paper, the Secretariat states “[its] research indicates that there are more examples of public interest grounds resulting in an anti-competitive merger being cleared than of a merger cleared by the competition authority being prohibited”¹³. This is not, however, consistent with the experience of BIAC’s members, and may reflect a definitional issue¹⁴.

14. It is important to distinguish between public interest considerations that are extraneous to the core competition law principles discussed above and those, such as efficiency and failing firm defences that are properly viewed as forming part of the competition analysis itself. “Efficiency defences”, such as those under the Canadian or German law, which require the competition agency to permit a merger to proceed where the efficiency gains generated from the transaction outweigh and offset any anti-competitive effects, serve efficiency goals in the merger review process.¹⁵ So-called “failing firm” defences or considerations, too, are rooted in core competition principles, since permitting a merger involving an insolvent firm promotes the efficient allocation of resources for the benefit of the economy, in particular in situations in which the target firm would no longer exist as an independent competitor in the counterfactual, severely limiting the scope for any merger-specific harm.

15. On the other hand, under the Australian system, it is possible to apply either for merger clearance or merger authorisation. The former is a pure competition law review, whereas the latter is designed for situations where parties believe a merger to be potentially anti-competitive but carries substantive public interest benefits. Although the authorisation route has been rarely used due to a rigid process, it does include a reasonably well-defined set of criteria and – importantly, distinguishes clearly between competition and other considerations¹⁶.

¹⁰ Cf. Louis Kaplow, Harvard Law School, On the Choice of Welfare Standards in Competition Law, 2011.

¹¹ These include the European Commission’s former Chief Economist, see Motta, M. (2004), Competition Policy: Theory and Practice, page 21f.

¹² Brodley, *supra* note 6 at 1026.

¹³ Background Paper, para 32, page 11.

¹⁴ Alternatively, it may reflect the outcomes for purely domestic cases, including those creating “national champions” in sensitive sectors, as opposed to acquisitions by foreign buyers which are more frequently prohibited.

¹⁵ For a recent example of the application of the efficiencies defence by the Supreme Court of Canada, see *Tervita Corp v Canada (Commission of Competition)*, [2015] SCC 3.

¹⁶ See the report of the Harper Review, pages 312-334: http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf

2.3 *Achieving Public Interest Goals Through Competition Law Goals*

16. BIAC believes core competition law goals are not irreconcilable with but an important aspect of the public interest, and therefore agrees with the Background Paper that a “solid competition policy framework may help in itself achieve sustainable development objectives, such as poverty alleviation, job creation and economic growth”¹⁷. Indeed, public interest benefits are already inherent within an established competition regime. For example, maintaining a competitive market contributes to the non-efficiency goal of decentralizing economic and political power. In fact, antitrust scholars have emphasized competition law’s beneficial impact on the public interest from as early as the 1970s.

17. An effective competition regime promoting maximum efficiency can lead to the enhancement of social and political policy by providing a neutral marketplace, i.e., “an even playing field”. In his 1977 article, Kenneth Elzinga found that “efficiency and equity are not mutually exclusive domains”¹⁸. While Elzinga recognized that antitrust laws will not tackle issues such as income redistribution head-on, he argued that a well-implemented competition regime can contribute positively to wealth redistribution by leading to less accumulation of concentrated wealth from capitalized monopoly positions¹⁹. Therefore, equity goals such as redistribution of income are “indirectly and costlessly promoted by a direct attack on inefficient, anti-competitive market structures and practices”²⁰.

18. Similarly, Joseph Brodley noted that there exists a unity between what appear to be “purely” economic goals of competition and the social and political foundations of the law: “the pursuit of the correctly defined economic goals of antitrust will generally advance the social and political objectives of the law as well”²¹. William Baxter, who was one of the drafters of the United States 1968 Merger Guidelines commented: “[f]requently, the antitrust laws’ concern for protecting and improving economic efficiency also serves to further social and political goals”²².

19. Echoing the sentiments above, the Australian National Competition Policy Review of 1993 found that “the promotion of competition will often be consistent with a range of other social goals”²³.

20. In *Jobs*, BIAC demonstrated how the benefits of competition, such as lower prices, greater efficiency and innovation can lead to sustained and sustainable economic growth and increased job opportunities in the long run. The long-term consequences of a merger may result in beneficial economic growth by increasing the longevity and competitiveness of the business at issue, which in turn will support more and better jobs for all.

¹⁷ Background Paper at para 12, p 5.

¹⁸ Kenneth G. Elzinga, “The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?” (1977) 125 U PA L Rev 1191 at 1193.

¹⁹ *Ibid*. Elzinga concedes that competition law may only make a “modest or unmeasurable contribution” to non-efficiency objectives such as public interest, but other areas of law and policy (such as corporate tax) can supplement such modest contribution to achieve the desired social goal, at 1200.

²⁰ *Ibid* at 1202.

²¹ Brodley, *supra* note 6 at 1021.

²² William F. Baxter, “Responding to the Reaction: The Draftsman’s View” (1983) 71:2 Cal L Rev 618 at 619.

²³ Frederick Hilmer, Mark Rayner and Geoff Tapewell, “National Competition Policy Review” (1993) Australian Government Print Services, Canberra, Australia at p 5.

3. Promoting Transparency, Predictability and Evidence-Based Adjudication in Merger Review

21. There are several disadvantages of introducing a separate public interest analysis in merger reviews: (a) unpredictability and uncertainty; (b) increasing susceptibility of competition agencies to political pressure and to depart from merger-specific analysis; and (c) the risk of outcomes which damage the long term public interest to the extent efficiency-enhancing mergers are prohibited or deterred.

22. Due to the broad and uncertain scope of the public interest, an introduction of public interest analysis in merger reviews can lead to a prolonged review process where the outcome may be less predictable for the entities applying for review. This can also lead to increased litigation to dispute the outcome of a merger review. A recent survey of merger legislation from 75 developed and developing countries found that 81.3% of the states surveyed either avoid considering public interest, or frame public interest analysis restrictively²⁴.

3.1 Institutional Considerations

23. Including public interest considerations in competition legislation is criticized by some because they believe that the concept of “public interest” is too vague or too political. To this end, some scholars view public interest and competition as having an antithetical relationship²⁵. Others question the appropriateness of a competition authority assessing public interest goals, which do not fall within the core competition goals²⁶. In a speech often cited by competition law scholars discussing the role of public interest in merger reviews, David Lewis explained it is “possible to structure the evaluation in such a way that competition considerations occupy pride of place in the ultimate decision, indeed, in such a way that the competition authorities are able to use the public interest investigation to educate key public stakeholders about competition”²⁷.

24. In Institutional Design, we recommended in favour of “multifunctional” competition authorities that have responsibilities extending, for example, to consumer protection, where there is a shared goal of promoting consumer welfare. This would extend to such considerations in merger control as efficiencies and failing firm defences, which can be seen as adjuncts to the core competition principles, rather than more generalized public interest considerations. However, as BIAC noted, complete separation and complete integration of functions are not the only alternatives available in designing a competition authority. BIAC cited a middle-ground of cooperation between distinct agencies in the case of, for example, reviews of mergers under specific sectoral regimes.

25. The Background Paper discussed the model of “concurrent competences”. BIAC agrees that such an approach can lead to more clarity, as well as less exposure of the competition authority to political pressure. This “concurrent competences” model can, however, lead to delays and the potential for inconsistent or unpredictable results. This problem arises most acutely in cross-border mergers.

²⁴ David Reader, “Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights” (2016) Centre for Competition Policy, University of East Anglia, CCP Working Paper 16-3 at 19.

²⁵ See for example Edward J. Graham & J. David Richardson, “Issue Overview” in *Global Competition Policy* (Washington, DC: Peterson Institute, 1997) at p. 9: “Efficiency and fairness, like oil and water, do not mix easily.”

²⁶ Dave Poddar & Gemma Stooke, “Consideration of Public Interest Factors in Antitrust Merger Control” (2014) Competition Policy International, Inc.

²⁷ David Lewis, “The Role of Public Interest in Merger Evaluation,” (2002) International Competition Network, Merger Working Group, Naples.

3.2 *Cross-border Mergers*

26. Promoting certainty and transparency can be a particularly significant challenge in cross-border mergers. BIAC recognizes that currently, certain countries have “parallel reviews” by non-specialized regulators, for example USA, Canada and Australia, each of which feature separate regimes for competition and foreign investment reviews. BIAC suggests that where such parallel regimes are in place, it would be useful for there to be mandatory time limits for initiation and completion of the parallel review in order to permit businesses to better plan mergers. This would also help prevent future situations like the ADM/Graincorp scenario in Australia²⁸, although BIAC would emphasise that business appreciates that transparency is assured by the competition agency publishing a separate decision dealing with competition aspects of the merger in any event.

27. Assisted by the work of the OECD and ICN, many competition authorities have made great progress in terms of coordination of cross-border merger reviews; however, coordinating public interest considerations in foreign investment review provides a bigger challenge, since public interest considerations in these reviews tend to be more local and idiosyncratic and more work should be done to create transparency and reduce harmful delays and uncertainty.

28. The ABA Section on Antitrust Law Task Force on Foreign Investment Review recently made a number of recommendations in this regard, which include the promotion of transparency and consistency in timetables of different agencies²⁹ and which could be given further consideration. In BIAC’s view, any coordination by different agencies must remain subject to ensuring compliance by the agencies with their separate legal and policy mandates and compliance with their confidentiality obligations. The restriction on the sharing of confidential information should only be waived by obtaining the consent of the businesses involved.

3.3 *Defined Public Interest Grounds*

29. Public interest is a broad concept that can take on multiple definitions, especially depending on the historical and social context of the state imposing these considerations³⁰. If public interest considerations are to be taken into account independently from the core competition analysis, BIAC recommends a specifically identified and closed list of public interest grounds to be taken into consideration, which will be examined secondary to the primary step of merger review focused on competition law principles.

30. A closed list of clearly identified public interest factors will lead to more predictable outcomes in merger reviews, rather than broad and vague legislative provisions that do not tailor “public interest” for the purpose of merger review. As noted in the Background Paper, a wide “catch-all” definition of the public interest clause may undermine the core objectives of competition law and certainty in the law.

31. South Africa is an example of a competition regime implementing a public interest analysis. The inclusion of public interest considerations arose out of South Africa’s unique history of apartheid,

²⁸ For an in-depth discussion of the issues around the interface between competition and foreign investment reviews, including the ADM/Graincorp transaction, see the ABA Section on Antitrust Law, *Report of the Task Force on Foreign Investment Review* available at: http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/20150928_foreign_investment_authcheckdam.pdf (“Task Force Report”).

²⁹ See Task Force Report.

³⁰ For a more detailed discussion of how public interest is tailored to the historical context of a country, see Simbarashe Tavuyanago, “Public Interest Considerations and their Impact on Merger Regulation in South Africa” (2015) 15:7 *Global Journal of Human Science* 23 and James Hodge, Sha’ista Goga, Tshepiso Moahloli, “Public Interest Provisions in the South African *Competition Act*: A Critical Review” (2009) *Competition Policy, Law and Economics Conference* at 3-5.

which led to notable economic inequality, in particular along racial lines, as well as higher concentration of wealth, a small closed economy and limited access to competitive exports, among other characteristics. Because of this, the South African government believed that competition policy must take into account broader social and political goals. The South African government believed that “competitiveness and development are mutually-supporting rather than contradictory objectives, if policies are properly aligned”³¹.

32. The South African *Competition Act*³² requires the Competition Commission or the Competition Tribunal to consider a closed list of defined public interest factors³³. When considering whether mergers can be justified under public interest consideration, the Commission or the Tribunal must consider the impact the merger will have on the following:

- a particular industrial sector or region;
- employment³⁴;
- the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and
- the ability of national industries to compete in international markets³⁵.

33. Through case law, the Commission and Tribunal have refined the scope and influence of public interest considerations further. In order to have an impact on merger review, the public interest considerations must be “substantial”³⁶. Furthermore, in order to be considered, the public interest consideration raised must also be residual in a sense that it is not already dealt with under another law or regulation to safeguard it³⁷. These are both interpretive principles that can help to limit the otherwise potentially wide-ranging and unpredictable results of applying public interest considerations.

34. Another example would be Germany, where a negative clearance decision by the competition agency can be overruled by the Federal Minister of Economics if the restraint of competition is outweighed by advantages to the economy as a whole or if the concentration is justified by an overriding public interest (cf. Sec. 42 ARC). While such a “ministerial authorization” has been granted only in very few cases, public interest grounds include energy security, health care coverage

³¹ South African Department of Trade and Industry, Proposed Guidelines for Competition Policy – A Framework for Competition and Development (1997) at para 2. See also Simbarashe Tavuyanago, “Public Interest Considerations and their Impact on Merger Regulations in South Africa” (2015) 15:7 Global Journal of Human-Social Science 23.

³² Competition Act 89 of 1998 (South Africa).

³³ It should be noted that in terms of the South African Competition Act, like the merger control regimes of many developing countries, a merger may be prohibited purely on public interest grounds (likewise, a merger which may be anticompetitive, could be approved purely on public interest grounds).

³⁴ Employment has been a key public interest consideration in South African merger reviews, and has received the most amount of analysis. For a more in-depth discussion, see John Oxenham, “Balancing Public Interest Merger Considerations Before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty” (2012) 9:3 US-China Law Review 211.

³⁵ *Competition Act*, s. 12 A(3).

³⁶ *Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd*, 66/LM/Oct01 at para 38. The term “substantial” still leaves the Commission or the Tribunal with discretion (thus leading to some unpredictability in the outcome), since the Tribunal later clarified that the “substantial” threshold is contextual in *Distillers Corporation (SA) Limited v Stellenbosch Farmers Winery Group Ltd*, 08/LM/Feb02 [“Distillers”].

³⁷ *Distillers* at para 237.

by specialized hospitals as well as more recently job guarantees. Such a ministerial authorization was granted in the recent case involving Edeka's takeover of smaller rival Kaiser's Tengelmann, where the Minister of Economic Affairs effectively overruled the decision of Germany's competition agency to halt the merger between the two grocery chains, on condition that Edeka safeguard the jobs of Kaiser Tengelmann's 16,000 works for the next five years³⁸.

35. Given that the decisions of the Minister are subject to appeal, the competent courts have reduced the application of the "ministerial authorization" to exceptional circumstances. Even though the competition authority does not like to be overruled on public interest grounds, it has made clear that the mere possibility of such an "authorization procedure" relieves it from political and media pressure in framing a decision solely based on competition grounds.

3.4 *Limited State Involvement*

36. One of the greatest challenges going forward is limiting the extent of state interest and influence in merger review. Such increased interest can be driven by diverse factors that will typically vary between the domestic and international contexts, and will typically not be restricted to merger control issues, as the government's wider responsibilities for economic development create a strong temptation to implement wider policy goals.

37. In the context of trans-border transactions in particular, this increased interest is driven by greater economic protectionism in the wake of the failure of global trade talks, as well as national security concerns in light of the unstable geopolitical environment. Some examples include the rise of "industrial policy" masquerading as competition considerations, in the form of IP policies or the protection of national champions.

38. This phenomenon is not unique to either developed or developing economies. The UK model provides an example of state intervention creating uncertainty in merger review. In the UK, even though the role of the public interest has been much reduced, the *Enterprise Act* still allows the Secretary of State to prohibit, conditionally approve or authorize mergers on the following defined public interest grounds:

- national security
- plurality of media; or
- stability of the UK's financial system³⁹

39. The government also has the power to impose further public interest grounds through an order, which must be passed by Parliament within 28 days⁴⁰. The last public interest ground, i.e., the stability of the financial system, was added after the global financial crisis in 2008.

40. In a relatively rare example of the application of a public interest consideration prompting the approval of a merger, the UK government considered the stability of the UK's financial system when it approved the merger of Lloyds TSB and HBOS unconditionally, despite certain anticompetitive effects of the transaction⁴¹. However, in the case of the proposed merger between

³⁸ Regulators overruled in supermarket takeover, DW.COM March 17, 2016 at: <http://www.dw.com/en/regulators-overruled-in-supermarket-takeover/a-19122420>.

³⁹ Allison Jones & John Davies, "Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate" King's College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2015-12 at 11.

⁴⁰ Robert Profusek et al., "Foreign investments into the EU: demystifying national protectionism." (Oct 29, 2014) Lexology.

⁴¹ *Ibid.*

Pfizer and AstraZeneca, extensive media and public concern about the potential loss of British jobs and R&D led the UK government to considered adding another enumerated ground to the list of public interest considerations that the Secretary could consider⁴². Although Pfizer's bid failed for other reasons, this transaction demonstrated the enormous political pressure that can be brought to bear in the case of trans-border transactions in particular, as well as the dangers of leaving the categories of public-interest considerations open-ended.

41. In BIAC's view, governments should not have broad discretionary powers under the banner of "public interest" to overrule the competition authority's merger review decisions. The risk of undue political pressure may be even more pronounced for developing countries that are still establishing their competition regimes and need to inject their competition authorities with legitimacy⁴³ and also governments can readily see wider development goals that they may be tempted to implement through competition policy. However, if a governmental authority in either a developed or developing country conducts a separate public interest review, it should be done by a separate institution in a transparent proceeding. In addition, the outcome of the proceeding entailing a weighing of public interest considerations against the restraints of competition established by the competition agency should be subject to a legal review by a competent court.

4. Conclusion

42. Businesses contemplating pro-competitive transactions require substantive and procedural certainty and transparency in the merger review process. No matter how well-intentioned, the introduction of public interest considerations into this process can create undesirable uncertainty, which can have a "chilling" effect on investment decisions, with adverse impacts on levels of economic activity and the long term public interest.

43. In order to promote certainty and transparency in the merger review process, these reviews should remain focused on core competition law principles such as competitive pricing, efficiency and innovation. A merger review based on these principles will also promote public interest considerations such as ensuring productivity, enhanced job security and equity. If extraneous public interest considerations are to be introduced in merger reviews, it is vitally important that these policies be clearly defined and considered by a separate entity in a transparent and certain manner that leaves the merger review process free from political interference.

⁴² Jones and Davies, *supra* note 27 at 15.

⁴³ Hazel, *supra* note 7 at 344.