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The Relationship between Article 4(1)(b) of the Cross-Border Merger Directive and the European Merger Regulation

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Abstract:

In a time when protectionism is re-emerging as a strong policy stance on a global scale, the opposition to cross mergers based on public interest grounds may once more become more frequent. The lack of a common policy at the EU level leaves each Member State free to set its own framework to oppose mergers based on the public interest. However, such frameworks need to comply with Article 4(1)(b) of the Cross-Border Merger Directive (CBMD) which expressly introduces a non-discrimination principle in respect of MS's provision which regulate the opposition of public interest. This paper compares the protection offered under Article 4(1)(b) with the one offered under the EU Merger Regulation (EUMR). It shows that the protections under the EUMR are greater and that the EUMR provides a robust *ex ante* assessment of public interest claims raised against the merger. However, it also shows that the role of the EUMR in the protection of mergers against public interest opposition is limited. This limitation stems from the threshold for establishing a Union dimension within the meaning for that Regulation. This Chapter suggests that, while the scope of the CBMD covers more mergers, the real playing field of public interest opposition is prior to the merger - during the takeover by a foreign company or the change of control in the terms of the EUMR.

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1. Introduction

The European Union Cross-Border Merger Directive (CBMD)[1] aims at facilitating 'the cross-border merger of limited liability companies.'[2] Cross-border mergers may be more difficult than purely national ones for a number of reasons. The cross-border element entails a significant increase in transaction costs. Such transaction costs may derive from diversity in legal, linguistic and cultural variables. Crossing borders means not only having to deal with different legal systems, different languages and different legal and business cultures. It also means dealing with different national political systems that may show fragmentation and divergence from an EU perspective.

State measures directed to block mergers might be an expression of such political attitude. Therefore, although marginal in the average merger assessment, a state's opposition to a merger on grounds of public interest may be particularly likely to occur in a cross-border merger contexts. As a matter of fact, companies are crucial assets for a state's economy. This is true from at least two different perspectives, one of which is internal to the state whereas the other one is international:

From an internal perspective, corporations contribute to a state's treasury through corporate taxation. Moreover, corporations are often connected to a series of interests associated to a large number of stakeholders, such as creditors, employees, consumers - but also to ordinary citizens. While the citizens may not be involved directly with any specific corporation, they may be affected by negative externalities deriving from corporate action, such as for instance pollution or job losses because of a merger. Hence, it is not surprising that a state wants to exercise a degree of control over the acquisition of corporations by foreign players.

From an international perspective, some corporations may be perceived as national champions, i.e. entities that actively promote the interest of the nation, well beyond their private sphere of action. Such conception can be intended in many ways. One may be political, that is a state may be interested in protecting interests related to strategic sectors such as defense. Another may be related to politics of economic dominance, which nowadays may intersect also non-economics spheres, such as in the case of the IT giants which have access to users' personal data well beyond the state where they are incorporated.[3]

Strengthening a national player may also be perceived as furthering competition on an international plan, especially where the playing field is not levelled, for examples due to public subsidies to industry.[4] While EU State Aid policy may be considered as an essential tool for the purpose of furthering competition within the EU's internal market, it may also be criticized, because it may provide an advantage for non-EU corporations which can receive State aid within their home state.

The implications of the public interest defenses raised by a state whose corporations are involved in a merger are extremely complex and go well beyond the legal analysis of the provision in the CBMD and

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[1] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1.
[2] Considerandum n (1) para 9.
[3] See for example the debate surrounding access to emails stored by Microsoft but within a different jurisdiction, Ellen Nakashima, 'Supreme Court to hear Microsoft case: A question of law and borders (Washington Post 25 February 2018) https://www.washingtonpost.com/world/national-security/supreme-court-case-centers-on-law-enforcement-access-to-data-held-overseas/2018/02/25/756f7ce8-1a2f-11e8-b2d9-08e748f892c0_story.html?utm_term=.7905abd72b12 (accessed 30 March 2018).
[4] See for example the Commission decision in *Siemens/Alstom* (6 February 2019) Commission Press release IP/19/881 http://europa.eu/rapid/press-release_IP-19-881_en.htm (accessed 04.03.2019), where one of the arguments made were the subsidies given to Chinese train companies.

the scope of this Chapter. Nonetheless, there is a leitmotiv to be kept in mind. There is an inherent tension between the protection of 'valid' (national) public interests by EU member states and cases where such interests are employed to camouflage protectionist interventions within the EU internal market. Such action favors some companies and may provide a short term electoral gain but may end up damaging citizens, as well as the competitive process as a whole, in the medium and long term.[5] The risk presented by protectionist intervention in the merger process and the divergence in approaches to the opposition to mergers based on public interest grounds is addressed in Article 4(2)(b) of the CBMD. That provision makes reference to the European Merger Regulation (EUMR)[6] and declares that Article 4(2)(b) is not applicable where the merger is covered by the EUMR. From a practical perspective, the legal assessment of a merger represents a major concern for the companies intending to merge ex ante, because of merger law's potential to prevent the merger. Besides Article 4(1)(b), the CBMD mentions competition law only in its *consideranda*, stating that the directive 'is without prejudice to the application of the legislation on the control of concentrations between undertakings, both at Community level, by Regulation (EC) No 139/2004 (1), and at the level of Member States.'[7] Thus, competition law could be conceived as another legal order which can introduce further obstacles for companies that intend to merge. However, in this chapter we show that at least the EUMR might also have the reverse effect. It provides companies with a shield against the Member States attempting to prevent a merger based on public interest grounds. We also claim that the situation is remarkably different when a merger is assessed under national merger laws.

In the following Sections, we will first highlight a number of national rules of the EU member states with regard to the opposition of a merger for reasons of public interest. This shows the substantive divergences that still exist in this non-harmonized area of the law. Second, we will delve into the interpretation of CBMD Article 4(2)(b), explaining its substantive and procedural meaning in limiting such governmental action. Third, we will compare the protection offered by the CBMD against the protection available under the EUMR. In the fourth Section, we will conclude showing that the benefits of the EUMR are only available in a limited number of cases and that the majority of cross-border mergers between small and medium sizes companies do not necessarily receive this special protection. Moreover, we show that even the protection embedded in the CBMD is only relevant for a very small number of cases.

2. National Merger Rules on Public Interest and Article 4(1)(b) CBMD

In this Section, we provide an overview of selected jurisdictions. We show how they provide for the consideration for public interests in mergers. The aim of this section is to highlight the divergence in EU member states' approach to this issue. We also provide a short account of the development of such doctrine within the UK. Although leaving the EU, the UK is a good example of the evolution of a state's policy towards cross-border mergers: from an approach taking carefully into consideration national interests to one almost entirely based on open markets.[8] We believe that the development of such policy within the UK may offer a chance to reflect on this difficult subject matter, also given that UK

[5] Neelie Kroes, 'European competition policy facing a renaissance of protectionism which strategy for the future' (11 May 2011), SPEECH/07/301.
[6] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.
[7] Considerandum n. 9.
[8] See this Section, text to (n **Error! Bookmark not defined.**ff).

academics and politicians have always influenced the EU competition law making with their liberal tradition, so crucial for the creation of the Internal Market.[9]

A recent paper on public interest within domestic merger control has provided an overview of this subject matter on a global scale.[10] It has highlighted the diversity in the institutional mechanisms employed for considering public interests within a *domestic* merger procedure. Such diversity in institutional mergers would emerge also in the context of a *cross-border* merger, as stated in CBMD Article 4(1)(b). Such an approach does not fit within the usual competition framework, so that a State can either balance public interest against competition as part of the substantive test for mergers or regulate public interest as an exception to the ordinary merger assessment.[11] Often States also have sectorial regulations and procedures for certain industries to ensure the public interest is protected in mergers, for instance in banking, transports or defence.[12]

Merger procedures and rules on the substantive assessment of a merger do not only differ substantially across the globe. Even within the European Union, such differences are remarkable across member states. In a recent OECD round table on public interest in merger control, only a few EU member states have submitted their observations, which provide summary descriptions of their way of assessing public interest within national merger procedure. From this limited sample of EU member states, a clear trend towards restricting governmental intervention in merger procedure in defence on public interest can be observed. Nonetheless, national legislations still display a diversity in the ways in which public interest considerations may become part of a merger assessment.[13]

The Netherlands represents the most liberal approach in the EU with regard to the public interest defence in national merger procedure. Under the procedure set by Section 47 of the Dutch Competition Act (DCA), the Dutch Ministry of Economic Affairs is authorised to intervene within a national merger procedure only to positively influence the decision of the ACM.[14] This may not be of great interest in the context of a cross-border merger, unless these pro-merger derogations are applied in a discriminatory manner,[15] that is to say if the Netherlands granted such exceptions more easily to Dutch companies or in a national context as compared to a cross-border one. Such discriminatory action may reflect negatively especially on takeover plans, where a foreign offeror could be dissuaded from launching a takeover if the Dutch government had systematically denied pro-merger interventions in favour of cross-border mergers.

Regardless of the effect on cross-border mergers, the authorization of anticompetitive mergers on grounds of public interest has raised political criticisms in the Netherlands, especially in relation to the

[9] Giorgio Monti, The United Kingdom's Contribution to European Union Competition Law (2017) 40(5) Fordham International Law Journal 1443-1474.
[10] David Reader, Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights, CCP Working Paper 16-3, http://competitionpolicy.ac.uk/publications/working-papers/working-paper-16-3, last access 29-03-2018.
[11] Ibidem
[12] Ibidem
[13] On the Roundtable see the documents produced in occasion of Session III at the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016. See in particular a background paper by the Secretariat on Public Interest Considerations in Merger Control, 30th of June 2016, DAF/COMP/WP3(2016)3
[14] DCA Article 47 (1) states the following. 'After the Board has refused a license for the implementation of a concentration and following an application requesting such, Our Minister may decide that the license shall be granted if, in the Minister's opinion, this is necessary for important reasons in the public interest, which outweigh the expected impediment to competition.'
[15] Hilson, Chris. 'Discrimination in Community free movement law.' *European Law Review* 24 (1999): 445-462.

clearance of mergers taking place in the area of public health care.[16] The justification advanced by the Dutch government for clearing this kind of merger was increasing countervailing buyer power.[17] However, retrospectively there seem to be no real improvements in terms of efficiency nor prices.[18]

While the Dutch government can allow an otherwise anticompetitive merger, it is not authorised to interfere within a national merger procedure for preventing a merger from taking place.[19] Hence, from this perspective, the Netherlands seem to be embracing a very liberal approach, which contrast for example with the one adopted by Germany.

In Germany, similarly to the Netherlands, a system to authorise[20] otherwise anticompetitive mergers based on public interest grounds exists.[21] However, Germany also has a system in place that can be used to oppose a cross-border merger on grounds of public interest. Two procedures can be distinguished in this regard. The general procedure[22] under which, according to Section 4 of the Foreign Trade and Payments Act, a ministerial decree can make any kind of transactions with foreign countries subject to an authorisation system based on public interest grounds. As Sec 5(3) highlights, such restriction can be imposed in particular in cases of acquisition of equity in German companies that are relevant for national security. However, the system[23] also allows for individual decisions[24] to protect the public interest. Moreover, acquisitions in certain industrial sectors, such as armaments or IT security, are already subject to special procedures.[25] Therefore, it can be said that the German government has a degree of discretion in intervening for the protection of (national) public interests within national cross-border merger procedures.

Our brief comparison of the essential features of the procedures for the defence of public interests in German and Dutch national merger procedures shows that there still is quite a degree of difference, even in two EU member states with closely related legal traditions. [26] Such raise concerns from a policy perspective. To put this in the words of the OECD secretariat,

> the way public interest considerations are set forth in the law has practical consequences and that, in order to protect legal certainty, public interest considerations should be clearly spelt out in law or soft law. As it is difficult to balance competition and public interest criteria guidance would help authorities to

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[16] https://www.acm.nl/en/publications/publication/17614/ACM-clears-merger-between-two-Dutch-hospitals-in-Amsterdam, last access at 17-03-2018. https://www.competitionpolicyinternational.com/wp-content/uploads/2017/07/CPI-Varkevisser-Schut.pdf, last access at 17-03-2018. Criticism have been raised for the absence of improvement in the quality of healthcare. See https://www.competitionpolicyinternational.com/wp-content/uploads/2017/07/CPI-Broers-Kemp.pdf, last access at 17-03-2018.

[17] Kemp, Ron GM, Nikki Kersten, and Astrid M. Severijnen. 'Price effects of Dutch hospital mergers: an ex-post assessment of hip surgery.' *De Economist* 160.3 (2012): 237-255.

[18] Ibidem.

[19] Public Interest Considerations in Merger Control, Note by the Netherlands, 03-06-2016, DAF/COMP/WP3/WD(2016)6, at 2, points 4 ff.

[20] Sec. 36 § 1 of the Gesetz gegen Wettbewerbsbeschränkungen (German Anti-Competition Act) applies a pure SIEC (significantly impedes effective competition) criterion.

[21] Public Interest Considerations in Merger Control, Note by Germany, 10-06-2016 DAF/COMP/WP3/WD(2016)3, 2 ff.

[22] Außenwirtschaftsgesetz – AWG (Foreign Trade and Payments Act) of 6 June 2013 (Federal Law Gazette [BGBl.] Part I p. 1482)

[23] Sec 6 of the AWG.

[24] Rather than general ministerial decrees subjecting whole industries to an authorization system.

[25] For more details see Public Interest Considerations in Merger Control, Note by Germany (n 13) par 26 ff.

[26] For an overview on the difference see Lexidale, Study on the Application of the Cross-Border Merger Directive, September 2013.

> interpret and apply public interest considerations in an objective, transparent and predictable manner.[27]

Regardless of the state of the art within each EU member state, it is worth noting that member states may still go through phases of relative openness or closeness towards cross-border equity acquisitions and cross-border mergers, as long as there is no common EU framework. For instance, in 2006 there has been a strong waive of protectionism in the EU, by states such as France, Italy, Poland and Spain.[28] A good example in this respect is offered by the UK. British competition law dates back to the middle ages.[29] It was only after the 1929 crisis that the British Empire introduced legislation such as the 1932 Import Duties Act, which produced cartelisation of several sectors of its economy.[30] Already in the mid-1940s, a reintroduction of the competition principle in the British Empire industrial system can be observed. The Monopolies and Restrictive Practices (Inquiry and Control) Act (MRPA) 1948 was constructed around a rather flexible but also uncertain criterion of public interest. Such a formulation provided the Monopolies and Restrictive Practices Commission – under the direction of the Secretary of State – with a highly discretionary power.[31] Unsurprisingly, it was strongly opposed by business leaders.[32]

The Fair Trading Act 1973, section 84 cited several criteria to be taken into account when assessing a merger, such as for instance ‘maintaining and promoting the balanced distribution of industry and employment in the United Kingdom’ (as in s 84 (d)). Although some of those criteria were external to the competition one and potentially in opposition to it, the Act was progressively interpreted in a pro-competitive way.

A strong stance in favor of a clear pro-competition approach was taken by Lord Tebbit during his time as Secretary of State, in 1984.[33] When appointed as Secretary of State for Trade and Industry, Lord Lilley reversed at least on paper Lord Tebbit’s approach. He strongly supported the idea of applying a public interest test to cross-border mergers, for countering attempts by foreign state-owned companies to take over British companies. He referred to these attempts as ‘nationalization by the back door’.[34] The Lilley doctrine did not receive a particularly intense application,[35] and the victory of a strong competition-oriented approach is very clear in the UK Enterprise Act 2002 (UKEA 2002). UKEA 2002 Chapter 2 is devoted to ‘public interest cases’. It contains several detailed provisions which seems

[27] Public Interest Considerations in Merger Control, Background Paper by the Secretariat, DAF/COMP/WP3(2016)3, Par 65

[28] Galloway, Jonathan, and NORWICH UEA. ‘EC merger control: does the re-emergence of protectionism signal the death of the ‘one stop shop’?.’ *Draft Paper to the 3rd Annual CCP Summer Conference*. Vol. 14. 2007, at 2 ff.

[29] John Dyer's Case, Y.B. 2 Hen. 5, fo. 5, pl. 26 (C.P. 1414). See in detail Barry Hawk, English Competition Law before 1900, 63 *Antitrust Bull.* (2018) (forthcoming). Another important area for the development of competition law was Italy. Medieval Italy is one of the oldest European example. See Marco Claudio Corradi, ‘Notes on Competition and *Justum Pretium* Theory and Practice in Medieval Italy: Lessons for Modern EU Competition Price Theory?’ *63 Antitrust Bull. (2018) (forthcoming).* However, England stuck faithfully to its competition tradition without interruption until the XX century.

[30] Wise, Michael. ‘Review of Competition Law and Policy in the United Kingdom.’ *OECD Journal: Competition Law and Policy*5.3 (2004): 57-140.

[31] Andrew Scott, ‘The evolution of competition law and policy in the United Kingdom’ (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344807##, last access 20-03-2018.

[32] Ibidem.

[33] Kryda, Georgine M. ‘The competition criterion in British merger control policy.’ *Policy Studies Journal* 30.2 (2002): 252-269.

[34] Department for Trade and Industry press notice 90/457, Merger reference policy, 26 July 1990.

[35] Kryda (n 32).

to restrict, through a heavily regulated procedure, the discretion of the Secretary of State when intervening in a national merger procedure on public interest grounds.[36]

On the verge of Brexit, the UK seems to show renewed interest for the protection of national economic interests. In a government press release, it has been clarified that after the Hinkley Point C nuclear plan merger clearance, the UK government has purported to introduce an approach 'considering the national security implications of all significant investments in critical infrastructure, including nuclear energy, in the future.' [37]

It becomes clear that even in a well-rooted pro-competition tradition there are options or trends towards allowing government to oppose mergers on public interest grounds even where no competition concerns exist.

Given these options to limit cross-border mergers based on public interest grounds, one might ask what options EU law provides to defend against protectionist measures. One of these tools is Article 4(1)(b) of the CBMD. According to that Article, the merging parties 'shall comply with the provisions and formalities of the national law to which it is subject' including those that provide for the opposition to a given internal merger based on public interest grounds as well as the EUMR.

Thus, member states are allowed to object to mergers based on public interest grounds. Yet, this Article seems to contain also a non-discrimination clause because it allows only the application of those rules that would apply to 'a given internal merger.' Thus, Article 4(1)(b) prevents the application of rules that apply discriminatorily, in particular rules that are designed to apply only to cross-border mergers. While this clarification regarding discrimination might be welcomed, it is unlikely that EU member states adopt procedures for the assessment of public interest which apply only to cases of cross-border mergers, that is to say rules that are discriminatory *de jure*. It is much more likely that the procedure at stake is applied in a discriminatory way *de facto,* which is harder to prove.[38]

While Article 4(1)(b) is helpful in prohibiting *de jure* discrimination*,* it might also be misleading. The Article leaves out that EU law does also prohibit *de facto* discrimination and other measures that might make cross-border mergers more difficult. Of relevance is in this regard in particular *Gebhard*[39]which that provides that every measure that makes the exercise of the freedom of establishment less attractive needs to be justified by imperative requirements in the general interest and must be proportional.[40] Thus, Member States might use some of their domestic rules to object to cross-border mergers subject however to the non/discrimination provision contained in Article 4(1)(b) and the general compliance with the freedoms and the relevant principle of proportionality. However, it is important to bear in mind that it is up to the company to challenge any measure that hinders its cross-border mergers before national courts, where the relevant authorities might then defend their action.

[36] UK Enterprise Act 2002, https://www.legislation.gov.uk/ukpga/2002/40/contents, last access 29-03-2018.
[37] https://www.gov.uk/government/news/government-confirms-hinkley-point-c-project-following-new-agreement-in-principle-with-edf, last access 19-03-2018.
[38] It may be possible to identify and punish discriminatory approaches in a takeover context, where for instance there may be competing offers, in case a cross-border offer is antagonized by the state of the target whereas national offers are facilitated. Yet, in a pure merger context after the takeover this would more difficult.
[39] C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,*[1995] ECLI I-4186, para 37
[40] Ibid.

3. The Role of the EUMR in Protecting Mergers against Public Interest Oppositions

The CMBR and the free-movement rules provide some protection to merging parties against the invocation of public interest against a merger. Yet active engagement by the parties is required to invoke these defences. The parties would have to pursue a court case against the government's decision blocking the merger. This requirement to take legal action alone has a chilling effect. This effect might be even greater taking into account that not all courts in Member States readily apply EU law. [41] While in these cases the merging parties would need to bring court cases to defend themselves against government, the EUMR offers a different system of protection. This system provides the parties with an *ex ante* system where public interests claims are scrutinised by the Commission.

This system is a consequence of Article 21(2) of the EUMR that allocates the 'sole jurisdiction' to the European Commission to review the compatibility of concentrations of an EU dimension based on competition ground.[42] While, the *ex ante* system allows the Member States to protect public interests that are not protected by the EUMR itself[43] it sets out conditions for instances. Article 21(4) EUMR distinguishes between two different types of public interest: privileged and non-privileged interests. In general, all objections against mergers based on public interests need to be notified to the Commission. From this general rule an exception exists for privileged public interest, namely media plurality,[44] public security,[45] and prudential rules.[46] The invocation of these interests to block a merger is permissible without *ex ante* notification.

However, even such privileged public interest are only exempted where the measure genuinely aims at such an interest and complies with the non-discrimination and proportionality principles. Thus, the Commission in *Secil/Holderbank/Cimpor*[47] decided that the Portuguese Minister of Finance's decision aiming to block the merger between Secil and Holderbank with the cement company Cimpor should have been notified and was contrary to EU law. In particular, prudential rules were not at stake because the parties were neither active in banking nor the provision of insurance services. The disciplining force of Article 24 can also be seen in *BBVA/BNL* and *ABN AMRO/Banca Antonveneta,*[48] where the Bank of Italy refused to authorise the take-over of Italian banks by reference to 'national consolidation' of the

[41] See for example with regard to the requirement to request a preliminary reference Niels Fenger Morten P Broberg, 'Finding Light in the Darkness: On the Actual Application of the acte clair Doctrine' (2011) 30 Yearbook of European Law 180–212.
[42] On the current state and the future of public policy consideration within the Commission's appraisal of mergers see David Reader, 'At a Crossroads in EU Merger Control: Can a Rethink on Foreign Takeovers Address the Imbalances of Globalisation' (2017) 2 *European Competition and Regulatory Law Review* 1-12.
[43] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (OUP 2014) p 1164
[44] See for example the European Commission Decision of 21/12/2010 in Case COMP/5932 — News Corp/BSKYB which was cleared by the Commission but then blocked by the UK based on reason of media plurality.
[45] Public security is interpreted narrowly concentration in relation to arms trade or production or to security of supplies such as the security of energy supply to the extent that they are necessary to ensure a minimum level of energy supplies in the event of a crisis, see eg Case 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727. See also with regard to energy and water supply European Commission Decision of 29/03/1995, *Water Industry Act*; European Commission Decision of 21/12/1995 in Case COMP/M.567 — *Lyonnaise Des Eaux/Northumbrian Water*; European Commission Decision of 27/01/1999 in Case COMP/1346 — *EdF/London Electricity*.
[46] Such as for example rules related to banking, finance and the insurance sector and are often designed to ensure financial stability and adequacy, see Richard Which and David Bailey, Competition Law (OUP 2015) p 896.
[47] European Commission Decision of 11/01/2000 in Case COMP/M.2054.
[48] See Cases M.3768 and case M.3780.

banking sector. After a mere warning about a violation of Article 21 EUMR by the European Commission, the Bank of Italy abandoned its opposition.

This *ex ante* system changes the power play between the merging parties and the State substantively. The State is required to justify its attempt to block a merger on public interest grounds in front of an independent body. Moreover, where a Member State does not comply with the notification requirement, the Commission could open an infringement procedure pursuant to Article 258 TFEU[49] or issue a decision declaring the Member States' choice to block the merger to be contrary to Article 21 of the EUMR and even order the withdrawal of the relevant legal measure. In practice, such withdrawal decisions are more frequently used than infringement procedures as they provide a more direct remedy for the merging parties. For example, in *Abertis/Autostrade*[50] Italy sought to prevent the acquisition of Autostrade -which manages Italian Motorways- by the Spanish Abertis group. The Italian State feared that Abertis would not invest enough into Italian motorways. The Commission decided that this measure had not been notified and was incompatible with EU law, thereby ensuring the merger would not be blocked by Italy for these reasons.

Substantively, the Commission under Article 21 EUMR assesses in particular the non-discrimination principle and ensures compliance with free-movement of capital and the freedom of establishment, that is to say Article 69 and 49 TFEU. In this regard, it is important to note that these provisions do not only capture discriminatory rules but go beyond discrimination by prohibiting all measures that 'prohibit, impede or render less attractive'[51] cross-border establishment of the movement of capital. The examination of these principles can for example be observed in *E.ON/Endesa*[52] or in *Enel/Acciona/Endesa*.[53] In *E.ON/Endesa,* the Commission found that the State measure would dissuade investors by impeding the acquisition of shares in the undertakings thereby restricting free-movement of capital. In *Enel/Acciona/Endesa*, the Commission found that a) the requirement to maintain the registered office and the decision-making bodies of Endesa in Spain, and b) the requirement to use domestic coal and to refrain from divesting Endesa's assets outside the Spanish for at least five years were contrary to the freedom of establishment. Thus, the Commission prohibited these conditions for the merger. It thus becomes clear that the EUMR provides a rather effective system to protect the parties involved in a merger against member states that aim to prevent the merger and claim to do so in the public interest.

4. The Difference in Scope and The Limits of Protection

Having explored the protection offered under the EUMR, in this section we explore the extent to which this protection is available in cross-border merger situations. We then highlight the broader scope of the CBMD. Finally, we show that even though the scope of the CBMD is broader than that of the EUMR, the protection offered under the CBMD is often of limited use in practice.

The EUMR's introduces a one-stop-shop and limitations on public interest grounds to block mergers. Yet, this system applies not in all cases that are covered by the CMRD, as the EUMR only applies where a 'concentration' has a 'Union dimension' within the meaning of Article 1 and 3 of the EUMR. Thus,

[49] See European Commission Decisions of 20/12/2006 and 26/09/2006 in Case COMP/M.4197 — E.ON /Endesa.
[50] Case M.4249.
[51] See eg Case C-168/91 *Konstantinidis* [1993] ECR I-1198 with regard to establishment or Case C–98/01 *Commission v UK* [2003] ECR I- 4641 para. 20 with regard to capital.
[52] European Commission Decisions of 20/12/2006 and 26/09/2006 in Case COMP/M.4197 — *E.ON /Endesa.*
[53] European Commission Decision of 11/09/2007 in Case COMP/M.4685 — *Enel/Acciona/Endesa.*

two cumulative conditions determine whether the one-stop-shop is available and with it the streamlined assessment of national interests involved in such a transaction.

The EUMR will apply in many cases where a merger within the meaning of the CBMD exists because according to Article 3(1)EUMR it is relevant whether a change of control on a lasting basis occurs. As Article 3(2) clarifies such control can be 'constituted by rights [such as shares], contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, [which] confer the possibility of exercising decisive influence on an undertaking'.[54] Thus, the EUMR often applies already before a merger within the meaning of the CBMD comes into play, that is to say where for example take over takes place.

While the requirement of a change in control within the meaning of the EUMR will be satisfied in many cases of cross-border mergers, the issue of Union dimension is crucial in the context deciding whether the EUMR will apply. Where this criterion is not met, the merger would in general only be subject to national merger regulations and the benefits of the EU one-stop-shop would be lost.

The Union dimension is established by means of turnover thresholds established in Article 1(2) or (3) of the EUMR. Article 1(2) establishes two cumulative minimum thresholds:[55] (a) 5,000 million € combined aggregate worldwide turnover of the undertakings concerned (b) 250 million € aggregate Union-wide turnover of each of the undertakings concerned. Article 1(3) sets out a second threshold based on four other criteria for mergers that do not meet the Article 1(2) threshold.[56] The undertakings concerned must a) 2,500 million € combined aggregate worldwide turnover of all the undertakings concerned, and b) 100 million € combined aggregate turnover of all the undertakings concerned in each of at least three Member States, and c) 25 million € aggregate turnover of each of at least two of the undertakings in each of the three Member States included for the purpose of (b), and d) 100 million € aggregate Community-wide turnover of each of at least two of the undertakings concerned. The thresholds of Article 1(3), are designed to tackle concentrations that fall short of achieving Union dimension under Article 1(2) but could have a substantial impact in at least three Member States leading to multiple notifications under national competition rules.[57.]

This rather strict regime of thresholds combined with the EUMR focus on undertakings in competition leads to a situation where many cross-border mergers are not subject to these rules. This can be either because the thresholds are not met or because the control of the undertaking does not change. At least for those cases that involve a transfer of control but do not meet the threshold, there is one more option of obtaining the benefits of EUMR's one-stop shop and additional protection against the raising of public interests by the authorities of the member states. Pursuant to Articles 4(5) and 22 of EUMR concentrations which do not meet the thresholds may nevertheless be investigated under the EUMR by the European Commission if the undertakings concerned or a Member State makes such a request. An undertaking concerned may make such a request where the merger involves at least three jurisdictions. After the request, the Member States involved have 15 days-time to express their opposition against the referral to the Commission. This objection has the effect of preventing the referral to the Commission according to Article 4(5) of the EUMR. However, even if there is no objection from the Member States, Commission would still consider whether it is best placed to review

[54] For examples with regard to means of how control can be obtained for the purpose of the EUMR, see Commission's Consolidated Jurisdictional Notices, para 16-23.
[55] The thresholds are not met where 'each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.'
[56] These thresholds are again subject to the 2/3 provision highlighted above.
[57] Commission's Consolidated Jurisdictional Notices, para 126.

the case.[58] If it finds that this is not the case, it will refer the case back to Member States according to Article 9 EUMR. While the risk of a referral back to the Member States is a concerne for merging parties fear that a Member State could invoke public interests against the merger, the option to veto the Commission jurisdiction is an even greater issue. Member State which aim to block a merger are likely to object to the referral to the Commission as this would take the case out of the hands of the Member State concerned and would reduce the leeway for invoking public interests against the merger.[59]

The situation is different where a Member State makes the request for referral according to Article 22 of the EUMR. Rather than having the requirement that the merger involves at least 3 Member States, a substantive assessment is relevant. A Member State within Article 22 of the EUMR can ask for a referral where the Merger "affects trade between Member States and threatens to *significantly* affect competition within the territory of the Member State or States (emphasis added)." Other Member States can only provide observations but it is the Commission who is charged with this assessment. Thus in contrast to an Article 4(5) referral request, objections from the Member States have no legal consequences.

Yet, neither the Article 4(5) and Article 22 referral procedures are likely to be an effective shield against public interest based opposition to a merger. While in the case of Article 22 of the EUMR the company could lobby the competition authority within its home jurisdiction to make an Article 22 referral request, it would essentially accuse itself of significantly distorting competition by means of the envisioned merger. Similarly, the referral under Article 4(5) is also of little use. A company would first have to overcome the hurdle of having three jurisdictions involved, and second, and more importantly, the Member State aiming to prevent the merger based on public interest grounds could simply veto the referral. In other words, the system of referral does not provide an effective way for undertakings involved in a merger, in particular SMEs, to shield themselves against Member States using public interest to block the merger. Hence, the EUMR and its protective one-stop-shop only applies to a limited amount of cross border mergers.

In contrast, the CBMD, includes a very broad range of merger situations. It it covers mergers between public and private limited liability companies[60] and the three most common ways in which mergers are operationalized.[61] Thus, in all these case Article 4(1)(b) and its protection against discrimination can come into play. However, in practice issues relating to public interest grounds are not exclusively encountered in the merger context. Instead, problems connected to the protection of public interest typically arise as a consequence of a shift in control, that is to say before the actual merger. A shift in control is usually determined by an equity purchase – which can take place within a takeover context or not - and which may *in a case* end up in a merger between acquirer and target, when the parties decide to take such an additional step.[62] Hence, there is no exclusive connection between rules for the protection of national public interests and mergers as defined in the CBMD. Instead rules for the protection of public interest are likely to be triggered by a simple equity purchase which determines a shift in control. This shift in control turns the target into a subsidiary of a foreign parent company and is therefore subject to its industrial directives. Such foreign industrial directives are the usual source

[58] For the criteria used see Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2 para 25-32.

[60] Art 1 of the CBMD

[61] Art 2, para 2 CBMD

[62] Details on different mergers and acquisition strategies are explained for instance in Gaughan, Patrick A. *Mergers, acquisitions, and corporate restructurings*. John Wiley & Sons, 2010.

of concerns for the state where the target is incorporated. This is in particular the case where the acquirer is a foreign company subject to the directives of its state of origins.[63]

The idea of mentioning within the CBMD the opposition to a merger based on public interest as well as the EUMR seems understandable. However, it is not clear why such a provision on public interest opposition and competition law is contained *only* in the CBMD, whereas the problem of public interest defenses is not mentioned – for instance - in the takeover directive.[64] It may well be that one of the reasons why the EU legislator has decided to place the abovementioned provisions in the CBMD has mostly to do with terminology: CBMD and EUMR both refer to 'mergers'. If the inclusion of Article 4(1)(b) is based this pure commonality in the terminology within two different fields of EU law, this choice may prove at least partly misleading. If one considers the operation of the EUMR,[65] it becomes clear that its reach is far broader than the one of identified by the CBMD. This difference already becomes clear if one examines the official denomination of the so-called 'EC (now EU) Merger Regulation' which is actually 'Regulation on the Control of Concentrations between Undertakings.' In its Article 2 'concentrations' are defined as changes 'in control on a lasting basis' deriving either from a merger or from '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.'

For a reason of efficient coordination of different branches of EU law, it may have been advisable to mention the problem at issue both in the takeover and in the CBM directive – so catching the full range of transactions which may trigger public interest defenses. One might therefore conclude two things. First, that the protection afforded by the EUMR is only available in a small number of cases, and second that the protection afforded by the CBMD would be required already at the stage of the takeover rather than the actual implementation of the merger. It is in the context of the takeover rather than merger that the public interest opposition will be relevant and it is also the time when the EUMR with its focus on the change of control becomes relevant.

5. Conclusion

These are times of deep political and institutional transformations, not only within the European Union but also on a global scale. Hence the opposition to mergers based on public interest might see a revival. In the EU, Brexit has chilled what seemed to be an everlasting progression towards the enlargement of the EU. During the referendum on Brexit but also in other EU member States, national identities are often employed by politicians in defensive terms, showing obstacles towards further integration. On a global scale, the WTO is losing grip on the multilateral agenda. The new emerging scene is dominated by bilateral and plurilateral agreements, through which states are better able to tailor the protection of their national interests. In such a scenario, it is hard to imagine that the defence of public interest within merger proceedings is going to disappear and be replaced an approached based on economic integration and open markets. The drafting of the CBMD may reflect a rather conservative stance, 'respectful' of the EU member states. These retain their autonomy in determining the extent to which they can protect their national interests by imposing only a non-discrimination requirement. However, as we have shown member states are more limited in their application of such rules. They will have to respect provisions on freedom of establishment and will even have to follow the strict procedural rules of the EUMR where a merger has a union dimension. However, beyond the EUMR the companies might

[63] See (n 33 ff).
[64] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJEU 30/04/2004 L 142/12.
[65] For details see under Section 3.

face an uphill battle against governments' opposition. The takeover directive seems not to bar member states from any form of opposition. It will thus be upon the companies to explore the relevant free-movement case law and to bring a case before a national court. Given the workings of the judicial process, it might take years before the case has been decided, in particular if a reference to the ECJ is involved. The Article 4(1)(b) therefore only comes into play where first, the EUMR is not applicable and second where the member state has not already intervened before the actual merger.