ANGLIA RUSKIN UNIVERSITY

FACULTY OF BUSINESS AND LAW

DO PUBLIC INTEREST CONSIDERATIONS PLAY A LEGITIMATE ROLE IN MERGER REVIEW? A COMPARATIVE STUDY BETWEEN THE EU AND NIGERIA

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ABSTRACT

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A LEGITIMATE ROLE IN MERGER REVIEW?

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The purpose of the thesis is to discuss whether public interest considerations play a role in merger review in the EU and Nigeria and to determine the extent to which the concept is considered in merger review in the EU and Nigeria.

The research will investigate whether public interest is considered in merger review in the EU and Nigeria and the extent as well as the basis of its consideration. It will also explore how and when public interest is given priority over market effects in the EU and Nigeria as well as carrying out a corporate investigation of cross-influences of merger review in the EU and Nigeria literature. The research will consider the tension in considering public interest factors alongside a competition assessment in a single evaluation with a view to balance the public interest assessment with the competition assessment.

The research will also focus on which public interest counts? How are public interest consideration factors addressed in competition cases? And are all public interest consideration factors appraised the same way? It will also consider critically the methodology of the application of the public interest concept by the Competition Commissions by analysing the exclusionary method and how conditional exceptions are used as remedies to achieve a public interest goal.

The researcher found that public interest consideration in merger review is an aberration in the EU because of its lack of transparency and consistency, and it would play a significant role in Nigeria if the procedural rules were implemented.

The thesis concludes that the concept of public interest is already integrated by the fundamentals of competition law, which have already taken care of consumers' interests, hence there may be no need for the concept to stand alone during merger review.

Keywords: Public, Interest, EU, Nigeria, Merger, Review.

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CHAPTER ONE

1.0 INTRODUCTION

This is chapter one of a seven-chapter thesis that investigates and compares the role being played by public interest considerations in merger review in the EU and Nigeria. This chapter is divided into six sections and sub-sections. The first section discusses the background and purpose of the research while the second section explains the research questions. The third and fourth sections discuss the contributions to the body of knowledge and the limitations of the thesis while the fifth and the sixth sections discuss the research methodology of the thesis and the structure and outline of the chapters. To this end, chapter one discusses and analyses the background and purpose of the research. In doing this, this chapter attempts to find out how and why public interest is considered in a merger review process. A brief history of merger review in the EU and Nigeria will also be discussed and analysed in this chapter. This chapter will also attempt to dissect the meaning of the concept of public interest as well as discuss and analyse definitions of various scholars like W du Plessis, Sterry Waterman, Goodsell, Frank Sorauf etc. on public interest and adopt a definition for this thesis after a considered review of the various definitions. The chapter will therefore highlight different topics, principles, issues and cases on public interest that will be discussed and analysed in subsequent chapters of the thesis. Furthermore, the chapter will discuss the contrasting views of several scholars[1] on the desirability or otherwise of the public interest consideration in merger review.

Having introduced what this chapter is about, it is expedient to discuss the background and purpose of the research.

1.1 BACKGROUND AND PURPOSE OF THE RESEARCH

The main research question concentrated on in this thesis is whether public interest considerations are considered in merger review in the EU and Nigeria and what is the extent and basis of the consideration as exemplified in decided cases in the EU and Nigeria.

[1] Richard Whish And David Bailey, Giorgio Monti, G.O Gbede, Alex Chisholm, Alison Jones And Brenda Sufrin

The research question is necessary to determine whether public interest considerations play any significant role in a merger review process and whether it is necessary to consider public interest considerations in a merger review at all since merger review is expected to be guided by competition rules. The expectation of the competition authorities is that merger review should strictly be based on competition rules, that is, mergers should be assessed only on competition rules without taking cognisance of social factors. While the socialists or welfarists[2] expect merger review to be a combination of social factors and competition rules so as to reduce the effect of strict adherence to competition rules by the competition authorities. In other words, the aim of the competition authorities is to have a depoliticised merger control administration.

In order to understand the significance of the public interest concept in merger review in the EU and Nigeria, a brief history of merger control would be relevant at this stage.

1.1.1 HISTORY OF MERGER CONTROL

Merger control law in Europe came about as a result of the resolve of the then twelve Member States of the European Economic Community in 1986[3] to revive their desire to create a single market by 1993[4]. The purpose of their desire was economic. The Member States wanted an integrated market for over 320 million people in the EU with the attendant scale to reduce inefficiency and be able to compete effectively with American and Japanese firms[5]. It was predicted that the benefits from such a large market in terms of savings would be to the tune of 258 million euros and one-third of such savings would come from rationalising and restructuring of inefficient firms in the EU[6].

The twelve Member States realised the importance of mergers in industrial restructuring and decided to agree on a way and manner to police interstate mergers in order to realise the benefits of an integrated market. In view of this agreement, the Council of Ministers,

[2] Douglas. G. Baird, 'Bankruptcy's uncontested Axioms' 108 Yale I.J 1998 Pages 573-577

[3] European Economic Community Members; Germany, France, Italy, Belgium, Luxemburg, The Netherlands, Denmark, Ireland, United Kingdom, Greece, Spain And Portugal

[4] Ulrich Von Koppenfels. 'A Fresh Look At The EU Merger Regulation?: The European Commission's White Paper. 'Towards More Effective EU Merger Control' Liverpool Law Review (2015) 36: 7-31

[5]Weitbrecht ,Andreas, 'Under the Radar of Public Attention?, EU Merger Control 2016' ECLR 2017, 38(6), 251-264

[6] Anu BradFord, Robert J. Jackson And Jonathan Zytnick. 'Is EU Merger Control Used For Protectionism? An Empirical Analysis. J.ELS 2018, 15(1) Pg 65-191

which is the decision-making body of the Commission, reached agreement to introduce a common merger control regulation on December 21, 1989[7].

The 1989 Regulation empowered the Commission to reject or approve all mergers in which the Commission has jurisdiction. That is, mergers with a 'community dimension', or in other words, mergers that met the thresholds stipulated by the European Commission. Pre-notification of the proposed merger must be made to the Commission who have the final authority to either approve or reject the proposed merger after examining whether the proposed merger would "create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market". The Commission could base its approval or rejection of the proposed merger on factors such as barriers to entry, a company's financial and economic power, structure of the market, potential competition and the extent to which the proposed merger might contribute to the economic progress of the EU.

The ambiguity and limitation of scope of the 1989 Regulation made the Regulation of 2004 on merger control inevitable. The 1989 Regulation could not address the issue of demarcation of national and community jurisdiction, the yardstick for evaluation of mergers and the method to be adopted in undertaking evaluation by the Commission[8].

The need to correct the shortcomings of the 1989 Regulation brought about the amendments of 1997 and 2004 which ultimately led to the emergence of the current Regulation 2004[9].

To underscore the importance of merger control, the EU in its website on the overview of the role of the Commission on merger control states that mergers may expand markets for the benefit of the economy, introduce new products and reduce production costs, which will lead to increased efficiency and benefit the consumers with a reduced price from higher quality of goods[10].

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[7] Dethmers, Frances. 'EU Merger Control: Out Of Control?' ECLR, 2016 Vol37(II) PP. 435-452

[8] A.C. Witt, 'Public Policy Goals Under EU Competition Law' (2012) 8 European Competition Journal Pg 24-36

[9] Ulrich Von Koppenfels. 'A Fresh Look At The EU Merger Regulation?: 'The European Commission's White Paper 'Towards More Effective EU Merger Control' Liverpool Law Review (2015) 36: 7-31

[10] European Commission On 'Merger Policy of The EU' 24th September 2015 Available at ec.europa/competition/mergers/overview.en.html .Accessed on 1ST April 2020

As good and beneficial as mergers of companies sound, they may bring hardship to the consumers and thereby affect the economy of the nation when they are aimed at reducing competition in the market with the creation or strengthening of a dominant player.[11] The resultant effect of a reduction in competition in a market as a result of merger is the introduction of higher prices to consumers, reduction of choice or less innovation on the part of the merging entities[12].

The need to curb these excesses or nip this unwholesome situation in the bud is what brought about merger review and the objective of merger review is to examine the proposed marriage of two companies to prevent a harmful effect on competition.

The inadequacies of Article 101 and 102 of TFEU as highlighted under section 1.1.4 of chapter one of this thesis and as exemplified by the cases of *Continental*[13] and *Bat and Reynolds*[14] brought about the need for a regulation specifically for merger review, hence the birth of the EU Merger Regulation[15]. The aim of the Regulation[16] is for the Commission to review mergers of a certain size and ensure that such merger is compatible with the common market and it would not significantly impede effective competition. The next sub-section will briefly discuss the meaning of the term public interest in this thesis.

1.1.2 MEANING OF PUBLIC INTEREST IN THIS THESIS

For the purpose of this work, the term public interest will be used to refer to situations where other social factors like industrial policy, national interest, public security, prudential rules and plurality of the media, etc. take the place of competition rules in a merger review. The list of public interest considerations is not exhaustive.[17] Public interest in the EU or Nigeria could either be general as in legitimate public interest or overriding public interest, or it may be specific, reflecting the political, economic and

[11] 'European Commission On Merger Policy Of The EU' 24th September 2015 Available At ec.europa/competition/mergers/overview.en.html .Accessed on 1st April 2020
[12] Richard Whish And David Bailey, 'Competition Law' 9th Edition (Oxford University Press 2018) P. 712
[13] Case 6/72, Europemballage Corp and Continental Canco V. Commission [1973]ECR 215
[14] Case 142 and 156/84 [1987]ECR4487, paras 36-39
[15] Council Regulation (Commission) 139/2004 (OJ 2004L24/129.01.2004)
[16] Council Regulation (Commission) 139/2004(OJ2004L24/129.01.2004)
[17] DAF/Comp/WP3/M (2016) 1 /ANNS/FINAL, 'Executive Summary Of The Round Table On Public Interest Considerations In Merger Control' 14 June, 2016.Pg10

social needs of a country.[18] In a broader sense throughout this research, the term 'public interest' will be used to refer to circumstances or factors that do not conform to the basic competition rules in a merger review, that is, non-economic factors such as plurality of the media, public security, industrial policy and prudential rules, which means rules created to ensure financial stability of banks and other financial institutions. In other words, it refers to situations where transactions that are competitive are declared anti-competitive in merger review or vice versa because of application of the concept of public interest, or where the fundamentals of competition rules are subordinated to the public interest concept in a merger review.

At this juncture, it is apt to discuss briefly the views of above-mentioned scholars on the definition of public interest in this thesis, and to settle for one of the definitions of said scholars.

1.1.3. VIEWS OF SCHOLARS ON THE DEFINITION OF PUBLIC INTEREST

According to W du Plessis,[19] the term public interest generally means 'a collective noun for a variety of economic, strategic, administrative, social and legal interests that have emerged throughout the history of a state as being worthy of the state'. These interests also uphold the balance in a community between the conflicting interests of individuals in their relation to the state. On the other hand, Sterry-R. Waterman[20] defines public interest as 'some interests by which the legal rights or liabilities of the community at large are affected'. While Goodsell[21] defines public interest as 'values that may be followed by public professionals who would act in the public interest. These values are: legality, morality, political responsiveness, political consensus, concern for logic, concern for effects and agenda awareness' and Frank Sorauf[22] defined the concept as 'an ethical imperative, some superior standard of rational and right political wisdom or the goals or consensus of a large portion of the electorate'.

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[18] Dave Poddar, "Public Companies And Competition Law: The Launching Of An ICN Project' httpss://www/competitionpolicy international.com/profile/show/27741 & Gemma Stooke (https://www.competitionpolicy international.com/profile/show/27742) Clifford Chance LLp. Accessed on17th December 2019

[19] W Du Plessis, 'A Definition Of The Concept Of Public Interest' 1987, SOTHRHR At 290.

[20] Sterry Waterman, 'Whither The Concept Affected With A Public Interest?' 1972, 25 Vanderbilt Law Review At45

[21] C.T. Goodsell, 'Public Administration And The Public Interest' 1990, Sage Publications, Newbury Park at 96-113

[22] Frank Sorauf,' The Public Interest Reconsidered' (University Of Chicago Press Journals) 1957 pp.212

This research adopts the definition provided by W du Plessis and contends that the concept has much to do with the welfare and benefits due to the community even though such benefits may not be easily ascertainable. This thesis adopts the definition of W du Plessis in view of the fact that the Competition Commission as it were is always trying to balance the competition interest of efficiency with the public interest concept of employment, plurality of the media, public security and prudential rules in a merger review . This is necessary in order to ensure that the welfare of the consumer is attained and protected.

This thesis also adopts W du Plessis's definition in order to shed more light on the expropriation of the public interest concept of public security, prudential rules and plurality of media for competition elements in a merger review for over- all benefit of the consumers on the basis of public interest[23].

Having settled for the definition of W du Plessis in this chapter, the remaining part of the next section of the chapter will discuss issues, topics, principles and cases that will be discussed and analysed in the thesis.

1.1.4. ISSUES, TOPICS, PRINCIPLES AND CASES TO BE DISCUSSED IN THE THESIS

This thesis under sections 3.2 and 6.2 of chapters three and six will review and compare various public interest principles such as public security, the plurality of the media, prudential rules, national interest, environmental policy, industrial policy, consumer policy, culture, loss of efficiency, concentration of wealth and overseas control on merger reviews by competition authorities in the EU and Nigeria and their economic considerations, to determine the appropriateness or otherwise of those principles and the desirability of the economic considerations.

There are rules and regulations guiding merger review under the EU[24], and these rules and guidelines can be classified under competition law and public interest considerations. These two indices have been the basis of the decisions of the EU Commission and the General Court, and the Court of Justice of the European Union (CJEU) has interpreted these principles as necessary guidance for merger review even though there have been suggestions whether merger review should be solely based on

[23]BV Slade, 'Public Or Public Interest' And Third Party Transfers Per/Pe LJ 2014 (17)1.
[24] Weitbrecht Andrews, 'EU Merger Control In 2005 – an overview' ECLR, 2006, 27(2) 43-50

competition considerations alone without accommodating other social factors like employment and industrial policy as discussed in chapter two of the thesis. The essence of the thesis is to assist the policy makers in taking informed policy decisions on merger review in the near future.

In order to appreciate the role played by public interest considerations in merger review, it is desirable to understand the background of public interest considerations in merger review. The remote and immediate evolution of the policy will be analysed and discussed in chapter two of the thesis with the view of bringing out the significance of public interest considerations in merger review.

Until 1999, the European Commission believed that public interest considerations were not relevant in competition law in Europe[25]. The basis for this position was found in statements by the Commission that the purpose of Article 101(3) TFEU is to provide a legal framework for the economic assessment of restrictive practices, and not to allow the application of competition rules to be set aside because of political considerations[26]. Alexander Schuab, a former EU Director General of Competition, supported this view when he said that:

'while the ultimate objective underlying the political decision to have competition policy is the promotion of the public interest widely defined, the day-to-day enforcement of competition law should not be translated into criteria for law enforcement but are achieved by preventing distortions of competition in the internal market' [27]

The European Commission has since moved away from the position that public interest considerations were not relevant in competition law, stating that the language of Article 101(3) includes other non-economic values, including a form of distributive justice and some form of industrial policy[28] that takes cognisance of public interest considerations.

[25] EC Commission Whiter Paper On Modernisation Of The Rules Implementation Articles [101] And [102] Of The
Treaty Com (99) 101 Final Para 57

[26] EC Commission Whiter Paper On Modernisation Of The Rules Implementation Articles [101] And [102] Of The
Treaty Com (99) 101 Final Para 57

[27] A Schuab, 'Working Paper VII' In C-D. Ehlermann And L. Lauda (Eds) European Competition Law Annual 1997. Objectives Of Competition Policy (OUP 1998)

[28]Giorgio Monti, 'EC Competition Law' (Cambridge University Press) 2007 pp90

Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) compels the insertion of certain public interest considerations through the inclusion of 'cross sectional clauses' (these are clauses that cover environmental protection, cohesion, employment and social policy, and their purpose is to ensure a balance between public interest concept and competition), which encourage taking into consideration the effects of other public interest considerations in the implementation of community policies in a given area.[29]

These divergent views centred on the effect of public interest considerations on restrictive agreements, but could not deal directly with merger reviews. Even though certain aspects of Articles 101 and 102 TFEU could be applied to mergers and the acquisition of shares, there were no procedural regulations to support the application of these Articles by the Commission. It was this failure of the two Articles to provide an effective system of merger control that led to the adoption of merger regulation, first in 1989 and later in the European Merger Control Regulation of 2004[30] (EUMR). The concept was introduced to the Nigerian jurisdiction in 2007 through the importation of the South African Competition Act of 1998[31]. It was introduced with the enactment of Investments and Securities Act of 2007[32]. The wording of the South African Act 1998 was exactly the same as the wording of the Investments and Securities Act in Nigeria. It was because of the shortcomings of the Investments and Securities Act 2007, which were primarily due to the absence of a single and independent Competition Commission for merger review in the 2007 Act that led to the enactment of the new Federal Competition and Consumer Protection Act of 2019.[33]

This inadequacy in the merger regulation of 1989[34] was not so apparent in *Europemballage Corp and Continental Can Co. Inc v Commission* [35] when the Court upheld the Commission's view that Article 102 TFEU could be used to prevent a dominant undertaking from abusing its position by acquiring a competitor, and thereby strengthening that dominant position. If there was no dominance, Article 102 TFEU

[29] Treaty On The Functioning Of The European Union
[30] Council Regulation (EC) 139/2004 Of 20 January, 2004
[31] South African Competition Act No. 89 Of 1998 As Amended.
[32] Investments And Securities Act 2007
[33] Federal Competition And Consumer Protection Act, 2019
[34] Council Regulation (EEC) No 4064/89 Of 21 December 1989
[35] Case 6/72, Europemballage Corp And Continental Can Co. Inc. V. Commission [1973] ECR 215

would not have been successfully applied. This confirms the gap in the application of Article 102 TFEU to merger review, but its partial success in *Europemballage*[36] did not highlight the inadequacy of Articles 101 and 102 TFEU until *Bat and Reynolds v Commission*[37] was decided. In *Bat and Reynolds*[38] the difficulties and ambiguities raised and left unresolved by the judgement in trying to confirm acquisition by an undertaking of a minority shareholding in another led to widespread concern in the industry as a result of the application of Article 101 of TFEU.

A closer look at Article 21(4) of EUMR on the legitimate interest clause reveals that Member States may take appropriate measures to protect legitimate interests other than those considered by EUMR that are in compliance with the general principles of Community Law. In addition, other provisions of EU Law and doctrine enshrined in Article 346(1) b TFEU will reveal the backing of EUMR on public interest considerations in merger review. A further look at other theories of public interest such as loss of efficiency, concentration of wealth, unemployment, overseas control, environmental policy, industrial policy, national interest, consumer policy, culture, and special sectors, all of which might give the impression that merger review is entirely based on public interest considerations without taking into consideration the importance of the economic reasons that border on competition law. This issue is discussed in chapters two and three of the thesis.

The role of public interest considerations in merger review is a worldwide phenomenon as it is discussed in various jurisdictions all over the world. America's jurisprudence deals with this topic[39]; over the years most African countries like Nigeria and South Africa have also developed the concept of public interest considerations in their merger review laws as a result of their political background and history. What constitutes public interest considerations in both Nigeria and South Africa is similar even though the backgrounds that necessitated the requirements in both countries are not similar as Nigeria did not experience apartheid while South Africa practised apartheid until 1994.

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[36] Case 6/72, *Europemballage Corp and Continental Can Co Inc v. Commission* [1973] ECR 215

[37] Case 142 And 156/84 [1987] ECR4487, Paras 36-39

[38] Case 142 And 156/84 [1987] ECR4487, Paras 36-39

[39] Jay Lawrence Westbrook, 'Commercial Law and Public Interest' 2015, Penn State Journal Of Law And International Affairs. Volume 4 No 1 Pages 1-15

In chapters two and five, the thesis will occasionally consider the cases from South African jurisprudence in order to compare the basis of their political consideration in merger review, which is influenced by their apartheid history to the Nigerian and UK's jurisprudences, which are devoid of apartheid political background. The thesis will consider cases from South Africa because the country played a significant role in shaping the Nigerian competition regime as the newly enacted law on competition in Nigeria was imported from South Africa.

There have been concerns about the relevance of public interest considerations in merger review. The South African theory is that public interest consideration was integrated into the law to promote employment and advance social and economic welfare, and to enable small- and medium-sized enterprises to participate in the economy; and to promote a wider ownership spread, particularly in relation to historically disadvantaged people.[40] Another theory is that public interest considerations have no relevance in the determination of whether a merger will be approved, prohibited or approved with conditions, because in their view there is no way the Commission will approve an agreement that is restrictive of competition on the ground of public interest consideration, and most mergers are considered purely on the well-known indices of competition law.[41]

A further theory that the essence of public interest consideration in merger review is to promote ownership of businesses by South Africans was flawed as most cases decided since the South Africa Competition Act[42] have found public interest considerations not to be relevant in determining whether a merger was likely to substantially prevent or lessen competition, while the proponents of non-relevance of public interest considerations in merger reviews are astonished at certain decisions like *Wouters and*

[40] Lesley Morphet, 'South Africa Competition and Public Interest' 2007,pg28
http://www.mondaq.com/southafrica/xN47176/Trade<accessed17 May 2019

[41] G.Van Gerven, 'The Application of Article 8 in the New Europe' (2003) Fordham Corporate Law Institute 429- 30(Haw ed20)
Case Comp/M.4439 Ryanair/ AerLingus Decision of 27 June 2007
Case Comp/M.5364 Iberia/Vueling/Clickair Commission Decision of 9 January 2009

[42] South Africa Competition Act No. 89 of 1998 As Amended
Shell v. Tepco Petroleum Co. Ltd Case No. 66/LM/October 01 Paragraph 58
Minister of Economic Development et al and Wal-Mart Stores Inc. et al ('Wal-Mat/Massmart') Case No 1101/CAC/Jul 11

others v. Algemene Raadvande Nederlandse order van Advocates[43] where the European Commission approved a merger on reasons that are restrictive of competition. In *Wouter*[44] the Commission held that any restriction of competition necessary to safeguard a national public interest consideration may be allowed to stand.

The divergent theories on the relevance of public interest considerations in merger reviews have created confusion because the first step of a merger analysis is to determine whether a merger is likely to prevent or lessen competition, and this is achieved by assessing all the accepted tools of competition analysis including the test of significant impediment of effective competition and market definition. The competition authority must then determine whether the merger can or cannot be justified on public interest grounds by considering the effect of the merger on public interest consideration factors.[45] This thesis in chapter two will argue that there is an element of public interest consideration in every decision taken by the European Commission in as much as the interest of consumers is protected. It is also argued that, if the aim of merger policy under the EU is to promote or ensure the maintenance of rivalry in the market, the Commission will only approve a merger that is anti-competitive to service a public interest consideration.

Public interest in merger review involves an assessment of the impact of the merger on a particular industrial sector or region; employment; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive and the ability of national industries to compete internationally.[46]

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[43] Case – 309/99 *Wouters and others v. Algemene Raadvande Nederlandse order van Advocates* [2002] ECR I-
1577

[44] Case – 309/99 *Wouters and others v. Algemene Raadvande Nederlandse order van Advocates* [2002] ECR I-
1577

[45] Lesley Morphet, 'South Africa Competition And Public Interest' 2007, Pg28
http://www.mondaq.com/southafrica/xN47176/Trade<accessed 17 May 2019

[46] Andrew Scott, 'The Evolution of Competition Law And Policy In The United Kingdom' 2009, LSE Law, Society
And Economy Working Papers.1-15

According to Hantke-Domas, public interest in the legal context has more to do with the realisation of political and moral values, and it is this concept of public interest that informs the decision makers on how to decide disputes where there is conflict.[47]

This study in chapter five will agree with Hantke-Domas in part as the economic consideration cannot be wished away by the competition authority in reviewing a merger in as much as the political consideration may be relevant in some cases. The thesis in chapter five will also argue for the importance of the economic consideration in reviewing a merger as this is the fulcrum of competition law. In chapter two and three the thesis will further argue that the role of public interest considerations in merger review may be inconsequential in certain situations.

Chapter four will also consider the tension in considering public interest factors alongside a competition assessment in a single evaluation, such as a merger decision, in that there may be no clear way to balance the public interest assessment and the competition assessment.[48] Recitals 4, 23 and 29 EUMR suggest that non-competition considerations such as national interest, industrial policy, consumer policy and public security may be taken into account, but it is unclear how and how far they may affect decisions. Chapters two and five will also look critically at the extent to which public interest is considered in decisions under merger review in Europe and Nigeria.

Chapters two and three attempt to investigate and determine how public interest factors are appraised in a merger review in the EU by analysing the position of the courts on the value to be placed on each public interest factor in relation to the merger being reviewed. To this end, the General Court in *Metropole*[49] in determining the relevance of public interest in merger review raised three questions on the relevance of public interest considerations in merger review: which public interest counts? How are public interest consideration factors addressed in competition cases? And are all public interest consideration factors appraised in the same way or do some count more than others?[50]

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[47] Hantke- Domas, 'The Public Interest Theory Of Regulation, Non Existence Or Misinterpretation' [2003]
European Journal of Law and Economics 15(2),35

[48] Stephen Wilks, 'In The Public Interest: Competition Policy And The Monopolies And Mergers Commission'
(Manchester University Press 1999) 25.

[49] *Metropole Television (M6) and others v. Commission*(2001) ECR II-2459, 30, 34, 126

[50] Bouterse, Wesseling And Sauter,' Competition Law and Industrial Policy in the EU' (Oxford 1997) CAP 4 10-12

These questions were relevant to the public interest considerations in merger reviews because it is almost impossible to determine which of the public interest considerations count, and whether it is environment, national interest or industrial policy that is preferable to others. The Commission has not been able to come up with guidelines on how public interest consideration factors should be addressed in competition cases or the appraisal method of the public interest considerations. The thesis will align with the questions asked by the Court and discuss these questions comparatively between Nigeria and EU.

In trying to play down the relevance of public interest considerations in merger reviews, the Commission attempts to narrow the meaning of Article 101(3) in its Guidelines on the Application of Article 101(3) EC by interpreting the phrase 'technical or economic progress' narrowly and in such a way that it only includes economic efficiency and also marginalises the role of non-efficiency consideration.[51] This means the Commission places more emphasis on economic efficiency by not interpreting widely the term "technical or economic progress" so as to include public interest considerations[52]. The strategy adopted in the Guidelines, which is discussed in chapter three of the thesis, was to subsume goals highlighted in the Treaty under the four conditions enumerated in Article 101(3) TFEU[53].

This development made reasons such as employment, cultural and industrial policy considerations irrelevant because they cannot be subsumed under the 'efficiency' gains of Article 101(3) TFEU.[54]

Chapter three will also critically look at the position of Jean Dermine that public interest considerations are mainly for the protection of investors, systemic stability, potential impact on lending to small- and medium-sized firms (SME), and international competitiveness of financial firms[55]. The thesis will advance the argument that public

[51] David Cardwell, 'The Role Of The Efficiency Defence In EU Merger Control Proceedings Following UPS/TNT, Fedex/TNT And UPS v. Commission 2017, Journal Of European Competition Law And Practice, Vol. 8 (9) Pages 551-560

[52] Guidelines In The Application of Article 101(3) of the Treaty (2004) OJ (101197 Para 50

[53] Giorgio Monti,' EC Competition Law' (Cambridge University Press 2007) 95

[54] Giorgio Monti,' EC Competition Law' (Cambridge University Press 2007) 94

[55] Alison Jones And Brenda Sufrin, 'EU Competition Law: Text, Cases And Materials;' 6th Edition (Oxford University
Press 2016) 1245

interest considerations are not incorporated into merger review basically for the reasons stated by Dermine.

The methods used in applying public interest considerations by the Commission will also be analysed critically. Chapter four will look into the exclusionary method, how economic efficiency is redefined to include other public interest considerations, how economic benefits are used as factors that tip the balance in favour of granting an exception, and how conditional exceptions are used as remedies to achieve a public interest goal.

The research in chapter six will also consider the role of public interest considerations in merger reviews in Nigeria as an under-developed country. The basis of public interest considerations in Nigeria, which are akin to those of South Africa, will be compared with Article 21(4) EUMR 2004, which provides that the range of public interest includes only three items: (1) public security; (2) plurality of the media; and (3) prudential rules.

It will also consider the advantages and disadvantages of public interest considerations in merger review and the significance of public interest considerations in merger review in the context of Nigeria as a developing nation vis-à-vis Europe as a developed continent.

Chapter six will thoroughly examine the actual weight these public interest considerations have in the merger review, how and where they are considered and what difficulties or challenges await any Commission that emulates this approach as a template for its merger review policy.

The thesis in chapter six will also identify the analytical process followed in a merger review situation and empirically examine the effect of these public interest considerations on the final decisions as against the other economic considerations usually taken into perspective during merger review. It will also scrutinise the methodology and principles behind merger review in Europe and compare them with the purpose of merger review in Nigeria so as to bring the inadequacies of the Nigerian merger review policy to the fore for proper evaluation.

Having highlighted the issues, principles and cases relating to the public interest concept that would be discussed in this thesis, it is necessary to briefly discuss the contrasting views of scholars on the need for public interest in merger review.

1.1.5. VIEWS OF SCHOLARS ON PUBLIC INTEREST AS REGARDS MERGER CONTROL

There are contrasting views on the need for public interest considerations in merger review. Alison Jones and Brenda Sufrin argued that public interest considerations like industrial, social and other factors are not reckoned with in the EU when appraising mergers, but they did agree that the provisions of Article 21(4) of the EUMR on legitimate interests allow the Member States to protect legitimate interests that are not protected under the EUMR during merger review[56]. The recognised legitimate interests are public security, plurality of the media and prudential rules. The authors also conceded that the provisions of Article 21(4) EUMR could only be used defensively. That is, a Member State may, while protecting its legitimate interest, prohibit mergers which raise concerns that are not strictly competition based, but cannot authorise a merger on public interest grounds where the EUMR does not apply. Alex Chisholm agreed with Alison and Sufrin and argued that merger review does not need a dose of public interest to perform optimally[57]. He went further to argue that weaknesses of the concept of public interest in terms of deficiency of transparency and certainty when applied in a merger assessment were enough reasons to discourage investors from embracing mergers that could otherwise be beneficial to consumers and the economy. He then concluded that the current regime of merger control in the UK is an "independently administered rule based system that provides legal certainty, limits itself to minimal economically justified interventions and inspires business and consumer confidence". Richard Whish and David Bailey on the other hand are of the view that the Commission unwillingly supports the intervention of public interest considerations during merger review in the EU with provisions such as Article 21(4) of the EUMR on legitimate interest[58], Article 346(1)(b) of TFEU on matters of security of

[56] Alison Jones And Brenda Sufrin, 'EU Competition Law: Text, Cases And Materials;' 6th Edition (Oxford University
Press 2016) 1245

[57] Alex Chisholm, 'Alex Chisholm Speaks About Public Interest and Competition –Based Merger Control' Speech Given by CMA Chief Executive, Alex Chisholm At the Fordham Competition Law Institute Annual Conference Published 11 September 2014. (https://www.gov.uk/government/people/alex-chisholm) Accessed 29th Nov.2019.

[58] Richard Whish And David Bailey, 'Competition Law' 9th Edition (Oxford University Press 2018) P. 767

Member States, Article 4(5) and Article 22 of EUMR on referral of concentration not having a union dimension by Member States to the Commission and Article 4(4) and Article 9 which allow the Commission to refer a concentration to a Member State to review on behalf of the Commission. Giorgio Monti concurred with Richard Whish and David Bailey. He was of the opinion that public interest considerations in merger review are an integrated part of the competition law[59]. He went further to argue that competition policy must have an impact on other community policies in order to be of great relevance to the society and not be marginalised. He then concluded that factors like environmental policy, industrial policy, employment policy, consumer policy, culture policy and national interest are methods used to recognise public interest factors in merger review[60]. In contrast, G.O. Gbede is of the view that the basis of consideration of public interest in merger review is to assist competition law. His position is predicated on the ground that effective implementation of competition rules will have no significant meaning without the application of other social factors alongside the pure competition rules[61]. In this regard, this research advances the argument that public interest consideration is rarely considered in merger review and that if it must be considered, it must be in accordance with the established principles to guide competition authorities in balancing the public interest considerations with the competition interest in merger review.

In order to demonstrate the limitations of Article 21(4) EUMR and S.94 of the Federal Competition and Consumer Protection Act[62] in the context of public interest in merger review, this research will use and analyse several decided cases[63] as a case study. In this regard, the thesis will focus on cases decided by the General Court and Court of Justice in Europe as well as the Competition Appeal Tribunal in South Africa (since there is a dearth of cases on public interest in Nigeria) to establish the limitations of

[59] Giorgio Monti, 'EC Competition Law' (Cambridge University Press 2007) 12
[60] Giorgio Monti, 'EC Competition Law' (Cambridge University Press 2007) 12
[61] G.O. Gbede, 'Strategic Mergers And Acquisitions: The Nigerian Perspectives' (2010) 1 FLR 29.
[62] Federal Competition And Consumer Protection Act 2019.
[63] Case M 423, NewsPaper Publishing (1984) Paras 25-30 And Case M. 5932, Newscorp/Bsky. B (2010) Paras 304-309
Case M. 759, Sun Alliance/Royal Insurance (1996), Paras 16-17
Case M. 1616, BSCH/A.Champalimand (1999) Para 66
Case 4197, E.ON/Endesa (2006) Para 25
Case No. 41/LM/July 10. Metropolitan Holdings Ltd And Momentum Grass Ltd.Para60
Case No. 53/AM/July 11. Kansai Paint Co. Ltd And Free world Coatings.Para36

the two laws on the concept of public interest in merger review as regards competition law.

With divergent theories on the relevance of public interest considerations in merger reviews, the suitability of the application of Article 21(4) of EUMR and s.94 (2) of the Federal Competition And Consumer Protection Act[64] (which is the law that governs mergers in Nigeria) to merger review need to be critically and comparatively analysed and discussed.

1.2 RESEARCH QUESTIONS AND SCOPE OF THE THESIS

The main research question concentrated on by the thesis is whether public interest considerations are considered in merger review in the EU and Nigeria, and if considered, to what extent are they considered as well as the basis of the consideration as exemplified in decided cases in the EU and Nigeria.

There is a need to break down the main research question because of its expansive scope. In order to answer the main research question, the following sub questions are asked in the thesis:

1. Whether the evolvement of the public interest concept in the EU and Nigeria has any impact on the way the concept is accommodated during merger review? This is addressed in chapter two.

2. What is the basis of the concept of public interest in the EU and how is the concept considered by the European Commission with regards to merger review? This is addressed in chapter three.

3. How significant is the role of the notion of public interest in merger review in the UK as analysed by decided cases? This is addressed in chapter four of the thesis.

4. What are the implications of public interest provisions in the newly enacted Federal Competition and Consumer Protection Act in Nigeria as regards merger review? This is addressed in chapter five of the thesis.

[64] Federal Competition And Consumer Protection Act 2019.

5. Is the concept of public interest in Nigeria and the EU the same in terms of social, law and economic perspectives? This is addressed in chapter six of the thesis.

6. Finally, what are the implications of the recommendations of the researcher on his findings as regards policy implementation on the extent of consideration of public interest in merger review in the EU and Nigeria. The conclusion chapter addressed this issue and recommended several informed policy recommendations.

1.3 CONTRIBUTIONS TO BODY OF KNOWLEDGE

Much has been written on the importance of public interest considerations in merger reviews[65], and only a limited body of legal literature critically assesses the suitability of Article 21(4) EUMR and s.94(2) of Federal Competition Act to merger review in Europe and Nigeria comparatively. This is the first aim of the thesis.

Secondly, although the relevance of public interest considerations in merger reviews has drawn a considerable amount of attention, none of the existing legal literature[66] offers realistic policy recommendations to deal with the issue of substantive tests for reviewing mergers either solely on public interest consideration grounds or jointly on

[65]Weithbrecht Andreas, 'From Cement To Digital Industries – EU Merger Control 2014' ECLR 2015, 36(4), 148-153
Weithbrecht Andreas, 'Innovation And Procedure – EU Merger Control 2017', ECLR 2018, 39(6) 250-265
Ulrich Von Koppenfels, 'A Fresh Look At The EU Merger Registration. The European Commission's White
Paper. 'Towards More Effective EU Merger Control' ' Liverpool Law Review (2015) 36. 7-31
Anu BradFord, Robert J. Jackson And Jonathan Zythick, 'Is EU Merger Control Used for Protectionism? An
Empirical Analysis'. J.ELS 208, 15(1) 165-191
Koutsky Thomas And Lawrence J. Spirak, 'Separating Politics From Policy On FCC Merger Reviews: A Basic
Legal Primer Of The Public Interest Standard' Common Law Conspectus Spring, 2010, Vol 18(2) Pg. 329-347.

[66] Fabienne Ilzkovitz, 'European Merger Control: Do We Need An Efficiency Defence?' (2003)3 Journal of
Industry, Competition and Trade 57
Grenfell Michael, 'Merger Control-Levels of Control in the U.K and EU' (Norton Rose 1997) 25
Jean Dermine, 'The Economics of Bank Mergers in The European Union, A Review Of The Public Policy Issues'
(1999) Insead Working Paper 99/35 FIN
Raybould, David, 'U.K. Merger Policy: A Case For Reform' (1983)12 Int'l Fin. L Rev 30
Johannes Luebking, 'The EU Merger Regulations Ten years After the 2004 Review' (2014) 5(4) Journal of
European Competition Law & Practice 185

public interest consideration grounds and economic grounds. In other words, there is no substantive test for reviewing mergers on public interest grounds alone or public interest and economic grounds together[67]. This gap is what the thesis is expected to fill as its contribution to the academic world.

Thirdly, scholars[68] of merger review studies have shown great interest in the UK, Europe and the US, probably because of their volume of merger transactions, but none concentrate on developing countries like Nigeria.

Fourthly, the thesis will contribute to the wider goal of fostering public interest considerations in merger review within the EU and Nigeria by critically examining Article 21(4) of EUMR and S.94(2) of the Federal Competition And Consumer Protection Act to merger review with the aim of suggesting policy recommendations to ameliorate identified shortcomings of the two legislations.

1.4 LIMITATIONS OF THESIS

The thesis is concerned with the relevance of public interest considerations in merger reviews in the EU and Nigeria. The thesis will not discuss Articles 101, 102 and 103 of the TFEU extensively, but may make reference to them occasionally. The thesis will also not discuss the EUMR on the statistics of notification and phase II investigations during merger reviews because they are not relevant to the theme of the thesis, which is the significance of public interest to merger review in the EU and Nigeria.

Contractual restrictions directly related and necessary to a merger, full function, joint ventures and principles applicable in cases of the acquisition of an undertaking will also

[67] There is No Known Substantive Test To Determine How To Apply Public Interest In Merger Review. There Are Laws That Provide That Public Interest Should Be Considered In A Merger. Laws like Article 21(4) Of The EUMR That Classified Plurality of the Media, Prudential Rules And Public Security As Public Interest But The Law Is Silent On How A Commission Will Determine What Constitutes Prudential Rules Or Public Security. The Interpretation Is Left At The Whims Of The Commission. The Same situation is applicable To The Nigerian Law that Provides that Effect Of Employment, A Particular Industrial Region and Ability Of Small Business To Be Competitive should be Considered During Merger Review Without Stating How The Commission Will Determine The Effect Of Such Factor On a Merger. This is different from Established Tests Like The Dominion Test And Significant Impediment To Competition Test (SIEC) That Apply in Competition Law When Reviewing Mergers Based On Competition Rules Alone.

[68] Allison Jones, Richard Whish, Giorgio Monti, Aelex Chisholm, Grenfell Michael, Alex Nourry, Nelson Jong And Johannes Luebking.

not be discussed in the thesis, as the research will focus on determining the relevance of public interest considerations in merger reviews.

1.5 METHODOLOGY

In order to verify the status of the law, a doctrinal legal research method will be adopted to lay the foundation for the project as arguments are derived from authoritative sources such as existing rules, principles, proceedings, scholarly publications, journals and texts. A qualitative method of research will be used to evaluate the adequacy of the existing rules and recommend necessary changes.

A doctrinal method of research entails studying existing laws, authoritative materials and related case-law and statutes in analytical manner on an identified matter. It is also called black letter methodology. It is also a library- based research method which focuses on analysis of statutory provisions in various documents.[69]

Having defined doctrinal method of research, it is apposite to also define comparative method of research which this thesis will also adopt.

A comparative research methodology entails comparisons across different cultures and countries. It focusses on similarity and differences of the research object in order to have a better understanding of the object. In other words, Comparative methodology is a system of inquiry, investigation and analysis by comparison. It involves evaluation of two or more subject matters or issues by analysing the relevance and characteristics of each, the similarities and differences to one another, as well as the degree of these similarities and differences. In law, it entails comparing selected laws across time, space or geography, in order to draw particular insights and conclusions[70]

As the thesis compares merger reviews in Nigeria and EU, a comparative law methodology is used in the thesis to bring out a commitment to theory and to establish

[69] Dawn Watkins & Mandy Burton, 'Research Methods In Law' 2017, Taylor & Francis Group, 2017 Chapter 1 at Page 32.
[70]Charles C. Ragin, 'The Comparative Method' 1989, University Of California Press, Chapter 1 at Pg. 10.

and advance legal epistemology[71]. The interesting feature of comparative research method is the ability to reveal some of the deeply entrenched and unnoticed parochial assumptions peculiar to one legal system when compared with another[72].

This study adopts a comparative approach in view of unlimited access to the cases, statutes and academic articles of Nigerian legal systems and cultures which are available online.

The comparative research approach adopted by the thesis will also allow the thesis to research into how different legal systems and legal cultures have addressed problems faced by the Nigerian legal system and the degree of success achieved in that regard[73].

The comparative methodology adopted in this thesis seeks to make sense out of similarities and differences among the two legal systems[74]. Reviewing these differences could lead to a better understanding of these legal systems and recognising the common principles in making use[75] of each other's findings.

According to George Bereday[76], the root of scientific methodology of comparative education is observations of foreign people and description of foreign systems. The live concern is "to borrow from abroad some useful educational devices for the improvement of education at home". The comparative methodology is adopted to assist the Nigerian legal system to borrow useful aspects of merger review law in the EU for the improvement of the Nigerian law since Nigeria operates a Federal system of government which is similar to the EU structure, and this makes the EU's structure attractive compared with that of Nigeria.

This thesis is not unmindful of the fact that EU is a supernatural body and it is being compared with Nigerian who is a national juristic body. The rules guiding the

[71] C. Atias, Epistemelogie Juridique (Press Universitaires De France, 1985)30
[72] Michael Salter And Julie Mason, 'Writing Law Dissertations ' (Pearson Longman 2007)185
[73] Lijphart. A., 'Comparative Politics And Comparative Method' (1971) American Political Science Review, Vol 65 p. 684.
[74] H.L.A Hart, 'The Concept Of Law' (Oxford Press University, 1961) pp77-96
[75] R.Schlesinger ,'The Past And Future Of Comparative Law' (1995)43 AJCL 477
[76] George. z. Bereday, 'Comparative Method In Education' (Holt, Rinehart & Winston Of Canada 2002) 125

assessment of mergers in the EU and Nigeria are similar notwithstanding the fact that mergers are on the exclusive legislative list under the Nigerian Constitution.

The general principles guiding mergers in the EU is that mergers must be compatible with the general principles and other provisions of community law. In other words, mergers must have community dimension in order for the Commission to have jurisdiction over such mergers. The merger must also comply with the required threshold.

It is argued that the relevance of the doctrine of community dimension to the invocation of the jurisdiction of the EU Commission on merger review is analogous to merger review in Nigeria where merger review is placed on the exclusive list under the amended 1999 Nigerian Constitution. That is, merger review in Nigeria is only entertained by the Competition Commission at the Federal level. It is further argued that just like merger review in the EU is the exclusive preserve of the EU Commission except in situations where Member States have jurisdiction on mergers with communal dimension. Matters on the concurrent list in Nigeria may be entertained by both the Federal government and the State governments.

It should be noted that decisions of the EU Commission are binding on Member States because of the federal nature of the EU, the Nigerian Competition Commission's decisions on merger review are binding on the states of the federation notwithstanding the fact that merger review is on the exclusive legislative list. This is one of the reasons why this thesis attempts to compare merger review in the EU with the merger review in Nigeria.

The researcher will focus on the functional method, analytical method and structural method of comparative methodology of the research question. The functional method of comparative methodology is to look at the problems posed by adoption of non-competition rules (public interest factors) in merger review in Nigeria and how the problems are solved in the EU with similar or different results.

The analytical method of comparative methodology will analyse legal concepts and rules in the EU and Nigeria on merger review in such a way that common parts and differences are brought to the limelight while the structural method of comparative methodology will focus on the framework of the law through an analytical approach so

as to find out the extent of the impact of public interest principles in merger review in the EU and Nigeria.

In order to consider the need for introducing forms of legal regulation and reforms that have been successfully practised in EU on merger review and also to assess the impact of such reforms, this thesis adopts comparative research methodology as well[77].

The comparative research approach adopted by the thesis will also highlight the discrepancy between how law appears in books and how it actually operates in practice in Nigeria and the EU[78].

It is trite that law in action is quite different from law in books, hence, this thesis will not only compare the rules in merger review in the two jurisdictions but will complement the comparison by comparing the judicial decisions in the two jurisdictions to establish why a particular public interest factor may be relevant in a particular jurisdiction and may not be relevant in another jurisdiction.

The need to study the socio-political factors which form the background against which the merger review law of the EU and Nigeria have developed is the stimulant for the meaningful comparative analysis of what brought about the basis of the law on merger review or what influenced the law on merger review as it is presently constituted in the different jurisdictions[79].

In view of the fact that the thesis will explain conflicts and differences between legal concepts under the Nigerian jurisdiction and the EU jurisdiction as well as identify possible 'common ground solutions[80], the comparative research approach is suitable for the thesis.

A quantitative research method was considered initially, but the researcher decided against employing this approach after becoming aware of the difficulties in booking appointments with Commission officials for interviews. Competition lawyers' emphasis on client confidentiality also contributed to the abandonment of this method.

[77] J. Husa, 'Functional Method In Comparative Law – Much Ado About Nothing?' 2013 EUR.Rev.Priv Law p4-21
[78] J. Bonhoff, 'Company Legal Argument' (Cambridge University Press 2012) p74-95
[79] Adams & Griffiths, 'Against Comparative Method' (Cambridge University Press 2012) p279-301
[80] MarkVan Hoecke, 'Methodology Of Comparative Legal Research' (2015) Law And Method. P.1-35

The thesis considers and discusses primary and secondary legal materials. Primary legal materials are those that state the law in its original form, and these are 2004 Merger Regulation,[81] Treaty on the Functioning of the European Union (101 and 102 TFEU),[82] horizontal and non-horizontal guidelines on mergers,[83] the Nigerian Federal Competition and Consumer Protection Act[84], and the Companies & Allied Matters Act[85]. The secondary materials analysed and considered are materials that comment on the provisions of EUMR 2004 and FCCPA2019, including articles, decided cases, journals and books on competition law.

1.6 STRUCTURE AND OUTLINE OF THE CHAPTERS

This thesis contains seven chapters including the introduction and conclusion. This first introductory chapter provides background and purpose of the research, the research questions, the limitations, research methodology as well as the scope and outline of the thesis with a view to prepare the reader for the objective of the thesis.

The second chapter sets the stage for the understanding of the origin, background and objectives of the concept of public interest consideration. To this end, the chapter will discuss the remote and immediate evolution of the concept and the significance of public interest consideration in merger review, that is, why the concept is allowed during merger review. Thereafter, the chapter will examine the views of several scholars in the EU and Nigeria on the relevance of public interest considerations. The views would be critically analysed. The chapter goes further to consider and discuss how public interests are accommodated during merger review. The chapter discusses what constitutes a public interest factor while trying to identify the relevance of the concept during merger review. The chapter further attempts to define the meaning of the term public interest, discuss the arguments in support of the concept as well as the arguments against the concept during merger review. How and why the public interest concept is considered in merger review would be discussed with the aid of decided case law. The chapter concludes by identifying different classes of public interests in the EU and Nigeria and discussing the basis for the differences. The findings of the researcher

[81] Council Regulation(EC) 139/2004 Of 20 January 2004
[82] Treaty Of The Functioning Of European Union
[83] Guidelines On The Assessment Of Horizontal And Non-horizontal Mergers OJ(2004)C3115
[84] Federal Competition And Consumer Protection Act 2019
[85] Companies And Allied Matters Act 1990

are that public interest consideration factors have not played any significant role in the EU as only three interests are recognised as public interests (public security, plurality of the media and prudential rules). While social factors like industrial policy, environment, national champions and employment would need the proverbial needle's eye to get upgraded to the recognised public interests as the conditions are cumbersome.

The third chapter attempts to dissect the purpose as well as the background and objectives of Article 21(4) EUMR and to establish the basis for consideration of the concept of public interest during merger review in the EU. In order to achieve this, this chapter examines the relevant laws in the EU and explains the goals and development of EUMR 2004 as it relates to relevance of public interest in merger review. Subsequent to this, the chapter examines the origin of the concept of public interest as well as the meaning of the concept in the EU. The chapter further examines the different types of public interest in the EU such as creating national champions, cultural policy, environmental policy, industrial policy, security policy, prudential guidelines and plurality of the media, which have either influenced the application of Article 21(4) of the EUMR or may be used for comparison purposes. The chapter further discusses and analyses the requirements for the invocation of Article 21(4) of the EUMR, which is the recognition of the public interest by the EUMR and compatibility of the public interest element with the EU law which comprises Articles 49 and 63TFEU. The chapter will also discuss features of Article 21(4) EUMR which allow a Member State to act under national law where the merger is of a community dimension. That is, the chapter will discuss the supremacy of the EU law in that the Member State cannot rely on Article 21(4) EUMR to approve a merger on public interest grounds where the EUMR is inapplicable. The chapter goes further to discuss the importance of the provision of a One-Stop Shop system of the EU as it concerns public interest. This discussion is necessary because the EUMR uses a referral system in its procedural rules for the implementation of the EUMR law, and this referral system was initiated to provide a more flexible style of merger review, but the referral system has now affected the proper flow of the One-Stop Shop system because it increases legal and jurisdictional uncertainty.[86] This uncertainty is caused by the use of partial referrals

[86] Laura Macaskili, 'The EU Merger Regulation: A One-Stop Shop Or A Procedural Minefield?' Competition Policy
International, August 2016 At P.18

which Laura Macaskili[87] submits is a system that is inefficient and places a significant burden on businesses.[88] The chapter further defines the meaning of 'legitimate interest' in the context of public interest and what constitutes 'legitimate interest' with the aid of decided cases in the EU. The chapter also identifies and discusses circumstances where the concept of public interest may offend the provisions of Treaty of Functioning of European Union as regards the free movement of capital within Member States. The cases of *Eaux SA/Norhumbrian Water group*[89] and *Newscorp/BSkyB*[90] will be discussed and analysed under this chapter to underscore the relevance of the concept of public interest in merger review in the EU. Other cases like the cases of *Banco Santand*er[91] and *Portugal v. Commission*[92] will also be discussed and analysed to show the reluctance of the Commission in yielding to the invocation of public interest concept during merger review in the EU. In analysing how the public interest concept is used during merger review in the EU, the chapter will look at how the principles of remedies are used as camouflage to introduce the concept of public interest under the guise of conditional exceptions. In other words, the Commission uses principles of remedies as substitutes for public interest concept during merger review in the EU. The purpose of this chapter is to have a thorough understanding of the concept of public interest in merger review in the EU so as to have a basis for comparison with the UK and Nigerian jurisdictions. In the light of the analysis of the cases highlighted above, the researcher contends that public interest is sparingly considered in the EU during merger review because Article 21(4) of the EUMR itself has set up stringent conditions under which public interest may be considered during merger review in the EU.

The fourth chapter is about the public interest concept in the UK. The purpose of this chapter is to have a better understanding of the concept of public interest in the UK so as to appreciate the dynamics of the concept in the EU and Nigeria where the implementation of the concept is not woven around a politician. The chapter assesses

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[87] Laura Macaskili, 'The EU Merger Regulation: A One-Stop Shop Or A Procedural Minefield?' Competition Policy International, August 2016 At P.18

[88] Laura Macaskili, 'The EU Merger Regulation: A One-Stop Shop Or A Procedural Minefield?' Competition Policy International, August 2016 At P18

[89] Case M567 OJ (1995) C11/3

[90] Case M8354 C (2017) 2451

[91] Case No. QBCMF 1999/0673/A3

[92] Portugal V. Commission, Case C-367/98 [2002] ECRI-4731

and analyses the extent to which the Enterprise Act of 2002[93] accommodates the concept of public interest during merger review in the UK. The chapter discusses the public interest concept in the context of the Enterprise Act which is the main UK regulation in competition law. The chapter then seeks to explain the laws and organisations that revolve around the public interest concept during merger review such as the function of Competition and Markets Authority (CMA)[94] and the importance of Water Industry Act 1991[95] and Railways Act 1993[96] in terms of the relevance of public interest during merger review in the UK. The chapter will also analyse the case of *Lloyds TSB and HBOS*[97] to underscore the significance of public interest consideration in merger assessment during financial crisis in a nation. The role of the Secretary of State in the invocation of the concept of public interest in the UK will be analysed and discussed. The meaning and circumstances under which the Secretary of State can declare a merger to be of 'special public interest' will be discussed and analysed. What will constitute a special public interest merger will also be analysed in the context of the threshold required by the Enterprise Act. The difference between the special public interest intervention notice and the European intervention notice on public interest as regards the CMA will be discussed and explored to establish the extent of the consideration of the concept of public interest in the UK. Differences and similarities in the application and what constitutes public interest in merger review in the EU and UK will be analysed and discussed. The chapter will also discuss and analyse the current trend about the need to dispense with the concept of public interest during merger review in the UK. The chapter will also discuss the role of Brexit on the concept in the UK and what may change with the exit of the UK from the EU. The chapter will conclude with the opinion of the researcher that public interest considerations in merger review in the UK is a mirage as the concept is sparingly used in view of the robust and well-articulated competition policy in place in the UK and properly coordinated by the CMA.

[93] Enterprise Act 2002

[94] Functions Of Competition And Markets Authority Include Strengthening Business Competition, Preventing And Reducing Anti-Competitive Activities. CMA Took Over The Function Of Competition Commission In 2014. The CMA Monitors And Regulate Prices, It Formulates Policies As Regards Customer Service, It Acts As 'Surrogate Competitor' So As To Stabilise Prices And It Protects Public Interest In Competition Cases.

[95] Water Industry Act 1991

[96] Railways Act 1993

[97] Case M765 OJ (2008) C10/4

Chapter five discusses the extent of public interest considerations in the newly enacted Federal Competition and Consumer Protection Act[98] in Nigeria as regards merger review. The chapter starts by considering the origin of the concept of public interest in Nigeria and the development of the Nigerian law and economy as well as the impact of political parties on the country. This would be done with a view to appreciate the development level of Nigeria in order to properly analyse the role of public interest concept in Nigeria. The chapter will also consider the role of public interest vis a vis competition rules in the newly enacted competition law. That is, what level of priority or regard is accorded to public interest concept during merger review in Nigeria vis a vis the role and priority accorded to competition rules. This is necessary because the provisions of the newly enacted Act make it compulsory for the Commission to establish that the merger is public interest compliant while assessing the effect of technology, efficiency and public interest on a merger that has already been established to substantially prevent or lessen competition. In other words, it is compulsory for the merger to be compatible with public interest elements when the Commission is weighing up the anti-competitive effects of a transaction against any efficiency, technological or other pro-competitive gains arising from a merger. The chapter analyses the Nigerian law on merger review that borders on public interest. The chapter goes further to highlight and discuss the merger review process with emphasis on public interest. The chapter also discusses public interest considerations in Nigeria within the context of the Federal Competition and Consumer Protection Act 2019. The chapter further explores and analyses cases like *Kansai/Freeworld*[99] and *Wal-mart/Mass-mart*[100] as regards the application of the concept of public interest during merger review. These are cases where the Competition Commission challenged approval of mergers on the grounds of public interest and the court was able to explain the relevance of public interest in mergers. Advantages and disadvantages of public interest considerations in merger review will be discussed to further have a better understanding of the concept and decipher the extent of the usefulness of the concept in merger review in Nigeria, taking into cognisance the peculiar local factors in a developing economy. The chapter will also discuss the functionality of the concept of public interest in Nigeria since the

[98] Federal Competition And Consumer Protection Act, 2019

[99] Kansai Paint Co. Ltd And Freeworld Coatings Ltd; Case No. 53/AM/Jul 11

[100] Minister Of Economic Development et al And Wal-Mart Stores Inc. et al (Wal-Mart/MassMart): Case No. 1101/CAC/Jul 11

new law has no procedural rules to work with. The chapter ends with the opinion of the researcher on the extent of consideration of public interest during merger review in Nigeria to the effect that the concept in Nigeria is a classical example of the reality being totally different from what is in the book. The law provides for situations that could be classified as public interest; it goes further to define what constitutes public interest in merger review. The law even makes it mandatory for public interest to be determined and recognised by the Commission once the Commission comes to the initial conclusion that the merger is anti-competitive, but there is yet to be procedural rules that will guide the enforcement of the law. In other words, the law on public interest and the practice are not whistling the same tune, that is, what is on ground is different from what the law envisaged.

Chapter six is the discussion chapter and discusses the significance of the concept of public interest in merger review in the EU and Nigeria by comparing the workability and operation of the concept of public interest in merger review in the EU and Nigeria. This discussion will focus on the social, law and economic perspective of public interest on the two jurisdictions. That is, why the concept will be different in each jurisdiction in view of their glaring differences in terms of law, social and economics. In order to achieve this objective, the chapter tries to establish the need for and against the relevance of public interest considerations in merger review in the two jurisdictions. The chapter goes further to identify different types of public interest considerations so as to place premium on each type of public interest and to be able to determine what type of public interest is suitable to a particular jurisdiction vis a vis the other jurisdiction. The difficulty associated with the assessment and classification of these considerations will be analysed and discussed with the aid of decided cases like *E.on/Endesa*,[101] *BSCH/A. Champlalimond*[102] and *Secil/Holderbank/Cimpor*.[103] Cases such as *Iscor Ltd/Saldanhasteel*,[104] *Kansai* Paint Co. Ltd And Freeworld Coatings Ltd,[105] *General Electric v. Commission*,[106] *Minister of Economic Development And*

[101]Case M. 4197, E.O.N/Endesa (2006), Para 25
[102] Case M. 1616, BSCH/A. Champalimand (1999) Para 66
[103] C. (2000) 3543 Final
[104] Case No. 67/LM/Dec 01
[105] Case No 53/AM/Jul 11
[106] Case IV/M. 529 (1994), Case IV/M. 528 OJ C348/6

Wal-mart Stores Inc,[107] *IBM France/CGI*[108] and *Sun Alliance and Royal Insurance*[109] will be discussed and analysed while comparing the concept of public interest in the two jurisdictions. The chapter will also discuss and analyse public interest considerations within the context of Article 21(4) of EUMR and public interest considerations within the context of Nigerian Law as provided by S.94(2) of the Federal Competition and Consumer Protection Act, 2019. The chapter will take the advantage of the discussion and analysis on the contexts of public interest in the two jurisdictions to compare and contrast the contexts in the two jurisdictions so as to bring out a better understanding of the concept in the two jurisdictions. The chapter will also analyse the significance of locality factor (social political factors) in the judgements of the EU and Nigeria courts on what constitutes public interest. The chapter will conclude with the contention of the researcher that comparing the two laws on public interest between the two jurisdictions has been able to bring the inadequacies of the Nigerian law to the fore for improvement and has provided an opportunity of better understanding of the two laws on the concept of public interest in merger review.

Chapter seven is the conclusion chapter. It summarizes the findings of all previous chapters, draws conclusion from the study and makes several policy recommendations for the proper implementation of the public interest concept in merger review in Nigeria. The study concludes that public interest considerations do not play a significant role in merger review as it is seldom used by the competition authorities and the odds are against them. Public interest considerations may however be given roles in merger review if there are established rules in place that can ensure certainty in the implementation of the laws.

The future relevance of public interest considerations that is uneconomic and uncertain in the EU and Nigeria is bleak as merger review is largely based on economic efficiency rather than public interest considerations that are not consistent and are unclear as to how and how far they may affect decisions during evaluation.

The policy recommendations for the Nigerian jurisprudence is to holistically integrate the EU and UK jurisprudences on merger review, which have been tested into the

[107] Case 1101/CAC/Jul 11
[108] Case IV/M. 336 (1993)
[109] Case IV/M. 759 (1996)

Nigerian legal system, and incorporate reforms highlighted by scholars into the anticipated new improved Nigerian Law.

CHAPTER TWO: **THE SIGNIFICANCE OF PUBLIC INTEREST CONSIDERATIONS IN MERGER REVIEW.**

2.1 INTRODUCTION

The concept of public interest in merger review is the heart of this thesis. The relevance and the extent of the consideration of the concept during merger review in the EU is the focus of chapter three. Chapter four aims to determine the significance of the concept of public interest in the UK with the aid of decided cases and analysis of the powers of the Secretary of State, who is the central figure in the implementation of the concept in the UK. Chapter five discusses the implications of public interest provisions in the newly enacted Competition Act in Nigeria as regards merger review. This is done by way of analysis of the features of the newly enacted Act in Nigeria, discussions on how the concept was introduced to Nigeria and the challenges facing the implementation of the new Act in Nigeria. The introductory chapter of the thesis provided the background and purpose of the research. The objective of this chapter is to research the background of the concept of public interest considerations, the remote and immediate evolution of the concept and significance of public interest considerations in merger review, in other words, why the concept is allowed during merger review. The chapter also considers the views of several scholars in the EU and Nigeria on the relevance of public interest considerations in merger review. The basis of their views will be critically analysed. How public interests are accommodated during merger review are also discussed.

This chapter also discusses the relevance of the concept of public interest in the EU and Nigeria in terms of what constitutes a public interest factor with the aid of decided cases in the two jurisdictions.

The chapter also attempts to define the meaning of the term public interest and discuss the arguments against or for the relevance of public interest considerations in merger

review, how public interests are considered in merger review with the aid of decided cases and different classes of public interests in the EU and Nigeria. The chapter also discusses the concept of public interest in the context of the European Merger Regulation (EUMR) and Nigeria.

It is apposite to discuss the various contexts in which public interest may be used.

2.2 CONTEXTUALISATION OF PUBLIC INTEREST

The term public interest is used in various contexts. It is also settled that maintenance of order in society requires some limitation on the freedom and liberty of the citizens of the society. It is the maintenance of this order which must necessarily be by the government that brought about the concepts of public security, public order, public policy and public interest, and so on. These concepts are actually designed to maintain the society for the citizens.[110]

However, the extent to which the state has limited our freedom in the pursuit of these concepts is unclear.

The main concern of this chapter is the concept of public interest. The concept exists in almost all areas of law, be it contract law, arbitration, family law, employment law or competition law.

Conceptualisation of public interest determines to a large extent the role of competition authorities in a merger review.[111] The extent to which competition authorities can assess public interest as they come up during merger review remains unsettled in the EU and Nigeria.[112] Furthermore, the scope of authority given to competition authorities during merger review has proven to be discretionary.[113] This is so because under the EU, the Commission, which is the competition authority, may review a merger on competition-based principles or on public-interest-based factors. As discussed in chapter one and

[110] H. Schepel, 'Delegation of Regulatory Powers To Private Parties Under EC Competition Law' Towards A Procedural Public Interest Test" Common Market Law Review, February 2002, Volume 39(1) pp31-51.

[111] Eva Illouz, 'Re inventing The liberal self: Talk Shown On Moral Discourse, In The Politics Of SelfHood: Bodies And Identities In Global Capitalism' Richard Harvey Brown ed, 2013.pg137

[112] J.D. Banks, 'Competition And The Public Interest: A Comparative Overview Of European And Australian Merger Law' Competition & Consumer Law Journal, April 1998 Volume 5(3) P209-222

[113] Heinrich Holzler, 'Merger Control In European Competition Policy', Being Paper Presented at Chatham House 1990.pg1-25

subsequent chapters, the context in which the concept is used in this thesis is when the effect of competition on merger is subsumed to social factors like the plurality of the media, public security and maintenance of stability of the financial industry or prudential rules.

It is imperative to discuss the origin of the concept of public interest before discussing the various definitions of the concept by scholars.

2.3 ORIGIN OF PUBLIC INTEREST

In early modern Europe, people believed in the concept of common good,[114] that is, the idea of selfishness and unnecessary requests from monarchies to the people were becoming unbearable as it was seen as exploitation. Society developed the concept of public interest in mid-seventeenth-century England to mitigate the exploitation of society by the monarchy.[115]

The development of the concept of public interest was to aggregate private interest; it ended up placing individuals in a vintage position to safeguard material interest.[116]

By the time the Hobbesian theory[117] came into existence to legitimise selfishness and private interest as natural characteristics of human beings, which should not be considered immoral, the concept of public interest was fully established in Europe.[118] The concept then became an instrument for expressing private interests in the mould of public good. It was the realisation that the duty of the rulers was to ensure that the common good was protected for the overriding interests of society, and that society is bound together into a community where the state too is subjected to overriding public

[114] Kadri And Simm, 'The Concept Of Common Good And Public Interest From Plato To Biobanking' Cambridge Quarterly Of Healthcare Ethics, 2011, Volume 20(4) pp554-562.
Separating Politics From Policy In FCC Merger Reviews: A Basic Legal Primer Of The "Public Interest" Standard.
Thomas M. Koutsky, Esq, Lawrence J. Spiwark Esq. Common Law Conspectus, Vol.18 Pg.329-517, 2010
Blachuki, Mateusz, 'Public Interest Consideration In Merger Control Assessment', European Competition Law Review, August 2014. Vol 35(8), Pg.380-386.
[115] Gunn Jaw, 'Politics And The Public Interest In The Seventeenth Century London'. 1969, Routledge & K.Paul.pg 58
[116] Gunn Jaw, 'Politics And The Public Interest In The Seventeenth Century London' 1969, Routledge & K.Paul pg58
[117] Douglass B, 'The Common Good And The Public Interest' Political Theory 1980 8(1):107
[118] Douglass B, 'The Common Good And The Public Interest' Political Theory 1980. 8(1):107

interest, that transferred the concept of common good to the concept of public interest.[119]

The concept of public interest dates back to Roman law. It has been around in England since 1837 when it was mentioned in the Rolls of Parliament.[120]

Maclver argued that the founding fathers of the US coined the term "public interest" "sometime in the early nineteenth century to recognise that a landed interest, a manufacturing interest, a mercantile interest, a moneyed interest with many lesser interests grow up of necessity in civilised nations and divide them into different classes actuated by different sentiments and views".[121] Robert Maclver is of the view that public interest should be seen as a continuation of aspirations, objectives and values of a community. In other words, public interest evolved as part of the values and objectives of the people in a community.

As the Nigerian legal system was developed from the British legal system, it could be said that the concept of public interest in Nigeria has the same European origin.[122]

The concept of public interest in Nigeria could also be said to originate from the provisions of the amended Nigerian constitution of 1999,[123] which provides for the right to dignity of human persons, right to personal liberty, right to freedom of movement, right to freedom of expression and the press and compulsory acquisition of property by individuals and companies alike. The justification for this source of origin is that the constituents of public interest are effects of merger on employment, a particular industrial sector, the ability of national industries to compete in international markets and the ability of small and medium scale enterprises to become competitive. All these constituents of public interest are derived from the 1999

[119] Douglass B, 'The Common Good And The Public Interest' Political Theory 1980. 8(1):110

[120] Douglass B, 'The Common Good And The Public Interest' Political Theory 1980. 8(1):107

[121] Kadri, Simm, 'The Concept Of Common Good And Public Interest. Plato To Biobanking' Cambridge Quarterly Of Healthcare Ethics, 2011 Volume 20(4) pp554-562. Maclver, 'Interests' H132, 4 Encyclopaedia of Social Sciences At 145.

[122] Kamala Dawar And Ndaba Ndolvu, 'A Comparative Assessment Of Competition In Africa: Identifying Drivers Of Reform In Bostwana, Ethopia And Nigeria' 2017 Oxford University Press At 150.

[123] Amended 1999 Constitution Of The Federal Republic Of Nigeria

amended Nigerian Constitution which emphasised on the rights of citizens to employment and provision of industries for citizens by the government.

The justification for the Nigerian Constitution as the source of origin for public interest is because the Nigerian Constitution is the grundnorm and the supreme law in Nigeria. It is the barometer with which all other laws derive their validity and it is also the spring and fountain upon which all other laws find their source[124].

The concept of public interest was also introduced into the Nigerian jurisprudence by the introduction of the Investments and Securities Act of 2007,[125] which specifically provides for the accommodation of public interest consideration during merger review.

It was the first time in Nigeria jurisprudence or law that an Act would specifically provide consideration of public interest during merger review. The Act specifically states what the then Securities and Exchange Commission which was the Competition authority at that time must consider during merger assessment. This explains why it could be said that the ISA 2007 was one of origins of public interest in the Nigerian jurisprudence as there was no express mention of the term before then in Nigerian jurisprudence.

Having discussed the origin and various definitions of the concept as reviewed by scholars, it is now apt to discuss the views of scholars on public interest in the context of competition law.

2.4 DEFINITION

W du Plessis defines public interest as a "collective noun for a variety of economic, strategic, administrative, social and legal interests that have emerged throughout the history of a state as being worthy of legal protection and are maintained in the interest of the state. These interests also uphold the balance in a community between the conflicting interests of individuals in their relation to the state."[126] Plessis's position is that public interest is a cumulation of rights that must be protected by the state in order to strike a balance between the conflicting interests of the state and individuals.

[124] Attorney General of Abia State & Ors. V. Attorney General of Federation (2006), 16 NWLR (Pt.1005) 265 at 381.
[125] Investments And Securities Act Of 2007, CAP 124, LFN 2010
[126] W Du Plessis, ' A definition Of The Concept Of Public Interest' 1987, SO THRHR at 290

Sterry R Waterman in '*Whither the concept affected with a public interest'* gives a classic definition of public interest as "some interests by which the legal rights or liabilities of the community at large are affected".[127]

He is of the view that community liabilities and individuals' legal rights expand correlatively to give public interest a new meaning.

The concept is also defined as the "welfare of the general public (in contrast to the selfish interest of a person, group or firm) in which the whole society has a stake and which warrants recognition, promotion and protection by the government and its agencies".[128] Odudu's position is that the concept of public interest is monumental to the extent that the legal rights and liabilities of the community are determined by the concept.

Another definition is "The welfare of the public compared to the welfare of a private individual or company. All of society has a stake in his interest and the government recognises the promotion of and protection of the general public."[129] Townley's view is that the concept of public interest is about the welfare of the state and the citizens and it is the duty of both the state and the citizens to advance the course of the concept.

The concept is further defined as the "Common well-being or general welfare".[130] Witt's definition encapsulates the theory that morality takes a significant place in any society that values the well-being of its citizens.

C.T Goodsell in '*Public administration and the public interest'* defines public interest as "values that may be followed by public professionals who would act in the public interest. These values are legality, morality, political responsiveness, political consensus, concerns for logic, concern for effects and agenda awareness."[131]

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[127] Sterry Waterman, 'Whither The Concept 'Affected With A Public Interest?' 1972, Vanderbilt Law Review At 28

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[128] O. Odudu, 'The Wider Concerns Of Competition Law' (2010) 30 OJLS 599, 606-607.

[129] Townley,' Article 81EC And Public Policy' 2009 Hart Publishing At 50-54

19 AC Witt, 'Public Policy Goals Under EU Competition Law'2012,8 European Competition Journal. Page1

[131]C.T. Goodsell, 'Public Administration And The Public Interest, 1990, Sage Publications NewburryPart at96-113

G Colm in '*The public interest: Essential key to public policy'* defines the concept as "nothing more than a social phenomenon without explicit and predictable consent, but it seems from this description that something of importance to the daily experience of governing is taking place."[132] Colm's definition prioritises the concept as a significant tool of government in ensuring adequate governance for the people.

Frank J. Sorauf defined the concept as "an ethical imperative, some superior standard of rational and right political wisdom or the goals or consensus of a large portion of the electorate".[133] He is of the view that the concept is about moral ethics for majority of people.

Hantke-Domas defined the concept as follows: "Public interest in legal concept has more to do with the realisation of political and moral values and it is this concept of public interest that informs the decision-makers on how to decide disputes when there is conflict."[134] Hantke-Domas's position is that the concept is for the protection and benefits of the citizens and that there is a synergy between the concept of public interest and economic welfare of the citizens.

Michael Powell says the concept is no more than "an empty vessel into which people pour whatever their preconceived view or biases are".[135] He is of the view that the concept is anything imaginable to the people in terms of their views on government policy.

It is also defined as the "net benefits derived from, and procedural rigour employed on behalf of, all society in relation to any action, decision or policy".[136]

It is contended that all the definitions of public interest highlighted above are in agreement that the concept has much to do with the welfare and benefits due to the community, even though such benefits and welfare may not be easily attained.

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[132] G.Colm, 'The Public Interest: Essential Key To Public Policy' 1962, Atherton Press, NewYork at 127
[133] Frank Sorauf, 'The Public Interest Reconsidered'(University Of Chicago Press Journals) 1957 pp212
[134] M Hanke-Domas, 'The Public Interest Theory Of Regulation: Non Existence or Misrepresentation?'2003,15(2) European Journal Of Law And Economics.Pg22
[135] Michael K. Powell, 'The Public Interest Standard: A New Regulator's Search For Enlightenment" Address Before The American Bar Association 17th Annual Legal Forum On Communications Law. April 5, 1988
[136] https://Internationalfederationofaccounts/publicinterest Accessed 1st Aprill2020

It is further contended that the various definitions highlighted above have confirmed the exogenous nature of the concept of public interest when it comes to merger review, because they are circumstances imposed by external necessity, which is alien to competition law. In other words, the competition law was faced with an entity that was beyond logic resulting from Significant Impediment Of Effective Competition (SIEC)[137] paradigm. Put differently, in applying SIEC principles, the Commission is expected to consider several factors like the relevant market situations, the ease of entry into the market and dynamics characteristics of the market. The application of the public interest concept does not require this process of consideration.

This is evident when one realises that a transaction that is not anti-competitive by all parameters of competition law could be rendered anti-competitive by an external moral or legislative concern. This is what differentiates public interest doctrine from other doctrines: public interest doctrine does not concern itself with the logic of competition law, such as market forces or dominance.

Public interest in this chapter refers to situations where transactions that are competitive are declared anti-competitive in merger review or vice versa because of the application of the doctrine of public interest. The reasons for this position are manifold and this chapter will address what constitutes public interest considerations in merger review. The views of various scholars on public interest concept in merger review would assist us in having a better understanding of the concept.

2.5 VIEWS OF SCHOLARS ON PUBLIC INTEREST IN THE CONTEXT OF COMPETITION LAW

Lesley Morphet in '*South African Competition Law and Public Interest'* defines public interest as the balancing factor that competition authorities are required to balance the competition factors which are commonly accepted by competition authorities worldwide, against the commonly considered public interest factors like environment, social or industrial policies.[138] In her view this explains why a transaction that

[137] Significant Impediment Of Effective Competition. In 2004, The Test Was Changed To SIEC In The EUMR.2004. Jerome Foncel, Mercivaldi And Valerie Rabassa, 'The Significant Impediment Of Effective Competition Test In The New European Merger Regulation: In Theory And Practice'2007, Contributions To Economic Analysis Journal, Volume 282 Pages349-367.

[138] Lesley Morphet, 'South African Competition Law And Public Interest' 2007, Norton Rose Fulbright, 165.

substantially lessens competition may be approved in as much as the anti-competitive effect is outweighed by the positive impact of public interest consideration factors.

Morphet's view on public interest is quite interesting in that it contemplates a situation where merger review is incomplete without taking into consideration the effect of public interest. The view with due respect did not reckon with the fact that competition law in merger review is all encompassing as competition law has taken proper care of the effect of public interest in all the competition indexes of establishing whether a merger is anti-competitive.

Giorgio Monti is of the view that public interest consideration in merger review is an integrated part of competition law[139] and that competition law is better implemented with the infusion of certain public interest considerations. He went further to observe that it would be inconceivable that competition law could be applied in a vacuum without reference to the objectives of the community.

Giorgio Monti's view also confirms the importance of public interest doctrine in merger review. However, his view failed to take into account that public interest concept may be politicised, which may in turn defeat the essence of the doctrine in merger review: it is well known that public interest doctrine applicability is uncertain and unpredictable[140] .

Alison Jones and Brenda Sufrin are of the view that public interest considerations such as industrial and social factors are not reckoned with in the EU when appraising mergers.[141] They are of the candid view that mergers which form an obstacle to competition should be prohibited, no matter how beneficial they may be to the consumers.[142] The principle of essential interest of "security, legitimate interest or protectionist measures by the Member States or nationalistic tendencies of Member States" should be critically assessed by the Commission so as to discourage the infusion of public interest consideration into competition law.

[139] Giorgio Monti, 'EC Competition Law' (Cambridge University Press 2007) 12
[140] Giorgio Monti, 'EC Competition Law' (Cambridge University Press 2007) 18
[141] Alison Jones And Brenda Sufrin, EU Competition Law' 6th Edition (Oxford University Press 2018) 1239
[142] Alison Jones And Brenda Sufrin, EU Competition Law' 6th Edition (Oxford University Press 2018) 1239

Alison Jones and Brenda Sufrin are both very frank about the essence of competition law, which is to maintain competition in the common market in accordance with competition law and nothing more. However, their view should have acknowledged the existence of the public interest doctrine in merger review with a caveat that the doctrine should be of no moment in competition law.

Richard Whish and David Bailey are of the view that the Commission unwittingly supports the intervention of public interest consideration during merger review in the EU with the inclusion of Article 21(4) on legitimate interest into the EUMR by conferring exclusive competence on the Commission as regards concentration having a union dimension.[143]

Richard Whish and David Bailey recognised the importance of the inclusion of Article21 (4) on legitimate interest into the EUMR but did not factor in the conditions imposed by said Article 21(4) before the "legitimate interest" could be accepted as an exception to the rule. That is, the legitimate interest must be compatible with EU law as long as it is proportionate and non-discriminating.

G.O Gbede is of the view that the basis of consideration of public interest during merger review is to complement competition law, and since the concept is not to displace the competition rules, then the concept is a welcome idea.[144]

Gbede sees nothing wrong in the marriage of public interest with competition rules during merger review, but his view with respect failed to consider the fact that competition law on its own has inbuilt mechanisms that could adequately take care of any benefits inherent in the concept of public interest, since competition law is ultimately for the benefit of consumers.

It is submitted that several scholars share the view that the marriage between public interest considerations and competition law in merger review is necessary for the promotion of consumer welfare, but there must be established principles to guide

[143] Richard Whish And David Bailey, 'Competition Law' 9th Edition (Oxford University Press 2018) p.899
[144] David Reader, 'Accommodating Public Interest Considerations In Domestic Merger Control: Empirical Insights' (2016) Centre For Competition Policy. Pg1

competition authorities in balancing the public interest consideration with the competition interest in a merger review.

The next section deals with how the public interest concept is accommodated during merger review in the EU and Nigeria.

2.6 ACCOMODATING PUBLIC INTERESTS WHEN MAKING MERGERS

When completing a merger transaction, there are several steps that a country can take to accommodate public interest considerations. This can be through formal statutory provisions that can give directions on how public interests should be accommodated; it can also be through informal means unspecified in the legislation. The legal or formal options that a country can apply are normally related to appointing a public interest decision-maker or framing public interest criteria within legal frameworks.[145] There are four ways through which framing of public interests can be achieved through legal means. The first option includes affording no scope to considering criteria of public interest at any stage of the merger transaction; the companies involved seek commitments from the involved parties so as to alleviate public concerns.[146]

The second option involves considering the public interest test as part of a substantive test and the public interest will be considered in every merger assessment. This option involves weighing the findings of both the public interest criteria and competition so as to determine whether a merger should be permitted to proceed. The substantive test can also occur in two phases so as to ensure no key area is restrained by the test, where the merger is first assessed based on competition then against public interest in a different phase. The merger can either satisfy both phases or it can raise concerns with one phase. The merger can then be stopped to address the specific concerns that were raised. This alternative makes it easier for the Commission and the companies under review to know where the issue lies.[147]

The third option would be to reserve the public interest exceptions to the substantive test. In this instance, the decision-maker will base decisions on the competition criteria

[145] David Reader, 'Accommodating Public Interest Considerations In Domestic Merger Control: Empirical Insights' (2016) Centre For Competition Policy. Pg1
[146] David Reader, 'Accommodating Public Interest Considerations In Domestic Merger Control: Empirical Insights' (2016) Centre For Competition Policy. Pg15
[147] David Reader, 'Accommodating Public Interest Considerations In Domestic Merger Control: Empirical Insights' (2016) Centre For Competition Policy. Pg.18

during the process of assessing the merger, but in special instances where the merger is suspected of raising concerns on public interest then the public interest criteria may be used for merger assessment.

The exceptional circumstances occur when they affect the national interest or when they directly affect critical public interests such as national security, financial stability or the economy and media plurality.

The fourth option for accommodating public interest during a merger transaction is enforcing sector-specific policies that will run parallel to the merger control. This option is similar to the first option as the two approaches do not allow for public interest criteria to be considered within the merger assessment. The difference comes about when the first option fails to accommodate public interest even after the merger assessment, while this option can afford considerations after the transaction.[148] The EU merger review offers several options.[149]

Having discussed how the concept of public interest is accommodated during merger review, the next section will discuss arguments against the concept of public interest considerations before analysing arguments in support of the concept.

2.7 ARGUMENTS AGAINST PUBLIC INTEREST CONSIDERATIONS

There are several arguments against the relevance of public interest in merger review. First, the process of considering merger on competition-based rules through market efficiency invariably promotes public interest. This then suggests that there is no need to specifically consider public interest in merger assessment.[150]

Second, in view of the fact that social, political or cultural contexts differ from one country to another, the definition of public interest consideration is not uniform. This

[148] David Reader, 'Accommodating Public Interest Considerations In Domestic Merger Control: Empirical Insights' (2016) Centre For Competition Policy.Pg20

[149] Alex Chisholm, 'Public Interest And Competition-Based Merger Control' Speech delivered At The Fordham Competition Law Institute Annual Conference On 11 September 2014. (https://www.gov.uk/government/people/alex-chisholm. Accessed On 29th Nov.2019

[150] DAF/COMP/WP3/M(2016) 1/ANN5/FINAL, 'Executive Summary Of The Round Table On Public Interest Considerations In Merger Control' 14 June, 2016.Pg4

lack of uniformity in definition is a major reason some jurisdictions find the concept unattractive.[151]

Third, the process of assessing public interest consideration in most jurisdictions during merger review is left to government departments or sector regulators and not competition authorities. This leads to different modes of assessment of public interest consideration and different enforcement problems.[152]

Fourth, the challenge of how the Competition Commission weighs public interest considerations and competition in merger analysis is another argument against the relevance of public interest consideration in merger review. It is almost impossible to strike the right balance while assessing a merger based on a public interest consideration or on competition rules without reaching different conclusions.[153]

Fifth, public interest considerations are nothing more than non-competition objectives like political, social and industrial concerns and cannot promote the objective of competition policy.[154]

Competition policy both in the EU and Nigeria is strictly based on competition issues with the aim of promoting competition within the market.[155] It is argued that non-competition issues are outside the scope of competition law.[156]

It is also argued that most of the grounds of public interest considerations are integrated in the national development goals of a country and that it is inappropriate to rely on competition law to execute the national development goal of a country.[157]

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[151] DAF/COMP/WP3/M(2016) 1/ANN5/FINAL, 'Executive Summary Of The Round Table On Public Interest Considerations In Merger Control' 14 June, 2016. Pg8

[152] DAF/COMP/WP3/M(2016) 1/ANN5/FINAL, 'Executive Summary Of The Round Table On Public Interest Considerations In Merger Control' 14 June, 2016.Pg14

[153] C. Townley, 'Article 81 EC And Public Policy' (Hart Publishing, 2009) pg38

[154] FrankSorauf, 'The Public Interest Reconsidered' (University Of Chicago Press Journals) 1957 PP.212.

[155] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014)10(3) European Competition Journal 453

Kamla Dawar And Ndaba Ndolvu,'A Comparative Assessment Of Competition In Africa: Identifying Drivers Of Reform In Botswana, Ethiopia And Nigeria '2017 Oxford University Press At 150

[156] Authorities In Protecting Non-Competition Interest After Lisbon (2010) 35 European Law Review 635

[157] DAF/COMP/WP3/M(2016) 1/ANN5/FINAL, 'Executive Summary Of The Round Table On Public Interest Considerations In Merger Control' 14 June, 2016.Pg4

Finally, the uncertainty and unpredictability associated with the process of reviewing merger on public interest consideration is a major reason why some jurisdictions are not eager to adopt the concept in their merger control system, as consistency is the hallmark of cross-border merger reviews.[158]

The significance and importance of the concept of public interest would be discussed in the next section while analysing the arguments in support of the concept.

2.8 ARGUMENTS IN SUPPORT OF THE RELEVANCE OF PUBLIC INTEREST CONSIDERATIONS.

Article 21(4) of the EUMR recognised the concept of public interest considerations in merger review when it provides that Member States could have a "legitimate interest" in investigating a merger other than on grounds of harm to competition.[159]

The European Commission in its report[160] observed that public interest consideration and competition policy is a two-way process and it cannot be contemplated that one could be applied without reference to the other.

The proponents[161] of the arguments in favour of public interest considerations in merger review believe that the concept provides a greater role for industrial policy and targeting support at some selected sectors of the economy.[162]

The proponents also share the view that competition authorities are still struggling with credibility and legitimacy in the developing economies, and the concept of public interest consideration in merger review is needed to boost the required legitimacy.[163]

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[158] DAF/COMP/WP3/M(2016) 1/ANN5/FINAL, 'Executive Summary Of The Round Table On Public Interest Considerations In Merger Control' 14 June, 2016.Pg8

[159] Richard Whish And David Bailey, 'Competition Law' 9th Edition (Oxford University Press 2018) 755

[160] Twenty-First Report On Competition Policy (1991) P.10

[161] D. Lewis, 'The Role Of Public Interest In Merger Evaluation. International Competition Network, Merger Working Group Maples, September 2002 at 2. Lesley Morphet, 'South African Competition Law And Public Interest' 2007, Norton Rose Publication at 69. Richard Whish And David Bailey, 'Competition Law' 8th Edition (Oxford University Press 2015) 860. Giorgio Monti, 'EC Competition Law' (Cambridge University Press 2007) 320

[162] DAF/COMP/WP3/M(2016) 1 ANN4/FINAL, 'Summary Of Discussion Of The Roundtable On Public Interest Considerations In Merger Control' 7th Feb, 2017.Pg9

[163] G. Monti, 'Article 81 EC And Public Policy' (2002) 39. Common Market Law Review 1057

Another reason for the relevance of public interest consideration in merger review is that the concept could broaden development if properly harnessed to competition law.[164]

In order to justify the relevance of public interest considerations in merger review, there is the fear that the concept might be broadened unnecessarily to include all aspects of life categories in a bid to protect consumer welfare, which ironically may actually be a distraction to the competition test or consumer welfare.

It is contended by the researcher that the public interest consideration factors provided by different competition authorities do not allow a process of unified decision-making, unlike situations where decisions are not made by multiple competition authorities but by a single competition authority. The single competition authority makes coherence and consistency feasible in cases being handled by the competition authority, since it is the same single competition authority that will assess the public policy factors in line with the competition assessment.

It is further contended that this position of allowing a single competition authority and not multiple competition authorities to assess the public interest factors alongside the competition analysis or assessment may reduce the possibility of lobbying government departments that would be in charge of such a public interest assessment.

The next section deals with different classes of the concept of public interest considerations.

2.9 DIFFERENT CLASSES OF PUBLIC INTEREST CONSIDERATIONS

This section will discuss various types of public interest consideration concepts and how the Competition Commission both in Nigeria and the EU attempts to determine the assessment formula for these recognised interests in the two jurisdictions.

[164]W. Finkentscher, 'Culture, Law And Economics' (Carolina Academic Press, 2004).Pg28

As stated in chapter three, the list of public interest considerations in the EU is limited to a) plurality of the media and b) public security and a prudential rules[165] while Nigerian law recognises

a) the effect of the merger on employment

b) the effect of the merger on a particular industrial sector or region

c) the ability of national industries to compete in international markets.

In essence, public interest factors include welfare, social, national security and defence considerations as well as media plurality for political or social versions.

It should be noted that assessment of each of these considerations entails a cumbersome process of assessment that is not consistent with competition rules because of the peculiarity of the consideration.

2.9.1 PUBLIC INTEREST IN THE EU

Under the EU, these recognised interests must be compatible with EU law and must be non-discriminating and proportionate. The Member State does not need to inform the Commission when protecting these recognised interests.[166]

However, in a situation of uncertainty as to whether any of the recognised interests actually applies or conforms with EU law or where "any other public interest" is involved, then the Member State is enjoined to communicate such requests to the Commission for assessment and eventual clearance**.**[167]

In most cases, the Commission provides a decision within 25 working days of the request made by the Member State.[168]

The position of the Commission on these categories of public interest considerations is the supremacy of EU law over all national laws.[169] This position of the Commission

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[165] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014)10(3) European Competition Journal 453
[166] Case M.4197, E.ON/Endesa (2006), para 25
[167] Case M. 4197, E.ON/Endesa (2006), para 56
[168] Case M.1616, BSCH/A. Champalimand (1999) para 66
[169]Lavrijssen S,'What Role For National Competition Authorities In Protecting Non-Competition Interest After Lisbon? (2010) 35 European Law Review 635.

is in consonance with the case law principle recognising the supremacy of EU law on Member States when it comes to transactions prohibited under EU law. It then goes without saying that a Member State cannot invoke the recognised interests where the EUMR does not allow it or apply.[170]

The application of the recognised interests by the Member States under the EU as validated by Article 21(4) EUMR may give an impression that the Member States have a wide latitude to determine what constitutes these recognised interests, but on a closer look, the provisions of Article 21(4) actually limit the intervention of Member States in few circumstances.

These limited circumstances are glaring because the recognised interests (plurality of the media, public security and prudential rules) are concepts that have been developed under the EU free movement law principles. That is, the recognised interests are components of the EU free movement law principles. In other words, Member States' reasons must conform with the recognised EU principles.[171]

This explains why the Commission in most cases agrees that Member States may protect their military security or defence policy,[172] maintain different sources of information[173] or protect "prudential rules"[174] so as to maintain the integrity of the financial industry.

The determination of the assessment of these recognised interests is not always an easy or straightforward process as there have been occasions when the Commission had to intervene to explain the true position or meaning of these recognised interests.

A case in point is the case of *E.on/Endesa*[175] where the Commission had to intervene that the Spanish government action could not be regarded as falling into one of the recognised interests. The Spanish government had relied on public security grounds to

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[170] Case 14/68, Walt Wilhelm v. Bundeskartellant (1996) ECR 1 para 5-9. http://ec.uropa.eu/competition/mergers/legislation/notesreg406489enpdf. Accessed 29th Nov.2019

[171] Alex Nourry,Clifford Chance And NelsonJung, 'EU State Measures Against Foreign Takeovers:''Economic Patriotism'' In All But Name' Vol 8,(1) 2012 Competition Policy International pp35-39

[172] Case M.1858 Thomson CSF/Racal(II) (2000)

[173] Case M.423, Newspaper Publishing (1984) and Case M.5932, Newscorp/BskyB (2010) paras 304-309

[174] Case M.759, Sun Alliance/Royal Insurance (1996), paras 16-17

[175] Case M. 4197, E.ON/Endesa (2006), para 25

intervene in the merger, but the Commission was of view that the grounds of public security could only be relied on if there were a serious and genuine threat to the security of society.

Another difficulty as regards the interpretation or assessment of the recognised interests arose in the case of *BSCH/A.Champalimand*.[176] The Portuguese government hid under the recognised interests to block the merger between *Banco Santender Central Hispano (BSCH*), but the Commission countered the Portuguese government's basis for prohibiting the merger on the grounds of prudential rules and national interest as their actions of trying to discourage foreign nationals from participating in the Portuguese economy are against the free movement policy of the EU, which encourages free movement of capital within the EU.

A similar interpretation problem concerning recognised interests (public security, plurality of media and prudential rules) also arose in the case of *Secil/Holderbank/Cimpor*[177] where the Portuguese government prohibited a merger for not protecting the national economy under the pretext of prudential rules. The Commission frowned at this and maintained that the Portuguese government's action was against the principle of free movement of capital and freedom of establishment recognised by the EU.[178]

The highlighted cases above confirmed that the public interest consideration is not a mirage in the EU; however, there are other cases discussed below where the Commission and the courts actually construed what is meant by public interest considerations in the EU and how they are considered.

Another interesting case in this class of public interest is the case of *Lyonnaise/Northumbrian Water*.[179] The request of the United Kingdom to the Commission to accept that the UK system introduced to regulate the UK water industry should be classified as a legitimate interest was approved by the Commission. This is a sequel to the privatisation in 1989 of the UK's water and

[176] Case M. 1616, BSCH/A.Champalimand (1999) para 66
[177] C. (2000) 3543 Final

[178] C. (2000) 3543 Final
[179] Case IV/M.567 [1995] 4 CMLR 614

sewage industry; the effect of the law was to make mergers between water enterprises that were beyond a certain size referable for assessment by the Commission. The Commission was expected to determine whether the Director General of Water Services could make comparisons between different water enterprises (each of the enterprises either has a local or regional monopoly) in order to maintain the concept of "comparative competition" to guarantee competitive pressures on them in the absence of actual competition. The Director General uses these concepts for various reasons, but particularly to obtain comparative data on running and capital costs so as to have regular five-year reviews for each sewage and water authority.

It should be noted that the Commission's decision on legitimate interest went beyond the innocuous recognition of the concept of legitimate interest, but the decision gave the Commission an opportunity to advise the United Kingdom on how best to carry out her duty of assessing the legitimate interest.

The decision directed the UK authorities as follows:

"*…the control exercised by the UK authorities is aimed at ensuring that the number of independently controlled water companies is sufficient to allow the Director General of water services to exercise his regulatory functions… in order not to go beyond the interest pursued by the UK regulatory legislation other issues in relation to mergers between water companies can only be taken into account to the extent that they affect control regimes set out above….."*

This decision made the then UK Competition Commission[180] prepare a report on the *Lyonnaise/Northumbrian* merger. The report[181] concluded that since the merger would prejudice the principle of "comparative competition", the merger would operate against the public interest unless remedies by way of price reduction be imposed for the merger to proceed.

[180] The New UK Competition Commission Is CMA Which Is Competition And Markets Authority And Is Responsible For Strengthening And Monitoring Of Business Competition As Well As Preventing And Reducing Anti-competitive Mergers.

[181] 1990 Report By The UK Monopolies And Mergers Commission On Lyonnaise Des Eauxsa And Northumbrian Water Group Plc.

In essence this case confirms that the public interest is being considered in the EU during merger review but the public interest to be considered must be among the recognised interests.

Another relevant case as regards public security, which is one of the recognised public interest considerations, is the case of *General Electric Company/British Aerospace/VSEL*.[182]

The aspect of the bid in the acquisition of VSEL that deals with military equipment was not notified to the Commission even though both bids were such that the Commission should be notified since they were of community dimension. The Commission was only notified of the non-military aspect of the bid, which constitutes only 2.5 per cent of the total business, while the bulk of the business was the military aspect which was cleared without notification to the Commission.

The Commission also confirmed the relevance of the concept of public interest consideration in merger review in the EU in the merger of *Marconi Electronic Systems and British Aerospace*[183] where the merger of the military business of the companies was approved on the grounds of public security. The Swedish government's contention in the case was that the proposed concentration was very important to Sweden's security interest, hence the aspects of the concentration relating to military products under the merger should not be investigated.[184] The Commission agreed with the Swedish government on the grounds of public interest consideration.

The same principle of public security as a public interest consideration was followed in the case of *Northrop Grumman/TRW*.[185] The merger was about defence-related businesses that involved military command and aircraft as well as their control apparatus. The Commission confirmed the applicability of the public security grounds of public interest consideration since it involves military or defence hardware.

[182] Case IV/M. 529 [1994], Case IV/M. 528 OJ C348/6
[183] Case IV/M. 1438 (decision of 25 June 1999)
[184] Case IV/M. 1438(Decision Of 25 June 1999)
[185] Case Comp/M.2781 (decision of 13 September 2002)

The same position of non-interference with the public security of the Member State on the grounds of public interest consideration was maintained by the Commission in the case of *IBM France/CGI*[186], a company involved in the production and manufacturing of software with a lot of subsidiary companies that have collaborative agreements with the French Ministry of Defence. The Commission agreed with the French government that certain security measures as regards the CGI subsidiaries had been taken by the French authorities in order to protect France's legitimate interests as regards public security.

A case confirming the recognition of the plurality of the media as a public interest consideration is the case of *Newspaper publishing.*[187] An international consortium of Spanish and Italian holding companies and British newspapers worked to acquire the editing company of a British newspaper. The British government invoked the principle of pluralism on the acquisition on the grounds that the proposed acquisition would affect accuracy in the presentation of news or freedom of expression. The Commission agreed with the British authorities on the grounds of pluralism and requested the British authorities inform the Commission of any condition they considered necessary to be attached to the acquisition.

The British government in the case of *Alliance/Royal Insurance*[188] invoked the exception of prudential rules to the merger of companies which was about the proposed merger of two undertakings in the financial services business and insurance.

The British authorities' contention was that it was their right to intervene in the merger so as to protect their citizens through adequate supervision of the insurance companies operating in the UK.[189] The Commission agreed with the British on the grounds of prudential rules so as to protect the public interest consideration concept.

Having briefly discussed attempts by the EU Commission to determine what constitutes public interest in the EU, it is imperative to look at the Nigerian perspective of the concept.

[186] Case IV/M. 336 (1993)
[187] Case IV/M759 (1996)
[188] Case IV/M759(1996)
[189] Case IV/M.759(1996)

2.9.2 PUBLIC INTEREST IN NIGERIA/SOUTH AFRICA

The then Nigerian Securities and Exchange Commission and the current Federal Competition And Consumer Protection Act 2019 as well as the Nigerian courts have not had the opportunity of interpreting what will constitute the effect of the merger on employment or a particular industrial sector or the ability of national industries to compete in the international market.

In the absence of cases on the correct interpretation of public interest consideration in Nigeria, the South African jurisprudence may be of great assistance, since the provisions of the two Acts are similar.[190] A recourse to the South African Tribunal and Competition Commission may assist the Nigerian jurisprudence on the correct interpretation of the provisions of section 94(3) of the FCCPA which is in pari materia with the South African Competition Act.

The following cases are examples of cases considered under the South African Competition Act where meaning of public interest and how public interest was considered in merger reviews in South Africa were expatiated.

The South African Commission in the case of *Shell v. Tepco Petroleum Co. Ltd*[191] attempted to balance the public interest consideration as provided in the South African Competition Act with welfare. The Commission was to approve the merger between Shell Corporation, the International Petroleum Company and Tepco Petroleum Company, a black empowerment oil company, on the condition that Tepco should remain an independent company to be controlled jointly by Shell and Tepco on the grounds of public interest consideration, so as to protect historically disadvantaged individuals as provided by the competition Act. The Competition Tribunal rejected the Commission's decision on the basis that the Skills Development Act, Employment Equity Act and the Petroleum Charter were the appropriate laws in that circumstance. The Tribunal also advised the Commission not to carry its mandate on public interest too far so as not to jeopardise those interests the Commission seeks to protect.

It is argued that the South African Competition Commission attempted to consider the public interest provisions enshrined in the South African Competition Act which is in

[190]See Chapter 5 of the thesis
[191] Case No. 66/LM/October 01 Paragraph 58

pari materia with the Nigerian S94 of the FCCPA. The Commission was trying to protect the interest of the disadvantaged black citizens against the foreign company on the grounds of public interest.

It is also argued that the decision in *Shell South Africa (Pty) Ltd v. Tepco Petroleum Pty Ltd* raises the issue whether the Commission is the proper institution to balance public interest considerations and welfare. The Commission's officials are not elected and do not have the electorate's mandate to decide for the public on public interest issues. It is the duty of government to decide on public interest issues that may lead to political or social consequences.[192]

This position is more apparent when one considers mergers that impact on remote areas with high unemployment rates. The Commission is not in the best position to properly evaluate the economic effects of the anticipated merger in those areas as the Commission may not be situated in those areas. The Commission relies on third-party reports, which may be influenced by extraneous factors [193].

Another case where public interest was considered in a merger review in accordance with S94(3) of FCCPA which is in pari materia with S.12 of the South African Competition Act is the case of *Minister of Economic Development et al and Wal-Mart Stores Inc. et al ('Wal-Mat/Massmart'*).[194] The merger between Wal-Mart Stores Inc. and Massmart Holdings Ltd was already approved by the South African Competition Commission, which is the equivalent of the Nigerian Federal Competition Commission. The merger was further approved by the Competition Appeal Court of South Africa, notwithstanding efforts and objections of trade unions, the Ministry of Trade and Industry, the Ministry of Economic Development and Ministry of Agriculture as well as the South African Small Medium and Micro Enterprises Forum to prohibit the merger.[195]

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[192] Gal, M, 'Reality Bites (or Bits): The Political Economy Of Antitrust In Small Economies' Fordham Corporate Law Institute's 28th Annual Conference On International Antitrust Law And Policy (2001) October 25 & 26 at 13

[193] D. Lewis, 'The Role Of Public Interest In Merger Evaluation. International Competition Network, Merger Working Group Maples, September 2002 at 2

[194] Case No 1101/CAC/Jul 11

[195] Case No 1101/CAC/Jul 11

The objections of the interveners (the three ministries) was based on the international status of Wal-Mart's procurement system and network and the fear that Wal-Mart's extensive logistics capabilities might hinder imports into South Africa. Their contention was that the merger would discourage procurement from South Africans and encourage procurement from abroad to save costs because of Wal-Mart's international network.

Their contention was also that the failure to procure from South Africa would bring unemployment, job losses, stifling of domestic industries and closure of small businesses. Their contentions were based on the grounds of public interest consideration provided by S.12A of the South African Competition Act, which is analogous to S.94(3) of the FCCPA of Nigeria.

The case was an opportunity for the Competition Appeal Court to determine whether there were elements of public interest in the case as envisaged by the South African Competition Act. The court at page 65 held that:

"*The introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized business in particular."*

The Competition Appeal Court held that there is no doubt that the Competition Act allowed public interest considerations in merger review, but the facts of this case were such that the principles of public interest consideration would not apply. The court at page 77 stated thus:

"*Given Wal-Mart's size and expertise…the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to prevent job loses, at the least, and at best, to increase both employment and economic activity of these businesses protected under S.12A must form part of the considerations which*

this court is required to be taken into account in considering a merger of this nature…

This flows from the model of competition law chosen by the legislative and in particular as set out in S.12A. It also forms part of the mandate given to the Tribunal and, on appeal, to this court when faced with the inquiry as to whether a merger should be approved."

The lower court, the Competition Tribunal, had earlier ordered Wal-Mart to establish a procurement fund to help local suppliers on the grounds that public interest would have been considered with the establishment of the fund and thereafter approved the merger.

On the issue of employment, the Competition Appeal Court overturned the decision of the lower court that ordered Wal-Mart to ensure that the merged company should give priority to the employees already retrenched when employment opportunities became available. The Competition Appeal Court in taking cognisance of the public interest considerations ordered the merged entity to employ the retrenched staff by reinstating them back into the company in view of the court's findings that the retrenchment of the workers was patently related to the merger.

The interpretation and application of S.94(3) of the Federal Competition and Consumer Protection Act of Nigeria 2019, which is equivalent to S.12A of the South African Competition Act, was also made possible by the case of *Metropolitan Holdings Limited v. Momentum Group Limited*.[196] The employees were able to get a commitment from the merging parties on the grounds of public interest consideration that merger-related job losses should not be more than 1,000 and that the merging parties should also provide opportunities for employees to have training in both skilled and unskilled jobs as well as access to counselling and outplacement support. The Commission accepted the merging parties' undertakings to this effect and recommended the merger for approval subject to the implementation of the undertakings. However, the Competition Appeal Court overturned the Commission's decision and approved the merger on the condition that there should be no

[196] Case No 41/LM/Jul 10

retrenchment as a result of the merger for a period of two years from the date of the transaction.

In other words, the Tribunal confirmed that employment is a public interest concern as envisaged by the Competition Act and it is enough to prohibit a pro-competitive merger.

Another interesting case that confirmed the application of the doctrine of public interest consideration as envisaged by S.94(3) of the FCCPA, which is in pari materia with S.12 of the South African Competition Act, is the case of *Kansai Paint Co. Ltd and Free World Coatings Ltd*.[197] Free World Coatings Ltd was a distributor of performance and decorative coatings as well as a manufacturer in South Africa. The takeover of the company by Kansai Paint Co. Ltd was approved by the Commission subject to the following conditions on public interest grounds.[198]

Kansai was to establish an automotive coatings manufacturing facility in South Africa within five years of approval. Kansai must not retrench for a period of three years and the company must not discontinue the manufacturing of performance coatings for at least ten years. The investment in research, training and development of staff was important to the company.

The Commission agreed to these conditions because the takeover was seen as one that offended S.12(c) in that it could affect the ability of small businesses to become competitive. The takeover was also seen as one that would affect employment levels in South Africa in the event of the acquirer ceasing to manufacture automotive coatings.

It is argued that the retention of jobs of the target company by the acquirer reflects the public interest criteria in S.94(3) of the FCCPA in Nigeria and S.12A of the Competition Act of South Africa.

The *Iscor Limited/Saldanha Steel*[199] case is another case that significantly clarified the Commission's approach to the concept of public interest considerations provided by

[197] Case No 53/AM/Jul 11
[198] Case No 53/AM/Jul 11
[199] Case No 67/LM/Dec 01

the Act, which is reproduced in S.94(3) of the FCCPA in Nigeria. The economic consequences as regards the region where Saldanha was situated were considered extensively before the merger was approved. This approval underscores the importance of the concept of public interest as provided by the Competition Act.

Another case where the court approved the application of a public interest consideration in merger review is the case of *Lexshell 826 Investments (Pty) Ltd and Umcebo Mining Pty Ltd*.[200] The Commission disagreed with the contention of the merging parties that retrenchments were necessitated by the proposed merger, but it nevertheless approved the merger and imposed a condition that there should be no retrenchment for two years at both the target and the acquiring company.[201]

In the *Distillers Corporation (SA) Ltd and Stellenbosch farmers Winery Group Ltd*[202] case, the contention of the unionists was that the proposed merger would consume about 24 per cent of the workforce while the parties argued that it was less than 3 per cent of the workforce. The Competition Tribunal held that the deciding factor is whether the merger will have a substantial effect on employment.[203] In other words, employment under the category of public interest consideration is a factor to be reckoned with during merger review.

The position taken by the Competition Tribunal in the case of the *Distillers and Stellenbosch* merger was also taken in the case of the *Bidpaper Plus (Pty) Ltd and Pretoria Wholesale Stationers Pty Ltd*[204] merger. The Tribunal approved the merger on the condition that retrenchment of workers should not be more than agreed with the union. This also underscores the significant role being played by the public interest consideration factor as provided by the Act.

However, in the case of *Daun et cie AG and Kolosus Holdings Ltd*,[205] the Commission rejected the contention of the minister that pre-merger level of wages must be maintained by the merging entity, the merging entity should not interfere with the levels of employment and that the merged entity must subscribe to a particular

[200] Case No 09/LM/Feb 11
[201] Case No 09/LM/Feb 11
[202] Case No. 08/LM/Feb 02
[203] Case No 08/LM/Feb02
[204]Case No. 03/LM/Jan 09
[205] Case No. 10/LM/Mar 03

trade union. The Commission was of the view that although employment is a public interest component, it is not the duty of the Commission to dictate what type of employment should be given to a particular employee.

It is argued that in complying with S.94(3) of the FCCPA in Nigeria and S.12A of the Competition Act of South Africa as regards impact of the merger on employment, the Commission has not been focusing on job losses alone as the determining factor in assessing whether a merger impacts employment. The Commission has also been taking the positive side of employment into consideration, that is, job creation as against job loss.

Thus in *Rustenburg Platinum Mines Ltd and Aquarius Platinum (South Africa) Pty Ltd*,[206] the merger was approved because there was evidence that the merging of the firm would lead to the creation of about one million job opportunities at the Movikana Mine.

This case is quite different from the majority of cases involving consideration of public interest in merger review in that it is the positive sense of employment that was considered before approving the merger and not the usual fear of job losses which the Commission considers before approving the merger.

It is apposite at this junction to observe that the situation in the EU is completely different from the circumstances played out in the highlighted cases. It is not one of the public interest considerations in the EU to consider the effect on employment of mergers during merger review: the recognised public interest considerations are plurality of the media, public security and prudential rules. EU merger control rules provide for SIEC as a substantive competition test for the assessment of mergers; however, this does not preclude the public interest consideration as stipulated by Article 21(4) of the EUMR.

However, it is worth mentioning that there is an isolated case of a situation where the Court of Justice in Europe considered employment as a public interest consideration factor during merger review. The case is *Comite Central d'Entreprise de la Societe*

[206] Case No. 82/LM/Sep 05

Anonyme Vittel and Others v. Commission.[207] It was a case of merger between Nestlé and Perrier, and the Court of Justice found that for the merger deal to have significance, negative or positive impact on the community, employment must be taken into consideration by the parties.

It is submitted that this case is an exception to the rule in the EU and that this rule of recognising employment in merger review was only for this special circumstance because mergers are not reviewed and considered on such a basis in the EU.

What constitutes public interest consideration in Nigeria under S.94(3) of the FCCPA, which is analogous to the South African Competition Act, is not restricted to the effect of the merger on employment alone. Subsections (c) and (d) of S.94(3) of the FCCPA also stipulate that the ability of small businesses to become competitive and the ability of national industries to compete in international markets are constituents of public interest considerations which the Commission must take into account in reviewing a merger.

The next question is, what is the interpretation given to these subsections as regards public interest consideration in Nigeria and South Africa by the two Competition Commissions and the courts in Nigeria and South Africa?

2.9.3 THE INTERPRETATION OF SUBSECTIONS (C) AND (D) OF S.94 (3) OF FCCPA 2019

The highlight of the newly enacted Federal Competition and Consumer Protection Act 2019 in Nigeria is the establishment of the Federal Competition Commission, which is the commission responsible for the implementation and enforcement of rules pertaining to competition law.

It is submitted that the Nigerian courts and the Federal Competition Commission have not had the opportunity to interpret how public interests provided in the subsection may be interpreted, largely because there are no procedural rules yet in place and the courts have not been presented with such opportunities by the merging parties.

It is also submitted that even South Africa, where one could seek precedent and guidance since both laws are in pari materia, has fewer cases under the ‘effect of the

[207] [1995] ECR11-2147

merger on the ability of small businesses to become competitive' clause of the Competition Act. The subsection that deals with the ability of national industries to be competitive has one or two cases decided since the inception of the Competition Act.

It is against this background that the case of *Piruto B.V. and Optimum Coal Holdings Limited*[208] and other mergers may be relevant in interpreting S.94(3) of the FCCPA, which is analogous to S.12A(3) (c) of the Competition Act of South Africa.

It is customary for third parties to intervene in merger review in South Africa just like it is allowed under Nigerian law. In this case, the third parties were concerned that Glencore would leverage its effective control of logistics as regards trading market and also increase its allocation due to the prospective merger. This, in their contention, would be disadvantageous to the junior miners and would not allow small businesses to be competitive. The Commission agreed with their contention on the grounds of public interest and thereafter approved the merger on the condition that junior miners should have access to 401,500 tonnes per annum of port allocations in order to make them more competitive. The Commission also ordered that there should be an affidavit of compliance to the effect that a monitoring committee was set up by the merged entity to confirm compliance with the recommendation.

In the merger between Growth Point Properties Ltd and Liberty Group Limited,[209] the Tribunal, interpreting S.94(3)(c) of the FCCPA which is in pari materia with S.12A(3)(c) of the Competition Act of South Africa, looked at the effect of exclusivity clauses in lease agreements on small retail businesses such as pizza shops, spaza shops[210] and small cigarette shops. It concluded that long-term exclusive lease agreements raise entry barriers for small businesses and thereafter affect their ability to be competitive.

It is also apposite to mention that under the EUMR the Commission is not allowed to look at the effect of the merger on the ability of small businesses to be competitive, as the normal rudiments of competition law would take care of such a concern.

[208] Case No 86/LM/Oct 11
[209] Case No 20/LM/Mar 12
[210] Spaza Shops: Informal Convenience Shop Business In South Africa.

Having discussed what constitutes public interest in the EU and Nigeria with analysis of the cases in both jurisdictions, it is imperative to discuss the significance of the concept in Nigeria and the EU.

2.10 THE SIGNIFICANCE OF PUBLIC INTEREST CONSIDERATIONS IN THE EU/NIGERIA

The significance of public interest considerations in merger review is that the concept tempers the toughness of competition law in a merger review.

The effect of public interest considerations in merger review is that anti-competitive mergers may proceed or competitive mergers may not proceed on the basis of overwhelming public interest considerations in specific cases.

The concept of public interest consideration has been used on many occasions to prevent loss of jobs,[211] to protect the environment,[212] to promote national champions[213] and to protect local industries from foreign domination.[214]

The significance of this concept in merger review is evident in the merger between Lloyds TSB and HBOS, which was approved despite being a classic case of horizontal merger on the grounds of wider public interest to preserve the financial stability of the UK.[215]

Further evidence of the significance of the concept is the case of *Lyonnaise des Eaux SA/Northumbrian Water Group*,[216] in which the Commission accepted the public interest consideration's role in merger review by agreeing that the UK was obligated to investigate the regulating aspect of the transaction that allowed Lyonnaise des Eaux to acquire a UK water undertaking while the Commission would concentrate on other competition issues.[217]

[211] Case T-17/93 Matra Hachette v. Commission [1994] ECR I -595 para 139
[212] Case 26/76 Metro SB-GroBmarkle GMBH v Commission [1977] ECR 1875 para 43
[213] Brown Shoe Co. v. United States (1962) 370 US 294, 344
[214] The Proposed Acquisition Of Astrazeneca by Pfizer in 2014 that was aborted
[215] Case M765OJ (2008)C10/4
[216] Case M567 OJ (1995) C 11/3
[217] Case M567 OJ (1995) C 11/3

This was allowed to accommodate the public interest consideration in the UK where mergers between water companies are treated as public interest cases notwithstanding that merger review is about competition law and rules.

Another good illustration of the significance of this concept is the case of *NewsCorp/BskyB*[218] where the Commission allowed the merger but took cognisance of the right of the UK to consider the potential effects of the merger on the plurality of the media in the UK.

The question of whether competition authorities or government agencies or departments are to assess non-competition issues is a big threat to the significance of the public interest consideration concept.

It is argued that, as laudable as the significance of this concept is to merger review, the intervention should be restricted to exceptional circumstances. There should also be clear and unambiguous objectives and criteria of the concept.

Further, it is argued that the issue of how to balance public interest considerations against economic factors is still a major challenge to the concept. In other words, How does a Commission determine what weight should be allotted to a given public interest factor and how can such a factor be assessed against competition factors?

This is even more relevant if the concerned public interest consideration is such that requires political consideration as distinguished from economic factors traditionally considered by competition authorities.

The next sections will briefly discuss the concept of public interest within the EUMR Article 21(4) and section 94 of FCCPA.

2.11 PUBLIC INTEREST CONSIDERATIONS WITHIN THE EUMR ARTICLE 21(4)

Once jurisdictional tests under the EUMR are met, the competition authority is obligated under the EUMR to review a merger with a view to consider competition factors in the review.

[218] Case M567OJ(1995)C11/3

Notwithstanding the statutory obligation of the Commission, Article 21(4) of the EUMR enjoined the Member States of the EU to take appropriate measures to protect "legitimate interests" other than those taken into consideration by the EUMR.

However, this "legitimate interest" must be compatible with the general principles and other provision of community law.

Article 21(4) of the EUMR specifically mentions the interests recognised by the EUMR: a) public security, b) plurality of the media and c) prudential rules. The Article went further to provide that the recognised interests would be compatible with EU law as long as they are proportionate and non-discriminating.

Furthermore, Article 21(4) also controls the floodgate of public interest when it provides that Member States wishing to take action to protect any other interest must communicate that to the Commission.

The Commission thereafter has the exclusive duty of assessing the compatibility of the proposed public interest with the recognised communal principles and other provisions of EU law. The affected Member States may not take action on the proposed public interest until the Commission takes a decision.[219]

It is submitted that this is the provision that introduced the concept of public interest consideration to merger review in the EU. It is further submitted that the provision of Article 21(4) has restricted the gateways for EU Member States to invoke the concept of public interest consideration by providing that Member States' action must be non-discriminating and proportionate. It must also be subject to the approval of the Commission.

It should be noted that the Commission had blocked attempts by Member States to bypass the Commission by imposing strict rules on the classes of public interests recognised by the Commission.

[219] Neelie Kroes, 'European Competition Policy facing a renaissance of protectionism – which strategy for the future?' Speech delivered on 11 May 2007

A classic example of such a blockage is the case *of Commission v Portugal*[220] where the Court of Justice held that it was the prerogative of the Commission to determine whether public interest is incompatible with EU law.

It is apposite to mention that public interest consideration in the EU under the EUMR is not without constraints.

The substantive consideration and procedures of Member States are devoid of proper harmonisation and this might lead to complexity or legal uncertainty during review.[221]

There is also the danger that Member States may use national rules to create a national champion even when there is no potential harm to competition in the EU.[222]

Another obstacle to the implementation of the doctrine of public interest consideration in the EU is that it is not clear the extent to which EU Member States may prevent foreign investment from outside the EU jurisdiction.[223]

The failure of Article 21(4) to provide a comprehensive list of public interest factors to be considered so as to have an element of predictability and usual certainty whenever a Member State seeks to invoke a non-recognised interest is a major obstacle to the implementation of the doctrine of public interest in the EU.[224]

In conclusion, the EUMR provides an inbuilt mechanism to minimise the highlighted concerns by limiting the exercise of discretion of the Member States as regards public interest considerations. An example is the condition that the public interest concerned must have a community dimension and complies with EU law on free movement of goods and people.

[220] Commission v. Portugal, Case C-367/98 [2002] ECRI-4731
[221] John Davies, 'Public Interest Considerations in merger control: a practitioner's perspective' June 2016 OECD Discussion.Pg6
[222] John Davies, 'Public Interest Considerations in merger control: a practitioner's perspective' June 2016 OECD Discussion.Pg8
[223] John Davies, 'Public Interest Considerations in merger control: a practitioner's perspective' June 2016 OECD Discussion.Pg10
[224] John Davies, 'Public Interest Considerations in merger control: a practitioner's perspective' June 2016 OECD Discussion.Pg14

2.12 PUBLIC INTEREST CONSIDERATIONS WITHIN THE CONTEXT OF NIGERIAN LAW

The main law regulating merger review in Nigeria is the Federal Competition and Consumer Protection Act 2019. The relevant sections that deal with the concept of public interest considerations in merger review are sections 92 to 103.

Section 94 of the FCCPA introduced the concept of public interest into the Nigerian jurisdiction, and it provides that the Commission while reviewing merger should take into cognisance the effect of particular industrial sector or region, employment, ability of small businesses to become competitive and the ability of national industries to compete in international markets.

It is submitted that what is expected of the Commission when there is a likelihood of lessening of competition in a merger is to determine whether or not the merger will result in any technological gain which would be more beneficial than the effects of any prevention of competition in a merger. The Commission is also expected to determine whether the merger can or cannot be justified on substantial public interest grounds. It is of interest to note that S.94 of FCCPA is analogous to the South African Competition Act.

It is submitted that the highlighted conditions for the invocation of public interest considerations in merger review in Nigeria are a reflection of the social background of Nigeria. The relevance of this submission is supported by the view that in 2016 when FCCPA was contemplated in Nigeria, the unemployment rate was about 20 per cent, while the rate shot up to 27 per cent by 2018 when the Act was eventually enacted. It could therefore be said that preservation of employment plays a significant role in the formulation of the policy and eventual enactment of the law.[225]

To buttress this submission further, most small businesses in Nigeria have either collapsed or they are struggling to survive.[226] In order to protect the industry, the

[225] Dave Arowolo And Christopher Ologunowa, 'Privatisation In Nigeria; A Critical Analysis Of The Virtues And Vices'(2018) Lawbreed Journal Vol2 At 33

[226] Dave Arowolo And Christopher Ologunowa, 'Privatisation In Nigeria; A Critical Analysis Of The Virtues And Vices'(2018) Lawbreed Journal Vol2 At 38

condition that the competition authority must look at the effect of the merger on such companies becomes appropriate and binding.

The introduction of public interest to Nigerian law by S.94 of FCCPA has given weight to businesses' technical capabilities. It has also created jobs and export opportunities for businesses of valuable national importance.

It is also noteworthy to mention the increase in productivity of the industries as a result of protection provided by the concept of public interest.

However, the concept in Nigeria is not without its shortcomings, just like most other jurisdictions.

The main challenge of the concept is the absence of legal certainty and predictability. The Act has not provided for circumstances under which the public interest enumerated would be considered. There are no procedural rules guiding the applicability of the law.

There is also the tendency that the public interest goals provided by FCCPA may be unnecessarily broadened during interpretation.

Another obstacle to the implementation of the doctrine of public interest under Nigerian law is that the application of the doctrine may give rise to strategic differences in some transactions since the application of the rules is not certain.

Intervention by government is another challenge to proper implementation of the concept of public interest in Nigeria. To date, the government has not deemed it fit or necessary to inaugurate the newly established independent competition authority, which is to take charge of competition issues. The responsibilities expected of such authorities were vested in the Securities and Exchange Commission, which was the regulatory agency in charge of securities and Stock Exchange in the recent past. It should be noted, however, that the FCCPA 2019 gives immediate operational status to the Commission in view of the fact that the Commission subsumed the defunct Consumer Protection Council which the FCCPA has repealed under section 166 of FCCPA2019.

It is highly probable that because of lack of certainty and predictability associated with the implementation of the concept of public interest in FCCPA, there would be differentiated rules that will eventually generate substantive and procedural complexity.

It is submitted that most of these concerns can be ameliorated if the South African doctrine of "soft law guidance" can be implemented. This "soft law guidance" is a procedure whereby the public interest concept is integrated into the standard merger assessment of weighing available evidence and drafting appropriate remedies.[227]

The guidelines released by the competition authorities in South Africa are a five-step method to determine the effect of merger on public interest concept via an assessment. They are: (i) likely effects on public interest, (ii) merger specificity of effects; (iii) whether effects are substantial; (iv) whether the parties can show positive effects on the public interest; and (v) available remedies.

It is further submitted that the practicality of these guidelines is yet to be tested or verified.

2.13 CONCLUSION

This chapter has dealt comprehensively with the meaning, origin and various definitions of the concept of public interest. The definitions were analysed and supplemented with the researcher's views. Views of various scholars in the EU and Nigeria on the concept of public interest were also discussed and analysed critically for a better understanding of the concept.

Various ways of accommodating public interest considerations in mergers were also analysed. The arguments in support of the concept and arguments against the concept in merger review were thoroughly discussed and analysed as well with the aim of appreciating the need for the concept in merger review.

Different classes of public interest were discussed, and the challenges faced by the Commission in assessing the recognised interests, vis a vis the determination of what

[227] D. Lewis, 'The role of public interest in merger evaluation' International Competition Network, Merger Working Group, Naples 28-29 September 2002 P 2

constitutes recognised interests by Member States, were analysed with the aid of decided cases.

The chapter also looked at the significance of the public interest concept in merger review in both the EU and Nigeria.

The question of whether public interest is considered in merger review in the EU and Nigeria was answered through consideration and analysis of several decided cases in the EU and South Africa in view of an apparent dearth of cases in Nigeria as a result of the concept being relatively new in Nigeria and the FCCPA 2019 being as yet untested. The extent of the consideration of the concept in merger review was also considered through analysis of decided cases.

It is the researcher's take that the meaning of the term public interest (which is about the welfare of society) endeared it to the regulators and this motivation encouraged the regulators to try to bring the concept into the jurisprudence of competition law, even though competition law has promoted public interests indirectly through the promotion of market efficiency. Public interest has not played any meaningful role in the EU as only three interests are recognised as public interests (public security, plurality of the media and prudential rules) and some conditions like the communal principle of the EU and others must be met before the interest can be activated by the Member State concerned. Furthermore, it is only the Commission that has the prerogative power to determine what constitutes a public interest. The issue of whether other social factors like environmental protection, industrial policy and creation of national champions could be upgraded to recognised interests is unattainable. This is so because the applicable conditions in the EU are difficult and the process of upgrade is cumbersome. The Nigerian situation, which recognises social factors as public interests, is more complex because consideration of public interest factors in a merger review is compulsory. However, the Act is yet to inaugurate the Competition Commission, and it has not yet provided any rules that would guide the established Commission in implementing the provisions of the newly enacted Act nor provided guidance as to what would constitute a public interest in a merger review situation.

CHAPTER THREE: **HOW RELEVANT IS THE PUBLIC INTEREST CONCEPT DURING MERGER REVIEW IN THE EU?**

3.0 INTRODUCTION

The purpose of the thesis, the meaning of public interest, the methodology and the limitation and the outline of the thesis have been discussed in Chapter One. The significance of the concept of public interest in merger review, definitions of public interest, views of various scholars on public interest as well as how and why public interests are accommodated during merger review have been discussed and analysed in Chapter Two. This chapter will explore and analyse the relevance and the extent to which public interest is taken into consideration in merger review in the EU. In order to answer this question, this chapter will attempt to divide into two parts the issues relating to the relevance of the public interest concept and the extent to which it is taken into consideration in merger review. The first part will attempt to ascertain how the Commission is considering the concept of public interest in merger review in the EU, specifically, at the central EU level by the Commission, as opposed to the Member States. In this context, we will discuss the features of public interest in the EU, which will entail robust discussion of public interest factors such as environment, industrial policy, public security, plurality of the media and prudential rules. Case law will be used to analyse why the Commission took certain decisions pertaining to a particular public interest factor.

Additionally, under the first part, the ways in which public interest factors could influence merger review in the EU will be discussed together with the constraints of the Commission in applying the concept in merger review in the EU. Circumstances under which the Commission has allegedly applied the concept of public interest will be discussed, together with how the Commission applied the concept during merger review.

In a bid to predict whether the Commission might change its strict economic approach to the assessment of mergers in the EU, this chapter will attempt to explore the effect of the global economic crisis of 2008 to ascertain whether the Commission was able and willing to change its policy of strict adherence to rules of competition during

assessment in order to reduce the pains and hardship of the recession on the EU Member States during the period.

In view of the fact that the EU comprises many nation states as members, this chapter will discuss how the concept of public interest operates and is implemented in an organisation such as the EU, considering the problems inherent in the implementation of the concept of public interest within an organisation made up of diverse members with different backgrounds and cultures.

The second part of the chapter will focus on the concept of public interest in merger review in the EU from the perspective of Member States.[228] The first part, as discussed earlier, will concentrate on the application of the concept by the Commission itself.

Under the second part, the hope that the concept of public interest is considered in the EU by Member States during merger review as captured by Article 21(4) EUMR will be extensively discussed and analysed. In this regard, the issue whether Article 21(4) EUMR could be classified as an exception to the rule that the Commission strictly adheres to competition in merger review will be analysed with the aid of decided cases. The second part of the thesis will also discuss the limitations in the application of Article 21(4) EUMR as regards the concept of interest in merger review in the EU. The views of several scholars and former commissioners of competition, such as Joaquin Almunia, Noel Kroes and Monti, as well as the current commissioner Margrethe Vestager, on the provisions of Article 21(4) EUMR as it relates to the concept of public interest in merger review in the EU, will be discussed and analysed in this chapter.

The chapter begins with an attempt to adopt a working definition of the concept of public interest in the EU.

3.1 PUBLIC INTEREST DURING MERGER REVIEW IN THE EU.

The context within which public interest is used during merger review in the EU varies. Public interest is used interchangeably with non-economic consideration, and

[228] Italy, Germany, France, Spain, Poland, Sweden, Netherlands, Hungary, Romania, Greece, Denmark, Czechia, Ireland, Belgium, Austria , Portugal, Bulgaria, Finland, Croatia, Luxembourg, Slovakia, Lithuania, Malta, Cyprus, Slovenia, Estonia And Latvia.

equally with non-economic goals, non-competition interest, non-efficiency and social interest. The meanings are diverse too. One may not agree with most of the names being used interchangeably for public interest because most of them have different meanings that are not in consonance with the peculiar meaning of public interest in merger review. The specific meaning of public interest in merger review in the EU applies to when the Commission considers other factors such as plurality of the media, public security, and industrial policy other than the competition rules during assessment of mergers as discussed in Chapter One.

This position may be supported by the fact that the goals of a competition policy can be classified into "economic efficiency" and public interest.[229] Economic efficiency entails the pursuit of productive and allocative efficiency goals through the competition within the markets.[230] The achievement of these goals will deliver consumer benefits such as higher quality, greater choice among goods and services as well as lower prices of goods. Meanwhile, the public interest class will include industrial policy, environmental policy, prudential rules, plurality of the media and public security.[231]

It is argued that these two goals of competition policy are different in terms of their specific purpose, but one may not conclude that they are totally different from each other as each of the goals is mutually exclusive of the other.

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[229] David Cardwell, 'The Role Of The Efficiency Defence In EU Merger Control Proceedings Following UPS/TNT, Fedex/TNT And UPS v. Commission 2017, Journal Of European Competition Law And Practice, Vol. 8 (9) Pages 551-560
Fabienne Ilzkovitz, Roderick MeikleJohn, 'European Merger Control: Do We Need An Efficiency Defence? 2003 Journal Of Industry, Competition And Trade, Vol. 3 Pages 57-85

[230] Petri Kuoppamaki And Sami Torstila, 'Is There A Future To An Efficiency Defence In European Merger Control?' (November 20, 2015) Pages 10-18 Available At SSRU: https://SSRN.Com/Abstract272717. Accessed On 29th Nov2019

Helder Vasconcelos, 'Efficiency Gains And Structural Remedies In Merger Control' 2010. The Journal Of Industrial Economics, Vol. 58 P. 742-766

[231] Mats A Bergman, Maria Jacobson And Carlos Razo, 'An Econometric Analysis of The European Commission Merger Decisions'2005, International Journal Of Industries Organisation, Volume 23 Pages 717-737

As suggested in Chapter One, public interest, in this thesis, may be defined as circumstances where the fundamentals of competition rules are subordinated to the public interest concept in a merger review or, put succinctly, where "economic efficiency" is subordinated to public interest concept.

Having adopted a working definition of the concept of public interest in the EU, the thesis will now consider features of public interest in the EU.

3.2 FEATURES OF PUBLIC INTEREST IN THE EU

The EUMR classifies public security, the plurality of the media and prudential rules as public interest factors in the EU[232] because they are regarded as matters sensitive to the national interest, and Member States should maintain control over their classified interests. This was done to secure the commitments of Member States to the general cause of the EU. It is argued that the EU is careful not to arrogate all powers to the Commission alone; in a bid to share its power, the EU decided to allow the Member States to retain control over their legitimate interests. Legitimate interests are public security, plurality of the media and prudential rules. Other factors like industrial, environmental and national champions can be classified as public interest but only if the Commission approves the factors as such.[233]

In discussing the features of public interest in merger review in the EU, it is necessary to explore the meaning of these public interest factors and also consider why and how they might be considered in a merger review in the EU alongside a competition basis.

3.2.1. Environment

The first port of call is the environmental factor. The influence that an environmental factor may have on a merger may not be quantified, considering the important role a clean environment plays in a society or community. In order to give preference to the environmental factor, the Commission has encouraged "voluntary agreements", that is, being environment-specific while at the same time respecting the competition rules. In view of this, the courts have exempted agreements under Article 108(3)

[232] Article 21(4) European Merger Regulation, 139/ 2004 (OJ2004L24/129.01.2004)
[233] Article 21(4) European Merger Regulation, 139/2004 (OJ2004L24/129.01.2004)

because they reduced environmental pollution, or where agreements led to a reduction in waste emissions and lowered consumption of energy.[234]

In line with these decisions, the Commission, according to Monti, has published, in part[235] of the Guidelines on Horizontal Agreements,[236] its commitment to promoting environmental objectives through competition law. To this end, the Commission's policy on the environment is to the effect that it will overlook agreements that are environmentally friendly in as much as the "net contribution to the improvement of the environmental situation overall outweigh[s] increased cost[s]". This position of the Commission implies that the benefit to the society as a whole is more obvious than the benefit to the consumers.[237] It is argued that this is in contradiction to the general principle of the Commission in terms of competition rules. The basis of competition law is the welfare of the consumer, while it could be argued that when the community has a non-polluted environment, the consumer too will benefit indirectly from the advantages of such non-polluted environment. Monti supports this view on the basis that the environment has an economic value; hence, maintaining a non-polluted environment is consistent with the Commission's duty of promoting a "sustainable development of economic activities".[238] In other words, the Commission has widened the meaning of economic efficiency in order to accommodate the environmental factor in interpreting agreements.

It is submitted that it is not clear whether mergers that are environmentally friendly would have automatic clearance even if they are anti-competitive, considering the present position of the Commission on the issue. The matter is compounded further when one considers the importance being attached to climate change in recent times.[239] The new EU President of the Commission Ursula Von-der Leyen, has accepted that EU economic policy will be based around the existence of a climate crisis. Even before the new EU president's pronouncement, the EU had been fighting

[234] Giorgio Monti, 'EC Competition Law', Cambridge University Press, 2007, 89-90
[235] Giorgio Monti, 'EC Competition Law', Cambridge University Press, 2007, 89-90
[236] Guidelines On The Applicability Of Article 81 Of The EC Treaty To Horizontal Cooperation Agreements (2001) OJ C1 & 2 Para 179
[237] Giorgio Monti, 'Article 81EC And Public Policy' 2002 Common Market Law Review 39(5) pages 30-39.
[238] Giorgio Monti, 'Article 81EC And Public Policy' 2002 Common Market Law Review 39(5) pages30-39.
[239] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A PhD. Thesis Of The East Anglia University, U.K.pg44.

climate change via promotion of ambitious policies and cooperation with other international agencies. The EU took this approach upon realising that a climate-neutral society is a catalyst for human development. In this regard, the EU Commission Trading System (EUCTS) policy was formulated to fight climate change, and it is a major tool for reducing the cause of climate change in a cost-effective way.[240]

It is argued that the attention being paid to climate change by the Commission underscores the importance it attaches to climate change. This may in turn affect the position of the Commission when it comes to taking decisions on mergers that are anticompetitive but climate-change oriented.

3.2.2 Industrial policy

Another feature of public interest in merger review in the EU is the industrial policy. The Commission's policy on the surface by virtue of Article 157(3) EC is that the Commission is to ensure competition in the European industries, but in doing so, the Commission should not encourage any factor that leads to distortion of competition.[241] The reason for this is reasonable, as the Commission's central objective is the promotion of competitiveness in the internal market so as to boost the industrial strength of European industry in the world markets.

This on the one hand means that industrial policy is not a factor taken into consideration by the Commission in approving or disapproving a merger. However, on the other hand, the Member States normally use the industrial policy factors to prevent a foreign takeover of local companies by a rival competitor abroad. The Member States' governments do this to protect their national economies and also to retain ownership in areas that are of national or strategic importance to their nations. Examples of such areas are water and security companies.[242] This is why the EU is accused of being a protectionist trade block, in addition to instances where it imposes high barriers on other countries in order to protect Member States' producers. It is argued that it is normal for every country to protect its own producers by increasing

[240] Greenhouse Gas Emission.
[241] EC Treaty, Article 157(3)
[242] Hans Von Der Burchard, 'Here Comes European Proctectionism' https:www.politico.eu Accessed On 3rd April2020

the cost of imported goods. In order to determine whether the EU is a protectionist block, the tariffs of the EU on imported goods should be compared with other countries in the world.[243] Where it is found that the EU's tariff is excessively high or exorbitant, it may then be concluded that the EU is a protectionist block. It is further argued that the EU has certain arrangements with developing nations like Nigeria and most African countries whereby the African nations are given low tariffs and quota-free access for their exports. The arrangement is called "everything but Arms".

Monti[244] believes that industrial policy factors have the capacity to remodify directly the structure of the market in a beneficial way; both in the short and mid-term. Meanwhile, Schwartz[245] is of the view that industrial policy is so important that the Commission should only be considering merger review on the basis of industrial policy (class of public interest) and competition rules. To him, promotion of industrial policy will facilitate importation of technology from one continent to another and increases the pace of development of the home country for the betterment of the concerned industry.

It is argued that considering the position of the Commission on industrial policy as captioned by Article 157(3) EC and EU Merger Regulation (EUMR), the goal of industrial policy is not being implemented as the environmental policy is, hence the weight to be attached to the industrial policy factor is minimal. To underscore the importance of the Commission's position on industrial policy, in 2011, the Commission prohibited the proposed merger between Olympic Air and Aegean Airlines[246] on the basis that the merger would result in a monopoly of the Greek air transport market. The Commission was able to do this despite the fact that the merging parties operate in and out of Greece and more importantly because the two-thirds rule, that allows the Member State to have concurrent jurisdiction, was not at play. It is argued that the result would have been different if the two-thirds rule were

[243] Andrew Walker, 'Is The European Union A Protectionist Racket? https: //www.bbc.com.Accessed On 3rd April 2020
[244] Giorgio Monti, 'The New Substantive Test In The EC Merger Regulation-Bridging The Gap Between Economics And Law' 2008, Law Society Economy Working Papers, Pages 1-22.
[245] David A. Schwartz 'The Essentials Of Merger Review' 2013 American Bar Association, Section Of Int. Law Page10
[246] Aegean/Olympic II, Case No. Comp/M. 6796 (1991) OJ C25/3

at play in the sense that the turnover of the companies involved would ordinarily have given the Member States jurisdiction to entertain the matter.[247]

The position of the Commission not to allow the Member States to use industrial policy to promote national champions or European champions was also strengthened in the merger between *NYSE Euro next and Deutsche Borse*[248] when the then Commissioner of the Commission, Joaquin Almunia, was of the opinion that the proposed merger would have resulted in a quasi-monopoly in important markets to the disadvantage of millions of EU companies and that the merger was also going to be a threat to innovation in prudential services. The contention of Deutsche Borse that the over-the-counter market and exchange market are the same was rejected by the General Court of the EU when it held that derivatives traded in the exchange and derivatives traded on the over-the-counter market are not the same, as each of them belongs to separate markets. It is argued that the General Court of the EU took this position to stimulate competition in the EU in order to protect the financial industry of the EU as it was revealed during investigation that the proposed company was going to have a 93% market share of the trades if the merger was approved.

The Commission's chase for competitive internal market in the face of Member States' protectionist tendencies is not restricted to the Commission's powers under the EUMR but it has extended to the instituting by the Commission of infringement proceedings against Portugal's alleged special rights in *Energias de Portugal ("EDP") and Portugal Telecom.*[249]

It is argued that the Commission went this far to underscore the importance of its position to prevent the emergence of undue interventionist national industrial policies to override the competition policy of the Commission.

3.2.3 Public security

Another feature of the public interest factors in a merger review in the EU is public security. This is one of the factors recognised by the EUMR as a legitimate interest in

[247]Alex Nourry, Clifford Chance And Nelson Jung, 'EU State Measures Against Foreign Takeovers: ''Economic Patriotism'' In All But Name' 2012 Competition Policy International, Volume 8(1) pages 10-39

[248] Case No Comp/6/66, Decision Of 1st December 2012

[249] Case No Comp/M. 3440, Decision Of 12th December, 2004

which the Member State does not need the consent of the commissioner before employing the same to either block or approve a merger on a public interest ground. Public security could relate to the safety of people or organisations within a country for the maintenance of a peaceful atmosphere for people to conduct their affairs. The Commission may allow a merger to be blocked if the merging of the enterprises will affect the safety of the people in the nation in a negative manner.

3.2.4 Plurality of media

Plurality of the media is another factor of public interest in a merger review in the EU. The EUMR recognises that the Member States do not need the consent of the Commission before blocking or permitting a merger on the basis of plurality of the media. The wisdom behind this is that the public is expected to be aware of or exposed to a collection of sources of news, opinions and information. Genuine plurality requires choice and the need for the consumers to make enlightened decisions, which is the cardinal principle behind competition law. The BskyB/News Corp[250] attempted merger is a case in point where the state intervened on the ground of public interest to prevent distortion of competition. The reason for the state's intervention was the prevention of a situation where both media houses would be controlled by one person. The fear was justified because the management of BSkyB had controlling shares in NewsCorp. It is argued that if the merger had not been blocked, plurality of the media in the UK would have been affected as dissemination of news would be controlled by a single source in respect of the proposed merger.

3.2.5 Prudential rules

Prudential rules is another feature of public interest factors in a merger review in the EU. The EUMR recognises prudential rules as a public interest factor in that a Member State does not need to notify the Commission before employing the same as the basis for prohibiting or approving a merger. The merger of *HBOS and LLOYDS TSB*[251] was a classic example of a public interest factor at play in a case of a horizontal merger of HBOS and Lloyds TSB. The merger was approved despite the fact that both banks were in the same businesses and in the same market because of the turbulence in the global financial industry in 2009. In the words of the then

[250] Case No. Comp/M.5932. Decision Of 21st December, 2010
[251] Hbos And Lloyds Tsb. Case No. Me/3862/08

Secretary of State, the merger was allowed to "save the financial stability of the UK".[252]

Environment, industrial policy goals, public security, plurality of the media and prudential rules are examples of public interest considerations in the EU and why they are being considered here as public interest factors in a merger review in the EU to enhance competition goals.

It is interesting to note that each of these public interest factors, including employment and health, are actually covered by Articles of the Treaty on the Functioning of European Union (TFEU)[253]. Examples are Article 7 of the TFEU, which imposes on the EU the duty to ensure that its policies are consistent with its activities by taking into consideration the main objectives of the EU. In other words, Article 7 of the TFEU has obligated the EU to ensure that employment, health and welfare of EU citizens are protected whenever they are accommodated as public interest factors in a merger review.[254]

Another example of statutory backing for the public interest factors is Article 346 of TFEU, which allows a Member State to protect its national security, while Article 191 based on the premise of Article 11 of TFEU outlined the need for a cleaner and safe environment for the EU.

Having discussed the features of public interest factors in a merger review in the EU and why public interest factors are considered in a merger review process, it is apposite to discuss how public interest factors are considered in the process of merger review in the EU. In other words, in which ways could public interest factors influence a merger assessment.

3.3 PUBLIC INTEREST'S INFLUENCE ON MERGER REVIEW

The public interest factors under the EU can either be applied in a positive or in the negative manner.[255] The application of public interest factors in a positive way may be

[252] Lord Mandelson, The Secretary Of State For Business In 2008
[253] Treaty Of The Functioning Of European Union
[254] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A PhD Thesis Of The East Anglia University, U.Kpg55.
[255] Mateusz Blachucki, 'Public Interest Consideration In Merger Control Assessment 2014'. European Competition Law Review, 35 (8) Pg. 380-386

similar to the "efficiency defence" recognised under the EUMR.[256] In an "efficiency defence" situation, a merger that is anticompetitive could be permitted on the basis that the proposed merger might bring about efficiency gains that will offset the loss of competition.[257] The wisdom behind this is that a merged entity, which has derived economies of scale and scope as a result of the merger, would be able to offer its goods to consumers at a lower price because of a cut in its production cost. In other words, the welfare of the consumer is promoted as a result of productive and allocative efficiency notwithstanding the loss of competition due to the merger.

Staying with the positive manner of influencing public interest in a merger review, the Commission is obligated under Recital 29 EUMR to consider an efficiency defence.[258] The requirements of the horizontal merger Guidelines when the Commission is utilising the efficiency defence is that (i) the efficiency must provide a benefit to consumers, (ii) the efficiency must arise specifically out of the merger in question, and (iii) efficiencies must be verifiable and likely to be realised.[259]

It is submitted that taking into consideration the definition of efficiency provided by the Guidelines, one may now appreciate why the public interest defence is different from the efficiency defence and why the Commission may not find it attractive.

This also explains why the public interest defence cannot be substituted for efficiency defence provisions. The efficiency defence talks about the "receiver" of the benefit that outweighs/offsets the loss of competition; the receivers of the benefits are of course the consumers who enjoyed lower costs and greater choice and quality as a result of the merger while the receivers of the benefits created by the public interest defence are the general public in the form of social benefits such as wider news coverage, secure environment, unpolluted environment and sound and secure financial

[256] David Cardwell, 'The Role Of the Efficiency Defence In EU Merger Control Proceedings Following UPS/TNT, Fedex/TNT And UPS v. Commission 2017, Journal Of European Competition Law And Practice, Vol. 8(9) pages 551-560

[257] Daniel L. Crane, "Rethinking Merger Efficiencies' 2014, 110MICH-Law Rev, Volume 347, Pages 347-391.

Mitja Kocmut, 'Efficiency Consideration And Merger Control – Quo Vadis, Commission? 2006 European Competition Law Review Page 19-27

[258] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A PhD Thesis Of The East Anglia University, U.K..pg60

[259] Horizontal Merger Guidelines

institutions operating in the economy.[260] The second reason why the Commission may not easily use the public interest defence has to do with how the defences in each situation of either the public interest defence or the efficiency defence is able to outweigh the negative effect on competition. In the case of the efficiency defence, the loss of competition is outweighed by establishing efficiencies which ultimately enhance consumer welfare while in the case of the public interest defence, the loss to competition is outweighed or offset by protecting wider community interest which is not direct to the consumer welfare. This further explains why it is difficult to pinpoint the direct benefits of public interest factors for consumers; hence, the Commission may not readily find public interest factors attractive to use since competition law is principally about the direct welfare of consumers.

This brings us to the constraints of the Commission in applying public interest factors during a merger review in the EU. The constraints concern the organisational structure of the EU, transparency and legal uncertainty constraints posed by the international nature of the EU.

3.4 ORGANISATIONAL STRUCTURE

The organisational structure of the EU, being an international organisation vis-à-vis the consideration of public interest factors in merger review in the EU, has been a major concern for the Commission. A number of scholars[261] have raised the issue of competence or eligibility of the EU to make rulings on public interest because members taking decisions for the Commission as regards Phase 2 investigations are unelected, given that the members of the College of Commissioners were appointed by national governments of their respective countries. It is argued that this view may not be correct as the members represent the interests of the EU and not the interests of their home country. It is further argued that since votes are cast on a majority basis, it would be difficult for a Member State to place its interest over and above the EU's

[260] David Cardwell, 'The Role Of the Efficiency Defence In EU Merger Control Proceedings Following UPS/TNT, Fedex/TNT And UPS v. Commission 2017, Journal Of European Competition Law And Practice, Vol. 8(9) pages 551-560

[261] Petri Kuoppamaki And SamiTorstila, 'Is There a Future To An Efficiency Defence In European Merger Control?, (November 20, 2015) Available At SSRN: https://ssrn.com.abstract272717 pg 29-45Accessed on 29thNov.2019
Orley Ashenfelter And Daniel Hosken, 'The Effect Of Mergers On Consumer Prices: Evidence From Five Mergers On The Enforcement Margin' 2008. Journal Of Law And Economics, Vol. 53 Pages 417-466

interests. However, the question would then be whether the Commission, if best placed to represent the interests of the EU, would be able to protect and recognise the public interests of the individual Member States.

It is argued that if the public interest factors were such as the EU specifically provided for in the EUMR or TFEU, for example environment and public security, then the Commission would find it easy to decide on the expected benefits that would accrue to all the members of the EU. However, the situation would not be the same if the Commission were to decide on a public interest factor that is restricted to a single Member State because the issue of balancing public interest goals against economic efficiency goals would now arise. The Commission may then find itself in a tight corner.

3.4.1 TRANSPARENCY AND LEGAL INCONSISTENCY

Another constraint of the Commission when applying public interest factors during a merger review in the EU is the issue of transparency and legal inconsistency of the decisions taken by the Commission.

The body that makes decisions is the College of Commissioners, which is made up of 27 commissioners from each Member State. As said earlier in this chapter, the mode of appointment of the commissioners is not by election by the electorate but by appointment by the home governments of each Member State. The contention is that since these commissioners are appointed, they may be political in their decisions. This is coupled with the fact that the process of decision-making by the commissioners is not transparent as the college deliberates in private meetings when deciding on the outcome of a transaction. At the meeting, they are not obliged to state the reasons behind their decision taken at the meeting.[262] This, it is submitted, deals a major blow to the transparency of the Commission in decisions taken on public interest grounds. Thus, whenever the Commission chooses to apply the public interest factor to merger review, the lack of transparency in the decision-making process may be an albatross for the Commission.

[262] Round Table On Competition Policy, Industrial Policy And National Champions – Daf/Comp/G-F (2009) 9

Another related issue is legal inconsistencies. It is difficult for a merging party to establish the basis of a decision taken by the Commission when the decision-making process is not transparent; hence the merging firm may not be certain about the outcome of the Commission's decision on public interest factors during the merger review. Another dimension to this is that it is difficult to ascertain which of the public interest factors is more important to the other in the list of public interest factors.

Is the Commission justified in excluding public interest in merger review as a result of the highlighted constraints?

The Commission, through its commissioners,[263] has based its refusal to use public interest factors in merger review in the EU on the reasons discussed above. For these reasons the Commission has adopted a strict competition-based approach to mergers during its merger review process.

It is argued that the Commission's position in this regard (rarely applying the public interest factors) is not an unlawful one since the accommodation of public interest considerations now is almost impossible, or impractical, in the sense that such accommodation might undermine the efficacy of the entire merger review process of the EU. The Commission may be excused from implementing what is attainable in this regard. However, the question would then be whether it is justifiable for the Commission to place procedural law before substantive law. Would the Commission be justified in disregarding the EU law that allows public interest factors to be used in the EU simply because of procedural irregularity? It is submitted that the proper view to be taken by the Commission is to accommodate public interest factors during a merger review despite the procedural irregularity. This is even more the case when progress can only be made in a nation or community if the legislature refuses to place too much emphasis on the ease at which a particular law can be enforced.

Having said this, it is imperative to state here that the EUMR as at today does not provide for any substantive assessment formula for the Commission, as the EUMR did for the efficiency defence. Even though the Commission could explore other areas provided by the EUMR, for example (Article 21(4)), to accommodate public interest

[263] Nello Kroes, Joakins Almunia And Magrathe Vestager

factors, it has chosen to give preference to procedural norms over substantive norms.[264]

That said, it would not be out of place to analyse the way and manner in which the Commission uses public interest factors during merger review in the EU. The next section will attempt to do just that.

3.5 APPLICATION BY THE COMMISSION OF PUBLIC INTEREST CONCEPT DURING MERGER REVIEW IN THE EU.

In view of the constraints mentioned earlier in the previous section, the Commission is suspicious of the outcome of a full-blown regime of merger review process that incorporates public interest factors. This section will discuss a number of instances where the Commission has maintained its stance that it is in favour of strict adherence to competition rules[265] because of the constraints outlined in the previous section. The question then will be whether, in view of the stance of the Commission, would the Commission consider public interest factors in merger review in the EU?

3.6 THE BASIS OF EU'S ADHERENCE TO STRICT COMPETITION RULES IN MERGER CONTROL

The Commission, prior to the current Merger Regulation (2004), was using the dominance test[266] for merger review under the 1989 Merger Regulation even though it was the absence of substantive law in merger review in the 1989 Merger Regulation that led to the introduction of the EUMR 2004.[267] The introduction of the EUMR 2004 also brought about the change from using the dominance test to using the SIEC test (Significant Impediment of Effective Competition).[268]

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[264] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A Ph.d. Thesis Of The East Anglia University, U.K..pg77

[265] Round Table On Competition Policy, Industrial Policy And National Champions – Daf/Comp/G-F (2009) 9

[266] Giorgio Monti, 'The Concept of Dominance In Article 82' 2006, Hart Journals, Pages5-20

[267] Michael G. Egge And Matco F. Bay, 'The New EC Merger Reguation: A Move To Convergence' 2004, 19 Antitrust Page. 37

[268] Jerome Foncel, MercIvaldi And Valerie Rabassa,' The Significant Impediment Of Effective Competition Test In The New European Merger Regulation: In Theory And Practice' 2007, Contributions to Economic Analysis Journal, Volume 282 Pages 349-367

Whish, 'Substantive Analysis Under The EC Merger Regulation: Should The Dominance Test Be Replaced By Substantial Lessening Of Competition?' 2002 Hellenic Competition Commission 2002 Pp. 45-62

As such, the SIEC test lays more emphasis on an economic effects-based formula than the dominance test where the key word is the "creation or strengthening of a dominant position".

Notwithstanding the strict adherence to a competition approach adopted under the 1989 Regulation, there was provision for the Member States' interference in the merger review process of the Commission on legitimate public interest grounds. Suffice to say that this "legitimate public interest" clause is retained under Article 21(4) of the current EUMR. This will be discussed further in full before the end of this chapter. Having said this, the principle of a "one-stop-shop" as recognised by the EUMR 2004 helps the Commission to ensure that all mergers with a community dimension[269] will only be reviewed by the Commission. This means it is automatic for the Commission to assess any large EU merger for compliance with the Commission's economic agenda.

It is further argued that both the EC Regulation of 1989 and the EUMR 2004 have brought tremendous benefits into the industry in the sense that both laws – especially the EUMR 2004 – have introduced predictability and certainty for merging entities.[270] The principle of a "one-stop-shop", which means that the merging parties are only enjoined to meet the assessment requirement of the Commission and not any other body, is commendable. It is then left for the Commission to decide how far it can go with the application of public interest factors to merger review in the EU in view of the fact that the Commission has the choice of strictly adhering to the competition rules or relying on public interest goals. The next question will be when would the Commission want to depart from its strict adherence to an economic approach?

3.7 LIKELY AREAS OF APPLICATION OF PUBLIC INTEREST FACTORS BY THE COMMISSION.

Having discussed the Commission's stance of strict adherence to economic policy in merger review and the constraints of the Commission in the application of the public interest concept, this section will discuss situations where the Commission has considered the public interest concept during a merger review, despite the apparent

[269] Cook And Kerse, 'EC Merger Control' (Sweet And Maxwell) 5th Ed., 2009) Pp 19-22
Levy, 'European Merger Control Law: A Guide To The Merger Regulation (Lexis Nexis, 2003) Chapter 21
[270] Lindsay, 'The EU Merger Regulation: Substantive Issues' (Sweet And Maxwell, 4th Ed., 2012) Pg. 204

impression that the Commission does not take into consideration the public interest concept in its merger review. In this respect, the views of proponents of strict adherence to economic policy of the Commission and the views of the antagonists will be discussed and analysed in this section.

A cursory look at Article 2 EUMR would give the impression that the Commission may not be able to consider public interest factors in merger review in the EU. Article 2 EUMR[271] provides thus: "Concentration within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all markets concerned and the actual or potential competition from undertakings located either within or outwith the community;

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."

However, on a closer look at Article 1(b)[272], the Commission is enjoined to be cognisant of the development of technical and economic progress, provided that it is to the consumers' advantage and does not form an obstacle to competition.

It is argued that the words "technical and economic progress" could be interpreted to mean non-competition interest (that is, industrial policy, environment, national champions etc.). However, there is a caveat; the non-competition interest must have a great impact on consumer welfare, and this makes it look like one of the categories of efficiency defences. That said, the final interpretation of this clause rests with the Commission to determine whether to interpret the clause as one that can allow it to trigger the public interest factor or not.

[271]Article 2, European Merger Regulation 139/ 2004(OJ2004L24/129.01.2004)
[272] Article 1(b), European Merger Regulation 139/ 2004(OJ2004L24/129.01.2004)

As discussed above, the Commission has three criteria in its application of the efficiency defence in merger review in the EU. The three criteria are: (a) the efficiency must benefit consumers; (b) the efficiency must arise specifically as a result of the merger; and (c) the efficiency must be verifiable and likely to be realised.[273] The Commission would prefer to keep to this criteria instead of using the public interest factors to allow anticompetitive mergers for insignificant efficiency benefits.

As a corollary to the preceding paragraphs arguments, the Commission may apply a wide interpretation of efficiencies under the EUMR to all transactions that are caught by the Union dimension without losing its ability to review all transactions that meet the thresholds needed for the Union dimension. This is possible because of the one-stop-shop principle that gives the Commission sole competence to review all mergers with a Union dimension. This argument can be extended further to say that the Commission will not compromise its ability to review mergers if it applies public interest factors as its assessment formula for merger review.

The strict adherence of the Commission to the economic approach for the assessment of mergers has been echoed at several forums by the various commissioners of the Commission.[274] Joaquin Almunia[275] has never minced his words when talking about the supremacy of the economic approach over non-competition considerations. He

[273] Recital 29 Of European Merger Regulation 139/ 2004(OJ2004L24/129.01.2004)

[274] Speeches By Neelie Kroes, 'Delivering Better Markets And Better Choices' On 15th September, 2005 At The London European Consumer And Competition Day.
Kroes Neelie, 'The Competition Principle As A Guideline For Legislation And State Action – The Responsibility Of Politician And The Role Of Competition Authorities' Delivered on 6th June 2005 At Born, Germany At The 12th International Conference On Competition.
Joakins Alumunia, ' Competition And Consumers: The Future Of EU Competition Policy' Delivered On 12th May, 2010 At Madrid, Spain On European Competition Day: 'Competition, State Aid And Subsidiaries In The European Union' Delivered on 18th February, 2010 At Paris, France During The 9th Global Forum On Competition. 'Reflections On Recent Contribution from the European Commission Directorate General Competition To The Innovation In Payment Debate', Delivered In December, 14 2011. At The European Commission.
Margrethe Vestiger, 'Making Globalisation Work For European' Delivered On November 23, 2017 At Universiteit Leuven.: 'Cleaning The Part For Innovation Delivered At Lisbon Web Summit On November 7, 2011

[275] Joakins Alumunia, Competition And Consumers: The Future Of EU Competition Policy' Delivered On 12th May, 2010 At Madrid, Spain On European Competition Day: 'Competition, State Aid And Subsidiaries In The European Union' Delivered on 18th February, 2010 At Paris, France During The 9th Global Forum On Competition. 'Reflections On Recent Contribution from the European Commission Directorate General Competition To The Innovation In Payment Debate', Delivered In December, 14 2011 At The European Commission.
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believes that "EU merger control must remain anchored in its own rules and purpose and that EU merger review should be kept immune from non-competition consideration". Almunia's view further confirms the theory that the Commission could apply public interest factors to merger review in the EU if it chose to do so but that it is just being defiant.

In the researcher's quest to look for justification for the Commission to embrace public interest factors during merger review, it is contended that Recital 23 of EUMR has given leeway to the Commission to use public interest factors during such merger review. Recital 23 provides thus: "It is necessary to establish whether or not concentrations with a community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In doing so, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 3 of the Treaty on European Union."[276] The contention of the researcher is supported by Article 3 of the TFEU, which defines "fundamental objectives to include full employment and social progress, the promotion of peace, protection and improvement of the environment and the wellbeing and security of citizen etc." Recital 23 on the other hand has imposed on the Commission the duty to "place its appraisal within the general framework of the functions and objectives of the EU". It is further contended that the Commission is enjoined by Recital 23 to use public interest factors in merger review whenever the Commission is placing its appraisal within the general framework of the objectives of the EU, since the fundamental objectives have been defined to mean public interest factors. However, it should be noted that the Commission by virtue of Recital 23 is not under a positive duty to consider the fundamental objectives as part of its substantive criteria for reviewing mergers.[277]

However, Timothy Portwood[278] may have disagreed with the contention of the researcher when he interpreted Recital 23 as conferring both a positive and negative duty on the Commission whenever the fundamental objectives of the EU are in issue. He is of the opinion that fundamental objectives should always take precedence

[276]Article 3 Of The Treaty Of The Functioning Of European Union
[277] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A PhD Thesis Of The East Anglia University, U.K.
[278] Timothy Portwood, 'Mergers Under EEC Competition Law' (The Athlone Press, 1994) Pg. 92

whenever there is conflict between fundamental objectives and competition. He went on to say that even when there is no conflict, the fundamental objectives should always be the basis upon which competition rules are applied.[279]

Portwood's interpretation seem fascinating but it is not in consonance with the reality, taking into consideration the position of the Commission that a strict economic approach is superior to public interest factors. The Commission's current policy does not encourage using public interest factors to approve anticompetitive mergers. In this respect, it would be safe to aver that Recital 23 may not give the Commission the leeway to use public interest factors during merger review. Having said that, a second look at some cases in the aviation sector might suggest that the Commission unwittingly adopted public interest factors in merger review in order to accommodate the wider social goals of the EU.

In the case of *Boeing/McDonnell Douglas*[280], *which is a case* involving the mega-merger of two American aerospace companies, the Commission opposed the transaction on competition grounds and also on the grounds that the merger was against the Article 3 objective in the sense that it would not strengthen social and economic cohesion within the EU. The Commission's objective was said to be an attempt to strengthen the European civil aviation industry. The merger was eventually cleared after the Commission considered the competitive effect of the merger on Airbus.[281]

In the *Air France/KLM joint venture*,[282] the merger created a 60 per cent share in routes at Amsterdam and Paris, thereby creating perhaps the largest airline in Europe, yet the Commission cleared the merger subject to remedies. The Commission considered the effect of the merger on the competition and also on the recommendation of the DG of the Commission, agreeing with the DG Transport's position that Europe should not miss the potential benefits of the merger. The benefits were: cost reductions in distribution, station handling, catering and harmonisation of sale policies as well as sharing of airport lounges. Passengers would have more

[279] Timothy Portwood, 'Mergers Under EEC Competition Law' (The Athlone Press, 1994) Pg 92
[280] Boeing/McDonnell Douglas Case No.IV/M.877 [1997] L336/16
[281] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A PhD. Thesis Of The East Anglia University, U.K.pg79
[282] Air France/KLM (Case Comp/M.3280) (2004) v JC60

options of choice as regards destinations and connecting flights.[283] KLM, who had been making losses before the merger, eventually made profit in the last financial year before the merger as a result of the news of the merger.[284]

It is argued that these two cases tend to support the position of Portwood, that the Commission is obligated by Recital 23 not to act contrary to the goals of the EU when reviewing mergers in the EU. However, since the two cases were competition cases, the other view of Portwood, that the Commission was under a duty to consider the fundamental objectives of the EU even where the merger was not anticompetitive, could not be confirmed.

It may be too early to conclude that the two cases of Boeing/McDonnell Douglas and Air France/KLM are conclusive evidence of the fact that the Commission employs public interest factors during assessment of mergers in the EU. This is so because the impression created by the Commission's current commissioner, Margrethe Vestager, has not clarified matters. At every opportunity, she reiterates the Commission's stance that it does not consider non-competitive interests of merging entities.[285] She has said that the Commission would not bow to pressures from government and other stakeholders as regards the independence of the Commission. [286] The industry thought her regime would be pro public interest factors during merger review when she was initially appointed. In her mission statement she charged the Commission with "mobilizing competition tools and market expertise to contribute to creating jobs and promoting economic growth". But traces of events have proved otherwise on telecoms mergers in the EU. In a similar vein to Almunia, she too has refused several requests from Member States to allow national competition authorities power over some competition cases in compliance with Article 9 EUMR.[287] Vestager's reason was that telecoms mergers were of high importance and must be dealt with at the EU level.

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[283] Scott Moellaer And Chris Brady, Intelligent M & A: Navigating The Mergers And Acquisitions MineField, John Wiley & Sons, 2007

[284]Pierre Sparaco, 'Franco-Dutch Leader" Aviation Week & Space Technology, May 10, 2004.

[285] Vestager Margrethe, 'Competition And The Rule Of Law, Delivered On 10th May, 2019 At Copenhagen During The European Association Of Judges Conference. https://ec.europa.euAccessed on 29th Nov2019

[286]Margrethe Vestager "Independence Is Non-Negotiable'. Charthan House Conference On 'Politicisation of Competition Policy: Myth or Reality?' London 18 June, 2015.

[287] Vestager Margrethe, 'Defending Competition In A Digitised World, Delivered At Bucharrest, Roman On The 4th April, 2019 During The European Consumer And Competition Day.

Even during the regime of Almunia, the Commission, in the spirit of ensuring the realisation of the EU's objective of encouraging a pan-EU telecoms market, allowed about four mergers in the telecoms section so as to show commitment to the EU's objectives.[288] This is a credit to Almunia's efforts at promoting public interest factors in the EU during the merger review process, even where competition concerns were in issue. Unlike Almunia, Vestager does not want to allow public interest factors to be taken into consideration during merger review; she believes in an economic-based approach.[289] In the case of *Telia Sonera/Telenor*,[290] a merger between two Scandinavian telecoms companies operating in Denmark, was abandoned by the parties because of remedies requested by the Commission to address highlighted competition concerns. Vestager's comments after the botched merger was that the primary duty of the Commission was to ensure that markets were competitive and that the Commission was not interested in the creation of a pan-EU telecoms market devoid of competition.[291] This comment has confirmed fears that the Commission under Vestager would not condone or encourage public interest factors during merger review in the EU with regards to the telecoms industry. Another interesting case that confirms the position of the Commission in the telecoms industry is that of *Hutchinson/Telefonica*,[292] where the Commission held that because of its wide experience in mergers in the telecoms industry, it was in a better position to handle mergers relating to telecoms and therefore refused the request of the UK Competition and Markets Authority (CMA) to transfer the case under Article 9 of EUMR.

It is argued that the two cases in the telecoms industry analysed above have confirmed the position of the Commission in terms of the relevance of public interest factors in the telecoms industry during merger review. The Commission is adhering to a strict

[288] Joakins Almunia – ' Competition And Consumers: The Future Of EU Competition Policy' Delivered On 12th May, 2010 At Madrid, Spain On European Competition Day: 'Competition, State Aid And Subsidiaries In The European Union' Delivered on 18th February, 2010 At Paris, France During The 9th Global Forum On Competition. 'Reflections On Recent Contribution from the European Commission Directorate General Competition To The Innovation In Payment Debate', Delivered In December, 14 2011 At The European Commission.

[289] Margrethe Vestager 'Antitrust Law And Policy' Speech Delivered At Fordham Unversity, USA, 2015.https://ec.europa.eu. Accessed On 29thNov 2019

[290] TeliaSonera/Telemor/JV (Case M.7419) 2015 OJC 119/1

[291] Margrethe Vestager 'Antitrust Law And Policy' Speech Delivered At Fordham Unversity, USA, 2015.

[292] Hutchison 3 GUK/Telefonica UK (Case M.7612) 2016

economic approach for its assessment of mergers and remaining distant from the public interest factors approach.

Considering the uncompromising competition approach exhibited by the past and present competition commissioners, the pro-economic SIEC test and the flexible nature of Recital 23, one may deduce that the EU merger control is about a strict economic approach or simply a competition-based approach. Having said this, it is appropriate to ask whether the Commission could explore the possibility of considering public interest factors in its merger review process. On this issue, one may infer that if the Commission had chosen to adopt a strict competition-based approach as its assessment formula for merger review, what stops it from adopting public interest factors alongside the competition-based assessment in order to actualise the wider social interest of the EU? We may revisit the 2008–9 global economic crisis to see how the EU coped during that time.

3.8 WHETHER THE ECONOMIC CRISIS OF 2008–9 AFFECTED THE POSITION OF THE COMMISSION ON MERGER REVIEW

During the global financial crisis of 2008–9, most Member States' economies were in meltdown, hence there were calls on the Commission as to a way forward to a sustainable economy in the EU.[293] This specifically related to how the Commission might apply public interest factors during its merger review process so as to help the Member States' economies to recover from the recession. This was also the situation with the UK government around the same time whereby it closed its eyes to the competition concerns surrounding the merger between Lloyds TSB and HBOS.[294] The Commission approved the merger to sustain the financial stability of the UK economy. Merger activity was slow during the period but it was preferred to state aid because it was more beneficial to the economy. The clamour then was that the Commission would take advantage of the crisis to adopt a non-economic interest policy as a basis for its merger review.

[293] Andreas Weithbrecht, ' Horizontals Revisited –EU Merger Control In 2010' 2011 E.C.L.R 32(3)Pg126-131

[294] Hbos And Lloyds Tsb. Case No. Me/3862/08

The Commission did not yield to the pressure to adopt a non-economic interest policy for its merger assessment. In a speech delivered at Chatham House,[295] Almunia reiterated how the Commission rebuffed calls for a softer competition policy in merger review and he concluded that there should be no difference in the policy of the Commission whether in times of plenty or those of scarcity.

Almunia[296] in another forum frowned at the calls on the Commission to embrace protectionist measures so as to reduce the effect of the global crisis in the EU. He was of the view that such measures would cause more harm in the long run than any imagined short-term benefits of the protectionist measures. He opined further that protectionist measures would create trade barriers which could be disastrous to the EU economy considering the fact that the EU is claimed to be largest foreign investor in the world.[297] This thesis is indifferent to the truth of the statements of Almunia, but the concern of this research is that his statements have shown the position of the Commission towards a strict adherence to competition when it comes to merger review in the EU, even when there is crisis or recession in the economy. The Commission is not interested in any short-term benefits that could derail its merger assessment process.

In view of the foregoing, it is argued that the possibility of the Commission applying public interest factors is very slim; the thesis will therefore consider circumstances under which Member States may employ public interest factors during merger review in the EU.

3.9 INSIGHTS INTO ARTICLE 21(4) EUMR

By now, it is obvious that in reality, the Commission is hesitant to use public interest factors in merger review in the EU. The opportunity afforded the Member States by Article 21(4) EUMR may be the only opportunity to embrace public interest factors

[295] Almunia, 'Almunia Reflects On 20 Years Of The Merger Regulation'2011,76/77Pg1-6: http://Europa.eu/rapid/press releases action—Speech/11/166&Format.Accessed On 29thNov2019

[296] Speeches By Joakins Alumunia, ' Competition And Consumers: The Future Of EU Competition Policy' Delivered On 12th May, 2010 At Madrid, Spain On European Competition Day: Speech/11/561, Policy Objectives In Merger Control' Fordham Competition Conference, New York, 8 September 2011.

[297] Speeches By Joakins Alumunia, ' Competition And Consumers: The Future Of EU Competition Policy' Delivered On 12th May, 2010 At Madrid, Spain On European Competition Day: Speech/11/561, Policy Objectives In Merger Control' Fordham Competition Conference, New York, 8 September 2011.

during merger review in the EU. However, the question is, to what extent would Article 21(4) EUMR allow invocation of legitimate interest by Member States in the EU. As discussed in the previous section of this chapter, Article 21(4) of the EUMR allows Member States the opportunity to have jurisdiction in Union dimension mergers that may affect their legitimate national interests. This process or opportunity would allow the Member States to use public interest factors during their own merger review and thereby erode the economic-based criteria operative at the EU national level. The exercise of this power given to the Member States by Article 21(4) EUMR does not affect the operations of the Commission as regards its strict position on competition, but in a way it allows the introduction of the public interest concept into the merger review process in the EU. With this provision, Member States may rule on mergers with a Union dimension, thereby exercising the same power enjoyed by the Commission, at least in this respect. It is the domestic merger laws of the particular Member State that will determine the extent to which public interest factors may be used during merger review. In this regard, it is prudent to probe the source of public interest factors in Member States before determining the level to which public interest factors may be used as required by Article 21(4).

3.10 STATUS OF PUBLIC INTEREST CONCEPT AMONG MEMBER STATES

All Member States of the EU have adopted a merger review law except Luxembourg.[298] Luxembourg did not allow prior merger control regime. What is obtainable under the Luxembourg law is ex post control of mergers, which strengthens an existing dominant position as provided for under Article 102TFEU.[299] The mode of assessment of all the concerned Member States is the economic-based substantive test.[300] Some Member States adopt the dominance test, while others adopt the SLC test and SIEC test as their mode of assessment of merger review. Out of the 27 Member States, 19 of them have some sort of public interest consideration in their laws for merger review.[301] In view of this, one may infer that Member States would be willing to rule on mergers of legitimate interest that are important to them rather than

[298] DAF/Comp/WP3/M (2016) 1 ANN5/FINAL, 'Summary Of Discussions Of The Round Table On Competition Policy, Industrial Policy And National Champions. Pg 16

[299] Elvinger Hoss, - 'Luxembourg-Merger Control. https://www/elvingerhoss.lu.Accesed on 29thNov2019

[300] DAF/Comp/WP3/M (2016) 1 ANN5/FINAL, 'Summary Of Discussions Of The Round Table On Competition Policy, Industrial Policy And National Champions. Pg 18

[301] Whish R. And Bailey D, 'Competition Law' 9th Ed. (Oxford University Press 2018) Page 928

give the opportunity to the Commission to rule on such mergers. The thesis will now consider the scope, relevance, limitations and significance of Article 21(4) EUMR in terms of merger review in the EU.

3.11 THE EXEMPTION AFFORDED BY ARTICLE 21(4) EUMR

As said earlier, in previous sections of this chapter, Article 21(4) EUMR provided the leverage for Member States to embrace public interest factors during merger review. The public interest factors to be used are called legitimate interests.

Article 21(4) EUMR provides thus: "Notwithstanding paragraph 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of community law. Public security, plurality of the media and prudential rules should be regarded as legitimate interests within the meaning of the first sub paragraph."

Article 21(4) EUMR further provides that "any other public interest which a Member State wishes to protect 'must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of the community law before the measure to protect such an interest is taken by the Member State."[302]

It should be noted that the Commission is obligated to inform the Member State concerned of its decision on the notification within 25 working days of the notification.[303]

The implication of Article 21(4) EUMR in terms of the EU jurisprudence concerning merger review is that the Commission is temporarily stripped of the exclusive competence to assume jurisdiction on Union dimension mergers. It means Member States can invoke public interest factors during merger assessment using Article 21(4) EUMR. The conditions attached to the invocation are that the measures must be "appropriate" while interests should be "legitimate". Another condition is that the said measures and interests must be compatible with the general principles of the

[302] Article 21(4) Council Regulation (Commission) 139/2004 (OJ 2004 L2, 129-01-2004)
[303] Article 21(4) Council Regulation (Commission) 139/2004 (OJ 2004 L2, 129-01-2004)

community law. The clause further provides an exclusive list of legitimate interests that may stimulate the intervention of Member States, the legitimate interests being public security, media plurality and prudential rules.

The Member States may proceed to take appropriate measures to protect themselves without communicating to the Commission. However, any other public interest factor has to be communicated to the Commission, which has the competence to determine the legitimacy of such additional public interest. This gives the Commission the latitude to declare which public interest is legitimate and which one is not, thereby confirming what has been said in this chapter, that the Commission determines what is a public interest in the EU and that it assumes the prerogative of adhering strictly to competition in merger review by maintaining a fluid interpretation of what constitutes a legitimate interest.

There are controversies[304] as to the scope of the powers conferred on Member States by Article 21(4) EUMR. Some scholars[305] believe that Article 21(4) has not given new rights to the Member States, that Member States have always had the right to intervene by virtue of their territorial rights. Even if it is agreed, for argument's sake, that Member States have always had this right, the extent to date is debatable. Others[306] suggest that Article 21(4) gives the public interest concept the opportunity to enter the EU jurisprudence on merger review through the side door. It is apposite at this stage to discuss the limitations of Article 21(4) EUMR before venturing into the extent of its scope.

One of the limitations of Article 21(4) EUMR is provided by the Guidance to the said Article 21(4),[307] which says that the Article can only be used negatively. Put differently, a Member State may only use the Article to prohibit pro-competitive

[304] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014) 10(3) European Competition Journal 453

[305] Alex Nourry, Clifford Chance And Nelson Jung, 'EU State Measures Against Foreign Takeovers: Economic Patriotism' In All But Name' 2012 Competition Policy International, Volume 8(1) pages 10-39 Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014) 10(3) European Competition Journal 453

[306] N.Kroes, 'European Competition Policy Facing A Renaissance Of Protectionism – which Strategy For The Future?. Speech To The St. Gallein International Competition Law Forum, 11 May 2007.
Almunia . 'Some Highlights From EU Competition Enforcement'. Speech Delivered On 19 September, 2014.

[307] Guidance On Article 21(4) European Merger Regulation. , 2004.

mergers; it may not be used to approve a merger that the Commission had earlier prohibited. In essence, Article 21(4) cannot be used to elevate or prioritise public interest concerns over competition concerns during merger review in the EU.

Another limitation may be deduced from the wording of the first paragraph of the said Article 21(4) EUMR, which provides that the legitimate interests to be protected by Member States must be such interests that are not taken into consideration by the EUMR. It is submitted that on a cursory look, the statement could be construed to mean that Member States are prevented from classifying "competition" as a legitimate interest since the main purpose of the regulation is competition. However, this may not be so: as discussed earlier that the Commission, in reaching a decision, must take into consideration the wider policy objective of the TFEU. The next question would then be whether these wider policy objectives constitute interests that are captured by the Regulation, even if the said interests are seldom considered by the Commission in reality. If the answer is in the affirmative, then Member States are prevented from raising legitimate interests that relate to any of the objectives stated in Article 3 of TFEU as the stated objectives have been considered by the Regulation in view of their reference by Recital 23. Another implication of this interpretation, it is submitted, is that the prerogative of determining whether a wider policy objective is applicable to a merger review process would now rest squarely on the Commission alone, and not any other institution. This situation will no doubt give the Commission the scope to block the implementation of public interest goals in the EU since the Commission would have the monopoly of determining what constitutes a wider policy objective.

The third possible limitation to the applicability of Article 21(4) EUMR is the condition stipulated by the Article 21(4) whereby the public interest notified by the Member State must be compatible with "other provisions of EU law" and the "general principles of community law". The other provisions of the EU law will ordinarily include provisions relating to movement of capital and freedom of establishment as provided by the TFEU. The "general principles" connote EU law on procedure and this will include principles of proportionality and non-discrimination. It should be noted that the principle of proportionality is one of the procedures employed by the EUMR to limit the power of the Member States to take advantage of the benefits of Article 21(4) on public interest. Article 21(4) underscores the importance of

proportionality when it states that steps taken by a Member State must be proportionate to the action necessary to safeguard the legitimate interest in question. A judicial confirmation has been given to this position in the case of *Commission v France*,[308] where the European Court of Justice ruled that the "proportionality" contemplated by Article 21(4) EUMR is such that measures expected of a Member State to safeguard the legitimate interest in question must not be disproportionate to the objectives being targeted. The same position was taken by the European Court of Justice in the case of *Commission v Spain*,[309] where the court held that the provisions of Article 21(4) EUMR must be observed by Member States in accordance with the goals of the Commission as regards proportionality.

In view of the highlighted case, one can infer that the principle of proportionality is aimed to clip the wings of Member States in respect of the power given to them under Article 21(4) EUMR as regards the application of public interest.

The fourth limitation of the applicability of Article 21(4) EUMR is the condition that states that interests other than public security, plurality of the media and prudential rules should be notified to the Commission. The implication of this is that the Member States cannot invoke public interests apart from the recognised interest without the permission or approval of the Commission as to the legitimacy or otherwise of the public interest.

In relation to this limitation, there have been occasions[310] where Member States deliberately acted pursuant to Article 21(4) EUMR without notifying the Commission in a bid to eagerly invoke the provisions of Article 21(4) to actualise the benefits of the public interest concept for their states. In such circumstances, the position of the Commission has been that the Member States acted in breach of provisions of Article 21(4), the EUMR and other EU laws.

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[308] Commission v. France [2002] ECR I-4781, Para 49
[309] Commission V Spain (2009)ECR695 Para 34
[310] E.ON/Endesea Case Comp/M.4110, 2006 O.J. (c68) 09
Commission v. Spain [2008] ECRII-00069, Para 72
Commission v. Italy [2000] ECR I-3811
BSCH/Champalimuad, Case IV/M. 1616, 1999 O.J (C197)

A case in point is the case of *Portuguese Republic v Commission*,[311] where the court held that it was compulsory for the Member States to communicate to the Commission in compliance with Article 21(4) and that even in situations where no communication is made by Member States to the Commission, the Commission could adopt a decision under Article 21 to assess whether steps taken by such a Member State are in consonance with Article 21(4). The Commission, it was further held, could ask the Member State to withdraw measures which are not in line with Article 21(4) if the Commission decides to that effect. What this means is that the Commission is not under an obligation to immediately begin the procedures contemplated in Article 258 TFEU to sanction the erring Member State.

Having analysed the limitations of Article 21(4) EUMR as regards invocation of public interests by Member States, it would be useful to examine the challenges of Article 21(4) before discussing the scope of the application in the EU.

3.12 CHALLENGES OF ARTICLE 21(4) EUMR

The deliberate limitation of the application of Article 21(4) EUMR by the Commission should not be to the consternation of scholars.[312] This is because the Commission has not hidden its mission to maintain competition in the open market in the EU for the benefit of consumer welfare. The effect of allowing a merger that is not competitive, even on the ground of public interests, could be disastrous to the EU economy. The proper and constant application of Article 21(4) will therefore endanger the strict adherence to the competition policy of the Commission, and the Commission is ready to use all the tricks in the book to protect its objective, even if it means discouraging the application of Article 21(4) by Member States.

Another possible challenge to the implementation of Article 21(4) is the fear expressed by some scholars[313] that Member States would use it to promote Member

[311] Portuguese Republic v. Commission (2004) ECRI 607
[312] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014) 10(3) European Competition Journal 453
Alex Nourry, Clifford Chance And Nelson Jung, 'EU State Measures Against Foreign Takeovers: Economic Patriotism' An All But None' 2012 Competition Policy International, Volume 8(1) pages 10-39
[313] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014) 10(3) European Competition Journal 453
Alex Nourry, Clifford Chance And Nelson Jung, 'EU State Measures Against Foreign Takeovers: Economic Patriotism' An All But None' 2012 Competition Policy International, Volume 8(1) pages 10-39

State protectionism. In other words, Member States could use Article 21(4) to discriminate and restrict trade between themselves so as to protect businesses that are considered vital to their economy.

It could be argued that this fear is not unfounded, as the case of *Banco Santander Central Hispano/A. Champalimaud*[314] demonstrated. In this case, the Portuguese minister of finance objected to a Union dimension concentration in financial services that was notified to the Commission on the ground that Portugal had concerns that the concentration would affect the national interest of Portugal if allowed. He further objected on the ground that the merger would prejudice the economy and financial system of Portugal. The Commission rejected the arguments of the Portuguese and required the minister to withdraw his opposition to the merger.

However, Gerard[315] disagreed with the view that Member States could use Article 21(4) to promote protectionism; he opined that instead of using Article 21(4) to promote protectionism, the Commission could actually use Article 21(4) to act against protectionism. He suggested that since the Commission would always support cross-border mergers as encouraged by the freedom of movement principle of the EU, any Member State who did not a support cross-border merger must present measures that would satisfy a three-part "internal market" analysis. According to Gerard, the three-part internal market aspects are: (a) whether the measure amounts to an obstacle to trade; (b) whether that obstacle can be justified on overriding public interest grounds; and (c) whether that justification is proportionate and non-discriminating. Gerard concluded that it is almost impossible to have protectionism among Member States if the Commission adopts this template and conducts a review of Member States' measures on this basis.

The irony of agreeing with the view of Gerard is that the process suggested by him would further reduce the application of the public interest concept as envisaged by Article 21(4) EUMR, in the sense that the process further empowers the Commission to scrutinise what constitutes legitimate interest.

[314] BSCH/A. Champaliuad, Case M1616, M1680 And M1724

[315] Damien Gerard, 'Protectionist Threats Against Cross-Border Mergers: Unexplored Avenue To Strengthen The Effectiveness Of Article 21 EUMR' (2008) 45(4), Common Market Law Review, 987-996.

In view of the foregoing, Article 21(4) may be seriously challenged by fears of protectionism and impropriety of usage. We may now therefore seek to examine the scope of the application of Article 21(4) EUMR in the light of decided cases in the EU.

3.13 JUDICIAL INTERPRETATIONS OF SCOPE OF ARTICLE 21(4) EUMR

There has been a dearth of cases on the interpretation of Article 21(4) as regards application of the public interest concept in merger review in the EU. There are fewer than 10 merger cases that have proceeded on the basis of Article 21(4) EUMR between 1990 and 2018.[316] The cases that will be discussed in this section will shed light on what constitutes "national legitimate interest", the meaning of "proportional and non-discriminatory'' and the importance of notification to the Commission by the Member States. More importantly, the analysis of the cases will assist in knowing how far other public interest factors are considered in the EU as a result of the application of Article 21(4).

In the case *of Lyonnaise des eaus/Northumbrian water*,[317] the United Kingdom, after the privatisation exercise of its water industry, tried to ensure competition among its suppliers by regulating the number of independent water providers in the UK through enactment of law. The Commission held that the UK government complied with Article 21(4) EUMR on the meaning of legitimate national interest by the enactment of a law regulating the domestic water industry in the UK. However, in the case of *Electricité de France/London Electricity*,[318] the Commission refused the request of the UK to intervene on legitimate interest grounds in respect of the merger on the basis of Articles 9 and 21(4). Article 9 was based on a request for a referral to have jurisdiction on the merger while Article 21(4) was based on recognition of legitimate interest in the electricity sector in the UK. The Commission did not recognise the legitimate interest sought by the UK in respect of electricity on the basis that the merger was not being carried out to protect the UK electricity industry in that there had been regulatory measures in place in the UK electricity industry before the proposed merger.

[316] Whish R. And Bailey D, 'Competition Law' 9th Ed. (Oxford University Press 2018) Page 877
[317] Lyonnaise Des Eaus/Northumbrian Water Case. M2936 OJ (1995) C11/3
[318] Electricite De France/London Electricity. Case IV/M 1346 1999

The Commission, in the case *of E.ON/Endesa*,[319] rejected the application of the Spanish government to block a merger which had been cleared by the Commission on the grounds of Article 21(4) EUMR, citing public security as the basis of the application. The Spanish government imposed conditions upon the merger already cleared by the Commission because the national legislation of Spain requires potential investors in a regulated sector to seek the prior consent of Spanish government to the transaction. The Commission disagreed with the Spanish government's perspective that the conditions imposed were necessary to protect the legitimate interest of Spain. The Commission requested that Spain vacate the conditions imposed on the investors, but Spain refused. The Commission was forced to start infringement proceedings against Spain in accordance with Article 258 of TFEU. The court held that public security could only be relied on if there were a serious threat to a significant interest of society.

In *BSCH/A. Champalimaud*,[320] the Commission found that Portugal wrongly applied Article 21(4) EUMR to an insurance transaction. The Portuguese minister of finance purportedly relied on a local enactment that restricts the foreign acquisition of more than 20 per cent of domestic insurance companies in Portugal to block a proposed merger with an EU dimension between a Spanish banking group named Banco Santander Central Hispano (BSCH) and Champalimaud. The Portuguese government failed to notify the Commission as required by Article 21(4) EUMR but went to the press to declare that their action was based on the need to protect their national interest and national economy. The Commission frowned upon the non-notification by the Portuguese and held that protections of crucial sectors of the economy and national interest would not constitute a legitimate interest contemplated by Article 21(4) EUMR. The Commission went further, doubting the authenticity of the Portuguese government's claim that their action was based on prudential rules; rather, it resembled a discriminating move on the part of the Portuguese government to restrict the inflow of foreign nationals to the financial services sector of Portugal.[321] This, the Commission further held, violated the EU procedural principles of freedom of movement of capital within the EU and freedom of establishment. The Commission

[319] E.ON/Endesa. Case M4110 Decision Of 25 April 2006
[320] BSCH/A. Champaliuad, Case M1616, M1680 And M1724
[321] Commission Decisions Of 20 July 1999 And 20 October 2000: The Commission's XXIX Report On Competition Policy (1999), Paras 194-196.

then mandated Portugal to withdraw the measures taken in respect of the transaction and to immediately notify the Commission as required by Article 21(4). The transaction was eventually cleared under EUMR after the Portuguese agreed to the modifications stipulated by the Commission.

It should be noted that after the case of *BSCH/A. Champalimaud,* Mario Monti, who was the competition commissioner during the hearing of the case, said the intervention of the Commission in the case was to safeguard the internal market and that the case would serve as a lesson to other Member States not to prevent the opening of their markets to foreign nationals.[322] He concluded by saying that in principles-transactions that are devoid of competition concerns should be cleared.[323]

In the case of *Secil/Holderbank/Cimpor*,[324] the Commission maintained the same position it took in the case of *BSCH/A. Champalimaud*.

The Portuguese government objected to the proposed merger of *Cimpor*, a Portuguese cement company that the Portuguese government was in the process of privatising. The Commission had exclusive jurisdiction on the merger because the proposed merger had a Union dimension. The Commission took a decision, informing Portugal to withdraw its opposition to the merger on the ground that Portugal failed to exhibit a legitimate interest as contemplated by Article 21(4) EUMR. The Portuguese government challenged the decision of the Commission but the CJEU in the case of *Portugal v Commission*[325] held that it was within the prerogative of the Commission to give a verdict as to the compatibility with EU law or otherwise of the public interest measures taken by a Member State. The court held further that the position remains the same even where that interest has not been communicated to the Commission by the government that asserted it. The court also held at paragraph six of the judgment that the Commission is obligated under Article 21(4) EUMR to withdraw the state measure in question.

[322] Commission Decisions Of 20 July 1999 And 20 October 2000: The Commission's XXIX Report On Competition Policy (1999), Paras 194-196.
[323] Report Prepared By Monti For The President Of The European Commission, 'A New Strategy For The Single Market: At The Service Of Europe's Economy And Society' 9 May, 2010.
[324] Secil/Holderbank/Cimpar. Case M2054
[325] Portugal v. Commision. Case C-42/01 [2004] ECRI -6079

In *Unicredito/HVB*,[326] the Commission ruled that measures adopted by Poland violated Article 21(4) of the EUMR as well as freedom of establishment and free movement of capital in the EU. The Commission had cleared the proposed acquisition of HVB by Unicredito of Italy. However, Poland wanted Unicredito to forgo its shares in BPH, a Polish bank which is a subsidiary of HVB, because Unicredito's retention of those shares would breach a previous contract whereby Pekao (another bank) was purchased by Unicredito in compliance with the process for the privatisation of banks in Poland.

In addition, in the case of *Abertis/Autostrade*,[327] Italy objected to the merger on the ground that Abertis, a Spanish company, did not have the capacity to fund the investment needed to improve and maintain the motorway network in Italy. The transaction had earlier been cleared by the Commission because it had a Union dimension. The basis of Italy's objection was on public interest assessment but the Commission held that Italy was in contravention of Article 21(4) EUMR as their public interest ground was not contemplated by that Article.

From the discussion and analysis above, it is argued that even though there were pockets of cases where Member States relied successfully on recognised interests – public security, plurality of the media and prudential rules – to assess a merger in terms of its impact on public interest factors, the same cannot be said as regards other legitimate interests, that is, other interests that need the approval of the Commission to confirm their legitimacy. Such instances are a rarity.

Having discussed the scope of Article 21(4) in terms of judicial interpretations via the cases discussed, it is useful to briefly discuss the future role of public interest factors in the EU as contemplated by Article 21(4) EUMR before the closing remarks.

3.14 WHAT DOES THE FUTURE HOLD FOR THE MEMBER STATES AS REGARDS ARTICLE 21(4) EUMR IN THE EU?

The impact of Article 21(4) EUMR and its application in the EU to date as regards public interest consideration in merger review has not been significant in terms of merger control in the EU. The enforcement procedure of the Commission in this

[326] Unicredito/HVB. Case M 3894 Decision Of 18 October, 2005
[327] Abertis/Autostrade. Case M4249, Decision Of 22 September, 2006

regard does not help matters as it is using the provisions of Article 21(4) to guard carefully its strict adherence to competition policy. In view of the fact that the Commission is unyielding in its quest to maintain competition in the market, it is unlikely that Member States will use Article 21(4) to extend the scope of public interest factors in the EU.

In addition, Harker[328] has queried the need for the intervention of Member States on Union dimension transactions with a view to applying public interest considerations in merger review in the EU. He suggested that Article 21(4) EUMR should be abrogated to allow the Commission alone to take decisions on all transactions with a Union dimension. His ground for this view is that there would be legal certainty should the Commission reject qualitative criteria during the review stage.[329] Another ground is that the strict adherence to the competition approach of the Commission would achieve long-term policy goals contrary to the Member State's policy goals, which are short-term. This in turn, according to Harker, would increase the long-term welfare of Member States as they would no longer be in a position to prohibit mergers that are efficiency based.[330]

It is argued that the future of application of Article 21(4) by Member States in the EU to deploy public interest factors during a merger assessment is uncertain considering the discussions in this section and prior sections of this chapter.

3.15 CONCLUSION

In a bid to answer the question raised in this chapter, which is to determine the extent to which public interests are considered in merger review in the EU, the researcher discussed features of the public interest concept in the EU, the ways in which public interest factors influence merger review in the EU, the constraints facing the Commission in applying the public interest concept in the EU and how the public interest concept is considered during merger review by the Commission as highlighted

[328] Michael Harker, 'Cross-Border Mergers In The EU: The Commission v. The Member States' (2007) 3(2)
European Competition Journal 509-J18
[329] Michael Harker, 'Cross-Border Mergers In The EU: The Commission v. The Member States' (2007) 3(2)
European Competition Journal 509-J18
[330] David Michael Reader, 'Revisiting The Role Of The Public Interest In Merger Control'. A PhD Thesis Of The East Anglia University, U.K2015,Pg87

in subsection 3.4.2 of this chapter. The conclusion of the researcher is that the Commission was prone to accepting the environmental factor as a feature of public interest over other factors such as industrial policy and national champions. The researcher also concludes that the Commission does not readily find public interest factors attractive. The researcher further concludes that transparency and legal inconsistency are the major constraints of the Commission in applying the public interest concept. Circumstances where the Commission has applied the public interest concept was also discussed in this chapter. The issue of whether the global economic crisis of 2008 changed the policy direction of the Commission in terms of public interest as regards merger review was discussed as well as insights into Article 21(4) EUMR. The findings of the researcher are that the global economic crisis of 2008 did not change the policy direction of the Commission in terms of the public interest concept as regards merger review. The researcher's conclusion as to the insights into Article 21(4) EUMR is that the exception afforded the Member States by Article 21(4) EUMR has been eroded by the conditions attached to the invocation of the provisions of Article 21(4) EUMR by the Member States.

The researcher also discussed the status of the public interest concept among Member States and the limitation of the application of Article 21(4) EUMR. The challenges of Article 21(4) and the scope of its application as highlighted by judicial authorities were analysed and discussed in order to ascertain the extent to which the public interest concept is taking into consideration in merger review in the EU.

The extent to which public interest concepts are accommodated during merger review in the EU may be limited in view of the discussions in this chapter. The reason for this is relatively clear, as the Commission is adamant in maintaining its policy of strict adherence to competition during assessment of mergers in the EU. The Commission insists that the main reason for the adoption of its strict economic approach to merger review is to ensure the maintenance of consumer welfare, which is the goal of competition law. The adoption of the economic approach to merger review by the Commission has enabled it to focus on its agenda and to avoid becoming distracted by various concerns attached to the public interest concept such as protectionism and inconsistency. The euphoria, on the other hand, exhibited by Member States in relation to the significance of Article 21(4) EUMR to the public interest concept could

not be sustained because of several limitations in its application, the narrow interpretation of the provision of Article 21(4) EUMR adopted by the Commission and the judicial interpretations given to the provision of the Article as highlighted by various cases.

In view of this, the current EU merger review process may not have captured the intentions of the EUMR 2004 as regards public interest considerations in merger review in the EU. This is so because the wording of the EUMR actually intended to establish a robust public interest concept, which may not be feasible for now in view of the strict adherence to economic policy adopted by the Commission. This is compounded by the fact that there are no visible signs that the Commission intends to change its stance.

CHAPTER FOUR: **HOW RELEVANT IS THE CONCEPT OF PUBLIC INTEREST IN MERGER REVIEWS IN THE UK AND WHAT IS THE EXTENT OF ITS APPLICATION?**

4.1 INTRODUCTION

Chapter Three of this thesis discussed the relevance of the concept of public interest consideration in the EU. It dealt with the issues bedevilling the concept such as the strict adherence to competition policy of the EU in merger reviews and the problems associated with the organisational structure of the EU as regards the jurisdictions of the Member States when it comes to local mergers and exceptions afforded by Article

21(4) of the EUMR. This chapter will discuss the relevance of and the extent to which public interest is taken into consideration in merger reviews in the UK in order to appreciate the significance of the concept in the EU. It will do so by comparing the basis of the concept in the two jurisdictions. The UK's merger review law is slightly different from the EU's law. Absence of notification and the role of the Secretary of State are examples of differences. That is, the merging parties do not have a duty to notify the Commission about the impending merger in the UK during the merger review process, while the significant role of the Secretary of State to solely make a decision on public interest is not entertained in the EU.

Prior to Brexit,[331] the EU law had competence over the UK law in terms of merger review since the UK was a member of the EU. However, the UK law on merger review was given some scope to differ from the proper EU law on merger review, hence why the issues of notification and the role afforded to the Secretary of State earlier discussed were retained in the UK law.

The public interest concept is not new in the UK, but recently there has been an increase in the demand for more consideration to be paid to the concept in terms of merger review in the UK.[332] The basis of this current clamour due to the fact that the concept of public interest is now a phenomenon in the sense that it is known to almost all jurisdictions in the world. The concept exists in the US by virtue of the Clayton Act of 1914[333]; China's legal jurisprudence is familiar to the concept[334]; while the concept is common in most African countries.[335] In addition, there are debates in the UK's media and politics about the need to protect the national interest against foreign

[331] Douglas Webber, 'Why Brexit Has Not And Will Not Trigger EU Disintegration' https://the conversation .com/why-brexit-has-not-trigger-eu-disintegration-130719.Accessed On 5thDec.2019
Simon Usherwood, 'Brexit:Here's What Happens Next'University Of Surrey, Conversation Journal,Jan 30,2020 at https://the conversation.com/brexit-heres-what-happens-next-130849. Accessed On 5thDec2019

[332] Alex Chisholm, 'Public Interest And Competition-Based Merger Control' Speech Delivered At The Fordham Competition Law Institute Annual Conference On 11 September, 2014. (https://www.gov.uk/government/peopele/alex-chisholm.) Accessed On 29th Nov2019

[333] Society, 'Social Science And The Public Interest' April 2017, Volume 54, Issue 2, Pp93-94
Baloria, Visual, 'Discussion Of "An Examination Of The U.S Public Accounting Profession's Public Interest Discourse And Actions In Federal Policy Making"' Journal Of Business Ethics, 2017 Vol. 142(2) Pp 221-224

[334] Zhang, Qianfan, 'Transcending The Dilemma Of Public Interest' Frontiers Of Law In China, 2007, Vol 2(1) Pp 23-43

[335]Leigh, Robert Treisman & Haylene, 'Public Interest Factor In Merger Proceedings' International Financial Law Review, April 2001, Pg 45-48

takeovers in certain situations.[336] To digress a little, the breakdown of talks in 2014 among member countries of the World Trade Organization (WTO) was interpreted as a triumph of protectionism over the supporters of a multilateral trading system, which has been in vogue since the Bretton Woods era.[337] The need to strike a balance between the application of competition laws and industrial policy is also one of the reasons for the recent demand for greater attention to be paid to public interest in the UK. The question is whether the UK should continue with its strict competition-based review by independent authorities or whether the government should intervene in mergers to create, protect and sustain more domestic jobs and infrastructures for its citizens and nation at the expense of globalisation. This is discussed in section 4.3 herein.

In attempting to ascertain the extent to which public interest is taken into consideration of the concept of public interest in the UK, this chapter will adopt the definition given to the concept in Chapter Three: that the public interest concept in the context of this thesis is when the fundamentals of competition rules are subordinated for other non-competition interests like public security, plurality of the media and stability of the financial system during merger assessment. This has already been discussed extensively under section 3.2 of Chapter Three.

The significance, benefit and importance of state intervention as well as whether the widening of the scope of the public interest concept in merger reviews, and control of foreign investment in the UK, could assist the implementation of state intervention policy continues to dominate debates in the UK.[338]

To further confirm the significance of the concept of public interest in merger reviews in the UK, the recent reforms carried out in 2013[339] under the Enterprise and Regulatory Reform Act 2013 did not consider any change to the concept of public interest contained in the Enterprise Act 2002, while other areas of competition law

[336] A Scott, M Hvid And Blyons, 'Merger Control In The United Kingdom' Oxford University Press, 2006, Pg 5.
[337] Mark Field MP, 'After Astra-Zeneca/Pfizer – Is Protectionism Part Of The 'New Economics'. International Financial Law Review, August 2014 Pp. 30-38
[338] Alex Chisholm, 'Public Interest And Competition-Based Merger Control', Speech Delivered At The Fordham Competition Law Institute Annual Conference On 11th September2014
[339] Enterprise Reform Act, 2003, Schedule 2, Para 20

enforcement were discussed and reviewed by the ERRA. These are discussed below at sections 4.3. and 4.3.3 specifically.

This chapter will also discuss the evolution of the concept of public interest in the UK, that is, when and how the concept was introduced into the UK, the legal structure of the concept, and how it operates and is applied. It will also address the process by which it is applied as well as the weaknesses of the application in terms of the powers of the Secretary of State. The chapter will also discuss the role of the Secretary of State in determining what constitutes a public interest as well as the types of public interests that are available in the UK. Judicial cases in the UK will be analysed to determine the extent of the consideration of the concept during merger reviews in the UK. The effect of Brexit on the public interest concept will also be discussed and analysed.

This chapter will not discuss whether the process of taking public interest into account in merger control in the UK is transparent or predictable. Nor will it discuss the rationale for the introduction of this concept, which gives power to the Secretary of State to decide on behalf of the Competition and Markets Authority (CMA) in merger reviews with respect to the concept of public interest. It will not discuss whether the intervention of the state through the concept of public interest is beneficial or whether the concept should be used to widen the extent to which a state can intervene in order to protect domestic companies against foreign takeovers. The chapter will not address mergers, types of mergers or significance of mergers in the UK economy, and will instead focus on the specific topic: the significance of public interest in the merger review process.

It is vital to know how, when and why the concept of public interest entered the jurisprudence of the UK before discerning the extent to which it is considered in merger reviews.

4.2. EVOLUTION OF THE CONCEPT OF PUBLIC INTEREST IN THE UK

The Monopolies of Mergers Act of 1965[340] was the first Act that regulated merger transactions in the UK, even though there existed the Monopolies and Restrictive

[340] Monopolies Of Mergers Act 1965

Practices Act of 1948.[341] The 1948 Act was not as comprehensive as the 1965 Act, which introduced the broad public interest test to the UK jurisprudence. The broad public interest test was such that mergers were assessed on the basis of whether they were likely to affect public interest or whether they would not affect public interest.

In other words, public interest was central to the assessment of mergers under the 1965 Act. Under this Act, the decision whether a merger affected public interest or not would be taken by the Secretary of State even though the Monopolies Commission who was an independent Commission was responsible for the assessment of the mergers. This situation, where the Secretary of State who was not a member of the Monopolies Commission had overriding influence on the process of merger review, was also allowed during the introduction of the Fair Trading Act 1973,[342] though with some modifications. The modifications are to the effect that the Monopolies and Mergers Commission must take into account five factors in determining whether a merger would affect public interest or not, while trying to apply the broad public interest test.[343] The five factors are: (a) the maintenance and promotion of effective competition between entities supplying goods and services in the UK; (b) promotion of the interest of consumers, purchasers and other users of goods and services in the UK; (c) ensuring the reduction in costs and development of new products and techniques in the UK; (d) maintenance and promotion of balanced distribution of industry and employment in the UK; and (e) maintenance of international competitive activity of the UK's concerns abroad.

It is argued that the enumerated five factors provided by S.84 of the Fair Trading Act 1973 recognised the importance and benefits of competition in reviewing mergers on the basis of a public interest test. Furthermore, it is glaring that the factors are incompatible with each other. A classic example is the factor (c), which stipulates that a reduction in costs and the use of new products through competition may encourage companies to prefer technology to human labour in contradiction to the promotion of employment as suggested by factor (d) of S.84. In fact, Andreas Stephan[344] believes

[341] Monopolies And Restrictive Practices Act, 1948
[342] Fair Trading Act, 1973
[343] S.84(1)[a-e] Fair Trading Act, 1973
[344] Andreas Stephen, 'Did Lloyds/HBOS Mark The Failure Of An Enduring Economics – Based System Of Merger Regulation?' (2011) 62(4) Northern Ireland Legal Quarterly 539-549

that protection of jobs by government could be counterproductive as the likely result of efficiency is unemployment. The view of Charlie Weir[345] is that the five factors recognised by the Fair Trading Act are wide-ranging in character, hence they could be susceptible to compatibility issues. Meanwhile Hubert Hansen[346] is of the view that the motive behind the wide-ranging nature of the factors enumerated under S.84 was that the UK government at that time approached the concept from a political perspective, hence the broad public interest test could not have any meaningful impact on the system. It should be noted that mergers whose public interest content is negligible are susceptible to creating uncertainty in "marginal cases" because of the wide-ranging characteristics of the five factors provided by S.84. This is so because S.69 (1)(b) of the Fair Trading Act compelled the MMC, while reviewing mergers according to the broad public interest, to assess the merger in terms of how it operates in favour of the public interest or against it. In effect, all a merger needs to pass the broad public interest test is to show the merger's benefits or neutrality to public interest; if so, the coast would be clear for such a merger. This position on what constitutes clearance of a merger under the broad public interest test has attracted many comments from scholars.[347] Some believe that the assessment procedure is already in favour of merging firms as against "marginal cases" firms in the sense that merging firms were only expected to show that the merger was not anti-public interest – and more so, when it was the duty of the MMC to show that the merger was against public interest. However, the position with the "marginal cases" firms is different, considering the fact that the wide-ranging character of the five factors could dim their chances of enjoying the opportunities afforded them as merging firms. In other words, the Fair Trading Act would direct the Secretary of State to prohibit a merger that has little or insignificant adverse effect on the public interest as it was not compulsory for

[345]Charlie Weir, 'The Implementation Of Merger Policy In The UK, 1984-1990'. (1993) 38 Antitrust Bulletin, 943-944.

[346] Hubert Hansen, 'The Political Economy Of Regulating Change: The Case of British Merger Control' (2012) 6(1)
Journal Of Regulation And Governance 101-110

[347] Andreas Stephen, 'Did Lloyds/HBOS Mark The Failure Of An Enduring Economics – Based System Of Merger Regulation?' (2011) 62(4) Northern Ireland Legal Quarterly 539-549
Charlie Weir, 'The Implementation Of Merger Policy In The UK, 1984-1990'. (1993) 38 Antitrust Bulletin, 943-944.

the MMC to show overwhelming evidence of adverse effect on the public interest before prohibiting a merger.

This broad public interest test, with its inadequacies, was in operation until the year 1984, exactly 19 years after the introduction of the 1965 Act. The uncertainties and unfairness associated with the application of the broad public interest test made the then Secretary of State in 1984, Norman Tebbit, to introduce preference of competition rules over public interest during merger review in the UK. That is, the effect of competition on mergers should form the basis of assessment of mergers and not the effect of public interest on mergers. The introduction of the process of merger review that prioritised competition rules over public interest factors by Norman Tebbit was also known as the "Tebbit doctrine". This doctrine was a big move on the part of the UK towards achieving a free market policy and enhancement of competition as the cardinal principle of merger assessment in the UK.[348] It should, however, be noted that despite this lofty objective of a free market and the prominent stature of competition in merger assessment in the UK during these periods of the "Tebbit doctrine", the assessment process was not completely devoid of political colouration. This was evident in 1990 during the tenure of Peter Lilley as the Secretary of State with the introduction of the "Lilley doctrine", which was aimed at discouraging state-owned foreign companies from taking over British companies. The "Lilley doctrine" was unsustainable and did not last. It was difficult for merging firms to predict when a merger would be prohibited, and the independent competition agencies were reduced to a rubber-stamp role as the prerogative of prohibiting or approving a merger rested only with the Secretary of State; the agencies' role was only advisory.[349]

The identified shortcomings of the "Lilley doctrine" made the introduction of a full-blown competition regime introduced by the Enterprise Act in 2002 inevitable. The Act[350] was described by Stephen Wilks[351] as eliminating in the UK the "Substantial room for the exercise of political preferences". The truism of this assertion will be

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[348] Alex Chisholm, 'Public Interest And Competition-Based Merger Control' Speech Delivered At The Fordham Competition Law Institute Annual Conference On 11 September, 2014. (https://www.gov.uk/government/peopele/alex-chisholm. Accessed On 29th Nov 2019

[349] McElwee, 'Politics And The UK Merger Control Process: The Public Interest Exceptions And Other Collision Points' 2010, Competition Policy International. Page 80

[350] Enterprise Act 2002

[351] Stephen Wilks, 'In The Public Interest: Competition Policy And The Monopolies And Mergers Commission'. Mup, 1999, Pg 227

discussed later. The political conversion of all political parties during the debate of the Act was interesting as all parties were ad idem on the need to move towards a complete competition-based assessment regime.[352] This was interesting because politicians who agreed to the competition-based regime would also disagree when it came to the merits of a particular transaction that may be of interest to them. The introduction of a full-blown competition-based assessment procedure introduced the UK to the league of countries using an economic-based assessment as their template for merger assessment.[353] This internationally accepted process is assisted by the International Competition Network, the Organisation for Economic Co-operation and Development and the European Competition Network.[354] The introduction of the Enterprise Act[355] has made the process of merger assessment in the UK more transparent, predictable and rules-based. This development has also promoted public confidence in the process as well as promoting investments in the UK. The Enterprise Act 2002, in taking the competition-based approach to merger review in the UK, adopted the "Substantial Lessening of Competition" (SLC) test[356] as against the Significant Impediment to Effective Competition (SIEC) test[357] of the EU for the assessment of mergers in the UK. This SLC test is also obtainable in the USA. The essence of the SLC test according to the Enterprise Act 2002 is to demystify the authority and powers of the Secretary of State as regards merger review. Put differently, the Enterprise Act sought to remove politics from competition matters when it comes to merger review. The Act attempted to do this by creating two competition authorities, namely: the Office of Fair Trading (OFT) and the Competition Commission, with most of the powers of the Secretary of State transferred to the two competition authorities. Under the Enterprise Act, the assessment procedure was a two-stage process: the OFT was in charge of phase 1 and

[352] Anthony Seely, 'Takeovers: The Public Interest', House of Commons Library, 3 June 2014 Page 7
[353] France, Germany, USA, Italy And Sweden
[354] International Competition Network Is An Informal, Virtual Network Which Ensure Cooperation Between Different Countries' Competition Commissions.
Organisation For Economic Cooperation And Development Is An Economic Forum Which Encourages Economic Prosperity Of Member States And Non-Member States Through Collaborations.
[355] Enterprise Act 2002.
[356] Substantial Lessening Of Competition – Is The Process Adopted In The UK And USA To Review a Merger As To Its Anti-Competitive Effects
[357] Significant Impediment To Effective Competition – Is The Process Adopted In The EU After The Dominion Test To Assess A Merger In Order To Determine Whether The Merger Has Anti-Competition Elements.

it was the OFT that would recommend mergers that were likely to substantially lessen competition or that are actually lessening competition, and phase 2 investigation was carried out by the Competition Commission. It is important to note that the current situation now, as from 2014, is that the competition elements of both the OFT and the Competition Commission have been merged together under the Competition and Markets Authority (CMA).

Notwithstanding the introduction of a strict competition-based regime of assessing mergers via the Enterprise Act 2002, the public interest concept is still recognised in the Act with the provisions that deal with national security, plurality of the media and stability of the financial system as public interest factors that the Secretary of State may use in order to intervene during merger review and to take decisions on behalf of the CMA. The Act (S.58(3)) also empowers the Secretary of State to come up with new public interest factors at the appropriate time. This will be discussed later in this chapter. It should be noted that under the Enterprise Act 2002, the role of public interest and the powers of the Secretary of State in that regard have been reduced considerably in comparison to their role and powers before the enactment of the Enterprise Act. However, the fact that public interest still has a role in the new Enterprise Act shows the significance of the concept to the merger review process in the UK. This is evidenced by the case of *Lloyds/HBOS*[358] in 2008 when the Secretary of State relied on S.58(3) of the Enterprise Act 2002 during the global recession to introduce "maintaining stability of the financial industry of UK" as a public interest factor. The case will be discussed fully later in this chapter.

Having discussed the evolution of the concept of public interest, it is appropriate to discuss the legal structure of it as well its operation in the UK as provided by the Act. The discussion on the legal structure is necessary to appreciate the extent of the consideration of the public interest concept under UK jurisprudence.

4.3. THE LEGAL STRUCTURE OF THE CONCEPT OF PUBLIC INTEREST IN THE UK

Under S.42 of the Enterprise Act, when the OFT has not made a decision to refer a merger to the Competition Commission or to the EU (if such is the type to be referred

[358] Lloyds/HBOS(2008)ME/3862/08

to the EU), the Secretary of State may intercede once its established that a relevant merger situation arises[359]. This provision of the Act is carried out by the Secretary of State when he or she gives an intervention notice to the OFT.[360] The intervention notice may be in respect of one merger and the Secretary of State would state why he or she believes that public interest is relevant to the merger. However, if there are more than one public interest considerations that are relevant to the merger, the Secretary of State may not state such other public interest considerations in the intervention notice if he considers them inappropriate.[361] The recognised public interests are national security, plurality of the media and stability of the financial system or those other considerations that the Secretary of State proposes to be public interest. Put differently, the list of public interest factors is not exhaustive as the Secretary of State is enjoined by S.58(3) of the Enterprise Act to introduce a new public interest consideration, or amend or remove the existing public interest considerations.

This is exactly what happened in the merger between Lloyds/HBOS. The public interest consideration may be for all purposes or a particular purpose as specified by the Secretary of State, while the presentation of the public interest proposal to the Parliament must be approved by an affirmative resolution.[362] It should be noted that any intervention notice produced by the Secretary of State must be finalised and if it is such that is not finalised, the Secretary of State must ensure that an affirmative resolution is obtained from Parliament to finalise the intervention notice or an amendment is made to the Act in pursuance of the intervention notice in order to finalise the intervention notice.[363] This is so because an un-finalised intervention notice within 24 weeks may lead to cancellation of the intervention notice by the Competition Commission or a situation where the public interest considerations may be ignored. The OFT on receipt of the intervention notice is expected to report to the Secretary of State the need to subject the merger to a competition analysis to find out if a merger situation has arisen or whether such merger is expected to substantially

[359]Graham Cosmo, 'Public Interest Mergers' European Competition Journal, Volume9, Number2, August2013,Pg383-406
[360] Enterprise Act, 2002. S.43(2)
[361] Enterprise Act, 2002 S.44
[362] Enterprise Act 2002, S.58(4)
[363] Enterprise Act 2002 S.43(6)

lessen competition in the UK.[364]The OFT is also expected to report to the Secretary of State the OFT's position and recommendations on the issues highlighted in the intervention notice as well as the summarised version of all the representations mentioned in the intervention notice. Where the media plurality public interest consideration is mentioned in the notice, the Office of Communications (Ofcom) is mandated to give a comprehensive report that includes advice and recommendations on the public interest considerations as well as a summary of the representations on the media plurality public interest consideration to the Secretary of State.[365]

Once the Secretary of State receives the report from either the OFT or Ofcom as the case may be, the Secretary of State is obligated to decide whether or not to refer the intervention notice to the Competition Commission.[366] The Secretary of State is mandated to accept the outcome of the OFT's decision on competition issues. If the Secretary of State believes the merger in the intervention notice is such that it may lead to an SLC, that the public interest consideration specified in the intervention notice is relevant and that both the public interest consideration and the competition highlighted in the intervention notice operate or are likely to operate against the public interest, the Secretary of State may make a reference to the Competition Commission. Alternatively, the Secretary of State may make a reference to the Competition Commission even where the merger is not anticompetitive, but where the specified public interest consideration mentioned in the intervention notice is such that it will work against the public interest. However, he/she may not need to make such a reference.

In situations of competition concerns, the Secretary of State may decide not to make a reference and decide to accept undertakings from the parties to address the public interest consideration issues as provided by schedule 7 paragraph 3 of the Enterprise Act. The OFT is expected to consult with the parties to find out whether the parties would be willing to offer an acceptable undertaking to the Secretary of State. On the issue of the competition issues in the case, the decision of the OFT on the issues is binding on the Secretary of State while schedule 10 enjoins the Secretary of State to

[364] Enterprise Act 2002 S.46(3)
[365] Enterprise Act 2002 S.44(3)(b)
[366] Enterprise Act 2002 S.46(2)

make publications in respect of the proposed undertakings of the parties as well as any representation on the proposed undertakings.[367]

After receiving the reference, the task of deciding whether or not the merger may lead to an SLC or not is entrusted with the Competition Commission, which must also, on confirmation that the merger leads to an SLC, determine whether the competition concerns and the identified public interest considerations are such that could be construed to mean that the merger works or may be likely to work against the public interest. Or, if it is only the public interest consideration that is being taken into account, the Competition Commission is still expected to determine whether the public interest consideration mentioned is such that it works or is likely to work against the public interest. If the Competition Commission comes to the conclusion that the merger would lead to an SLC, then the Competition Commission is enjoined to identify the actions needed to address the SLC.[368] In the event that the Competition Commission's decision is that the merger works against the public interest, then the Competition Commission is under further obligation to take a decision as to whether or not the Secretary of State should address the identified concerns or direct other bodies, including the Competition Commission itself, to address such concerns.

When the Secretary of State receives a report from the Competition Commission, they are duty bound to determine the implications of making an unfavourable decision on public interest.[369] Once this is done, the Secretary of State is bound by the decision of the OFT as regards the absence of an SLC, any decision of the Competition Commission on whether the merger is anticompetitive or on the public interest cases. A decision must be made by the Secretary of State that he agrees with the reasons enumerated by the Competition Commission and the OFT for an unfavourable public interest finding before making an unfavourable public interest finding.

Apart from the highlighted procedures, section 59 of the Enterprise Act also enjoins the Secretary of State to serve a Special Public Interest Intervention Notice (SPIIN) in two types of merger situations. The first is where the merger concerns some government contractors or sub-contractors who hold confidential information relating

[367] Enterprise Act 2002, S.45
[368] Enterprise Act 2002, S.47(8)
[369] Enterprise Act 2002 S.47(7)

to defence; and the second situation concerns mergers in the newspaper industries that do not meet the requirements for investigation because of their inability to pass the turnover tests. In both situations, mergers are not assessed on competition grounds but only against public interest grounds. Just like the earlier procedures, Ofcom and the CMA have roles to play in this kind of procedure as provided by the Enterprise Act 2002. There are two cases that illustrate the provision relating to special public interest in practice. In the case of *Insys Group Ltd/Lockheed* Martin *UK Ltd*,[370] the Secretary of State accepted undertakings in lieu of a reference to the Competition Commission after issuing a SPIIN in August 2005 as contemplated by S.59 of the Enterprise Act. Also, in the case *of Atlas Elecktronik UK Ltd/QnetiQ*[371] the Secretary of State accepted undertakings in lieu of reference to the Competition Commission after issuing a SPIIN in May 2009 to a government contractor company that specialised in defence equipment.

It is imperative to state here that since April 2014, the processes of taking into account public interest outlined above have been modified by the Enterprise and Regulatory Reform Act,[372] which did away with the OFT and the Competition Commission and changed both of them with a single Competition and Markets Authority (CMA). The CMA is a direct replacement of the OFT while the chair of the CMA replaces the Competition Commission to set up a CMA group as stipulated by schedule 4 of the new Act. This set up group is independent and its decisions are also independent of any input of the board of CMA. The existence of this new rule is to ensure independence of the decisions made by the two bodies within the CMA and also to maintain the two-stage process of the old regime.

Despite the fact that the Secretary of State has influence in determining what constitutes a public interest consideration, in that the list of public interests is not closed, the Secretary of State cannot act irrationally, as they have to consider the report of the OFT and the Competition Commission before arriving at a decision. There are even instances in which the Secretary of State is bound by the decision of the CMA, especially in competition matters. In other words, the Secretary of State's decision in public interest cases may be political, and he/she is still guided in making

[370] Insys Group Ltd/Lockheed Martin UK Ltd – Case No. 1104/3/9/06
[371] Atlas Electronik UK Ltd/Qinetiq – Case No. 1012/2/8/10
[372] Enterprise Reform Act 2013, Schedule 4, Para 49

decisions on public interest considerations in the UK. It is appropriate in this context to look at the implications of the powers of the Secretary of State as a sole decision maker.

4.3.1 IMPLICATIONS OF SECRETARY OF STATE BEING A SOLE DECISION MAKER

While it may be appropriate to charge the CMA with the prerogative of making final decision when it comes to granting approval to mergers on competition grounds, the role afforded the Secretary of State as the only decision maker on public interest mergers may not be appropriate considering the likelihood of abuse inherent in placing too much power in the hands of an individual. The task of balancing the two interests of competition and public interest factors may overwhelm a Secretary of State who has no background experience on competition matters generally. Furthermore, it is also argued that in as much as it is certain that the position of the office of the Secretary of State is not permanent for an individual, there is this palpable fear that consistency of policies would be missing in the decisions of various Secretary of States, being different individuals with different traits and characteristics. The implication of this is that firms are unclear as to whether their transactions are such that the Secretary of State would subject them to the public interest consideration test or not. And if the transactions are subjected to public interest considerations by the Secretary of State, the next worry of the investors is how the Secretary of State will resolve the issue of balancing the competition interests with the non-economic interests in a merger review.[373] Wilks[374] is of the view that some past Secretaries of State embraced a milder approach to merger review, giving MP Michael Heseltine as an example of a Secretary of State who laid more emphasis on public interest than competition. It is therefore not surprising that the same Lord Michael Heseltine was in the vanguard of the people clamouring for the extension of the scope of public interest consideration in the UK.[375]

[373] Graham Cosmo, 'Public Interest Mergers, 'European Competition Journal, Volume 9 Number 2, August 2013, Pp 383-406

[374] Stephen Wilks, 'In The Public Interest: Competition Policy And The Monopolies And Mergers Commission'. Manchester University Press 1999, Pg 227

[375] HL. Deb 18 October 2002, Vol. 640 Col 805.
House of Lords Select Committee On The Scrutiny Of Delegated Powers' First Report, HL 57, 1992-93. Para 8.

Yet different individuals are bound to have different interpretations or views of a particular issue, and so the Secretary of State may not be an exception on this issue when it comes to decision making. In fact, there are various reasons why a particular Secretary of State's decision on a public interest matter may be different from that of another Secretary of State's decision on the same facts. The backgrounds of different Secretaries of State are bound to vary, potentially leading of them to sway their decisions in an attempt to satisfy their individual backgrounds. The Secretary of State may be under serious pressures from lobbyists and this interference from the lobbyists may affect their individual decisions. In addition, each Secretary of state may be driven by ambition to play to the gallery in order to be relevant as a politician and this may have an untoward effect on their decision on public interest consideration mergers.[376] It is apposite to know what guides the Secretary of State in taking decisions on the concept.

4.3.2 SIGNIFICANCE OF BRIAN LEVESON'S REPORT

It is not clear as to the guidelines to be followed by a Secretary of State when taking a decision on a public interest consideration in a merger as the Enterprise Act is silent on it. However, the Leveson report of 2012[377] attempted to come to the rescue when, in his findings in the inquiry into UK media culture and practices, he suggested that the Secretary of State, in carrying out his functions under S.58(3) of the Enterprise Act, should: (a) exercise procedural propriety, and (b) adhere to the six broad principles of fairness outlined by Lord Mustill *in R v Home Secretary ex p Doody*.[378] The six principles in this case are as follows: (a) power should be exercised fairly; (b) the standards of fairness are subject to change over time; (c) fairness depends on the context of the decision; (d) the statute conferring the power is indicative of context; (e) fairness will usually mean that those adversely affected by the decision will have the opportunity to make representations; and (f) fairness usually requires interested parties to be made privy to the "'gist' of the case". Lord Leveson's comments[379] on the quoted requirements in the Mustill case were that the Secretary of State could

[376] Peter Freeman, 'Merging Is Such Sweet Sorrow' Speech At The British Institute Of International And Competitive Law Mergers Conference, 13 November 2008.
[377] Lord Leveson, 'An Inquiry Into The Culture, Practices And Ethics Of The Press" 2012 Vol 3 Ch 9 at Pg. 98.
[378] RV Secretary Of State For The Home Department, Ex Parte Doody (1994) 1 AC 531
[379] Lord Leveson, The Leveson Inquiry: An Inquiry Into The Culture, Practices And Ethics Of The Press (Independent Report, 2012).Pg 69

perform his statutory function of taking decisions on a public interest consideration in a flexible manner if he chooses to be flexible, in that the mode of performing his role as a decision maker is not rigid. Lord Leveson[380] was also of the view that the Secretary of State's decision must not be that of all members of the Cabinet but the Secretary of State's own decision, and an unbiased one. Even though he recognised the fact that the Secretary of State may have his personal views on a proposed merger, those views are not allowed to affect the process of decision making provided by the rules.

Lord Leveson's comment on the role of bias in the decision-making process of the Secretary of State came into play in the case of the *NewsCorp/BSkyB*[381] merger, which raised questions as to the potential bias in the role of Secretary of State in taking decisions on public interest consideration mergers. It was in the process of the merger between Newscorp/BSkyB that Vince Cable MP was relieved of his role as a decision maker in the merger because of his comments during the process that he would declare war with Rupert Murdoch, who had large interest in one of the merging firms. Vince Cable MP was earlier given the role by virtue of his position as the Secretary of State for Business, Innovation and Skills. Jeremy Hunt MP, who was Secretary of State for Culture, Media and Sport replaced Vince Cable MP. Interestingly, Hunt had earlier shown sympathy for the merger during the assessment period of Vince Cable MP. However, his view would not count in as much as it did not affect his final decision on the merger. Interestingly too, a director of the merging firm, Fredric Michel, was also communicating with one of the aides of Jeremy Hunt throughout the process of the merger review. Lord Brian Leveson in his report criticised the closeness of Jeremy Hunt MP to the director of Newscorp and concluded that Jeremy Hunt's closeness to a director of one of the merging firms had compromised the decision-making process, even though on the whole, Jeremy Hunt did a good job, particularly in respect of the advice given by Ofcom.[382] Lord Leveson went further to explain that if the decision not to prohibit the merger was challenged by a rival firm, Jeremy Hunt MP would have been mandated to provide details of his

[380] Lord Leveson, The Leveson Inquiry: An Inquiry Into The Culture, Practices And Ethics Of The Press (Independent Report, 2012).Pg72
[381] NewsCorp/BSkyB Case No M5932
[382] Leveson Report Chapter 5 Paragraphs 6.4 at Page 96.

correspondence with the director of NewsCorp.[383] This case (NewsCorp) clearly shows the vulnerability of the Secretary of State's decision in the media sector as many interests are always at play and the lobbyists can capitalise upon these to put pressure on the occupant of the post of the Secretary of State. Notwithstanding the threat of lobbyists in the decision-making process of the Secretary of State, Lord Leveson's report still supported the idea of the Secretary of State keeping his role as a decision maker as regards media merger when plurality of merger is an issue or when public interest is to be determined in a merger involving the media. The report backed this position on the ground that publicly elected officials are more suitable to make decisions on public interest issues. However, Jeremy Hunt MP disagreed with the report of Lord Leveson on this issue and opined that justice would only be seen to be done by the public if independent regulators make decisions on media mergers and not when politicians are allowed to make decisions.[384] Jeremy Hunt MP did not however state which independent regulator should make such decision, whether it is the CMA or another body. The recommendation of the Leveson report is that the Secretary of State is suitable to make decisions on public interest mergers but with a caveat that whenever the Secretary of State wishes to depart from the advice of the CMA or Ofcom, she/he should explain the basis of their decision.[385]

Jeremy Hunt MP's view that independent regulators are best suited to take decisions on media public interest mergers than the Secretary of State who is likely to be a politician may be a credible alternative. This is so because the politicians delegate authority to make decisions on their behalf to independent regulators like CMA because of their conviction that the delegation will show transparency and credibility in the process of decision-making. This conviction is based on the fact that even though the independent regulators are unelected, members are likely to be professionals whose decisions would be based on transparency and professionalism, which ultimately will lead to consistency in their decisions. The next stage is to consider the other element of the Secretary of State's functions.

[383] Leveson Report Chapter 5 Paragraphs 6.5 At Page 100
[384] Leveson Report Chapter 5 Paragraphs 6.4 at Page 98.
[385] Leveson Report Chapter 5 Paragraphs 7.2 At Page104

4.3.3 IMPLICATIONS OF SECRETARY OF STATE'S POWER TO PROPOSE NEW PUBLIC INTEREST CONSIDERATION

Pursuing further the analysis of the process of application of the Secretary of State's functions as provided by the Enterprise Act, and having discussed the implications of the singular executive power to make decisions on public interest matters, it is appropriate to discuss the role afforded the Secretary of State by the Enterprise Act whereby he can propose a new public interest consideration. This power is provided under S.58(3) of the Enterprise Act, but the Act is seemingly silent on the time and circumstances whereby the Secretary of State may exercise his power to promote a new public interest consideration. S.58(3) provides thus: "The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section." By the provisions of S.58(3) the Secretary of State may only propose a new public interest consideration with the permission of Parliament through the affirmative procedure. This means that the two Houses of Parliament in the UK must examine and approve the proposal before the Secretary of State's intervention in the merger would be allowed. The provision also allows the Secretary of State to either amend or remove any of the existing public interest considerations. This means that even the statutorily recognised public interests like plurality of the media and national security may be removed or amended by the Secretary of State and replaced with a new one. This in effect means the Secretary of State may widen the scope of public interest considerations in the UK and at the same time, s/he may limit the scope. However, the Act did not specify the circumstances under which the Secretary of State may exercise the power to create a new public interest consideration, hence the Act is ambiguous in this respect.

In order to explore circumstances where the Secretary of State may propose a new public interest consideration, given that the Act is silent on it, one may consider the argument of the Labour government during deliberations in Parliament that the power to propose a new public interest consideration should be given to the Secretary of State in order to make the Secretary of State flexible in "unforeseen circumstances", when the need for a new public interest arises[386]. Lord Sainsbury[387] rejected an

[386] HL Deb 16 November 2002, Volume 639 Col 801
[387] HL Deb 19 November 2002, Volume 638 Col 1366

amendment to the bill during deliberations on the review of the clause that eventually became S.58(3) and his basis was that such clauses were necessary to act as a safety valve that would greatly assist in dealing with the unexpected situation. This came to pass in 2008 during the global crisis when HBOS was underfunded, having lost its capital in the property business, and was about to collapse.[388] The British government, through the Secretary of State, deployed S.58(3) of the Enterprise Act to propose a new public interest consideration, "to maintain the financial stability of the UK", to approve the merger between HBOS and Lloyds. This evidences circumstances under which the Secretary of State may propose a new public interest, when the unexpected happens or in extreme situations. It is also argued that the power given to the Secretary of State to propose a new public interest consideration by amendment or removal or existing public interest consideration is tantamount to amending an Act of Parliament without going through the normal legislative review processes. As discussed earlier in this chapter, when the Secretary of State proposes a new public interest consideration, it must be in the form of an order by Parliament, which means it would only come into force with agreement from the House of Lords and House of Commons. This makes the process cumbersome, and it may not be correct to say that the Secretary of State's power to propose a new public interest consideration is such that he may amend the Act without going through the normal legislative review processes. But this does not mean that the procedure is not without blemish. A procedure that allows an Act to be amended without going through the rigorous examination of the Bill under the guise of public interest may not be appropriate considering the fact that the statutorily recognised public interests like national security and plurality of the media went through intense and rigorous examination before being included in primary legislation. The justification, however, may lie in the fact that the proposal of a new public interest consideration is likely to arise when time is of the essence in an emergency situation, hence the need to obviate some procedural finesse.

Having discussed the legal basis and procedure of applying the public interest consideration by the Secretary of State and in order to appreciate the relevance of the concept in the UK, it is apposite to analyse some decided cases on public interest

[388] Oft, 'Anticipated Acquisition By Lloyds TSB Plc Of HBOS Plc' (2008), Financial Services Authority Submission To OFT. At Pg. 111.

considerations so as to determine the extent of the consideration of the concept in the UK.

4.4 ANALYSIS OF JUDICIAL CASES BORDERING ON PUBLIC INTEREST CONSIDERATIONS IN THE UK

The last section of this chapter has discussed the procedure for the application of public interest considerations and the role of the Secretary of State in making a decision as to whether a merger would affect a public interest consideration and the circumstances under which the Secretary of State could exercise his powers to declare whether or not a merger would be compatible with a public interest consideration. This section attempts to establish the relevance of the public interest concept in decided cases so as to ascertain the extent of the relevance of the concept in the UK. In furtherance of this, the cases to be analysed will be divided into categories: cases bordering on defence, cases on plurality of the media and the locus classicus case of *Lloyds/HBOS* merger.

4.4.1. Cases in relation to defence

4.4 .1. 1 THE CASE OF GENERAL DYNAMICS/ALVIS REGULATION[389]

Alvis, a British company that specialises in manufacturing of armoured vehicles and tanks, was to merge with the American company, General Dynamics, which was also in the business of supplying turrets as a sub-system for armoured vehicles. A turret is made of a protected shell that contains other weapon systems like the gun barrel, communication system and fire control systems. The Ministry of Defence is always the customer of the merging firms' products. The Ministry of Defence's contention was that the merger of the two companies could instigate a reduction in the capabilities of the UK's strategic defence or that the merger could lead to leaking of the UK's confidential information to the US. It was suggested that the merging companies should enter into an undertaking with the Secretary of State to address the issues raised and the merger was subsequently cleared.

[389] General Dynamics/ALVIS Regulation – Case (EEC) No. 4064/89

4.4.1.2 Finmeccania/Agusta Westland

Another case of relevance to be discussed under the defence category is that of *Finmeccania/Agusta Westland*.[390] Finmeccania was in the aerospace business, as well as energy, communications, transport and automation, while Agusta Westland was in design, maintenance and manufacture of both military and civil helicopters. The Secretary of State approved the merger subject to the giving of undertakings to address the issue of disclosure of confidential information pertaining to the military.

4.4.1.3 BAE Systems Avionics and Communications

A similar case is the case of *BAE Systems Avionics and Communications*.[391] It concerned a merger between the British Aerospace Plc and Marconi Electronic Systems. The merger was in furtherance to Article 296 of the EUMR 2004, which permits any Member State to take essential security interests which are connected with the manufacturing of war materials such as ammunitions, etc. The British Aerospace Plc opted not to notify the European Commission about the military aspects of the merger, hence the merger was considered under the national merger control of the UK. The Secretary of State under section 75(1) of the Fair Trading Act 1973 requested BAE Systems through the Director General of Fair Trading to provide undertakings to prevent the adverse effect of the merger. Among the undertakings requested were that BAE should appoint a compliance officer and make provision for a future scout and cavalry system/Tracer and Joint Strike fighter. All these undertakings were requested in a bid to protect the national security of the UK.

4.4.1.4 Lockheed Martin UK of Insys Group

The proposed acquisition by Lockheed Martin UK of Insys Group[392] is another interesting case that shows the relevance of the public interest consideration concept to merger control in the UK. The merger between the two companies was going to affect the national security of the UK and since it was a public interest recognised by

[390] Finmeccania/Agusta Westland – Case No. Comp/M559
[391] Bae Systems Avionics And Communications – Case No Comp/M 4228
[392] Lockheed Martin UK Of Insys Group – Case No 1104/3/9/06

the Act in the UK, the intervention of the Secretary of State was imperative. The then Competition Minister, Gerry Sutcliffe, announced that he would accept undertakings from the parties in respect of the merger between Lockheed Martin and Insys Group instead of referring them to Competition Commission. The Secretary of State in his announcement said: "The OFT has advised that, should I consider it necessary on national security grounds, I can either refer this merger to the Competition Commission or accept undertakings from Lockheed Martin UK in lieu of such a reference. In line with the MoD's advice I am proposing to accept from Lockheed Martin UK certain behavioural undertakings which MOD considers are necessary to ensure the protection of programme and technologies which are important for UK national security."[393] The merger was subsequently approved after Lockheed Martin UK addressed all the concerns of the Secretary of State in accordance with the powers vested in the Secretary of State by virtue of S.59(2) of the Enterprise Act.

In all the four cases discussed above, the concern of the Secretary of State was focused on the protection of the UK's sensitive security information and on the companies' obligation to comply with the UK law on subsidiary companies. This was so that there could be directors or a board that would have ordinarily been cleared of any security issues in relation to the UK law on appointment of directors. In other words, the directors of such companies must be cleared of any security issues in compliance with the guidelines of the Ministry of Trade. The merger between Lloyds/HBOS is another case that illuminates the relevance of the concept of public interest in the UK.

4.4.2 Cases in relation to the financial sector

4.4.2.1 THE MERGER BETWEEN LLOYDS/HBOS[394]

The global recession of 2008 was brought about by the financial crisis in the US, which was caused by the unimaginable bankruptcy of Lehman Brothers. The recession extended to the UK naturally. HBOS was already in a dire financial situation caused primarily by its unusual business style that laid emphasis on using

[393] Gerry Sutcliffe – Announcement Of Acceptance Of Undertakings Provided In The Merger Of Lockheed MartinUK/Insys Group
[394] Lloyds/HBOS{2008}ME/3862/08

governments funding to reduce the gap between its lending and deposits.[395] The combination of the global financial crisis and the peculiar crisis of HBOS meant that nobody was willing to lend to HBOS, which had significant exposure in terms of corporate lending and the property market. The fear, then, was that only massive government aid or outright nationalisation could save the bank. Commentators[396] believed that Lloyds was approached about the possibility of saving HBOS through a merger instead of government dipping its fingers into the public Treasury to save the ailing bank.

The solution proffered, which was the merger between Lloyds/HBOS, was not an easy one because during the period of the global recession, the two bodies were numbers four and five in the ranks of banks in the UK, hence it was obvious that the merger between the two banks may be prohibited by the Competition Commission. The condition for the merger was that it should not be referred to the Competition Commission in order not to be given undertaking in lieu of reference. The Secretary of State issued an intervention notice immediately the merger was announced on 18 September 2008 and simultaneously gave the OFT a deadline of 24 October to submit its report. However, the government announced the merger on the 13 October 2008 before the OFT report was ready. By 24 October 2008, "financial stability of the UK" was included in the Enterprise Act as a specified public interest consideration pursuant to an amendment of S.58 of the Act. The competition issues in the merger were presented in the OFT's report submitted on the same day. The report identified banking services for small and medium-sized enterprises, mortgage lending and personal current accounts as concerns in terms of competition while in other areas, no competition concerns were identified. The OFT was of the view that the "failing firm" defence would not assist the merger because it was obvious that the government would not allow HBOS to fail.[397] The appropriate counter-factual according to the OFT report was to sell HBOS to an independent outfit which was not in the same

[395] Graham Cosmo, Public Interest Mergers, 'European Competition Journal, Volume 9 Number 2, August2013, Pg386-406

[396] Graham Cosmo, 'Public Interest Mergers, 'European Competition Journal, Volume 9 Number 2, August 2013, Pp 383-406

Stephen Wilks, 'In The Public Interest: Competition Policy And The Monopolies And Mergers Commission'. Manchester University Press 1999, Pg 227

[397] Office Of Fair Trading Report To The Secretary Of State For Business Enterprise And Regulatory Reform 24th October 2008 Pages 1-158. https:assets.publishing.service.gov.uk. Accessed On 29thNov2019

market as HBOS after the government's intervention in terms of support for a short while. The OFT's conclusion was that the merger was such that it would substantially lessen competition in the British personal current account market because the combination of Lloyds and HBOS would have had a 33 per cent market share in the United Kingdom while the next three competitors were between 14 and 17 per cent. The OFT also believed that the merger created significant concerns about the small–medium enterprise and mortgage market, hence the merger was referred to the Competition Commission by the OFT. It should be noted that the merger could have been stopped at that stage since the agreement between HBOS and Lloyds was that there should be no reference made in respect of the merger.[398] The government decided via the Secretary of State on 31 October 2008 not to make a reference in line with the agreement of the merging firms on the basis that the UK's financial stability was at risk if the merger was not approved.

It should be noted that the decision of the Secretary of State that the merger be approved to save the financial stability of the UK was contested at the Competition Appeal Tribunal (CAT) by a group known as Merger Action Group on the ground that the Secretary of State improperly used his discretion to propose a new public interest consideration when the government had already decided on the merger before the intervention of the Secretary of State. The group's action was dismissed because they could not convince the CAT that the Secretary of State did not balance the competition concerns with the public interest consideration concerns before formulating the financial stability consideration.[399]

It is argued that in the merger of Lloyds/HBOS, the Secretary of State properly identified a public interest concern, the Act was amended to include the identified public interest issue as a specified public interest consideration, the OFT in accordance with the Act submitted its report on competition concerns and views on public interest concerns, and the Secretary of State in exercise of his powers reached a decision to protect the financial stability of the UK. Considering the circumstances at

[398] Office Of Fair Trading Report To The Secretary Of State For Business Enterprise And Regulatory Reform 24th October 2008 Pages 1-158. https:assets.publishing.service.gov.uk.Accessed On29thNov2019

[399]Merger Action Group v. Secretary Of State For Business, Enterprise And Regulatory Reform – Case No 1107/4/10/08

the time and the need for an urgent solution to the magnitude of the problem at hand, it could be said that the process was transparent and the relevance of the concept of public interest was adequately handled by the Secretary of State. It is also argued that the merger of Lloyds/HBOS is a perfect example of competition matters being sacrificed for short-term gains and the financial stability of the UK in order to save the government from raiding the state coffers to bail out a dying company. This is so because the obvious problems of competition already discussed in this chapter were ignored to create further competition problems. It should be noted that the European Commission approved the merger on the ground that state aid should be provided by the government. However, the case created an opportunity for the private sector to provide a solution to the larger community problem. A further consideration of the judicial cases involved in media mergers may shed more light on the relevance of the concept of public interest and the extent of its consideration in UK merger review.

4.4.3. Media mergers and plurality of media

As discussed earlier in this chapter, national security was the only public interest consideration recognised in the Enterprise Act 2002 before the plurality of the media was then introduced, and later in 2008, stability of the financial industry in the UK.[400] Before discussing the cases under this heading, it may be apt to introduce how the public interest consideration factor of plurality of the media came about so as to have a better understanding of the cases to be discussed herein under that section of this chapter. This will entail discussion of the provision of the Act in relation to plurality of the media and an attempt will be made to interpret the sections of the Act before going into the proper discussions of media merger cases like BSKYB/ITV and News International/BSKYB in order to determine the relevance of the concept of public interest and the extent of its consideration in media merger cases in the UK.

The plurality of the media as a public interest factor was enacted in the form of an amendment to S.58 of the Enterprise Act through the Communications Act 2003. It was brought in by the Joint Committee of the Bill in the House of Lords at a later stage of the Bill, the provision of plurality of the media not having been mentioned in the early version of the Bill.[401]

[400] Banking Act Of 2009 And FSA Act 2008.
[401] HL Deb 7 July 2003, Vol 651, Col 245.

The provisions of the Bill provides thus:

"(2A) The need for

(a) Accurate presentation of news and

(b) Free expression of opinions in Newspapers is specified in this section

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section:

(a) The need, in relation to every different audience in the United Kingdom or in a particular area of locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving the audience;

(b) The need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) The need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in Section 319 of the Communication Act 2003."

It is argued that these provisions are not easily understandable, as sub-section 2A and 2B laid particular emphasis on newspapers, meaning the sub-section only addresses newspaper mergers. Sub-section 2B is for members of local newspapers and sub-section 2C is for media mergers, which includes broadcasting. Sub-section 2C envisages three institutions involved in compliance with the section on plurality of the media. The first is that media enterprises should be controlled by sufficient plurality of persons in different areas and for different audiences. The second is the need for high-quality broadcasting with tastes and interests specified while the third is that the people working in the media industry must show a reasonable level of commitment to

the objectives of the Communications Act 2003. In other words, the media must be impartial and accurate in reporting news to the people.

It is also argued that if the intention of S.58 2A–2C as regards media mergers is to ensure plurality when news is being provided to the public, then the need for accurate and impartial news should adequately take care of such intention without laying emphasis on the merger of outlets that are churning out news to the public. In other words, plurality should not be about the number of outlets providing news; it should be about the quality of the news in terms of accuracy and impartiality.

Having introduced the background to the provisions of the Act in respect of media mergers, the stage is now set to discuss cases in respect of media mergers.

4.4.3.0 MEDIA MERGERS AND PLURALITY OF MEDIA CASES

4.4.3.1 THE CASE OF BSkyB/ITV[402]

BSKYB was interested in acquiring a 17.9 per cent shareholding of ITV because of the requirement in the Communications Act 2003 that cross-media holdings should not be more than 20 per cent.[403] In considering whether or not a relevant merger situation had arisen as envisaged by the Enterprise Act 2002, the Competition Commission is empowered to determine the stage at which enterprises are not to be regarded as distinct when they are brought under common control or ownership. Section 26(3) of the Enterprise Act defined persons in control of an enterprise as persons who could control either directly or indirectly the policy of a company or persons who could materially influence the policy of the enterprise notwithstanding the fact that such persons are incapable of having a controlling shareholding in the enterprise. The 17.9 per cent shareholding sought by BSkyB was not up to the 25 per cent needed to block a special resolution in companies, nor was it a controlling shareholding. The OFT tried to settle this impasse by suggesting that since the mode of attending shareholding meetings at ITV and the voting patterns was always between 63 and 70 per cent, it could be interpreted that BSKYB had more than 25 per cent of the votes cast with its 17.9 per cent shareholding. The OFT also concluded that

[402] BSkyB/ITV – Case Nos: C1/2008/3053 And 3066
[403] Communication Act 2003

BSkyB had internal hold or influence over ITV since BSkyB was then the biggest shareholder and biggest trade shareholder.[404]

However, the Secretary of State intervened by issuing an intervention notice on the basis that the intended acquisition of the shareholding of ITV by BSkyB was devoid of sufficient plurality of persons in terms of control of media and the audience. In short, the Secretary of State intervened on the basis of the plurality of media public interest consideration. The OFT and Ofcom responded through their reports. The OFT's conclusion on the matter of competition was that since BSkyB now had a controlling shareholding, according to their earlier interpretation that BskyB's acquisition of the 17.9 per cent shareholding of ITV was tantamount to a 25 per cent shareholding, then BSkyB could materially sway ITV's corporate strategy and that could substantially lessen competition.[405] On the issue of media plurality, the OFT's position was that since there were existing regulatory organs in the media industry and the known independence of the press within the television industry, it was unlikely that BSkyB would interfere in ITV's news production.[406] The Ofcom report was different from that of the OFT on the issue of media plurality. Ofcom was of the view that the merger was going to be a combination of the second largest and third largest providers of TV news while BSkyB had a 40 per cent stake in News International, which was the largest supplier of UK newspapers. This, in turn, according to Ofcom, meant reducing the number of television providers of news from five to four in the UK, and more importantly ownership of the provider of television news would be limited because of the nexus between ITV and Sky News.[407] The Secretary of State referred the proposed acquisition to the Competition Commission, which concluded that the merger would substantially lessen competition as regards the TV market in the UK but not as regards news. The Competition Commission also confirmed the position of the OFT on plurality issues: the merger had no plurality concerns with

[404] Department Of Trade And Industry, 'Enterprise Act 2002: Public Interest Intervention In Media Mergers' (2002) Para 4. 3-9

[405] Ofcom, 'Report On Public Interest Test On The Proposed Acquisition Of British/Sky Broadcasting Group Plc By News Corporation' (2010) Paragraph 1.16.

[406]Ofcom, 'Report On Public Interest Test On The Proposed Acquisition Of British/Sky Broadcasting Group Plc By News Corporation' (2010) Paragraph 1.16.

[407] Ofcom, 'Report On Public Interest Test On The Proposed Acquisition Of British/Sky Broadcasting Group Plc By News Corporation' (2010) Paragraph 1.16.

regard to news. The Secretary of State thereafter accepted the conclusion of the Competition Commission and carried out their recommendations in terms of remedies. It is interesting that the decision of the Secretary of State and the Competition Commission's report were challenged by BSkyB at the Competition Appeal Tribunal on the ground of the SLC findings of the Competition Commission, while Virgin Media challenged the absence of plurality decision of the Secretary of State. The Competition Appeal Tribunal found for Virgin Media on the issue of plurality of media on the ground of wrong interpretation by the Competition Commission of the Enterprise Act sections that deal with plurality of media .[408] But the Competition Appeal Tribunal's findings in favour of Virgin Media were overturned at the Court of Appeal, which returned the verdict of the Competition Commission that there was no plurality concerns in the merger. The Court of Appeal justified its position on the ground that what was needed in determining plurality of the people controlling the media and whether there was sufficient plurality of news was the real extent of control exercised by one enterprise over another.[409]

It is argued that the Court of Appeal properly identified with the Competition Commission and the Secretary of State that there was no plurality concerns in the merger since control exercised by BSkyB over ITV was not such that it could materially influence the corporate policy of ITV.

4.4.3.2 THE MERGER OF NEWS INTERNATIONAL/BSKYB[410]

News of the World, *The Sun* and *The Times* are owned by family members of Rupert Murdoch and also held 39 per cent of shares of BSkyB. Murdoch was also the chairman of NewsCorp, which was interested in purchasing 60 per cent of the shareholding of BSkyB. The European Commission cleared the merger on the ground that competition was not threatened by the proposed merger in the EU and also that it was a merger with the Union dimension.[411] The then Secretary of State, Vince Cable

[408] British Sky Broadcasting Group V. Competition Commission (2008) CAT, British Sky Broadcasting V. Competition Commission (2010) EWCA, CIV2.
[409]Graham Cosmo, 'Public Interest Mergers, 'European Competition Journal, Volume 9 Number 2, August 2013, Pg 308-406
[410] News International/BSkyB – M 5932
[411] News International/BSkyB – M 5932 Of 21 December, 2010.

MP, was concerned that the proposed merger may raise the issue of competition and a public interest consideration (plurality of media), issued an intervention notice and requested Ofcom to investigate the media plurality issues while the OFT should check whether there were competition issues in the proposed merger. What prompted the Secretary of State in the person of Vince Cable MP was that the proposed merger, if successful, would be the second biggest provider of news in the UK after the BBC and it would also bring the ownership of newspapers and television under single ownership. Ofcom's report[412] was that it was not sure that the internal arrangement of the companies was such that sufficient plurality would be guaranteed, hence it should be referred to the Competition Commission for further investigation. Meanwhile the Secretary of State, Vince Cable MP, had granted an interview to the press wherein he declared war against Murdoch, the chairman of NewsCorp, before he could make a decision on the merger based on the advice of Ofcom.[413] This interview now became an issue in the industry as to whether the MP in his capacity as the Secretary of State would be objective in his decision on the merger in view of his comments to the press. Hence he was replaced with Jeremy Hunt MP, the Secretary of State for Culture, Media and Sport, who incidentally had a close relationship with Murdoch while his personal assistant also had a close relationship with Fred Michel, who was the public affairs executive of News International. Jeremy Hunt[414] had also expressed views in support of the proposed merger. He gave the option of undertakings (conditions) to NewsCorp and BSkyB in that Sky News would have access to the platform of BSkyB once Sky News could ensure its independence as a separate company. This, the OFT and Ofcom agreed, could solve the plurality issues. However, the undertakings could not be proposed as the scandal of phone hacking at one of the merging parties broke out, which led to the withdrawal of the undertakings, which in turn led the matter to be referred to the Competition Commission. Eventually, the bid to acquire BSkyB by NewsCorp was withdrawn on the advice of Parliament on the ground of public interest.[415]

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[412] Ofcom, Report For The Secretary Of State Pursuant S.44 Of The Enterprise Act 2002 Of BSkyB Acquisition' (2007) Page 4.

[413]Ofcom, Report For The Secretary Of State Pursuant S.44 Of The Enterprise Act 2002 Of BSkyB Acquisition' (2007) Page 4.

[414] Leveson Inquiry Report, Chapter 5 Vol. 3 Paragraph 5.196, Paragraph 15.208

[415] Leveson Inquiry Report, Chapter 5 Vol.3 Paragraph 5.196, Paragraph 15.208

It is argued that the case of proposed merger between News International/BSkyB revealed the vulnerability of the office of Secretary of State as regards decisions taken on public interest considerations. The attacks on both Secretaries of State on the likelihood of bias because of their comments on the proposed merger confirm the fear that the stakes are too high when it comes to media mergers. Many interests are at play to contribute their own quota to the discussions on the proposed merger in order to protect their various interests. In fact, in the proposed mergers of NewsCorp and BSkyB, there were more than 156,000 representations to Ofcom.[416] The attacks and the unwarranted comments could have undermined the process of decision taking by the Secretary of State as any decision taken by him may be challenged on the ground of bias.

It is also argued that the case also raised the concern that politicians are not the suitable people to make decisions on public interest consideration matters and that such decisions are best left to independent regulators like CMA. Politicians are normally at ease with lobbyists and could encourage lobbying to circumvent due process as regards the decision-taking process by the Secretary of State.

The case of the proposed merger between News International/BSkyB showed how unwieldy the process of decision-taking by the Secretary of State as provided by the Enterprise Act could be when compared with the assessment procedure for competition-related mergers that is consistent and transparent in view of the platform provided for such assessment.

4.4.3.3 THE MERGER BETWEEN GLOBAL RADIO AND GMG GROUP[417]

This was a merger involving the biggest group of commercial radio outfit in the UK and the number three in the rank of commercial radio outfits in the UK. During investigation by the OFT, the merger was referred to the Secretary of State on the ground of public interest consideration. The Secretary of State thereafter referred the merger back to the OFT and Ofcom, after issuing the intervention notice for their reports. Ofcom absolved the merger of any plurality issues since there were other

[416] Leveson Inquiry Report, Chapter 5, Vol 3 Paragraph 5.66, Paragraph 13.200
[417] Global Radio/GMG Group – Case No. 1045/4/8/13

outlets such as TV and online news. This was despite there being a reduction in ownership control. The OFT believed that the transaction had SLC as it was a threat to competition as regards supply of non-contracted radio advertisement in some markets.[418] The merger was then, on competition grounds, referred to the Competition Commission where it confirmed the OFT report, that it was indeed a merger fraught with competition concerns but free from plurality concerns.

It is argued that this merger between Global Radio and GMG group also revealed the significance of the role of the Secretary of State in the process of decision-making as regards the public interest consideration matters in the UK. This is because it was the Secretary of State to whom the matter was referred by the OFT upon identifying the public interest concerns which the Secretary of State for Culture, Media and Sport (who had the responsibility at that time since departmental changes of 2010) referred to OFT and Ofcom for their reports as provided by the Enterprise Act.

Having in the previous section discussed and analysed how public interest is considered in defence related cases, financial related cases and media merger and plurality of the media related cases, it is apt before concluding this chapter to discuss Brexit and its consequences on merger review in general and its consequences on the public interest consideration in the UK in particular.

4.5 BREXIT AND THE CONSEQUENCES ON MERGER REVIEW

Before Brexit,[419] countries in the European Union (EU) enjoyed free trade within and between Member States and also had regulations that facilitated the control of mergers.[420] The laws that govern mergers in the EU include the 2004 Implementing Regulation (802/2004) and the EU Merger Regulation (139/2004). The role of the merger regulation is to set out rules for assessment, while the implementation regulations are concerned with the procedural formats. The body in charge of enforcing the merger regulations in the EU is the Directorate General for Competition,

[418] Global Radio/GMG Group – Case No. 1045/4/8/13

[419] Alex Hunt And Brian Wheeler, 'Brexit: All You Need To Know About The UK Leaving The EU - BBC News' (*BBC News*, 2020) <http://www.bbc.com/news/uk-politics-32810887> Accessed On Jan5 2020

[420] Baker Mckenzie, 'Merger Control Triggers And Thresholds In The European Union | Lexology' (*Lexology.com*, 2017) <http://www.lexology.com/library/detail.aspx?g=da36e39c-bd46-47a1-90d1-20af3ad2d6d2> Accessed On Jan5 2020

based in Brussels. This Commission enforces regulations across the European Free Trade Association and the European Economic Area Member States. After Brexit, however, there will be no need to notify the Competition and Markets Authority (CMA) of transactions before mergers can be formed.[421]

The EU merger review system is also quite different from that of the UK. Relevant merger situations in the UK occur when the target company has a turnover of about £70 million or when the combined market share in a plausible market definition is about or above 25 per cent. The parties either decide to notify the CMA formally or informally, and where the CMA feels it is needed, a review will be called for. As for the EU, merger notifications are mandatory for purposes of clearance. There is also a difference between thresholds for different types of mergers in both regulation bodies.[422] Also, while the UK recognises public interest, the EU regulations leave this issue to the Member States involved. This is possible with the invocation of Article 21(4) EUMR by the Member States.

The consequences of Brexit on merger control include a reduction of the number of EU filings because many companies with turnovers have invested in the United Kingdom. Another issue that arises is the divergent outcomes of merger reviews, for example in London and Brussels or England and Wales. When regulations for merger review differ, it causes setbacks for the individual companies. An example of these outcomes would involve the Sea France ferry operation that went bankrupt and was to be acquired by Eurotunnel. While the acquisition was agreed to by the French, the UK regulations blocked the activity.[423]

Another consequence will be the UK's elimination from the European Competition Network, which may affect the UK both positively, whereby the CMA will become a flexible and an informal case allocation system, and negatively as this means that in exiting the EU, the CMA will lose the cooperation of the European Competition Network.

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[421] Richard Whish and David Bailey, 'Competition Law' (Ninth ed. Oxford University Press,2018)pp854

[422] Mats A. Bergman and others, 'Comparing Merger Policies: The European Union Versus The United States.' [2007] ftp://zinc.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/MatsBergman.pdf. Accessed 29th Nov2019

[423] www.Lexology.com

There are, however, steps that the government can take to ensure they mitigate the negative consequences of Brexit that may be a burden to businesses. The CMA for example can create a framework for cooperation especially for cases that have been reported to both the EU and the UK jurisdictions. The CMA can also accept EU notifications, and if need be, include supplements of the UK law.

Having discussed the consequences of Brexit on merger review in the UK and the EU, it is appropriate to briefly discuss the consequences of Brexit on the concept of public interest in the EU and the UK.

4.5.1 CONSEQUENCES OF BREXIT ON PUBLIC INTEREST CONCEPT

Unlike the effect of Brexit on the merger review process in the EU and the UK, the effect of Brexit on the public interest concept in the UK is not significant. It was expected that with the passing into law the Brexit resolution as a result of the convincing wins of the Tories in the December 2019 general election, the public interest concept in the UK may change since the UK is no longer a Member State of the EU as of 31 January 2020.[424]

The reality, however, is that the UK law on public interest considerations as analysed earlier in this chapter is such that it is predicated on the role and powers of the Secretary of State as vested by the Enterprise Act.[425] This is in contrast with the provisions of Art 21(4) of the EUMR, which ostensibly regulates public interest in the EU, where the Secretary of State has no meaningful role to play.

It is argued that the consequences of Brexit on the concept of public interest in the UK is of no moment either in the UK or in the EU, as the exit of the UK from the EU may not change significantly any process as regards the concept of public interest considerations in the merger review process in either of the two jurisdictions.

[424] The December 13th General Election in the UK
[425] Enterprise Act 2002

4.6 CONCLUSION

In attempting to determine the relevance and the extent of the concept of public interest in the UK, this chapter has attempted to discuss its legal structure, the evolution of the concept in the UK, from the period of the broad-based public interest assessment procedure to the "Tebbit doctrine" and "Lilley doctrine" and eventually to the full-blown strict competition-based regime of the Enterprise Act 2002. The procedure of the application of the concept by the Secretary of State was also discussed and analysed in order to appreciate the wisdom behind the role afforded the Secretary of State in taking decisions on the public interest consideration. The issue of the weaknesses embedded in the function of the Secretary of State as regards the decision-making process concerning public interest in terms of power being given to a single individual authority to exercise. As well as the fact that the Secretary of State could extend the scope of public interest consideration by creating a new public interest consideration when the circumstances call for it, as seen in the case of Lloyds/HBOS, were also discussed and analysed in this chapter.

All these discussions and analysis of various media merger cases, such as News International/BSkyB and BSkyB/ITV, and cases that fall under the recognised national security factor of public interest consideration were examined to show the relevance of the concept of public interest in the UK and the extent to which the concept has been considered during merger review in the UK.

It is argued that the concept, though recognised by the Enterprise Act where two chapters were devoted to it, the merger assessment in the UK is primarily competition-based, led by strict compliance to competition rules by the CMA. The Lloyds/HBOS case was an exception and such cases happen once in a lifetime. Since 2008, the Secretary of State has not formulated another public interest factor, which confirms that the concept is sparingly used in the UK. This view is supported by all the avoidable controversies in the wake of the merger of Lloyds/HBOS as well as the merger of BSkyB/ITV and News International/BSkyB where the process of decision-making by the Secretary of State was almost compromised by the explosive comments that almost compromised the whole process of merger review in the UK.

The fact that other non-competition interests like industrial policy, employment, creating national champions, protecting the environment and other social policies are hardly reckoned with in merger review in the UK is confirmation of the view that the public interest consideration is sparingly used in the UK.

CHAPTER FIVE: THE IMPLICATIONS OF PUBLIC INTEREST PROVISIONS IN THE NEWLY ENACTED COMPETITION ACT IN NIGERIA AS REGARDS MERGER REVIEW

5.1 INTRODUCTION

The preceding chapter discussed the significance of the concept of public interest in the UK with the aid of decided cases to determine how significant the concept is in the UK and the extent of its consideration. It did this by analysing the powers of the Secretary of State to propose a new public interest consideration and to singularly make a decision when it comes to public interest consideration in a merger review. This chapter will discuss the concept of public interest in Nigeria in the light of the newly enacted Competition Act there. Notwithstanding the fact that competition has been around for a while in developed countries, the concept is just evolving in Africa, even though some African countries, especially Nigeria, have tried to reform their economy by adopting privatisation and other market liberalisation policies dictated by the World Bank. Results in this respect have not been encouraging, because of the absence of competition law and policies to regulate the behaviour of consumers and producers for a more co-ordinated economy for the benefit of consumers.[426] This gap (absence of competition law) may be due to lack of political will and skill to implement the concept.[427] In environments where there is no competition law, anti-competitive behaviours such as reduction in choice and increase in prices are predominant. It is the fear of this unwholesome situation of no choice and increase in prices that brought the introduction of competition law to Africa, including Nigeria. The introduction of competition law and its antecedents came with its own challenges, that is, a situation where mergers are assessed on the effect of competition on the mergers. It is the peculiarity of African countries in terms of local factors like employment, industrial policies and poverty that increases the tempo for the introduction of the concept of public interest in merger assessment. This is to delete or

[426] Kamala Dawar And Ndaba Ndolvu, 'A Comparative Assessment Of Competition In Africa: Identifying Drivers Of Reform In Bostwana, Ethiopia And Nigeria' 2017 Oxford University Press At 150
M.M Dabbah, 'International And Comparative Competition Law' Cambridge University Press,2010,pg3
[427] Kamala Dawar And Ndaba Ndolvu, 'A Comparative Assessment Of Competition In Africa: Identifying Drivers Of Reform In Bostwana, Ethiopia And Nigeria' 2017 Oxford University Press At 150

reduce the effect of strict competition rules on mergers in order to accommodate other public interest factors like employment, social and industrial policies.

This chapter under section 5.2 will discuss the development of the Nigerian law and economy in order to appreciate the evolution of the country as one that is capable of being compared with another nation or institution. The chapter under section 5.3 will also discuss the political system and parties and ideologies in Nigeria in order to have a better understanding of the concept of public interest.

The chapter will discuss the implications of the provisions relating to the concept of public interest in both the Investments and Securities Act (ISA) 2007 and Nigerian Federal Competition and Consumer Protection Act (FCCPA) 2019. In attempting to do this, this thesis will explore the background of the concept of public interest in Nigeria. That is, attempts to have a fully regulated competition regime in Nigeria will be discussed. In order to appreciate the significance of the new Act vis-à-vis the concept of public interest, the old regime under the Investments and Securities Act of 2007 will also be briefly discussed. The thesis will then examine the legal regime of the concept by presenting an overview and features of the FCCPA in order to analyse the effectiveness of the new Competition Act as regards the concept of public interest consideration during merger review. These will be discussed in 5.3., 5.4 and 5.6 of this chapter.

In view of the fact that this chapter is about the significance of the concept of public interest in merger review in Nigeria, it will not cover mergers in Nigeria, neither will it discuss the reasons and various theories for mergers nor reasons for merger review in Nigeria. It is imperative to trace the development of Nigerian law and economy before looking at the background of the concept of public interest in merger review in Nigeria.

5.2 THE DEVELOPMENT OF NIGERIAN LAW AND THE ECONOMY

The sources of Nigerian law are the Constitution, federal and state laws made by the legislative arm of government which comprises the National Assembly and the States Houses of Assemblies for the federating states.[428] As well as the customary laws,

[428] A.O. Obilade, 'The Nigerian Legal System' 1979, Sweet & Maxwell at Page45

Islamic laws and English law.[429] During the pre-colonial era in Nigeria, there were informal legal systems. Dispensation of justice was through the traditional institutions which were the custodians of law and order.[430] There were substantive laws though unwritten. Then the British colonised the country in 1861 through the conquest of Lagos.[431] The British general policy was to adopt the United Kingdom as a model; hence the English legal system was introduced into Nigeria. The Northern and Southern protectorates were merged together to secure the entity called Nigeria in 1914.[432] The introduction of Ordinance No. 4 of 1876 in the then Lagos colony empowered the courts to execute the Common Law of England, the doctrines of equity as applicable in England, statutes of general application as at 1st July 1874, and local enactments and customary laws that were not incompatible with the law then in force and were not repugnant to national law, equity and good conscience. Later, the federating units of the country was divided into three regions which turned into four at one stage and then into 12 states, 19 states, 21 states and currently 36 states and a federal capital territory.[433] In all these states of the federation, the sources of law are the same. In essence, English law forms a substantial part of Nigerian law.

Nigeria has been ruled by successive military administrations. Nigerian economy is natural resources oriented. The mineral resources of mining and oil support the economy of Nigeria as well as agriculture.[434] However, as at 2012, the largest export commodity of Nigeria was crude oil. Crude oil contributed about 45% to the nation's gross national product (GDP) while 95% of the country's export earnings came from crude oil, which constitutes 70% of the total revenue of the government. Interestingly, the oil sector employs about 5% of the nation's labour force.[435] In fact, as recently as

[429] A.E.W. Park. 'The Sources Of Nigerian Law' 1963 African University Press At Page27

[430] Dhikru A. Yagboyaju And Adeoye O. Akinola, 'Nigerian State And The Crisis Of Governance: A Critical Exposition'. July 24 2019, Sage Journals Publication At Page1-20, Https://doiporg/10.1177/2158.24401986510, https://Journals.Sagepub.com. Accessed On 5th Jan2020

[431] Aderibigbe Stephen Olomola, 'Fifty Years Of Post-Independence Development In Nigeria: A Critical Review' IDEP Discussion In Paper Series, No. 1 2011.At 10

[432] Jake Okechukwu Effoduh, 'The Economic Development Of Nigeria From 1914 to 2014' https://www.casade.org.

[433] T, Wuam, 'Nigeria Since 1960: A Comparative Study In Nation-Building And Development. https://www.jstir.org.stable. Accessed On 5th Jan 2020

[434] OzyB.JP Orluwene, 'The Politics Of Development Strategies In Nigeria Since Independence: An Overview 2014, Academy Journal Of Inter Disciplinary Studies At Page24

[435] Mercy Ada Anyiwe And Aigbo Khaevbolo Oziegbe, 'Democracy And Economic Growth: Statistical Evidence From Nigeria, 1960-2002' 2006, JOA, Volume 6 Issue 2 Page 257-265.

February 2020, NNPC, who is a major oil company in Nigeria, employed about 1,000 graduates out of about 100,000 applications.[436]

The country experienced civil war between 1967 and 1970, when the eastern part of the country attempted to secede from the federating units[437]. The civil war, with the incessant military interventions, did not allow the country to have a consistent policy development programme.

The manufacturing output to economy in Nigeria has increased tremendously as cement and other commodities are being manufactured locally though at exorbitant cost. Low technology and the absence of a steady electricity supply still dominate manufacturing in Nigeria.[438] Vehicles are largely assembled in Nigeria as there are fewer plants there where vehicles are manufactured. Hence manufacturing contributes little to stimulate the Nigerian economy.

Life expectancy in Nigeria is around 54 years of age according to WHO data.[439] According to the World Health Organization (WHO), Nigerians live on less than a dollar a day. The Nigerian population is about 180 million now and expected to be about 250 million in the year 2050. A variety of factors constitute to the life expectancy ratio in Nigeria. These include absence of stability of food supplies. The Nigerian economy is agricultural based but farming is not mechanised; it is largely agrarian. Hence, there are no modern ways of preserving agricultural products, and this leads to instability of food supplies. Crops or fruits that are not in season cannot be preserved for out-of-season periods.

The Boko Haram[440] war and other forms of insecurity like kidnapping, banditry and crime also contribute to the low life expectancy rate in Nigeria.

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[436] Emma Chukwuemeka, 'Obstacles To Nigeria Political Development, A Critical Evaluation'. https://www.researchgate.net.2680 Accessed On 5th Jan 2020

[437] E.O. Chukwuemeka, 'A Pathological Review Of Military Democracy In Nigeria'. 2008, Journal Of Policy And Development Studies Page 5-7.

[438] P.Alfa, 'Political Parties And Democratic Consolidation In Nigeria, 2007-2011'. 2011 Journal Of Policy And Development Studies Vol. 5(2) Pgs. 149-160.

[439] Elimma C. Ezeani, 'Economic And Development Policy-Making In Nigeria'. Journal Of African Law, 56(1) (2012), 109-138

[440] Akinola, A.O. And Uzodike U., 'The Threat Of 'BokoHaram'. Terrorism And Niger Delta Militancy To Security And Development In Africa: From Myth To Reality.' 2014 Ghandi Mars, 35, Page 391-417

The healthcare sector provision in Nigeria is the responsibility of the federal government, state governments and the local governments. According to WHO, the primary challenge for Nigeria's healthcare system is inadequate production and uneven distribution of health workers.[441] The current budgetary allocation for the health sector in 2020 is 4.14% of the budget, which is a far cry from 20% as recommended by WHO[442].

There are three different sectors that constitute the educational system in Nigeria: basic education, post basic education and tertiary education. Education is monitored or administered by all three tiers of government. Policy formulation for and quality control of education is the responsibility of the Federal Ministry of Education. The illiteracy rate in Nigeria is still very high notwithstanding the fact that there were about 20,000 Nigerians studying in various universities in the UK as at 2018.[443] The literacy rate for youth in 2015 in Nigeria was 72.8% and the adult literacy rate was 59.6% compared to the global rates of 90.6% and 85.3% respectively.[444] Education spending in the 2020 budget is 6.7% of the budget.[445]

It is argued that post-colonial Nigeria is still bedevilled by an economic structure that is economically dependent and underdeveloped notwithstanding being a primary producer of many cash crops and mineral resources. The rural areas are economically distanced and disassociated from the urban towns. It is further argued that the country is seriously working towards an inclusive development that will instigate economic growth through diversification and a shift from the economic mismanagement that has been the bane of the country's development despite brilliant and intelligent human resources.

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[441] LabourForce. 'WTO Trade Policy Review Nigeria: Report By The Secretariat' WT/TPR/S/149, 18 April 2013 At Pg9

[442] Maureen O. Akunne, M.J. Okonta And O. Ekwunife. 'Satisfaction of Nigerian Patients With Health Services: A Protocol For A Systematic Review'. 2019 Rev 8 At Page 256. https://doi.org/10.1186/S13643-019-1160.Accessed On 5th Jan2020

[443] S. Shanum, 'Democracy And Bad Leadership In Nigeria'. https://www.premiumtimesng.com/opinion/127105-democracyand-bad-leadership-in-nigeria-by-simonshanun.html.Accessed On 5thJan 2020

[444] Kamala Dawar And Ndaba Ndolve, 'A Comparative Assessment Of Competition In Africa: Identifying Drivers Of Reform In Botswana, Ethiopia And Nigeria' 2017 Oxford University Press At 150

[445] Jide Ojo. 'Will 2020 Budget Impact Positively On Nigerians?.' December 18, 2019, Punch Newspapers. https://www/punchng.com.Accessed On 29th Dec 2019

Having discussed the development of Nigerian law and economy, it is apt to examine Nigeria's political systems, parties and ideologies for a better understanding of the concept of public interest in Nigeria.

5.3 NIGERIA'S POLITICAL SYSTEMS, PARTIES AND IDEOLOGIES

The Nigerian nation got its independence from the British colonial powers on 1st October 1960.[446] Immediately after independence, the country practised a parliamentary system of government and was divided into three regions, Northern, Western and Eastern, until the 1966 military coup when the First Republic collapsed.[447] In order to ensure the unity of the country, the then military government started a unitary form of government, and the country was divided first into 12 states, later into 19 states and eventually into 36 states and a federal capital city at Abuja.[448] The military was in power till 1979, when power was transferred to the civilian democratically elected government of the late President Shehu Shagari to herald the beginning of the Second Republic[449]. The system of government then was presidential with the federal government at the centre. The government was short-lived, and in 1983 the military struck again on allegations of corruption against the civilian government.[450] The military government was in power for another 16 years until 1999, when power was transferred back into the hands of the civilians, who have been in power since then.[451] Elections have been conducted every four years since then, and the system of government is still federalism with a written constitution modelled after the American Constitution[452].

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[446] T, Wuam, 'Nigeria Since 1960: A Comparative Study In Nation-Building And Development'. Https://www.jstir.org.stable.Accessed On 29thDec 2019

[447] Jake Okechukwu Effoduh, 'The Economic Development Of Nigeria From 1914 to 2014' https://www.casade.org.Accessed On 29thDec2019

[448] OzyB.JP Orluwene, 'The Politics Of Development Strategies In Nigeria Since Independence: An Overview 2014', Academy Journal Of Inter Disciplinary Studies At Page24

[449]S. Shanum, 'Democracy And Bad Leadership In Nigeria'. Https://www.premiumtimesng.com/opinion/127105-democracyand-bad-leadership-in-nigeria-by-simonshanun.html.

[450]Moshood Saka, 'Democratization And Political Development In Nigeria Under The Fourth Republic'. 2014, OIDA International Journal Of Sustainable Development. Vol 07, No. 11 Page 109-122

[451] Aderibigbe Stephen Olomola, 'Fifty Years Of Post-Independence Development In Nigeria: A Critical Review' IDEP Discussion In Paper Series, No. 1 2011.Pg12

[452] Kamala Dawar And Ndaba Ndolve, 'A Comparative Assessment Of Competition In Africa: Identifying Drivers Of Reform In Botswana, Ethiopia And Nigeria' 2017 Oxford University Press At 150

5.4 BACKGROUND

The problems associated with anti-competitive behaviours like reduction in choice and increase in prices as well as the activities of cartels made the Nigerian government in 2002 attempted to introduce Federal Competition Bill. The bill was to establish the Federal Competition Commission to regulate competition matters in Nigeria, but before it could pass through the legislative processes it was abandoned.[453] As a result of lack of political will and commitment, in 2012 the same fate befell the introduction of the bill for the establishment of the Nigerian Trade and Competition Commission and for other matters connected therewith (NTCC Bill), ten years after the death of the Federal Competition Bill in 2002.[454] Prior to the attempted introduction of the NTCC Bill in 2012, the Investment and Securities Act of 2007[455] was enacted to cater for competition matters in Nigeria. The concept of public interest was introduced into the ISA of 2007 before finding its way into the newly enacted FCCPA. The 2007 Act made the Securities and Exchange Commission (SEC) the merger regulatory institution in Nigeria. SEC was to combine its traditional role of Securities and Exchange Commission with the function of a Competition Commission. The 2007 Act also explained some provisions of the 1999 Act[456] which were not clear; examples were the scope of the Investments and Securities Tribunal, the relationship between capital market legal rules and private companies and the importance of the Investors' Protection Fund (IPF). The 2007 Act also introduced the concept of mandatory takeovers, even though the concept was not properly defined as the wording of the provisions of the Act in relation to that section was very vague[457].

The absence of a single regulator for competition matters affected the efficiency of SEC, which was already overwhelmed by its traditional roles. This absence also contributed to a lack of robustness of the Investment and Securities Act 2007 in that

[453] Federal Republic Of Nigeria National Assembly www.nassnig.org/document/download/627 accessed 24 November 2019

[454] A Bill For An Act To Provide For The Establishment Of The Nigerian Trade And Competition Commission; And For Other Matters Connected Therewith (January 2012) <www.nassing.org/document/download/627/accessed 24 November 2019

[455] Investment And Securities Act, 2007

[456] Investment And Securities Act 1999

[457] Nnamdi Dimgba, 'Regulation Of Competition Through Merger Control: Case Under Investment And Securities Act 2007' Being A Lecture At The NBA Conference Abuja In 2017 Pgs. 1-36

SEC was distracted from performing the role of a competition commission.[458] SEC was responsible for giving approval before any merger could be approved. It received notifications, both pre- and post-merger, received formal applications for mergers and ensured that all post-merger requirements were not left out by the merging entities. Under the Investment and Securities Act of 2007, mergers that involved companies in regulated industries were bound by provisions of various sector legislations. In other words, there were many regulators regulating merger processes in regulated industries mergers, for example in the electricity, telecommunications, banking, insurance, and oil and gas sectors. Put differently, these sector regulators had almost all the powers of SEC as it affected their sectors but subject to the overall approval of SEC. The Investment and Securities Act of 2007 introduced the concept of public interest into Nigerian law by virtue of S.121.[459] This provision was imported from the South African Competition Act of 1989.[460] The section provided for the Exchange Commission to consider the effects of employment, industrial policy and technology in mergers before declaring whether a merger is competitive or anti-competitive. The absence of a single regulator for competition matters and overbearing powers of the sectors' regulators were the major reasons for the increase in tempo for the need to have a full-blown Competition Commission that will handle competition and allied matters in Nigeria. In 2016, the Federal Competition and Consumer Protection Bill was introduced, and after going through all the legislative processes of approvals in both legislative houses, was passed into law in February 2019 by the Nigerian President, Muhamadu Buhari, as the Federal Competition and Consumer Protection Act (FCCPA) 2019.[461] Before considering the possible challenges that operators might face with the immediate operational status of the new Act, it is necessary to provide an overview and discuss its features.

[458]OlaniwunAjayi, 'Federal Competition And Consumer Protection Act 2018.' https://www.olaniwunajayi.net/blog/federal-Competition-And Consumer-Protection-Act. Accessed On 29th Nov2019.

[459] S. 12,Investments And Securities Act 2007

[460] South African Competition Act Of 1989; Robert Legh And Haylene Treisman 'South Africa; The Public Interest Factor In Merger Proceedings' 2001 Investment Financial Law Review At Pg, 45

[461] Federal Competition And Consumer Protection Act 2019

5.5 OVERVIEW OF FEATURES OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT (FCCPA) 2019

Having discussed the rationale, inspiration and sources for the FCCPA2019 in section 5.4 of this chapter, this section will provide an overview of features of the FCCPA2019. The newly enacted legislation heralds a dedicated anti-trust authority in Nigeria. The Act establishes the Federal Competition and Consumer Protection Tribunal. The Tribunal's function is to adjudicate matters that are incidental to the operations of the Act. It is also sanctioned to hear appeals or review any decision from the exercise of the powers of any sector-specific regulatory authority in a regulated industry in respect of consumer protection and competition matters.[462] Whenever any of the provisions of the Act are breached, the Tribunal has power to impose administrative penalties against the affected parties. Appeals against the Tribunal's decision lies with the Court of Appeal. The decisions of the Tribunal are, however, to be registered at the Federal High Court's Registry for enforcement.[463] Wole Obayomi[464] is of the view that there is no need for registration of the decisions of the Tribunal at the Federal High Court because such a procedure would suggest that the Federal High Court could review the decision of the Tribunal whereas the Act provides that appeals should lie with the Court of Appeal. It is argued that Wole Obayomi's position might not be correct as the essence of registration of the decision at the Federal High Court is to allow the judgment creditor or the party who wins at the Tribunal to be able to enforce the decisions with the legal structure or process of enforcement of orders or decisions of the Federal High Court and not necessarily to submit the Tribunal's decisions for review by Federal High Court judges. It is further argued that the idea of registering the decisions of the Tribunal at the Federal High Court, coupled with the fact that appeals from the Tribunal lie with the Court of Appeal, directly puts the Tribunal on the same pedestal as the Federal High Court in terms of hierarchy as per jurisdictions. This, it is submitted, is in contravention of S.251 of the amended 1999 Constitution of Nigeria[465] that gives the Federal High

[462] S.39-58 Federal Competition And Consumer Protection Act, 2019.
[463] S.54 Federal Competition And Consumer Protection Act, 2019
[464] Wole Abayomi, 'Federal Competition And Consumer Act 2019' KPMG Advisory Services Issue 3.3 Pg. 1-5.
[465] S.251, Amended 1999 Constitution Of Federal Republic Of Nigeria

Court exclusive jurisdiction over all matters relating to competition, monopolies, consumer protection and decisions of a federal agency respectively.

The main features of the FCCPA established the Federal Competition and Consumer Protection Commission, and the powers and functions of the Commission are set out under section 17(a)-Z) of the Act.[466] The functions of the Commission can be categorised into four. They are merger control, promotion of competition, protection of consumers and investigations and enforcement.

The newly enacted Act makes provisions against restrictive agreements between business operators. Agreements that are likely to restrict trade, like price fixing either directly or indirectly, hoarding of goods and services, prohibition of minimum resale prices and exclusionary contractual provisions, are outlawed.[467] However, most of the prohibited arrangements may be allowed if the parties could show that the agreements are not against competition and they fall into any of the specified exceptions in the Act. The Act also provides for price regulations, and prohibition of monopolies and abuse of dominant position.[468] On the abuse of dominant position, the new Act forbids any business undertaking from indulging in abuse of a dominant position in the affected industry.[469] The Act regards blocking of transfer or dissemination of technology and lessening of competition as instances of abuse of dominant position. The penalty for any party who indulges in the act of abuse of dominant position amounts to not less than 10% of the previous year's turnover of the affected company.[470] The Act also provides penalties for competition infractions like

[466] S.17,FederalCompetition And Consumer Protection Act 2019; OlaniwunAjayi, 'Federal Competition And Consumer Protection Act 2018.' https://www.olaniwunajayi.net/blog/federal-competition-and-consumer.Accessed On 29th Nov2019

[467] S.59-69 Federal Competition And Consumer Protection Act 2019;. Ogochukwu Isiandinso & Emmanuel Omoju,' The Federal Competition And Consumer Protection Act 2019: Regulatory Implication For Merger Transaction In Nigeria'. www.businessday.ng March 19 2019 At Pg. 9.Accessed 24 Nov2019

[468] S.74 Federal Competition And Consumer Protection ACT 2019

[469] S.70-75 Federal Competition And Consumer Protection Act 2019;OdujurinAdefulu,' A Review Of The Federal Competition And Consumer Protection Act 2019' https://www.odujinrinadefulu.com/content/review-fed-competition

[470] S45 Federal Competition And Consumer Protection Act 2019

conspiracy, obstruction of investigation or inquiry, bid-rigging or giving of misleading or false information and price-fixing.[471]

Unlike the ISA 2007, the new Act grants the Commission powers of oversight in regulated industries and all sectors. It provides further that in the case of any conflict in the exercise of powers by the regulated industry and the Commission, the Commission's powers would prevail. The new Act enjoins the sector regulators to liaise with the Commission on how to exercise the powers in relation to competition and consumers.[472]

The ultimate power to disapprove or approve a merger is vested in the Competition Commission to be inaugurated. The power was taken away from the Securities and Exchange Commission (SEC). The Commission may revoke its earlier decision to approve a merger and may approve a merger subject to conditions.

The notification process is not different from the ISA as notification is not required of small mergers, except where the Commission specifically requests for it, while the Act also provides for rules guiding large mergers where notification is compulsory.[473] Mergers were categorised into small and large mergers as distinguished from the 2007 Act that provided for small, intermediate and large mergers. The Act stipulates that in competition and consumer protection matters, the provisions of the FCCPA will override the provisions of any other law, subject only to the provisions of the constitution of Nigeria.[474]

Merger under the Act is robustly defined to include acquisition. Section 92 of the Act defines acquisition as takeover by one company of sufficient shares or assets in another company so as to give the acquiring company control over the target company. It follows that acquisition would occur once control is transferred from the

[471] S.88-91 Federal Competition And Consumer Protection Act 2019;Olubunmi Fayokun, Uche Nwokocha' A review of the Federal Competition And Consumer Protection Act'.https://www.aluko-oyebode.com/insights/review-of-the-federal-Competition 2019.Accessed on 10TH April2020

[472] S.104 Federal Competition And Consumer Protection Act 2019; JacksonEtti,' The Enactment Of The Nigerian Federal Competition Act.' www.jacksonettiandedu.com/wp-content/uploads/2019. Accessed on 10thApril2020

[473] S.96 Federal Competition And Consumer Protection Act 2019

[474] Aluko & Oyebode,' A Review Of The Federal Competition And Consumer Protection Act 2019' March 2019 Edition, Pg 1-18

target company to the acquiring company.[475] The definition of acquisition by the Act laid to rest the controversy over whether assumption of control in a company would automatically arise in asset acquisition of the company in view of the fact that the defunct 2007 ISA Act was silent on the needed thresholds for control when it comes to purchase of assets in a company. The new Act is explicit on acquisition of shares and assets while defining scope of merger. It defines merger as when one or more undertakings directly or indirectly acquire threshold direct or indirect control over the whole or part of the business of another undertaking. The Act[476] specifies the following as such situations whereby a merger would arise: (I) the purchase or lease of the shares, interests or assets of the other undertakings; (ii) amalgamation or other combination with the other undertaking; and (iii) joint venture. The new Act, in addition to this, improves on the meaning of "an undertaking in control of another undertaking" when it classifies a person who owns assets of the company as a person in control, contrary to ISA 2007 provisions, which restricted ownership of half of the issued capital of the company as the only prerequisite for control.

The new Act[477] gives the Commission power while considering a merger to determine whether a merger is likely to substantially prevent or lessen competition by assessing its effect on competition and technology and other factors expressly provided in the Act.

The new Act also introduces the intervention of the Minister of Trade and Investment in the merger review process when it empowers this minister to make representations to the Commission during assessment of mergers, especially when it relates to public interest factors.[478] The Act also recognises third parties who are not part of the merging parties by allowing such parties to make representations too. However, it is argued that the Act is silent on spin-offs, deconsolidation and demergers, just like the

[475] S.92 Federal Competition And Consumer Protection Act 2019;LawNigeria, 'Federal Competition And Consumer Protection Act' Lawnigeria.com/federal-Competition-And Consumer-Protection-Act

[476] S.92 Federal Competition And Consumer Protection Act 2019; Lexology,' Analysis Of The Federal Competition And Consumer Protection Act 2018'. https://www.lexology.com/library/detail.aspx.Accessed on 12thApril2020

[477] S.94 Federal Competition And Consumer Protection Act 2019; Arthur Jackson,' Everything You Need To Know About The Federal Competition Act 'https:// www. gistalad.com/news/regulates/federal-competition. Accessed On 12th April 2020

[478] S.100 Federal Competition And Consumer Protection Act 2019 https://www.proshareng.com/news/regulates/federal-competition.Accessed on 12thApril2020

ISA too was silent about the terms; hence, there are no provisions to govern such transactions in the Act. The Act under S.94 introduced the concept of public interest in merger review with slight differences to the public interest concept introduced under the ISA 2007. The Act enjoins the Commission to determine whether the merger can or cannot be justified on substantial public interest grounds by assessing factors highlighted in the Act, such as industrial policy, employment, the ability of national industries to compete in international markets and the ability of small companies to be competitive. We shall discuss this in detail later in this chapter.

Having discussed the features of the new Competition Act, it is desirable to mention and analyse the potential challenges that operators may face now that the Act is fully operational.

5.6 POSSIBLE CHALLENGES OF THE NEW COMPETITION ACT

As discussed earlier under section 5.5 of this chapter, the Act has defined acquisition in a robust manner and in such a way that all indirect transfers of shares and assets that necessitate a control are being monitored by the Commission. The question is, in view of a lack of known procedure to compile a register or ascertain the owners of foreign investments in Nigerian private companies, would the Commission be capable of monitoring Nigerian undertakings by foreign holding companies?

It is argued that the introduction of requirement for registration of indirect transfers by foreign investors in a system that is not yet organised for such a process is bound to have a counter-productive effect as the registration processes will slow down a lot of activities in a bid to ensure compliance.

The FCCPA 2019 Act under section 166 automatically divested the Securities and Exchange Commission (SEC) of its traditional role of regulatory oversight function and gave it to the new Competition Commission by repealing the 2007 Act that established SEC. The new Commission is yet to be commissioned[479] and also is not

[479] The FCCPA 2019 Act has immediate operational status by virtue of section 166 of the Act, but the Competition Commission established by the FCCPA2019 is yet to be commissioned as at the time of writing. Members are yet to be appointed in line with the provisions of the Act. It is the defunct Consumer Protection Council that has taken over the functions of the newly established Commission without the newly established Commission being inaugurated. The limitations of the defunct Consumer Protection Council in terms of functions and powers in relation to competition matters actually brought about the enactment of the FCCPA.

staffed with skilled workers. This immediate repeal of the 2007 Act without a transition period would likely create problems for the new Commission as skilled workers as regards competition issues are scarce in Nigeria. Another challenge in relation to the absence of a transition period with the new Act for both SEC and the new Commission is the status of the ongoing merger transactions. What happens to such mergers now? How valid would they be if SEC without powers or jurisdiction continue with the transactions so as to fill the gap created by the omission? Put differently, how efficient would the Commission be if they are not staffed with experienced or merger-exposed staff to handle competition transactions, even though the Commission is backed by law? It is argued that the absence of transition period where SEC could put through the new Competition Commission on the workability of the new Act is an oversight on the part of the legislature which may affect effective workings of the new Competition Commission.

The time frame provided by the new Act for consummation of transactions is unnecessarily long, and it may protract the completion process of a merger. The review process in Nigeria according to the new Act is between 60 and 120 business days.[480] However, one may construe this to be an advantage for businessmen as they would have more time to consummate deals.

The new Act designates the Commission as a co-regulator with other sector regulators as regards competition and consumer protection.[481] However, the Act did not state the limit of the powers of the Commission as regards sector regulation, even though it provides that in the event of any conflict, the provisions of the Act will prevail except where the Constitution of Nigeria is involved. The question is, what is the extent of knowledge of the Commission in matters relating to technology, finance or communication as regards highly regulated industries?

As a corollary to the above, the Act gives the Competition Tribunal power to review decisions of industry-specific regulations with regards to competition. Sanction of highly regulated industries like banking, broadcasting and communications may be reviewed by a Competition Commission that is bereft of skill and knowledge in relation to the specific sector regulator. Unlike the Competition and Market Authority

[480] S.96 Federal Competition And Consumer Protection Act 2019
[481] S.104 Federal Competition And Consumer Protection Act 2019

(CMA) in the UK, which has Ofcom to deal with plurality issues as regards public interest consideration in merger review, the newly established Commission is yet to have specialised departments to handle industry-specific regulations.

Having considered the features and possible challenges that may face the newly enacted Competition Act, discussion on the implications of the concept of public interest as provided by the newly enacted Act becomes imperative.

5.7 IMPLICATIONS OF PUBLIC INTEREST PROVISIONS IN THE NEW ACT

The FCCPA improved on the concept of public interest introduced by the ISA 2007 with the inclusion of provisions relating to the intervention of the Minister of Trade and Investment. The new Act also made provisions for the hearing of third-party presentations to the Commission. A third party who is not a party to the transaction, but who has interest in the outcome of the transaction, may now make representation to the Commission as regards the concept of public interest in the merger transaction. This is a great improvement on the ISA. It is argued that with this introduction, the door is now open for the labour unions to challenge any merger that is seen to be anti-labour in terms of employment of their workers.

In discussing the implications of the provisions for the public interest concept in the newly enacted Act in Nigeria during merger review, it is apt to mention that the significance of merger review by an independent Competition Commission is to ensure that competition is unfettered and should not be harmed to the detriment of consumers, based on well-known economic principles.[482] To this end, Patrick Smith[483] is of the view that the standard competition test in merger review is about allocative, dynamic efficiency or productive, in short, the enhancement of consumer welfare via a process of rivalry that is expanding output, enhancing innovation, improving quality and lowering prices. He went further to say that the standard competition test would definitely not have much regard for factors like the promotion of exports,

[482] Anthony Idigbe, 'Nigeria: Overview Of Development Of Competition Law In Nigeria' 26 September, 2019, Mondaq Publications At 36

[483] Patrick Smith And Andrew Swan, 'Public Interest Factors In African Competition Policy' 2014. The African And Middle Eastern Antitrust Review. Pg.1-6.
Robert Legh And Haylene Treisman, 'South Africa; The Public Interest Factor In Merger Proceedings' 2001 Investment Financial Law Review At Pg.45.

employment, competitiveness of national firms in the international market or national competition, or a particular industrial part of the country.[484]

J. Oxenham,[485] however, believes that the assessment of mergers on competition principles alone would not be holistic if the public interest factors are not considered.

The FCCPA provides in S.94 that the Commission in considering a merger or proposed merger, should "*(a) determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2); and (b) If it appears that the merger is likely to substantially prevent or lessen competition, then determine:-*

(1) Whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than and off-set or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(2) Whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)

(3) Otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)

(4) When determining whether or not a merger or a proposed merger is likely to substantially prevent or lessen competition, the Commission shall assess the strength of competition in the relevant market and the probability that the undertaking in the market, after the merger will balance competitively or co-operatively, taking into account any factor that is relevant to the competition in that market, the actual and potential level of input competition in line market, the ease of entry into the market, including tariff and regulating barriers; the level and trends of concentration, and history of collusion in the

[484] Patrick Smith And Andrew Swan, 'Public Interest Factors In African Competition Policy' 2014. The African And Middle Eastern Antitrust Review. Pg.1-6.
[485] J oxenham, 'Can One Balance The Increasing Importance Of Public Interest Considerations In South Africa (and Sub-Saharan Jurisdictions) With The Quest For Merger Control Certainty' (2012)US-China Law Review 227

market; the degree of countervailing power in the market,; the dynamic characteristics of the market, including growth innovation and product differentiation; the nature and extent of vertical integration on the market, whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and whether the merger or proposed merger will result in the removal of an effective competition.

(3) Where it appears that a merger or proposed merger is likely to substantially prevent or lessen competition, the Commission shall determine – (a) whether or not the merger or proposed merger is likely to result in any technological efficiency or other pro-competition advantage which will be greater than, and offset, the effects of any prevention in lessening of competition, while allowing consumers a fair share of the resulting benefit; and

(b) whether the merger or proposed merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in sub section (4) when determining whether a merger or proposed merger cannot be justified on grounds of public interest, the Commission shall consider the effect that the merger or proposed merger will have on –

(a) a particular industrial sector or region;

(b) employment

(c) the ability of national industries to compete in international markets; and

(d) the ability of small and medium scale enterprises to become competitive."

The implications of S.94 of the FCCP Act is that mergers can be considered in the following manner: the Competition Commission is enjoined to examine the effects that the transaction will have on competition in the market. If the merger produces no anti-competitive effects, or if there is a likelihood of pro-competitive effects which outweigh the anti-competitive effects, then the merger may be approved. On the other hand, if the merger will produce an adverse impact on the transaction, the Commission is expected to weigh up the anti-competitive effects of the transaction against any efficiency and technological or other pro-competitive gains arising from

the merger. It should be noted that the obligation of the Commission does not end here, and it is further obliged to examine the effect of the merger on the public interest. The public interest according to the Act is constituted by four categories, which may be an open-ended list. The said categories are the effect the proposed merger would have on an industrial sector or region, employment, the ability of national industries to compete in international markets and the ability of small businesses or enterprises to become competitive in the market. In other words, the implication of this clause is that a merger with pro-competitive effects or a merger with no problem whatsoever may be blocked on the ground of its negative effect on just one of the public interest factors. Alternatively, an otherwise merger with anti-competitive effects may be authorised on the ground of its positive effect on any of the public interest factors.

Another implication of the newly enacted competition Act's provision in public interest is that the wording of the provisions give public interest factors priority over competition concerns. Anti-competitive mergers may be approved because they affect public interest positively while pro-competitive mergers may be blocked because of their negative effects on public interest factors. The curious issue about the factors is that they may have no or insignificant value to trade or the development of the Nigerian economy.

It is argued that the wording of the provision of the Act on assessment of mergers is such that whichever way one looks at the provisions, the Commission is enjoined to consider the public interest factors while assessing a merger. After assessing the effect of the merger on competition, whether the result is favourable or not, that is, after taking into consideration all the relevant factors like relevant market, ease of entry into the market, level and trends of concentration, the Commission is further obligated to consider the effect of the transaction on public interest factors listed in the Act. That is, the Commission is under a duty to always consider the public interest factors in a merger assessment. The Commission does not have the discretion to not do so. This is what makes the provisions unusual as consideration of public interest factors in a merger review is made mandatory by the newly enacted Competition Act.

This Act has placed public interest in a strategic position in merger review in Nigeria with the role afforded the concept in assessment of mergers. The question would then

be, in what way and manner would the Competition Commission approach the public interest factors so as to implement the intention of the legislature? Another question is whether public interest has any tangible role to play in the Nigerian economy by virtue of the role afforded the concept during merger assessment in Nigeria. In answering the latter question, it is argued that the provision of S.94 FCCPA categorised four public interest factors, and they are a particular industrial sector or region, employment, the ability of national industries to compete in international markets and the ability of small enterprises to become competitive. It is argued further that each of these public interest factors, if properly interpreted and implemented, may play a role in the Nigerian economy. An example is the employment factor. If the workforce of Nigeria is well taken care of in terms of emoluments and welfare, their contributions to the overall GDP of the Nigerian economy would not be quantified. Conversely, if the workforce of the Nigerian nation is malnourished or lack adequate incentives, their productivity levels would be nothing to write home about, and this would negatively affect the economy of the Nigerian nation. The same thing goes for small businesses. Small businesses are the engines of a nation's economy, the more robust they are, the more prosperous a nation is; hence, if the public interest factors are properly harnessed and channelled, their effect on the economy of Nigeria may be substantial.

In answering the former question on how the Competition Commission approach the public interest factors, public interest is a cumbersome concept to identify and work with; in fact, some commentators[486] call it an amorphous concept. The difficulty encountered in working with the concept is more pronounced where the law or the enactment that talks about it does not provide any guidance as to its content or, put differently, where the law does not state what constitutes a public interest other than mentioning it in the law or in the enactment. In this kind of situation, public interest would be the interpretation given to it by the judicial officer in the case of the Tribunal or, in the case of the Competition Commission, the interpretation of the officials of the Commission would determine what constitutes a public interest factor.

[486]Mateusz Blachuki, 'Public Interest Considerations In Merger Control Assessment' 2014 European Competition Law Review Pg.1-24.
Thomas M. Koutsky And Lawrence J. Spiwak,' Separating Politics From Policy In FCC Merger Reviews: A Basic Legal Primer Of The "Public Interest" Standard'. 18, Common Law Conspectors (2010) At 329.

The newly established Competition Commission in Nigeria has not been inaugurated as at the time of writing, even though the FCCPA2019 is fully operational.[487] The established Commission is also yet to set up operational rules for the law on merger review that borders on public interest. The implications of this is that in the absence of any guidance, we may have recourse to the South African jurisdiction where S.94 of the FCCPA is similar in words and contents to S.12A (3) South African Competition Law. The cases in South Africa may assist us in determining how the Commission may approach public interest factors during merger assessment. There are suggestions that the Competition Commission would be inaugurated anytime from now in view of the fact that the government that facilitated the bill into law is also the government in power now, and they are interested in implementing the new law.

The cases of Telkom and Praysa[488] and Heinz and McCain,[489] where the South African Commission approved mergers based on public interest, are relevant. In Telkom/Praysa,[490] the Tribunal refused to block a merger that was pro-competitive on the grounds that Praysa volunteered conditions that were favourable to employment. One of the conditions was that the company would not downsize employees for a period of 20 months after the merger is approved. In its judgment at page 39, the Tribunal based its reasons for allowing the merger by holding as follows *"when considering a merger the Act enjoins us to take into account public interest issues, including in terms of Section 16(3)(ii) the effect of merger on employment. This obligation must also be read in the context of Section 2(b) of the Act, which states that amongst the purposes of the Act is to promote and maintain competition in order to promote employment" … This means that we must look at whether the merger will result in the creation or loss of employment and weigh this against other factors that we have to consider in terms of the Ac*t". This was in response to the apparent objection of the merging parties to the intervention by the Communications Workers Union (CWU) to the merger.

[487] Footnote 473 Is exhaustive on Why The Commission Is Yet To Be Inaugurated.
[488]Case No. 81/LM/Aug 00 Merger Between Telkom SA Ltd And TPI Investment And Praysa Trade 1062 Pty Ltd.
[489] Case No. 17/AM/March 01 – Food Allied Workers Union And The Competition Commission And Mccain Foods (SA) (PTY) LTD AND HEINZ Frozen Foods (Pty) Ltd.
[490] Case No. 81/LM/Aug 00 Merger Between Telkom SA Ltd And TPI Investment And Praysa Trade 1062 Pty Ltd

It is argued that the equivalent section to 16(3) (ii) and section 2(b) in the newly enacted Competition Act in Nigeria is S.94 (2) and on this basis, it is suggested that similar facts and situation may warrant the Nigerian Competition Tribunal to follow the decision in Telcom/Praysa in view of the guidance provided as to what constitutes public interest.

The second case is that of Heinz and McCain,[491] which was an intermediate merger between McCain Foods SA Pty Ltd and Heinz Frozen Foods. The Food and Allied Workers Union intervened and asked the Commission not to approve the merger as it would lead to retrenchment of workers of the merging parties. The Commission rejected their presentation and approved the merger subject to the condition that the merging parties could only retrench seven workers within 18 months of the approval of the merger. In confirming the decision of the Competition Commission at page 76, the Competition Tribunal held as follows "*Section 12A(3) of the Act requires the relevant competition authority to determine whether or not a merger can be justified on specified public interest grounds. The public interest grounds specified include the transaction's impact on employment. The union's argument on this part is unusual. It is common cause that the transaction in question will lead, directly at any rate to a minimal loss of jobs – seven jobs in all – and then only at the higher, more mobile and re-employable end of the workforce. Furthermore, the Commission has imposed a condition on its acceptance of the merger that limits employment loss to these seven positions and requires the company to report its employment figures to the Commission each month for the next 18 months – we accordingly conclude that none of the public interest objectives provided for in the Act, including employment, will be furthered by prohibiting the transaction between McCain and Heinz*".

It is argued that S.12A(3) of the South African Competition Act relied on by the Competition Tribunal of South Africa to confirm the decision of the Competition Commission on the grounds of public interest was similar to S.94(3) of the Nigerian FCCPA in wording and in context. It is further argued that the Tribunal looked at the reasonableness of the conditions suggested by the merging parties before concluding that the conditions as regards employment would meet the requirement of S.12A(3) of

[491]Case No. 17/AM/March 01 – Food Allied Workers Union And The Competition Commission And Mccain Foods (SA) (PTY) LTD AND HEINZ Frozen Foods (Pty) Ltd.

the Competition Act of South Africa. In other words, the Tribunal will consider how reasonable the conditions suggested by the parties is before coming to a conclusion that the merger will not affect public interest negatively. It is submitted that the test of reasonableness is not in the South African Competition Act for assessment of mergers on public interest grounds neither is it in the Nigerian Competition Act nor in the South African rules on competition. The inclusion of the test of reasonableness by the Tribunal is ultra vires the power of the Tribunal, and it is not likely that the Nigerian Competition Tribunal would follow suit in this regard. However, the other reasons proffered by the Competition Tribunal of South Africa is enough guidance for the Nigerian Competition Commission to follow in determining what constitutes a public interest factor in a merger assessment.

It is interesting to note that in the two cases discussed, the conditions imposed on undertakings were suggested by the parties and not imposed by the Commission. This confirms the view that the Competition Commission was not the one insisting that there should be evidence of minimal loss of jobs in order for it to approve a pro-competitive merger. Rather, it was the parties to the merger, for fear of disapproval of their merger on the part of the Commission, that decided to suggest a situation where merger would not entail retrenchment or at best minimum retrenchment to the Commission in a seemingly apparent bid to comply with the requirements of the Act.

It is argued that the highlighted cases indicate that the public interest factors are considered in merger review but the extent of their consideration as regards the scope of wider enforcement of the public interest factors is still elusive or cannot be determined. This is so because there is tendency on the part of the courts to extend the scope of the concept through a broad interpretation of it, which may eventually distract the achievement of the goal of the concept, which is about the welfare of the consumers

The provisions of S.94 (1) and (2) as they relate to public interest is another implication of the public interest factors as enshrined in the FCCPA Act. The said provisions envisage a unified decision-making process by a single competition authority which will afford the Competition Commission the ability to have a consistent and coherent approach to cases being handled by it or the regulator in terms of public interest consideration. The advantage of this appointment of a single

competition authority is the reduction in lobbying activities since members of the single competition authority are likely to be professionals. Conversely, the situation would be different if the single competition authority were to be a government department or government officials.

It is argued that the inclusion of the public interest factors in S.94 (1) & (2) of the FCCPA has the tendency of encouraging the Competition Commission to promote job retention, economic stability and the compelling need to address broader socio-economic factors in Nigeria, all in a bid to satisfy the requirements of the Competition Act as it relates to public interest. The danger here is that the Competition Commission is likely to widen the scope of the public interest factors in compliance with the provision of S.94 (4) of the FCCPA.

Having examined the implications of the public interest consideration factors in the provisions of the FCCPA, it is necessary to discuss the need for rules and guidelines for effective implementation of the provisions of the Act as it relates to public interest.

5.8 THE NEED FOR RULES AND GUIDELINES FOR S.94 (4) OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT

The newly enacted Competition Act authorises the yet to be inaugurated Competition Commission to make rules in furtherance of Section 94(4). This is needed for the rules and guidelines to throw more light on what the Commission expects from the merging parties and how the Commission will interpret public interest considerations.

In the previous section, we tried to explore circumstances that warranted the invocation of the concept of public interest in South Africa through decided cases in view of the absence of guidelines and rules provided by the Competition Commission in Nigeria. The question would be, what should be the criteria and considerations for the much-needed rules and guidelines?

S.94(4) of the FCCPA provides for four categories of public interest, and they are effect of the merger on a particular industrial sector or region, employment, the ability of small businesses to become competitive and the ability of national interest to compete in international markets.

It is argued that, in making rules and guidelines in relation to the effect of mergers on a particular industrial sector or region, the Commission would classify areas of the country into zones in terms of the weather of the particular zone. That is, if agriculture is predominant in a particular area, the competition authority should take into account mergers that may likely affect development of agriculture in that particular locality.

It is also argued that, in considering the rules and guidelines needed to assist the Commission in determining whether a merger would have an effect on employment, it is expected to distinguish between loss of jobs as a result of merger and loss of jobs due to redundancy. This is necessary to avoid a situation where every job loss will be regarded as having an effect on the merger even if the job loss is not merger related.

The category of public interest that is related to the determination of the effect of mergers on small businesses' competitiveness is better guided by rules if the Competition Commission takes into cognisance the types of businesses that should be classified as small businesses; share capital of such companies should be included in the rules for easy classification. The location of such businesses is also important. Distinction should be made between businesses in towns, cities and villages. Those who will qualify as owners of small businesses should also be specified in the expected rules and guidelines. The efficiency of the merger review law as captured by the newly enacted FCCPA can be discussed now, having explored the features and implications of the public interest provisions in the Act.

5.9 A CRITICAL REVIEW OF MERGER REVIEW LAW AND PROCESS IN NIGERIA

The essence of merger review is to allow competition authorities to perform a background check on mergers as to whether they will have a negative impact on competition. Where a competition authority comes to the conclusion that a merger transaction will result in anti-competitive effects, it may then advise the merging parties to enter into commitments to reduce these anti-competitive effects or prohibit the transaction.

The Competition Commission is also expected to determine the effect of the merger on public interest factors like employment, particular industrial sector or region, ability of national industries to compete in international markets and ability of small companies to be competitive.

In order to determine how efficient the merger review in Nigeria is, this section will discuss the review process of the merger under Nigerian law in relation to the time frame of the approval process, the lacuna in the law as regards what constitutes public interest factors and the implication of the suspension of the powers of the defunct Securities and Exchange Commission as it relates to merger review when a new FCCPA2019 is given immediate operational status, in other words, where there is no transition period between the repeal of ISA2007 and the immediate operational status of the FCCPA2019.

The merger review law in Nigeria is governed by the newly enacted FCCPA2019.

The review process in Nigeria is between 60 and 120 business days.[492] This is an improvement on the old law that prescribed 20 and 40 days. The approval process is not divided into phases as practised in the EU or UK where phase 1 under the EU is 25 working days and phase 2 is 90 working days. It should be noted that phase 1 under the EU can be extended to 35 working days and phase 2 may be extended to 105 working days.[493]

It is argued that the longer period of time for approval in Nigeria will afford the parties and the Commission the luxury of having enough time to develop and assess additional evidence, prove their cases and discuss proposed commitments towards having a competitive merger.

The number of days allowed under Nigerian law may not be feasible to have an efficient merger review process because the number of days may not be enough to accommodate investigative work on the part of the Commission as regards the information provided by the merging parties while filing the notification form. The number of days approved may not be enough for the Commission and the parties to have a robust discussion on the prospects of commitments that may address any anti-competition issue. However, having long periods of investigation of mergers may unnecessarily prolong the process and thereby discourage both foreign and local

[492] S.96 Federal Competition And Consumer Protection Act 2019

[493] Alison Jones And John Davies, 'Merger Control And The Public Investment: Balancing EU And National Law In The Protectionist Debate' [2014] 10 (3) European Competition Journal 453
Sven Albak, Peter Mollgard And Per Baltzer Overgaard, 'Transparency And Coordinated Effects In European Merger Control' Journal Of Competition Law And Economies, 6(4), 839-851.

investors from investing in the country's economy. This in turn may affect the nation's economy negatively.

It is further argued that the only shortcoming in the Nigerian approval process is that it is not divided into stages as it is in the EU or UK, where we have phase 1 and phase 2 stages; hence the idea of knowing whether a merger will need full investigation as required under phase 2 in the EU or UK is not mentioned under Nigerian law. However, it may be assumed that notification in respect of small mergers may not necessarily go into phase 2 investigation since the approval stage is within 20 to 40 working days, unlike the large mergers where that approval process takes about 60 to 120 working days.

The substantive test operational in Nigeria is similar to the Substantial Lessening of Competition (SLC) test as captioned by Section 94(1) of the FCCPA, which provides that in considering a merger or proposed merger, the Commission shall determine whether or not the merger is likely to substantially prevent or lessen competition by considering all factors mentioned in Sub.Section94 (2) of the FCCPA2019. The Commission is further obliged to consider the concept of public interest in the proposed merger before going into conclusion as to whether the merger is anti-competitive or not.

It is argued that the second leg of the substantive test by the Commission is the crux of the matter as to whether the Nigerian merger review law is efficient as it stands now. This is because the Act is silent on how the Commission is to determine what constitutes public interest grounds. The Act only talks about the duty of the Commission to look into the effect that public interest grounds will have on a particular identified sector or region, employment, the ability of national industries to compete in international markets and the ability of small and medium-scale enterprises to become competitive when considering whether a merger is competitive or not.

The FCCPA provides that the Commission is to determine the notification threshold applicable to merger review within six months of its coming into operation. The Commission did not determine the threshold until September 2019[494], many months

[494] FCCPA2019, Notice For Pre-Merger Notification Pursuant To Section 93(3) FCCPA2019

after coming into operation of the Act. The new guidelines for threshold notification stipulates a combined annual turnover of =N=1billion for both the acquiring and target companies. The implications of this as earlier discussed in chapter two of the thesis is that many viable businesses would be left out of the regulating radar of the Commission because of their inability to meet the threshold. It is further argued that the current threshold is a big improvement on the old threshold provided under the amendment to ISA in 2013 where the threshold was minimum of =N=1billion and maximum of =N=5billion.

The FCCPA has specifically abrogated the Investments and Securities Act 2007, which was the law controlling merger review in Nigeria before the newly enacted law. The implication of this is that the newly created Commission, which is yet to be inaugurated, can act on merger review because the FCCPA has immediate operational status while the Securities and Exchange Commission's power on merger review has been suspended by the new Act. The expected gap that would have been created in the merger review process in Nigeria by the suspension of the Investments and Securities Act 2007 had been closed with the immediate operational status of the FCCPA2019 provided by section 166 of the newly enacted Act which subsumed the functions of the equally repealed Consumer Protection Council into the newly established Commission. However, there is another issue of lack of transition period for the SEC to either transform into the new Commission or take the new Commission through the workings of SEC before the enactment of the FCCPA2019.

Although the suspended Securities and Exchange Commission and Consumer Protection Council jointly issued a statement to the effect that the need to have a seamless commercial transaction has compelled the two organisations to come together to agree that all notification or filings will be reviewed under existing SEC regulations. Guidelines, fees and notifications will be filed at FCCPA OR SEC/FCCPC interim joint merger review desk at SEC, all applicable fees will be paid to FCCPC and that previous notifications received by SEC under the old law will be treated by the Joint Merger Review Desk at SEC and FCCPC will make a final decision on them.

It is argued that on what basis or platform would the Commission come into an agreement with an outfit (SEC) that has been stripped of its power on merger control

in Nigeria? The joint arrangement by the SEC and FCCPA may not stand in law as one cannot build something on nothing. It is further argued that the immediate operational status granted to the Commission by the FCCPA2019 is the antidote to a constitutional crisis that could spring up if the Commission was not given immediate operational status as a result of the instant abrogation of the then Investments and Securities Act 2007, which was the law governing merger review in Nigeria. This is because any act done by the new Commission (save for the immediate operational status) in the absence of its inauguration will not stand in law; as argued earlier, one cannot build something on nothing. Therefore, it is submitted that an early and fast inauguration of the Commission for Competition is highly necessary and long overdue for effective implementation of the newly operationally enacted Competition Act in Nigeria.

5.10 CONCLUSION

In attempting to explore the implications of public interest provisions in the FCCPA as regards merger review, this chapter has dealt with the background to the introduction of the concept of public interest in the new Act by discussing not only why but also how and when the concept was introduced. Lack of a single competition authority in the 2007 ISA Act and many inadequacies of the 2007 Act propelled the introduction of the Consumer Protection Bill in 2016, which was eventually passed into law in 2019. The chapter also provided an overview of the new Act as regards all its highlights without limiting the discussion to public interest provisions, in order to appreciate its significance to Nigerian jurisprudence. The likely challenges that the introduction of the new Act may bring was discussed and analysed with a view to preparing for the eventualities.

The implications of S.94 of the FCCPA was thoroughly examined and analysed in terms of the significance of merger review by the independent Competition Commission and the interpretation of S.94 (1),(2),(3)&(4) of the FCCPA to the effect that assessment of mergers in Nigeria is twofold by law in Nigeria. It is twofold in the sense that the Competition Commission is enjoined to assess a merger based on competition law and compulsorily on public interest factors. In other words, mergers must be assessed on competition rules and public interest factors, and all mergers must pass the public interest factors before they can be approved. The implication of

S.94 of the FCCPA was also looked at in terms of decided cases from South Africa since there is a dearth of cases in Nigeria and also because the wording of S.94 of the FCCPA is analogous to S.12(3)A of the South African Competition Law of 1989.

The need for the enactment of rules and guidelines for the effective implementation of the provision of the newly enacted law was discussed with the question of whether merger review in Nigeria is efficient as it stands now with the enactment of the new law in terms of the concept of public interest.

It is found that the implications of S.94 (1) (2) (3) & (4) of the FCCPA as regards public interest consideration during merger review in Nigeria is that the Competition Commission is bound by law to prioritise the public interest factors over the competition rules when assessing mergers that are anti-competitive. This is because the wording of the provisions are such that there can be no review of such mergers without considering the public interest factors. However, the law that places such a premium on the importance of public interest factors did not make any provisions for rules and guidelines that will explain what constitutes a public interest factor other than listing the four categories of these. It is also found that the absence of an operational Competition Commission with skilled workers will serve as a clog to effective implementation of the new Competition Act in Nigeria. If adequate and timely steps are not taken, the clauses in respect of public interest factors may be a toothless bulldog or just an academic exercise.

CHAPTER SIX: **COMPARATIVE ANALYSIS OF THE EU LAW AND NIGERIAN LAW ON PUBLIC INTEREST**

6.1 INTRODUCTION

The previous chapters have discussed the origin, definitions and basis of the public interest concept in merger review. The thesis has also discussed the relevance of public interest during merger review in the EU, and the significance of the role of Secretary of State in determining what constitutes public interest in the UK, as well as

the features of the concept of public interest in Nigeria in the newly enacted Competition Act. In view of the extensive analysis and consideration of the concept of public interest in the EU, UK and Nigeria, it is expedient to compare the concept of public interest in merger review in the EU and Nigeria not only to have a better understanding of the two laws in the two jurisdictions but also to reveal some of the deeply entrenched and unnoticed assumptions peculiar to one legal system when compared with another.

This chapter will compare the legal system of Nigeria as regards merger review in order to allow the Nigerian legal system to borrow useful aspects of merger review law in the EU since Nigerian merger review law is yet to be tested. This is necessary in view of the fact that the Nigerian merger review law was just enacted in 2019.

To this end, this chapter will discuss the EU merger review law as it relates to public interest. The features of the public interest concept as highlighted in Article 21(4) of the European Merger Regulation (EUMR) will be discussed in the context of the significance of public security, plurality of the media and prudential rules. These in turn will be compared with the law governing merger review in Nigeria, which is Section 94(3) of the Nigerian Federal Competition and Consumer Protection Act (FCCPA) 2019. The role of the courts in merger review will also be compared and analysed in this chapter. This chapter will also compare the role of socio-political factors in the two jurisdictions towards the determination of what constitutes a public interest factor in the two jurisdictions. That is why a public interest factor that is relevant in a particular jurisdiction may be irrelevant in another jurisdiction. Having said this, this chapter will compare the merger review laws in the EU and Nigeria as regards the concept of public interest.

6.2 COMPARATIVE ANALYSIS OF THE EU MERGER REVIEW LAW WITH THE NIGERIAN MERGER REVIEW LAW ON PUBLIC INTEREST CONSIDERATION

Under the EUMR, which is the main merger review law in the EU, the basis of merger review is to maintain competitive market structures to the benefit of consumers and businesses. This is in order to make the process of merger review predictable and transparent to the investors.[495]

[495] Faull And Nikpay, 'The EU Law Of Competition' 3rd Ed. Oxford University Press, 2014 pg86

To partly achieve this objective, the EUMR introduced Article 21(4), which provides that in certain situations, a Member State may take appropriate steps during merger review where it is necessary to protect a "legitimate interest" other than those taken into consideration by the EUMR. The legitimate interests taken into consideration by the EUMR are public security, plurality of the media and prudential rules.[496]

On some occasions in the past, the Commission had applied these public interest concepts to block or approve mergers as the case may be in the EU[497].

As discussed in chapter five of the thesis, the Nigerian Federal Competition and Consumer Protection Act 2019 is the law governing merger review in Nigeria, and the aspect of the law that deals with public interest consideration is S.94(3), which provides that in determining whether a merger can or cannot be justified on public interest grounds, the Commission shall consider the effect the merger will have on a particular industrial sector or region, employment, the ability of small businesses to become competitive and the ability of national industries to compete in international markets.[498]

Considering the above premise, it is submitted that what constitutes public interest in the two jurisdictions are not the same, as the recognised public interests in the EU are public security, plurality of the media and prudential rules. The effect of the merger on particular industrial sectors and the ability of small businesses to become competitive would clearly not constitute public interest in the EU as contrasted with the Nigerian jurisdiction, which recognised them under its law on merger review. Neither would employment nor the ability of national interest to compete in international markets ordinarily constitute public interest in the EU.

It is further argued that, however, there are certain similarities in what constitutes public interest in the EU and Nigeria. The subsection under Article 21(4) EUMR stresses the need for a Member State to communicate to the Commission if there is any other "legitimate interest"; this could be interpreted to mean that other public

[496] Richard Whish & David Bailey, 'Competition Law' Ninth Ed, Oxford University Press, 2018 pp 896
[497]Banco Santender Central Hispano/A Champalimand Case M 1616, Decisions Of 3 August 1999 & Thomson-CSF/Racial IP/00/628, 16 June 2000
Sun Alliance/Royal Insurance: Case M 759, Decision of 18 June 1996
[498] Federal Competition And Consumer Protection Act 2019

interests such as employment, national champion, social and industrial policies could come under this heading to be classified as public interests.

It is argued that herein lies the similarities between the EU and Nigeria. It is just that Nigerian law makes employment and the state of the region explicit while such criteria are not made explicit under the EU law on merger review.[499] In other words, social factors are not explicitly recognised in the EU but may be recognised after necessary notification is made to the Commission.

In comparing the EU merger law review with the Nigerian merger review law as regards public interest consideration in merger review, it is apposite to look at the threshold provided by the two laws. The reason for doing this is to bring the differences and common parts of the two laws into the limelight so as to have a better understanding of them.

In the EU, there are two basic requirements that must be met before the Commission can assume jurisdiction on a transaction as discussed earlier in chapter three. The first is that the transaction must have a community dimension and the second is that the transaction should constitute a merger or concentration for the Commission to be able to look at the transaction.[500]

A merger under the EU has a community dimension as discussed in chapter three of the thesis if the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 million and the aggregate community worldwide turnover of each at least two of the undertakings concerned is more than EUR 250 million.[501] The Nigerian merger review law, which is the Federal Competition and Consumer Protection Act (FCCPA), provides thresholds in the sum of =N=1billion Naira for both the acquiring undertaking and the target undertaking even though the Act orders the yet-to-be-commissioned Competition Commission to provide these within six months of coming into operation.[502] The ISA Act of 2007 and the rules made pursuant to it, the SEC Rules and Regulations 2015, as amended but which have

[499] Council Regulation(EC) 139/2004 Of 20 January,2004
[500] Article 1(2) Of The European Merger Regulation 2001
[501] Article 1(2) Of The European Merger Regulation 2001
[502] FCCPA2019, Notice of Threshold For Merger Notification Pursuant To Section 93(4)

been abrogated, fixed the lower and upper threshold at =N=1billion Naira and 5 billion Naira respectively.[503]

It is argued that the threshold applicable to each jurisdiction confirm the type of economy that operates in each jurisdiction. The Nigerian economy obviously is a developing economy, and the threshold for a large merger is less than 14 million US dollars compared to the EU, which stipulates EUR 250 million.

It should be noted that the amount stipulated under the then Nigerian law is still capital intensive for most indigenous companies; it is multinational companies that may be able to fit into the category. In other words, it is a way of encouraging foreign investors to the Nigerian economy. The disadvantage here is that many small Nigerian companies have been removed from the regulating radar of the new Commission as regards pre-merger notification to the competition authority if this threshold is sustained. It is also argued that the present threshold is disadvantageous to the Commission because the Commission would not be able to capture transactions in mergers that are not caught by the threshold so as to regulate such mergers.

The European merger review law, which is the EUMR 2004, gave the Commission the latitude to provide a stable framework for easy assessment of mergers. This is what brought about the introduction of several guidelines on merger review like the Notices on Horizontal and Non-Horizontal guidelines.[504] These notices are to guide the Commission and the investors alike on the process of merger review and thereby bring transparency and predictability to the whole process.

The Nigerian merger review law on the hand has introduced a substantive law on merger review with the enactment of the FCCPA without providing for the procedural rules that will guide the Commission and the investors on ways to have a seamless merger review process.[505]

It is argued that the Nigerian government may borrow a leaf from the EU in this respect and provide robust rules that will guide the Commission on the procedural

[503] 2013 Securities And Exchange Commission Rules of 2013
[504] Guidelines On The Assessment Of Horizontal Mergers OJ (2004) C 3115
Guideline On The Assessment of Non-Horizontal Mergers OJ (2008) C 26516
[505] Federal Competition And Consumer Protection Act 2019
Punuka Attorneys, 'Merger Control 2016' (Global Legal Group) 2016 p270

aspects of merger review. It is also argued that when the procedural rules are available, it will ease the interpretation of what does and does not constitute a public interest under Nigerian law.

Article 18(4) of the EUMR allows third-party interventions in merger review under the EU. The Article provides that natural or legal persons showing a sufficient interest have a right to be heard during the Commission's administrative procedure. Third parties are granted the right of appeal against the decision of the Commission as much as the decision is of direct and individual concern to them.[506]

Under the Nigerian merger review law as earlier discussed in chapter five of the thesis, S.101 of FCCPA2019 recognised third-party interventions in merger review in Nigeria by specifically providing that trade unions or representatives of employees concerned may make contributions to the merger process. This provision of the law has been given judicial recognition in the case of *Metropolitan Holdings Ltd And Momentum Group*[507] by the South African Competition Tribunal.

It is argued that the right of third parties being recognised in the merger review process in the two jurisdictions is to maintain a level playing ground for all the participants in a merger process for the overall interest of the consumers. This right of third parties to intervene in the merger review process is common to the two jurisdictions.

It is further argued that third parties under the Nigerian law too may appeal a decision of the Commission that is not favourable to them on the condition that the decision is of direct concern to them. The South African case of *Minister Of Economic Development et al And Wal-Mart Stores Inc. et al*[508] is a case in point, in which the third parties, who are unionists and ministries of government, are allowed to appeal the Competition Tribunal decision in the Competition Appeal Court. This was discussed in chapter two of the thesis.

Under the EU, in order to ensure effective control, the EUMR requires notification of concentration with an EU dimension. The notification can be done any time prior to

[506] CaseT-2/93, Air France v. Commission (1994) ECRII-323 paras 42-47
[507] Case No. 41/LM/Jul 10
[508] Case No 1101/CAC/Jul11

the implementation and agreement or where the agreement has not been made. The type of transaction will determine which of the parties is obliged to notify the Commission; joint notification is, however, allowed and could be made by the parties. The interesting issue about the EU notification is that it is compulsory.[509]

The Nigerian merger law review classified mergers as small and large under Nigerian law; small mergers are not subject to notification, but the merging parties are required to officially inform the Commission after successful completion of the merger while parties to large mergers are subject to notification to the Commission.[510] In the immediate past, mergers were classified as small, intermediate and large.[511]

It is argued that the two jurisdictions share similarities of notification to the competition authority of the prospective merger. The difference is the Nigerian jurisdiction allows only small mergers the option of not notifying the competition authority. This was done in order not to overburden the competition authority. The approach of the Nigerian law on this is similar to that of the UK under the Enterprise Act,[512] where notification is not compulsory. It is further argued that in the EU, once a transaction does not meet the threshold, there is no need for notification.

Another advantage of non-notification by small mergers under the EU is that the European Commission is the only regulator that deals with competition matters; everything about competition rules begins and stops with the Commission. This has helped the Commission to produce a consistent and unified decision-making process with the effect of having a coherent approach to cases being handled by it in terms of public interest considerations.

Under Nigerian law as discussed in chapter five, there is only one regulator for competition matters, like the EU, but the difference in the past was that the then regulator in Nigeria, which was SEC, was entrusted with other compelling responsibilities that were not related to competition.[513] This made the regulator's duty cumbersome, and its duties as regards competition suffered delay and an incoherent

[509] Article 4(1) Of The European Merger Regulation 2004
[510] Federal Competition And Consumer Protection Act 2019
[511] Investments And Securities Act 2007
[512] Enterprises Act, 2002
[513] Investments And Securities Act 2007

approach to cases because of distractions from other compelling responsibilities. This has now been corrected with the enactment of the Nigerian Federal Competition and Consumer Protection Act 2019. It is argued that having a regulator that deals with competition matters alone, like the situation in the EU, which is the position now in Nigeria, will have great impact on the robustness of the merger review law in Nigeria.

The newly enacted Competition law in Nigeria (FCCPA) provides for the intervention of the Minister of Investment through making a presentation during proceedings on public interest in a merger review assessment.[514] This kind of provision is missing in the EU merger review assessment procedure. It is argued that the Minister of Investment is allowed to make a presentation in a merger review in Nigeria because assessment of public interest consideration is compulsory in a merger review while the EU makes the application of the concept flexible.

Under the EU, the underlying principle on remedies as discussed in chapter two of the thesis is that the remedies agreed by the parties and the Commission must eliminate the competition concerns identified by the Commission in the overall interest of the business. There have been many instances where the Commission would use some of the public interest considerations as remedial conditions for the merging parties to fulfil before their merger is approved.[515] This, it is argued, it is an indirect way of approving a merger on a public interest consideration basis.

Remedies under the Nigerian law on merger review are allowed. A recourse to South African cases[516] would assist in confirming that commitments are taken from merging parties to satisfy S.94 (3) of the Nigerian law on public interest.

Under the EUMR, once the Commission approves a merger, the merging parties thereafter fulfil conditions imposed by the Commission if there are any. The new merged entity is home and dry and may thereafter start business under the new entity.

Under the former Nigerian law as discussed in chapter five, the Investment Securities Act, which regulated merger review (under S.121 (4)), enjoined the Commission after

[514] Federal Competition And Consumer Protection Act 2019

[515] Case T-210/01: General Electric v. Commission [2005] ECR II-5575, para 52; Case T-87/05 EDP v. Commission [2005] ECR II-3745, paras 62

[516] Kansai Paint Co. Ltd And Freeworld Coatings Ltd; Case No. 53/Am/Jul 11
Iscor Ltd/Saldanha Steel; Case No 67/LM/Dec 01

the grant of an approval in principle to direct the merging parties to make an application to the court to order separate meetings of shareholders of the merging companies to get their concurrence to the proposed merger.[517]

Herein lies the difference between the aftermath of approval of mergers in the EU and in Nigeria of the immediate past,[518] that is, before the enactment of the FCCPA2019. The need for a court to sanction a merger after approval by the Commission is not required in the EU while in Nigeria, it was one of the conditions to be fulfilled before the process of merger review may be completed.

It is argued that the involvement of the court in sanctioning the merger was unnecessary, wasteful and repetition of the duty of SEC, the then regulator. The question was, of what relevance was the sanctioning by the court of a merger already reviewed and approved by the regulator?

To confirm the fact that there was no need for such application to the court, the court in sanctioning the merger was expected to rely on the letter of approval of SEC to the merger before it could sanction it. It is further argued that the involvement of the court in sanctioning a merger after approval by the Commission gave recognition to the court in the process of merger review even though it was another way of elongating the review process unnecessarily. It should be noted that with the enactment of the new Act, the need for court intervention has been obliterated.

Another difference in the merger review laws of the EU and Nigeria is the socio-political factors in the two jurisdictions. A good example is the public interest factors recognised in the two jurisdictions.

The public interest factors recognised under the EU as discussed in chapter three of the thesis are public security, plurality of the media and prudential rules. The socio-political factors of the EU were responsible for the recognition of the public interest. It is argued that the need for maintenance of public security of Member States was the reason Article 21(4) of the EUMR recognised public security as an exception to the rule that the Commission would be responsible for all mergers with community

[517] S.121(4) Investment And Securities Act,2007
[518] Investments And Securities Act,2007

dimensions. This is the reason mergers that have to do with military hardware or equipment are left with the Member States on the grounds of public interest consideration.

It is the same socio-political factors of the EU that the EUMR took into consideration before allowing plurality of the media as an exception to the rule that only the Commission is to deal with mergers that are of community dimension. In the EU, the role of a free press is important. It is the need to have a free press that will have access to information and will not disclose its source of information that made the exception of plurality of media possible under the EUMR so as to protect the role of the press in a free Europe. The Commission is always eager to let go such mergers once the exception of plurality of the media is involved. As discussed in chapters two and four, a case in point is that of *Newspaper Publishing*,**[519]** where the Commission agreed with the British on the grounds of public interest to provide the Commission with the conditions they wanted attached to the merger for its conditional approval.

The stability and viability of the financial industry is important to any economy, most especially to a developed economy like most countries under the EU. The need to maintain the stability of the financial industry as a form of recognising the socio-political factors of the EU made the EU recognise prudential rules as a form of public interest to be considered during merger review.

One of the objectives of the competition law is the maintenance of the competitive market for the interest of the consumers.[520] In other words, there must be a strong economy before the interest of the consumers can be protected.

A case relevant to prudential rules as a form of public interest consideration factor is that of *Lloyds TSB Plc/HBOS*,[521] where the British government approved the merger of Lloyds TSB to save the financial stability of the UK even though this was a classic example of a horizontal merger. This was done on the grounds of public interest consideration. It should be noted that the Commission too approved the merger when it was presented to it.

[519]Case IV/M759 (1996)
[520]O,Odudu,'The Wider Concerns Of Competition Law' 2010,30 OJLS 599, At 602-604
[521] Case M765OJ(2008)C10/4

The point being made here is that socio-political factors of a nation may inform why a particular public interest factor may be relevant in the jurisdiction and why it may not be relevant in another jurisdiction.

Under Nigerian law, the Commission is expected to take into consideration the effect of the merger on employment, region or the ability of small businesses to compete competitively.[522] These are regarded as public interest consideration factors.

It is argued that job retention, economic stability and the compelling need to address broader socio-economic factors in Nigeria is enough reason as to why the Act takes particular interest in classifying the effect of the merger on employment as a public interest factor that the Commission must take into cognisance while reviewing a merger.

This is buttressed by the fact that in 2007, when ISA was enacted in Nigeria, the unemployment rate was about 20% while the rate had shot up to 27% by 2018. It could therefore be said that preservation of employment plays a significant role in the formulation of the policy and eventual enactment of the law.[523] In the same vein, the industrialisation of a society is an important catalyst for its advancement, hence the need to place a premium on the effect of public interest factors on an industrial sector or region of the country. Nigeria is in dire need of infrastructure, which availability of industries would assist in making readily obtainable. This explains why the newly enacted Act, in complying with the socio-political factors of Nigeria, placed a premium on the need to consider the effect of public interest factors on an industrial sector while reviewing a merger.

It is argued by the researcher that the socio-political factors of Nigeria must have been taken into consideration when the newly enacted FCCPA2019 made the ability of small businesses to become competitive and of national industries to compete in international markets requirements to be considered when the Commission is determining the effect of mergers on public interest factors. This is necessary because the need to encourage small businesses and national industries in Nigeria to be

[522] Section 94(4) FCCPA2019

[523] Dave Arowolo And Christopher Ologunowa, 'Privatisation In Nigeria; A Critical Analysis Of The Virtues And Vices'(2018) Lawbreed Journal Vol2 At 33

competitive is compelling with regard to the advancement of the country from a developing nation to a semi-developed or developed nation.

The EUMR provides for judicial review in the process of merger review by ensuring that decisions of the Commission under the EUMR are appealable on the grounds of lack of competence, infringement of an essential procedural requirement and infringement of the Treaty or of any rule of law or misuse of powers. Fines and periodic penalty payments are also subject to review.[524]

Appeals from the Commission are to the European courts including the General Court and Court of Justice of European Union CJEU while the EUMR law ensures that not all decisions of the Commission are appealable; only acts that produce binding effects may be appealed.[525]

The Nigerian merger review law provides that a decision from the Commission is appealable to the Federal Competition and Consumer Protection Tribunal.[526] The Tribunal has three months within the date of commencement of hearing of the substantive action to conclude any dispute before it. Decisions from the Tribunal may be appealed to the Court of Appeal, but only concerning issues on points of law.

It is argued that the two laws in the EU and Nigeria on merger review recognise the judicial review concept and encourage both the merging parties and interveners alike to use right of appeal against the decision of the Commission. This is as far as the similarities between the two jurisdictions may go. While the EU judicial review processes are active, in that the General Court and the CJEU have been dispensing justice on merger review cases brought to the courts at the instance of the aggrieved parties, the Nigerian Federal Competition and Consumer Protection Tribunal has not been dispensing justice on merger review related cases. This is because of the absence of procedural rules, which are needed to activate the process of merger review, and which will lead to the eventual need for the services of the Competition and Consumer Protection Tribunal. The Tribunal is yet to be inaugurated, just like the Competition Commission itself as at the time of writing of this thesis, even though the

[524] Article 263 TFEU
[525] Case T-342/99 Airtours v. Commission [2002] ECR II-2585
[526] Federal Competition And Consumer Protection Act 2019

FCCPA is fully operational.[527] All cases before the then Investment Securities Tribunal were not merger review related but emanated from disputes from stock exchange related transactions, capital market and other investments.

It is argued that in comparing the merger review laws in the EU and Nigeria as regards public interest consideration, it is observed that the socio-political factors of each of the continents where the two laws operate play a decisive role in determining what constitutes public interest factors in each jurisdiction.

It is further argued that comparing the two laws on merger review has highlighted the similarities and differences between the two legal systems for a better understanding of both, with a view to the Nigerian legal system adopting and adapting the more robust European merger review law on public interest consideration where the application of the concept is flexible.

6.3 CONCLUSION

This chapter examined the EU merger review law on public interest and compared the law with the Nigerian Federal Competition and Consumer Protection Act 2019. In comparing the two laws on merger review in the two jurisdictions, the chapter discussed the meaning of legitimate interests in the EU and the role afforded legitimate interests by Article 21(4) of EUMR in determining what constitutes a public interest factor. The significance of Section 94(3) of the Nigerian Federal Competition and Consumer Protection Act 2019 was also explored and its features compared with those of EU law in merger review. This was done specifically as regards what constitutes the public interest concept in the EU and Nigeria. The chapter looked at circumstances under which social factors like industrial and social policies could be upgraded to legitimate interests. The chapter also described and analysed circumstances under which the upgraded public interest factors in the EU

[527] Section 166 of FCCPA2019 gives the newly established Competition Commission to subsume the functions of defunct Consumer Protection Council, hence the immediate operational status given to FCCPA. However, the Commission is yet to have its members appointed by the President in line with the provisions of the FCCPA. SEC has been proscribed with the repeal of Investments And Securities Act 2007 and the defunct Consumer Protection Council with all its limitations that prompted the enactment of FCCPA2019 cannot act as a replacement for the newly established Commission without its inauguration or commissioning.

could share similarities with the Nigerian public interest factors. The importance of the notification process in the EU was highlighted, where notification is only compulsory as regards larger mergers and optional when the merger is a small one. The significant role provided by the threshold stipulated by the two laws was compared for a better understanding as regards their differences and similarities. The chapter was able to identify why the threshold in Nigeria was low when compared with the threshold in the EU, which is in the region of millions of euros. The chapter identified underdevelopment as the major reason why the threshold in Nigeria was low when compared with the EU law. The importance of the latitude provided by EUMR 2004 to the European Commission in providing a stable framework for easy assessment of mergers was discussed and compared with the Nigerian situation, where the newly enacted FCCPA has not provided procedural rules for effective implementation of the merger review law. The relevance of third parties' intervention in merger review in Nigeria was examined and compared with the role afforded third parties in the merger review law of the EU. The chapter found that the two jurisdictions acknowledged the role of third parties' interventions in merger review so as to have a transparent review process. The significance of a single regulator for competition matters was considered both under the Nigerian law and the EU law on merger review. The chapter also showed that the two jurisdictions adopt a single regulator for competition matters and that the adoption of a single regulator is good for consistency and transparency in the decision of the Commissions.

The role played by the principle of remedies in what constitutes a public interest factor in the EU was discussed and compared with the role afforded remedies by the FCCPA2019 in Nigeria. The chapter found that in the two jurisdictions the process of using public interest considerations as remedial conditions for the merging parties is an indirect way of approving mergers on a public interest consideration basis.

The role of the court in merger review was also highlighted and compared in the two jurisdictions. It was found that the Nigerian jurisprudence as a result of the enactment of the FCCPA2019 is on a par with the EU on the stance that the courts do not have a role to play when mergers are being reviewed on the basis of public interest. The old Nigerian position, where the courts were given a role to play, was also discussed and analysed. The roles afforded judicial review concept and appeal in the two

jurisdictions were described and compared, and it was the findings of the researcher that the right of appeal of parties and third parties are accommodated in the two jurisdictions on attainment of conditions as parties could only appeal on decisions that produce binding effects.

It is argued that the socio-political factors relevant to each jurisdiction determine what constitutes a public interest factor in each. These socio-political factors have coloured the features of the law on merger review as it relates to public interest in both the EU and Nigeria. The underdevelopment situation of Nigeria has made the emphasis on industrialisation, employment and development of small businesses relevant and significant in the merger review process in Nigeria as regards the concept of public interest. It also argued that the role afforded the Minister of Trade under the Nigerian law when reviewing a merger on a public interest basis could be abused by politicians and this may scare foreign investors away; a political appointee for various reasons not limited to ambition and politics may use his office to distort the position of the Commission on public interest issues.

It is further argued that comparing the laws of the EU and Nigeria on merger review has highlighted the differences and similarities between the two legal systems and brought about a clearer and deeper understanding of both. This understanding gives the Nigerian legal system the opportunity to further improve the recently enacted FCCPA2019 as regards the role of public interest in merger review.

CHAPTER 7: CONCLUSION

7.0 INTRODUCTION

This thesis analysed the public interest concept in the EU and Nigeria. The study also explored whether public interest is considered in merger review and the extent of consideration in the EU and Nigeria with a view to proposing viable solutions to the inadequacies of the concept of public interest in merger review.

This final chapter is divided into three sections and is arranged as follows.

The first part deals with the previous chapters of the thesis and presents a review of the research findings. The second part discusses policy recommendations, and the final part is the conclusion based on the research findings.

7.1 SUMMARY OF RESEARCH FINDINGS

The first chapter comprised a general introduction to the research questions, contributions to the body of knowledge, research methodology, and the scope and limitation of the thesis, as well as the structure and outline of the chapters.

The purpose of chapter 2 was to research into the background of the concept of public interest consideration and the remote and immediate evolution of the concept and to analyse its significance in merger review in the EU and Nigeria. This was discussed under sections 2.1, 2.2 and 2.9 of chapter two. The conclusions were that the concept of public interest as used in this thesis is when the effect of competition on merger is

subsumed by social factors like the plurality of media, public security and prudential rules. The conclusion on the significance of public interest considerations in the EU and Nigeria is that the concept tempers the toughness of the competition law in a merger review .The chapter under section 2.5 also discussed views of several scholars in the EU and Nigeria on the relevance of public interest considerations in merger review. As such, the protagonists and antagonists of public interest considerations in merger review were analysed. Protagonists like Lesley Morphet[528] and Giorgio Monti[529] were of the view that merger review is incomplete without taking into consideration the effect of public interest while antagonists like Alison Jones[530] and Brenda Sufrin[531] were of the candid view that public interest considerations like industrial, social and other factors are not reckoned with in the EU when appraising mergers. The finding was that quite a few of the scholars were for the consideration of public interest in merger review for the promotion of welfare of consumers. However, such consideration must be on the grounds that there are established principles to guide competition authorities in balancing the public interest considerations with the competition interests in a merger review. The effects of the differences in the legal cultures of the EU and Nigeria as they relate to thresholds, control criteria factors and remedies in the merger review process of the two jurisdictions were analysed under sections 2.8.1 and 2.8.2 of chapter two to have a better understanding of the concept of public interest. The conclusion was that the legal cultures of the EU and Nigeria play a leading role in determining the thresholds of the two jurisdictions. Accommodation of the concept of public interest during the merger review process and the arguments for and against its relevance in this context were discussed under sections 2.6 and 2.7 of chapter two to confirm the significance of the concept in the merger review process.

The importance of Article 21(4) of the EUMR as well as the perceived control on the floodgate of what constitutes public interest factors in the EU was discussed under sections 2.8 and 2.8.1 of chapter two, with the findings that the provisions of this

[528] Lesley Morphet, 'South African Competition Law And Public Interest'2007, Norton Rose Fulbright, 165.
[529] Giorgio Monti, 'EC Competition Law' (Cambridge University Press 2007)12
[530] Alison Jones And Brenda Sufrin, 'EU Competition Law' 6th Edition (Oxford University Press 2018) 1239
[531] Alison Jones And Brenda Sufrin, ' EU Competition Law' 6th Edition (Oxford University Press2018)1239

Article rob the concept of the element of predictability and certainty during merger review assessment.

Decided cases in the EU and South Africa like *E.on/Endesa*,[532] *BSCH/A.Champalimand*[533] and *Secil/Holderbank/Cimpor*,[534] as well as *Shell v Tepco Petroleum Co. Ltd*[535] and *Minister of Economic Development et-al and Wal-Mart Stores Inc.et-al*[536](in lieu of cases from Nigeria), on public interest considerations were discussed and analysed to know how public interests are considered in merger review in the EU and Nigeria and the extent of their consideration. The findings on the analysis of the cases in the EU were that the Commission in rare cases like *Boeing/McDonnel Douglas*[537] and *Air France/KLM*[538] considered the public interest concept in merger review as attainable when it relates to legitimate interests (public security, plurality of the media and prudential rules). However, when the public interest relates to other social factors that are not legitimate interests, the concept is not attainable. That is, the concept may not be attainable when the social factors like environment, industrial policy and national champions are involved. However, the South African cases show that the concept of public interest is given adequate consideration in merger review in South Africa in view of the codification of the concept in the South African Competition Law.[539]

The essence of the third chapter was to facilitate an easy understanding of the background, objectives and structure of the EUMR 2004 as it relates to the public interest concept during merger review in the EU with a view to appreciating why and how public interest is given consideration in this context.

The chapter attempts, under section 3.1, to dissect the meaning of public interest as used in the thesis by explaining different contexts in which the public interest concept is being used. It settled for the peculiar meaning of when the Commission considers

[532] Case M.4197, E.ON/Endesa (2006), para 25
[533] Case M.1616, BSCH/A. Champalimand (1999) para 66
[534] C (2000) 3543 Final Secil/Holderbank/Cimpor
[535] Case No. 66/LM/October 01 Paragraph 58 as Shell v Tepco Petroleum Co. Ltd
[536] Case No 1101/CAC/Jul 11 Minister of Economic Development et-al and Wal-Mart Stores Inc.et-al
[537] Case No.iv/m.877(1997)L336/16. Boeing/McDonnell Douglas.
[538] Case Comp/M.3280.(2004)V JC60. AirFrance/Klm.
[539] South African Competition Act No 89 of1998 As Amended

other factors such as plurality of the media, public security, prudential rules other than competition rules during assessment of mergers.

Under section 3.2, the chapter examined and analysed the features of public interest in the EU during merger review. Features like industrial, environment and national champions, which need the approval of the EU to be recognised as public interests, and public interests like plurality of the media, prudential rules and public security, which do not need the approval of the EU to be classified as public interests, were discussed and analysed in the context of how and why they could be considered in a merger review in the EU alongside the competition basis. While discussing the features of public interest in the EU, the chapter also examined the views of several scholars like Schwartz[540], Monti[541] and Almunia[542] on the features of public interest as to why the Commission is reluctant to recognise the public interests that need its approval before being upgraded as recognised public interests. Under sections 3.5 and 3.6, the chapter also considered the effect of the public interest concept on merger review, and in order to explore this effectively, reviewed the organisational structure of the EU being an international organisation. The review also covered the issue of transparency and legal inconsistency as major constraints of the EU on implementation of the public interest concept during merger review in the EU. The chapter also considered the application of the concept of public interest in the EU as well as the basis for the adherence to strict competition rules in merger control by the Commission in the EU.

[540] David A. Schwartz 'The Essentials of Merger Review' 2013 American Bar Association, Section of Int. Law Pg 10

[541] Giorgio Monti, 'The New Substantive Test In The EC Merger Regulation-Bridging The Gap Between Economics And Law ' 2008, Law Society Economy Working Papers, Pages 1-22
Giorgio Monti, 'The Concept Of Dominance in Article 82' 2006, Hart Journals, Pages 5-20

[542] Joakins Alumunia, ' Competition And Consumers: The Future Of EU Competition Policy' Delivered On 12th May, 2010 At Madrid, Spain On European Competition Day: 'Competition, State Aid And Subsidiaries In The European Union' Delivered on 18th February, 2010 At Paris, France During The 9th Global Forum On Competition

Views of scholars[543] on the relevance of public interest in merger review and decided cases[544] were analysed and discussed under section 3.7 of chapter three to consider likely areas where the public interest concept was used in the EU by the Commission. The conclusion was that the Commission should maintain its strict adherence to competition rules by laying more emphasis on these rules at the expense of public interest. The chapter under section 3.11 looked into the significance and relevance of Article 21(4) EUMR in determining the extent of consideration of the concept of public interest in the EU during merger review. This was done with the identification of the Member States that are operating the public interest regime in the EU and also asking whether Article 21(4) EUMR could be regarded as an exception to the general rule that strict adherence to the competition rules is the norm during merger review in the EU.

The chapter's findings were that public interest consideration during merger review in the EU is unpopular with the European Commission as it is so engrossed with its strict adherence to competition rules during merger review, despite the leeway or leverage afforded by Article 21(4) EUMR. The Commission's position could be due to the fact that the policy of strict adherence to competition rules creates many benefits for consumers in terms of welfare and gives merging firms the assurance that the process of merger review is certain.

Chapter four of the thesis was about the relevance of the public interest concept in the UK and the extent of its application during merger review there. This was to enable readers to appreciate the significance of the concept of public interest in another country within the EU. The chapter under section 4.2 examined the evolution of the

[543] Mateusz Blachucki, 'Public Interest Consideration In Merger Control Assessment 2014'. European Competition Law Review, 35 (8) Pg. 380-386
David Cardwell, 'The Role Of the Efficiency Defence In EU Merger Control Proceedings Following UPS/TNT, Fedex/TNT And UPS v. Commission 2017, Journal Of European Competition Law And Practice, Vol. 8(9) pages 551-560
Daniel L. Crane, "Rethinking Merger Efficiencies' 2014, 110MICH-Law Rev, Volume 347, Pages 347-391.
Mitja Kocmut, 'Efficiency Consideration And Merger Control – Quo Vadis, Commission? 2006 European Competition Law Review Page 19-27

[544] TeliaSonera/Telemor/JV (Case M.7419) 2015 OJC 119/1
Hutchison 3 GUK/Telefonica UK (Case M.7612) 2016
E.ON/Endesea Case Comp/M.4110, 2006 O.J. (c68) 09
Commission v. Spain [2008] ECRII-00069, Para 72
Commission v. Italy [2000] ECR I-3811
BSCH/Champalimuad, Case IV/M. 1616, 1999 O.J (C197)

concept in the UK by analysing the Monopolies and Restrictive Practices Act of 1948[545] and Monopolies and Merger Act of 1965[546]with the introduction of a broad public interest test to the UK jurisprudence. The conclusion was that the concept of public interest was central to the assessment of mergers under the Monopolies and Restrictive Practices Act of 1948 and Monopolies and Mergers Act of 1965. It was also concluded that the concept of public interest was also in operation till the introduction of the Tebbit doctrine[547] and Lilley doctrine.[548]

The chapter under section 4.3 also discussed the legal structure of the concept in order to appreciate how the concept is applied and the process of this application during merger review. The weaknesses of the application of the concept in terms of the powers and roles of the Secretary of State as highlighted by S.58 (3) of the Enterprise Act[549] were analysed and discussed under section 4.3.1 in this chapter. The power of the Secretary of State to propose a new public interest concept during merger review was discussed under section 4.3.3 to expose the danger that is inherent in the said power of the Secretary of State if the political class plays the card often, even though the said power of the Secretary of State could be useful in emergency situation cases. An example is the case of *Lloyds/HBOS*.[550] The chapter under section 4.3.3 also proffered a solution to the weakness by suggesting that proper Parliamentary examination of the proposals suggested by the Secretary of State would be helpful to discourage abuse of such power. The implication of the Secretary of State being a sole decision-maker as a form of weakness of the application of the concept in the UK was also analysed under section 4.3.1 of chapter four. The danger of over-concentration of power in the hands of a single decision-maker was analysed under section 4.3.1 of the same chapter, and it was suggested that a team of politicians should be constituted to replace the Secretary of State so as to avoid abuse inherent in such a situation. It was

[545] Monopolies and Restrictive Practices Act of 1948
[546] Monopolies of Merger Act 1965
[547] Alex Chisholm, 'Public Interest And Competition-Based Merger Control' Speech Delivered At The Fordham Competition Law Institute Annual Conference On 11 September, 2014. (https://www.gov.uk/government/peopele/alex-chisholm.) Accessed on 29th Nov.2019
[548] Alex Chisholm, 'Public Interest And Competition-Based Merger Control' Speech Delivered At The Fordham Competition Law Institute Annual Conference On 11 September, 2014. (https://www.gov.uk/government/peopele/alex-chisholm.) Accessed On 29th Nov.2019
[549] Enterprise Act 2002
[550] Lloyds/HBOS{2008}ME/3862/08

also suggested that cases of lobbying, harassment or undue pressure on the Secretary of State should be reported to the appropriate authorities.

The chapter's findings were that the public interest concept does not play a significant role in merger review in the UK, even though the concept is recognised in the UK's jurisprudence on merger review. The regulator's emphasis is on competition rules and not public interest factors.

The purpose of chapter five was to identify the implications of public interest provision in the newly enacted Competition Act[551] in Nigeria as regards merger review. To this end, the view of Patrick Smith[552] on the irrelevance of the concept of public interest during merger review was discussed under section 5.7 alongside that of J. Oxenham,[553] who believed that a holistic review of merger could not be achieved without the input of the public interest concept. The chapter under sections 5.2 and 5.3 also discussed the development of the Nigerian law and economy as well as the political system and parties in Nigeria. The provisions of S.94(1) of the Federal Competition and Consumer Protection Act that give public interest factors priority over competition concern once the Commission comes to the initial conclusion that the merger is likely to lessen competition were also discussed and analysed under sections 5.5 and 5.6 of chapter five. The implication of the provisions of S.94 (2) make consideration of public interest factors during merger assessment compulsory in Nigeria. As such, the Commission does not have discretion not to consider public interest factors in a merger assessment once it finds the merger to be anti-competitive.

The chapter under section 5.4 explored the background of the concept of public interest in Nigeria by discussing several unsuccessful attempts to have a fully regulated competition regime there. The importance of the FCCPA 2019 was also emphasised in relation to the Investments and Securities Act[554]under section 5.2 of chapter five. The overview and features of the FCCPA 2019 were analysed under section 5.5 to determine its effectiveness in terms of application of the public interest

[551] Federal Competition and Consumer Protection Act 2019
[552] Patrick Smith And Andrew Swan, 'Public Interest Factors In African Competition Policy' 2014. The African And Middle Eastern Antitrust Review. Pg.1-6
[553] J oxenham, 'Can One Balance The Increasing Importance Of Public Interest Considerations In South Africa (and Sub-Saharan Jurisdictions) With The Quest For Merger Control Certainty' (2012)US-China Law Review 227
[554] Investments And securities Act 2007

concept during merger review. The introduction of the intervention of the Minister of Trade and Investment to the merger review process was discussed under section 5.5 of chapter five, and it was found that such intervention could introduce politics into the consideration of public interest in merger review in Nigeria in view of the enormous influence of the minister on civil servants. The chapter under section 5.5 also considered some decided cases like *Telkom and Praysa*[555] and *Heinz and McCain*[556] to highlight the application of public interest consideration in merger review in Nigeria.

The perceived tendency of the Commission to give a broad interpretation to the meaning of public interest factors enumerated by the FCCPA2019 was discussed, with the findings that the interpretation of the public interest factors should not be widened to distract from the goal of the concept, which is about the welfare of the consumers.

Chapter six of the thesis was the comparative chapter. The concept of public interest in the EU was compared with the concept of public interest under the Nigerian law. This was done in order to bring the differences and common parts of the two laws to the fore so as to have a better understanding of both. The chapter under section 6.2 examined and analysed what constitutes public interest factors in the EU and compared this with what constitutes public interest factors in Nigeria. The conclusion was that what constitutes public interest factors in Nigeria is different from what constitutes them in the EU, primarily because of the differences in the social and legal cultures of the two jurisdictions. To this end, the chapter under section 6.2 analysed features of Article 21(4) EUMR and compared it with S.94 of the FCCPA. The thresholds provided by the two laws were compared, and the framework for easy assessment of mergers, third-party interventions in merger review, judicial review and appeals, notifications and the effects of socio-political factors in determining what constitutes public interest in each jurisdiction were analysed and compared under sections 6.1 and 6.2 of the chapter. The chapter's findings were that the socio-political effects of each jurisdiction play a significant role in determining what constitutes a

[555] Case No. 81/LM/Aug 00 Merger Between Telkom SA Ltd And TPI Investment And Praysa Trade 1062 Pty Ltd.

[556] Case No. 17/AM/March 01 – Food Allied Workers Union And The Competition Commission And Mccain Foods (SA) (PTY) LTD AND HEINZ Frozen Foods (Pty) Ltd.

public interest factor in them. Factors like employment and industrialisation play a greater role as public interest factors in Nigeria because of the country's under-developed status. Conversely, public security, plurality of the media and prudential rules play fundamental roles in what may constitute public interest factors in the EU since employment and industrialisation may not necessarily be factors through which the Competition Commission wants to ease the toughness of the competition rules in a merger review assessment.

7.2 POLICY RECOMMENDATIONS

As discussed in chapter three under section 3.3, the introduction of EUMR 2004[557] was a great improvement on the Regulation 4064/1989,[558] which was the predecessor of the EUMR 2004, because it not only introduced substantive law for merger review which was conspicuously missing in the 1989 Act but also brought about the change from the dominance test to the Significant Impediment To Effective Competition (SIEC) test.[559] However, despite the comprehensiveness of the EUMR 2004, there are certain omissions and gaps that needed to be filled in order to have a better law on the public interest concept in the EU in particular and to have an improved and dynamic law on merger review in general in the EU, and this section will recommend some suggestions in this respect. Some of the gaps are the absence of a substantive assessment formula for the public interest concept in merger review, strict interpretation of Article 21(4) EUMR, case referrals between EU Member States and European Commission, and absence of comprehensive lists of public interest factors.

The Nigerian merger review law, which is regulated by the newly enacted Federal Competition and Consumer Protection Act 2019, is no doubt a great improvement on the repealed Investments and Securities Act 2007. The introduction of a single Competition Commission to handle competition matters and of the Competition and Consumer Protection Tribunal as well as ministerial intervention in merger review are some of the improvements on the repealed Investments and Securities Act 2007. The

[557] Council Regulation (EC) 139/2004 of 20 January,2004
[558] Council Regulation (EEC) No 4064/89 of 21 December, 1989
[559] Jerome Foncel, Merclvaldi And Valerie Rabassa, 'The Significant Impediment Of Effective Competition Test In The New European Merger Regulation: In Theory And Practice' 2007,Contributions To Economic Analysis Journal, Volume 282 Pages349-367.

newly enacted Act still has shortcomings that need attention and improvements as regards the concept of public interest consideration and the entire merger review process.

In order to deal with the shortcomings in the EUMR 2004 and the Federal Competition and Consumer Protection Act 2019 in relation to a dynamic and pragmatic merger review process, the following recommendations are made.

7.2.1 Policy Recommendations for the EU

7.2.1.1 A MORE TRANSPARENT AND LEGAL CONSISTENT DECISION-MAKING PROCESS

As discussed in chapter three, under subsection 3.4.2, the body that takes decisions on public interest issues in the EU Commission is the College of Commissioners, which comprises 27 commissioners from each of the Member States.[560] The commissioners are political appointees, and proceedings of the college are conducted in private meetings when deciding on public interest issues.[561]

It is recommended that the process of decision-making of the Commission should be made transparent by providing that the college deliberates in general as opposed to private meetings when deciding on the outcome of a transaction. It is further recommended that the College of Commissioners should be obligated to state reasons behind any decision taken by the body as opposed to the current situation, where they are not obliged to do this. This recommendation, if upheld, will bring transparency into the decision-making process of the Commission as regards public interest in merger review. A follow-up to a transparent decision-making process of the College of Commissioners will ensure consistency so that merging firms may be certain about the outcome of their decisions on public interest factors during merger review.

7.2.1.2 THE NEED FOR A SUBSTANTIVE ASSESSMENT FORMULA

[560] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark ,Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania
Slovakia , Slovenia, Spain And Sweden

[561] Graham Cosmo, 'Public Interest Mergers, 'European Competition Journal, Volume 9 Number 2, August 2013,pp383-406

The Commission has the Significant Impediment of Effective Competition (SIEC) formula for the efficiency defence.[562] Prior to the adoption of SIEC as a result of the enactment of EUMR 2004, the Commission used the dominance test as the assessment formula for efficiency defence. The Commission as at today does not provide for any substantive formula for assessment of public interest in merger review in the EU. Notwithstanding the leeway provided by Article 21(4) EUMR in terms of exception, the Commission has refused to explore this to accommodate public interest factors by providing an assessment formula for such situations. A liberal interpretation of Article 21 (4) EUMR by the Commission would afford it the opportunity of bringing in other social factors like industrial policy, environment and employment as public interest factors. The Commission may then introduce an assessment formula similar to SIEC to assess public interest factors during merger review.

It is recommended that provision of a substantive assessment formula by the Commission is urgently desirable. This provision is necessary so as to give certainty and credibility to the merger review process in the EU when it comes to the public interest concept. One of the features of a good law is certainty; the provision of a substantive assessment formula by the Commission would allow investors to know beforehand the fate to befall their transactions before applying to the Commission for review.

7.2.1.3 A BROAD INTERPRETATION OF ARTICLE 1 EUMR IS NECESSARY

As discussed under section 3.3 of chapter three, Alison Jones[563] and Giorgio Monti[564] believe that Article 2 EUMR gives on the surface the impression that the public interest concept is not allowed during merger review in the EU. This is because Article 2 EUMR emphasised the need to maintain an effective competition within the common market. But a closer look at Article 1 EUMR, which gives the Commission the power to take into cognisance the development of the technical and economic progress of the transaction, in as much as the transaction is for the consumer's

[562] David Cardwell, 'The Role Of the Efficiency Defence In EU Merger Control Proceedings Following UPS/TNT, Fedex/TNT And UPS v. Commission 2017, Journal Of European Competition Law And Practice, Vol. 8(9) pages 551-560

[563] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014) 10(3) European Competition Journal 453

[564] Giorgio Monti, 'The Concept Of Dominance in Article 82' 2006, Hart Journals, Pages 5-20

advantage and does not form an obstacle to competition, may give the Commission the impetus to give a wider and broader interpretation to the phrase "technical and economic progress".

It is recommended that a wider and broader meaning of the phrase "technical and economic progress" used in Article 1 EUMR should be adopted by the Commission to mean non-competition interests that not only have great impact on consumer welfare but also are not anti-competitive. The adoption of this liberal interpretation of Article 1 EUMR will afford the Commission the opportunity of bringing in public interest factors like environment, national champions and industrial policy during merger review in the EU.

7.2.1.4 AN AMENDMENT TO ARTICLE 21(4) EUMR AND BROAD INTERPRETATION IS DESIRABLE

As discussed in chapter three under section 3.7 of the thesis, the provisions of Article 21(4) EUMR give Member States the latitude to invoke public interest factors during merger assessment in as much as the measures are "appropriate" and interests to consider are "legitimate".[565] The legitimate interests are public security, plurality of the media and prudential rules. Another condition is that the said measures and interests must be compatible with the general principles of the community law. It is the contention of the researcher that the conditions attached to the invocation of Article 21(4) EUMR are such that may not make Member States enjoy the leverage provided by this Article. The leverage provided by the said Article may be enjoyable or feasible if its provisions are amended. The leeway provided by Article 21(4) EUMR in terms of public interest has been insignificant due largely to the way and manner the Commission has been deliberately interpreting the provision of the Article to promote its strict adherence to competition policy.[566] This was also discussed under section 3.4 of chapter three of the thesis.

It is therefore recommended that the provisions allowing Member States to communicate any additional public interest factors apart from the legitimate interests

[565] Giorgio Monti, 'The Concept Of Dominance in Article 82' 2006, Hart Journals, Pages 5-20

[566] Alison Jones And John Davies, 'Merger Control And The Public Interest: Balancing EU And National Law In The Protectionist Debate' (2014) 10(3) European Competition Journal 453

to the Commission for approval should be amended by removing the notification clause that makes the approval of the Commission necessary for confirmation of what constitutes a public interest factor other than the legitimate interests. It is also therefore further recommended that a liberal interpretation of the provisions of Article 21(4) EUMR should be adopted by the Commission where Member States would be able to maximise the potential provided by this Article.

7.2.1.5 MORE BUSINESS-FRIENDLY CASE REFERRALS BETWEEN EU MEMBER STATES AND EC

As discussed under subsection 3.4.1 of chapter three of the thesis, the current EUMR requires two separate submissions during pre-notification referrals to the Commission. Article 4(4) and Article 4(5) of the EUMR 2004 deal with the pre-notification referrals from the Commission to NCA.[567]

When circumstances demand that parties to a purported concentration with an EU dimension be referred to a Member State to review the merger instead of the Commission pursuant to the concurrence of the parties, the requirement of Article 4(4) and Article 4(5) that the parties must submit a reasoned submission twice to the Commission and for the approval of the Commission and other NCA's approval to the period of approval to the submission is cumbersome. The two-stage process is stressful and may delay the review process, which may not be in the interest of investors.

A friendlier referral process is recommended whereby one reasoned submission is needed for the approval of the Commission to the concentration since there is already agreement between the parties that they would prefer the review to be done at the Member State level despite the fact that the Commission may jurisdictionally review the merger.

7.2.1.6 THE JURISDICTIONAL THRESHOLDS SHOULD BE BROAD

[567] Whish R. And Bailey D, 'Competition Law' 9th Ed. (Oxford University Press 2018) Page 877

The existing thresholds of the EUMR 2004 are essentially based on turnover. This is reflected in the EUMR[568] when it provides that:

- The aggregate community-wide turnover of each of at least two of the undertakings concerned exceed EUR 250 million. Where these thresholds are not met, the secondary thresholds apply and are satisfied if all the following criteria are fulfilled:

- The combined aggregate worldwide turnover of all other takings concerned exceeds EUR 2.5 billion

- In each of at least three Member States, the combined aggregate turnover of all undertakings concerned exceeds EUR 100 million

- In each of those three Member States, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR 25 million

- The aggregate community-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million.

As argued in this thesis under section 3.7 of chapter three, it is glaringly obvious that jurisdiction can only be conferred on the Commission based on the annual turnover of the concentration. The world, however, is changing. We are now in the digital world; hence in the case of digital economy where services are based on user base before a business model is determined, that would lead to a profitable venture.

It is argued that the jurisdictional threshold set up by the EUMR 2004 is not broad enough as the thresholds are not capturing all transactions that can potentially have an impact in the internal market of the EU. A good example is the case of the digital economy.

It is recommended that existing turnover-based jurisdictional thresholds should be complemented with the transaction value principle in order to truly capture all the transactions that can have meaningful impact on the internal market of the EU. The transaction value principle envisages a situation where all transactions in a business

[568] Council Regulation (EC) 139/2004 of 20 January,2004

venture that do not translate to money are captured in the books of the company as against a turn over based principle that must necessarily entails money realised on a particular transaction or transactions. To do otherwise is not to allow the Commission to be proactive in dealing with competition-related matters.

7.2.2 Policy Recommendations For Nigeria

7.2.2.1 THE PUBLIC INTEREST CONCEPT SHOULD BE DISCRETIONARY IN A MERGER REVIEW

The Competition Commission should have the discretion to either use public interest factors or not.[569] This is because the 'discretionary approach' will not place the Competition Commission under the obligation of always subjecting mergers to public interest test even where the merger is not likely to prevent or lessen competition. The 'discretionary approach' is also the universal practice of most competition authorities as exemplified by the EU and UK Jurisdictions. Put differently, public interest test would only be used where necessary whenever the 'discretionary approach' is deployed. S.94 of the FCCPA2019 makes consideration of the public interest concept in a merger assessment compulsory once the Commission decides that the merger is likely to prevent or lessen competition. However, it should be noted that if the Commission decides pursuant to section 94 (1) of the FCCPA2019 that the merger is not likely to prevent or lessen competition, there is no need to consider the public interest factors provided under section 94(3) of the FCCPA 2019. This is because the provisions of the Act envisage a situation where the Commission is expected to assess the effect of the merger on competition and also consider the effect of the transaction on public interest factors listed in the Act. The implication of this is that a transaction may pass the competition test and fail the public interest test. When such a situation arises, the transaction will be blocked. As a corollary, a transaction may fail the competition test and pass the public interest test, and the transaction may not be blocked. Another dimension to the obligatory nature of the public interest concept during merger review in Nigeria is section 94(1)(c) of the FCCPA2019, which makes it duty bound for the Commission to conduct a public interest test on a merger

[569] https://gettingthedealthrough.com/intelligence/171/article/6218/merger-control-nigeria Accessed on 1st April 2020

assessment, irrespective of the outcome of the investigation on whether the merger is competitive or not. This is so because the word “otherwise” at the beginning of the subsection suggests that section 94 (1)(c) is different from the other subsections of section 94.

In order to have a regime that would be protective of competition at all times, it is recommended that the new Act should be amended to envisage a situation where a transaction must pass the competition test without necessarily passing the public interest test. This would be possible if the word “and”, which is conjunctive, is removed from section 94(1)(b) (i and ii) and replaced with the word “or”, which is disjunctive. In the same vein, section 94(1) (c) of FCCPA 2019 should be deleted by way of amendment because the word “otherwise”, which begins the paragraph, gives the impression that the subsection stands on its own; that is, the subsection 94(1)(c) is different from the previous sections 94(1) (a and b). The implication of this is that irrespective of the outcome of the Commission’s investigations under sections 94(1) (a and b), it is bound to consider the public interest factors as provided by section 94(1) (c). If the first leg of the recommended amendment is effected, the Commission would not be under obligation to consider the public interest factors once the efficiency defence provided under the Act can allay the fears of the Commission as regards the anti-competitive elements of the merger. Similarly, the implication of the implementation of the second leg of the recommended amendment to section 94(1) (c) is that the Commission would no longer be under obligation to consider the public interest factors but may do so only when occasion demands it. In other words, competition principles should be given priority over the public interest concept. This is because of the glaring weaknesses of the public interest concept, such as inconsistency and political interventions.

7.2.2.2 MINISTERIAL INTERVENTION SHOULD BE GUIDED BY RULES

As discussed under section 5.6 of chapter five of the thesis, the newly enacted FCCPA introduced the intervention of the Minister of Trade and Investment to the merger review process by empowering the minister to make representations to the Competition Commission on issues pertaining to public interest factors during merger

assessment.[570] The Act was silent on the mode and the effect of the minister's presentation to the Commission. The minister is a representative of the government that is in power at any time. The impression being created for the Competition Commission is that the minister's representation is the position of the government of the day, which the Commission is bound to accept. The concern here is that the Competition Commission may not have a free hand to operate because of government interference, especially in a developing country like Nigeria.

In order to minimise the government's intervention in the merger review process, it is recommended that there should be procedural rules on the input of the Minister of Trade and Investment's intervention and the role of the Commission whenever the minister intervenes in a merger review process on the public interest concept. In other words, it should be expressly stated that the Commission is not bound to accept the minister's presentation to the Commission so as to allay the fears of foreign investors.

7.2.2.3 THE REGISTRATION OF THE COMPETITION TRIBUNAL'S DECISIONS AT THE FEDERAL HIGH COURT REGISTRY IS NOT NECESSARY

As discussed in chapter five of the thesis, the newly enacted Federal Competition and Consumer Protection Act 2019 made compulsory the decisions granted at the Tribunal to be registered at the Federal High Court's Registry for enforcement.[571] The essence of the registration at the Federal High Court is not stated in the Act, and it is not easily discernible either, in view of the fact that the Competition Tribunal has concurrent jurisdiction with the Federal High Court on competition matters.

In view of this, it is recommended that the provision for the requirement of registration of Tribunal decisions at the Federal High Court's Registry be deleted from the newly enacted Act and the process of enforcement of the Competition Tribunal's decisions should be left alone with the Tribunal for coherence and uniformity. The Tribunal's decisions would be enforced as if it were a judgment of a

[570] S.94 Federal Competition And Consumer Protection Act 2019; Arthur Jackson,' Everything You Need To Know About The Federal Competition Act 'https:// www. gistalad.com/news/regulates/federal-competition Accessed on 1st April 2020

[571] Aluko & Oyebode,' A Review Of The Federal Competition And Consumer Protection Act 2019' March 2019 Edition, Pg 1-18 Accessed on 1st April 2020

Federal High Court with its own enforcement processes or procedures[572]. It is argued that this might be a tall order as Tribunals enforce their rulings through courts. However, the Act may be amended to state that the need for registration at the Federal High Court is for enforcement purposes and nothing more as the Act is silent on the purpose of registration.

7.2.2.4 THE NEED FOR SPECIALISED DEPARTMENTS TO BE URGENTLY CREATED BY THE COMMISSION

The newly enacted Federal Competition and Consumer Protection Act designates the Competition Commission as a co-regulator with other sector- regulators as regards competition and consumer protection.[573] As discussed under section 5.6 in chapter five of the thesis, the Act did not state the limit of powers of the Commission as regards sector regulator, notwithstanding the fact that the Act further provides that in the event of any conflict, the provisions of the Act would prevail save the Nigerian Constitution. The dilemma in this provision is, how capable is the Commission to review decisions of industry-specific regulators with regards to competition? How easy would it be for the Commission to review sanctions of highly regulated industries like communication, banking and electricity when it is almost impossible for all the members of the Commission to be skilled in all areas of life? It may not be that easy; hence it is highly recommended that specialised departments staffed with skilled professionals should be created by the Commission to handle specific-sector-related sanctions for review. This would be similar to what is obtainable in the UK, where Ofcom deals with any matter relating to plurality of the media issues in determining a public interest factor during merger review there.

7.2.2.5 RECOGNITION OF SINGLE COMPETITION AUTORITY IS IMPORTANT AND RELEVANT TO THE DEVELOPMENT OF MERGER REVIEW

The process of assessing public interest considerations in most jurisdictions during merger review is left to government departments or sector regulators and not competition authorities as discussed under section 5.8 of chapter five. The idea of

[572]Securities & Exchange Commission v. Professor A.B. Kasunmu. SAN (2009) 10 NWLR (Pt.1150) P509.
[573] S.92 Federal Competition And Consumer Protection Act 2019; Lexology,' Analysis Of The Federal Competition And Consumer Protection Act 2018'. https://www.lexology.com/library/detail.aspx. Accessed on 1st April 2020

multiple co-ordinators of public interest consideration in merger review leads to different modes of assessment of public interest consideration and different enforcement problems.[574]

It is recommended that competition authorities should be left with the assessment of public interest considerations in merger review so as to avoid enforcement problems. Single competition authority is also desirable because it makes coherence and consistency feasible in cases being handled by the competition authority since it is the same single competition authority that will assess the public interest factors in line with the competition assessment.

As discussed under section 5.8 of chapter five, the recommendation of single competition authority to assess the public interest factors alongside the competition analysis or assessment may reduce the possibility of lobbying of government departments if the assessment were being done by government departments. The current situation in Nigeria, where the newly enacted FCCPA introduced a new Competition Commission to handle competition matters, is commendable, but the Commission is yet to be inaugurated at the time of writing, notwithstanding the enactment of the FCCPA Act.[575] It is hereby recommended that the new Competition Commission should be inaugurated forthwith for effective implementation of the new Act.

7.2.2.6 COMPETITION AUTHORITY SHOULD BE RESPONSIBLE FOR REVIEWING HOLDING COMPANIES' TRANSACTIONS TO ASCERTAIN THE PURPOSE OF THEIR INVESTMENT

In chapter five under section 5.5, it was discussed that provisions of section 92(2) (d) of the FCCPA exempt some mergers that are not subject to prior review and approval of the Competition Commission, and situations envisaged by the Act are as follows:

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[574] FCCPA2019 https://www.olaniwunajayi.net/blog/federal-competition-and-consumer Accessed on 1st April 2020

[575] The Newly Enacted FCCPA2019 is given immediate operational status by virtue of the fact that the FCCPA under section 166 gives the Commission to take over the powers of the defunct Consumer Protection Council which incidentally is abrogated by the same FCCPA. However, members of the new Commission have not been appointed in line with the provisions of the FCCPA. Meanwhile, the Consumer Protection Council which is defunct could not do the functions of SEC which had already been scrapped with the repeal of Investments Securities Act2007. As at the time of writing, the new Competition Commission is yet to be inaugurated even though the FCCPA2019 is fully operational.

(a) Where the holding companies acquires shares solely for the purpose of investments and not for the purpose of using the shares by voting, and (b) merging entities in a small merger are not required to notify the Commission of the merger, but they are compelled to inform the Commission upon successful completion of the merger.

It is recommended that the regulators should be responsible for the review of the transactions of the holding companies acquiring shares and not the holding companies, as provided for by the current rules, in order to determine the real purpose of the acquisition, so as to avoid a situation where companies will hide under the existing rule to bring in anti-competitive transactions.

7.2.2.7 THE THRESHOLD SHOULD BE IN TANDEM WITH REALITY

The newly enacted Competition Act gives the Commission power to set the threshold in order to determine the categories of mergers contemplated under the new Act.[576] The Commission released the threshold sometimes in September 2019[577] and fixed one billion naira as the combined annual turnover of both the acquiring and target undertakings. The threshold provided by the old Act (ISA 2007) was not feasible for a long time as inflation eroded the value attached to it. It was the threshold provided by SEC Rules in 2013 that had a semblance of reality regarding the then economic situation of Nigeria.

In view of this, it is recommended that in setting a threshold of annual turnover for the purpose of determining the categories of mergers contemplated under Section 94(2) of the FCCPA, consideration should be given to the current economic situation in Nigeria so as to have a realistic threshold that will be in tune with the Nigerian economy. The current threshold will leave many thriving businesses out of the supervisory radar of the Commission as most of such businesses may not meet the threshold so as to be able to notify the Commission. To classify such companies as small mergers is tantamount to being not in tune with the economic reality of the

[576] FCCPA 2019 https://lawnigeria.com/federal-competition-and-consumer-protection-act Accessed on 1st April

[577] FCCPA2019,Notice Of Threshold For Merger Notification Pursuant To Section93(4) FCCPA2019,Dated 9th September 2019

country. It is also recommended that the turnover threshold should also be complemented with a transaction-based threshold in view of the current trends in the world, where user-based transactions are becoming popular in view of the emergence of the digital economy.

7.2.2.8 PROCEDURAL RULES ARE URGENTLY NEEDED FOR THE FULL AND PROPER IMPLEMENTATION OF THE FCCPA 2019

As discussed in both chapters two and five of the thesis, there are no procedural rules established yet by the newly enacted FCCPA on the concept of public interest consideration in merger review under the Nigerian law; hence there are no guidelines on the assessment of public interest provisions in merger regulation. In other words, there is no indication as to the approach the Competition Commission would likely follow and the types of information that it would require when evaluating public interest grounds under the Nigerian law.

In view of this, it is highly recommended that procedural rules as to the implementation of the public interest consideration factors should be urgently made available by the regulator for effective and coherent implementation of the law on public interest consideration. It is the procedural rules that will assist both the courts and investors on the interpretation of the provisions of the law.

7.2.2.9 THE NEED TO SET UP A COMPETITION TRIBUNAL

Section 39 of the FCCPA 2019[578] provides for the establishment of a Competition and Consumer Protection Tribunal to adjudicate over conducts prohibited under the Act and exercise jurisdiction, authority and powers conferred on the Tribunal by the FCCPA or any other law. As at the time of writing of this thesis, the Commission is yet to set up the Competition and Consumer Protection Tribunal. None of the members of the Tribunal have been appointed by the President, who has the power to make such appointment by virtue of section 40 of the FCCPA.

As discussed under section 5.6 of chapter five, the importance of the Tribunal to the effective workings of the Commission and implementation of the FCCPA 2019 cannot be underestimated. This is so because the Tribunal is the judicial arm of the

[578] S39 Federal Competition And Consumer Protection Act 2019

Commission that determines all decisions that emanate from the Commission. It is hereby recommended that the Competition and Consumer Protection Tribunal contemplated by the FCCPA2019 should be set up and inaugurated forthwith for a robust and better adjudicative system. It is also recommended that members of the Tribunal should be economists and lawyers who should be experts in the field of competition law. In other words, the appointees should be round pegs in round holes and not round pegs in square holes. It should be noted that section 40 of the FCCPA2019 directs the President of Nigeria to appoint a lawyer of not less than ten years at the Bar as a member of the Tribunal, and it is gratifying that the Act emphasised the need to have competition law specialists in the Tribunal.

7.3 CONCLUSION – MERGER REVIEW IS ABOUT COMPETITION RULES

The thesis has considered the significance of public interest in merger review in both the EU and Nigeria. A brief consideration was also given to the concept in the UK in chapter four of the thesis.

The extent of the consideration of the concept of public interest in the merger review process was also examined extensively in both the EU and Nigeria with the aid of decided cases. In the case of Nigeria, where there is a dearth of cases, resort was made to the South African jurisprudence for a better understanding of the concept of public interest in merger review.

Advantages and disadvantages of the concept of public interest as well as its meaning and origin, and the views of various scholars on it, were discussed and analysed in the thesis. Some of the advantages are that the concept could broaden development if properly harnessed to competition law and it also gives a greater role to industrial policy. The disadvantages are uncertainty and unpredictability in application and enforcement as well as lack of uniformity in what constitutes public interest in different jurisdictions.

It has been established that the concept of public interest is not peculiar to the EU and Nigeria jurisprudences alone. It is now a worldwide phenomenon as the concept is not strange in the US, where antitrust immunity has been confirmed in small businesses in

some instances.[579] Moreover, in the UK, governmental intervention under the guise of public interest is allowed during merger review as seen in the case of the *Lloyds TSB/HBOS* merger to save the financial sector of the UK during the recession.

The concept is also prevalent in most African countries like South Africa, Botswana, Malawi, Namibia, Swaziland and Zambia.[580] In fact, the Nigerian jurisprudence on the public interest concept was imported verbatim from South Africa.

In all, it is the researcher's findings that the Commissions in both jurisdictions remain absolute in their focus on merger review. The Commissions have not wavered on their stance that merger review is about maintaining competitive market structure to the benefit of not only the consumers but also the investors and this is done by laying greater emphasis on 'economics' and paying little or insignificant attention to non-economic considerations.

It is also the researcher's findings that recent cases especially in the EU suggest that the Commission did not want to go down the route of public interest, which is neither certain nor uniform in its application by different regulations. This is evidenced by the refusal of the Commission to recognise public interest factors such as environment, industrial policy and creation of national champions during merger review in the EU. The Commission only recognises the legitimate interests such as public security, plurality of the media and prudential rules during merger assessments.

It is the researcher's further findings that the introduction by the FCCPA2019 of the intervention of the Minister of Trade in the assessment of public interest factors by the Commission and the recognition given to third parties during merger review are great innovations that will help the merger review process in Nigeria, especially as it relates to the public interest concept. However, the Nigerian competition law is faced with the problems of non-composition of the members of the Commission as at the time of writing, the absence of the Competition Tribunal to adjudicate on disputes that arise

[579] Sterry Waterman, 'Whither The Concept Affected With A Public Interest?' 1972, 25 Vanderbilt Law Review At45

[580] Patrick Smith And Andrew Swan, 'Public Interest Factors In African Competition Policy' 2014. The African And Middle Eastern Antitrust Review. Pg.1-6

from the decisions of the Commission and the non-availability of procedural rules for easy interpretation of the law on merger review.

The Nigerian Competition Act, which seemingly prioritises the public interest concept over competition principles, is yet to present the opportunity of assessing how practicable the prioritisation of public interest factors over competition policy would be.

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