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**ABSTRACT**

This paper seeks to explore some of the public affairs principles involved in the EU mergers and acquisitions regulatory process, which affects most corporate restructuring of a European scope. Following a brief overview of the EU merger review process and the main role of public affairs in such cases, the paper explores some of the more sensitive issues that demand public affairs activities, and issues that are raised by public affairs activities.

The paper focuses on the open nature of the EU merger review process, which allows for wide consultation; the imperfections within the EU merger review process, which lead to confusion as to where the exact point of decision lies; and the fact that the process is only quasi-legal, so that competition policy and industrial policy considerations may filter into the regulator’s assessment. The impact of politics is also explored; from high-profile political interventions to low-key political negotiations. Finally, there is a review of the perception of lobbying and the question of the legitimacy of the public affairs discipline in the context of EU merger control.

**KEYWORDS:** public affairs, lobbying, merger control, European Commission

**INTRODUCTION**

Of all the regulatory hurdles relevant to corporate restructuring, one of the most potent, yet unpredictable, tends to be competition regulation. It is the framework within which corporate restructuring takes place and can, in short order, force a radical change on companies involved in corporate restructuring or, indeed, force a change on a whole industry.

The importance of merger clearance in restructuring strategies is self-evident, as industries that are going through wholesale restructuring (such as recent oil, energy, telecoms and aluminium industries merger waves) are confined by competition rules. The European Community’s Merger Con-
trol Regulation (EMCR), which governs mergers and acquisitions at the European level, specifically takes corporate restructuring into account. The EMCR states that the Single European Market ‘is resulting and will continue to result in major corporate reorganizations in the Community, particularly in the form of concentrations’ and that the European Commission, which is responsible for European competition regulation, must ensure ‘that the process of re-organization does not result in lasting damage to competition’.

THE EUROPEAN MERGER REVIEW PROCESS

The European merger review process is quasi-judicial, in that the Commission takes a decision involving an assessment of law, facts and economic principles, which affect the rights of companies. Formal steps in the merger review process are therefore necessary to fulfil the requirement of fair hearing. It is therefore worth undertaking a brief survey of the European merger review process, as this is the context within which public affairs activities take place.

European merger review is the responsibility of the European Commission, specifically the Competition Commissioner, currently Mario Monti, and the Director General for Competition, currently Philip Lowe. The Directorate General for Competition (DG Competition), which has recently undergone a radical reform, is made up of different Directorates responsible for industrial sectors, most with specific merger teams, and a slimmed-down Merger Task Force (MTF). In principle, there are two stages to merger investigations: a preliminary one-month review and, if there are serious doubts about the effect of the transaction on competition, a four-month in-depth review. In preliminary investigations, the responsibility for the decision rests with the Competition Commissioner; however, in in-depth investigations, the final decision is placed before the whole college of European Commissioners.

Overview of the key procedural stages

In practice, one can effectively identify four stages to a merger clearance:

- The first stage tends to be informal pre-notification discussions between the merging parties and the DG Competition case team, prior to formal filing. There is no strict timeline to this process but it is encouraged by the European Commission and is expected of the parties. These informal discussions provide an opportunity to discuss issues in a neutral environment and to identify core difficulties that will focus minds after formal notification.

- The formal filing of the transaction begins the initial one-month investigation (Phase I), at the end of which a transaction can be cleared unconditionally or with conditions. Where there are serious concerns about the competitive impact of the transaction, however, the case will undergo further scrutiny. During Phase I, the DG Competition case team will canvass the views of third parties, mainly competitors and customers. The majority of cases are cleared at the end of this process.

- In the event that serious competition concerns are identified, the DG Competition case team will undertake a four-month investigation (Phase II). This process involves a number of formal steps, including allowing the parties access to the case team’s file and the issuing of a Statement of Objections (SO) that outlines the DG Competition’s principal concerns. The parties may respond to the SO in writing and at an Oral Hearing. Procedure will naturally vary on a case by case basis, and the Commission can terminate proceedings at any time in a Phase II investigation, conditionally or
(rarely) unconditionally. The DG Competition case team also hears the views of third parties, who will also have the opportunity to attend the Oral Hearing. The Member States’ Advisory Committee then provides a non-binding opinion on the DG Competition draft decision. The draft decision may or may not include remedies (see below) which seek to address any remaining competition issues. The final draft decision is then debated and voted on by the 20 Commissioners, who take a collegiate decision on the matter. It is during Phase II cases that lobbying tends to be most intense.

- Although not a separate stage in itself, remedies negotiations are significant due to the fact that they can prevent a transaction going through an onerous Phase II investigation or because they can save a deal. While companies may submit remedies at any time, there tends to be a level of uncertainty as to which remedies should be submitted to the Commission before it has firmed up its case. This is compounded by a tight timeframe and a ‘timing squeeze’ at the end of the process. The viability of a remedies package is tested with the market and with the Member States’ Advisory Committee.

The 2002 reform package

Matters are currently in a state of flux regarding the procedure. In December 2001, the European Commission launched a wholesale review of the EMCR and issued a consultative Green Paper. The Green Paper looked at a number of jurisdictional, substantive and procedural issues and wide consultation resulted in a new draft EMCR presented in December 2002. This is currently wending its way through the legislative process. In conjunction with the revised Regulation, DG Competition undertook a series of further steps, including the publication for consultation of a Draft Notice on Horizontal Mergers to provide greater clarity to the Commission’s approach and the restructuring of DG Competition.

Following the eight high-profile prohibitions under Commissioner Monti’s tenure as Competition Commissioner (compared with ten prohibitions in the preceding nine years) and high-profile withdrawals such as Skandinaviska Enskilda Bank/FöreningsSparbanken and EMI/Time Warner, a chorus of criticism grew over the perceived unchecked nature of DG Competition’s merger policy. Criticism focused on concerns that the MTF was investigator, prosecutor, judge and jury. In its defence, the Commission’s Green Paper set out the view that existing checks and balances were sufficient; however, submissions received on the Green Paper and other commentators provided a detailed critique of why the existing system was unsatisfactory. There was an overwhelming view that the existing system needed to be reformed. As a result of this, the Commission undertook a series of additional reforms, which seek to address concerns. These reforms include:

- The appointment of a Chief Economist, supported by a separate unit, to provide guidance on economics and econometrics in the application of EU competition rules, as well as guidance in individual cases.
- The formalisation of an internal ‘peer review panel’ to test the finding of the DG Competition case team at key stages in Phase II cases.
- The publication of a Draft Best Practice Guidelines on merger process, which should ensure greater access to the Commission’s case file, state of play meetings at key points in the DG competition case and triangular meetings with third parties.
- An increase in staff for the Hearing Officer.
- The earlier involvement of the Member
States Advisory Committee Rapporteur.

- The creation of a specific consumer liaison unit within DG Competition to address consumer concerns.

These proposals are in addition to the existing system of checks and balances, but it is notable that very few aspects of the existing system were revised or improved. This may well be an acceptance by the Commission that the existing system could not be sufficiently improved to guarantee a better quality of decision making. One could also argue, however, that the existing system of consultations with other Commission departments and member states were, in any event, never meant to form an appropriate system of checks and balances (Heim 2003: 32). The new proposals are internal to DG Competition and do not benefit from the protection which enshrining these steps in legislation would provide.

Judicial review

A final word is necessary on judicial review of Commission merger decisions. The European Court of First Instance (CFI) has the jurisdiction to review the acts of the Commission; however, it has long been accepted that the length of time which proceedings take before the CFI makes judicial review practically meaningless from a commercial perspective. In 2002, the Commission suffered three resounding defeats at the hands of the CFI, in the Airtours, Schneider and Tetra appeals. The CFI used severe language in the Airtours appeal (Case T-342/99, 6th June, 2002), concluding that the Commission’s analysis in Airtours/First Choice was ‘vitiated by a series of errors of assessment’ (para. 294) and that the Commission prohibited the transaction without having proved to the requisite legal standard that the merger would have had anti-competitive effects. In the Schneider appeal (Case T-310/01, 22nd October, 2002) the CFI found that the Commission’s analysis in Schneider/Legrand contained ‘errors, omissions and inconsistencies’ which were of undoubted gravity (para. 404). While these decisions have had some calming effect on the Commission’s merger review policy, judicial review can rarely revive a prohibited transaction (Heim 2003 a: 30), so that companies will prefer conditional clearance rather than unconditional prohibition. One can but ask, however, how the existing system of Commission checks and balances allowed such serious errors to occur, especially as the weaknesses in the MTF’s case had been amply highlighted by the parties during the Commission’s investigation. This situation has led one commentator to state that ‘the courts’ unquestioned irrelevance to an individual deal’s outcome would seem to place a premium on lobbying’ (Goldhaber 2002).

COMPANIES’ PUBLIC AFFAIRS NEEDS

From a company’s perspective, the objective of EU public affairs activities in merger proceedings tends to be to ‘persuade decision-makers in the Commission, as well as those who influenced them both at pan-European and member state levels, about the benefits of the merger with reference to arguments that [are] framed more widely than the more technically based submissions in the official notification’ (Hatcher 1999: 269). Even competition lawyers recognise that building a consensus around a case can be key and that ‘the importance of contacting the other [officials] involved to gauge their reactions and address their concerns should not be underestimated — effectively ‘seeding’ [a] case with all the relevant individuals’ (Frederickson and Nourry 2003: 2). Ultimately, of course, companies are seeking clearance on the right terms. If that is not forthcoming, they must seek to ensure that the Commission’s decision is clear and that no precedent is set that could restrict possible consolidation in the future.

In the more controversial cases, companies often look to public affairs advice in order to
develop effective strategies, partly to guide the parties through what can be an arcane process. This is a role recognised by Director General Lowe, who believes that ‘public affairs firms familiar with regulation and the policy issues that affect it can be obviously very helpful to business in deciding how to develop their own strategy’ (Ward 2003: 39). This is especially true, given the large number of interested parties involved and the ever-evolving nature of a complex process.

**Media management**

A further aspect, that cannot be ignored, is the nature of media coverage of the merger review process. There is an unprecedented level of media scrutiny in EU competition cases, with speculation on the outcome of transactions, possible remedies and policy considerations influencing the final decision (Heim 2003b: 49). Interested parties often seek to use media coverage to highlight certain concerns, and the Commission’s spokesperson’s service is also adept at using the press. Indeed, it has become a policy goal in its own right, and the Commission spokesperson should have ‘absolutely no hesitation in defending [the Commission’s] right, often a duty, to publicise [its] provisional intentions when [it needs] to consult others before acting, or where third parties are presenting misleading information’ (Faull 2002: 65). This requires companies to adopt a sophisticated press management strategy, as business has ‘recognised that the press, by its very act of reporting cases, can affect their outcome’ (Burnside 2000: 398). If the press has a significant impact on a case, media strategies lie within the purview of integrated public affairs, as such strategies are intimately linked to the regulatory decision and the perception of the final outcome.

**Reputation management and wider commercial impact**

Over and above achieving the right result, the public affairs discipline also addresses a series of needs that corporations may have. This includes individual companies’ reputations, as well as the reputation of senior management. A poorly handled merger clearance can cost very dear indeed, especially if senior management is perceived as having miscalculated the reaction of the Commission, not effectively planned for potential concerns or, far worse, is seen as having lost control of the process. It is not surprising, therefore, that failed mergers often result in the removal of senior corporate officers.

The fall out of a high-profile merger case, whether an in-depth review or not, is not merely one of reputation. Customers may well be tempted to change suppliers and it is not unknown for competitors to seek to persuade the Commission to extend an investigation in order to entice customers away during a period of such uncertainty.

A further issue is the regulatory procedure on shareholders and stock markets. Companies need to factor in the effect of the merger review on shareholders, especially in hostile takeovers. Cases such as Hewlett Packard’s acquisition of Compaq or Carnival’s acquisition of P&O Princess demonstrated that companies need to pay as much attention to the market’s perception of the merger review as it does to the substantive investigation itself.

Another common factor in controversial cases is the involvement of hedge funds, which can hold massive proportions of shares in the merging parties. The regulatory stages in the merger review process are increasingly seen as points at which to trade the parties’ shares, so that the markets eagerly await certain stages in a case, even at points where there is no finality in the process. This is an issue that a public affairs strategy must factor in, as substantial stock fluctuations can occur which can create a damaging distraction.

**ISSUES CONFRONTED BY PUBLIC AFFAIRS IN EU MERGER REVIEW**

There is a considerable demand for public affairs advice around EU merger clearances.
From a regulatory perspective, the reasons tend mainly to be (i) that the opportunities which the EU merger review process and environment affords need to be maximised, taking into account the multiplicity of actors involved; (ii) that the parties need to apply a level of scrutiny on the decision makers, who are still seen as investigators, prosecutors, judge and jury, in order to ensure that effective checks and balances are applied and (iii) that, where policy and political arguments are being taken into account, these issues need to be effectively addressed.

The open nature of the EU merger review process

Procedures under the EMCR tend to be well known and the formal stages provide for consultation with a range of interested parties. In fact, the European Commission is more open to hearing the views of interested parties compared with many other merger control regimes. This is partly because the European Commission has always had a consultative nature in both policy and regulation, which has filtered across to competition regulation. As a result, parties take advantage of the ‘relatively open and permeable culture’ in their lobbying efforts (Hatcher 1999: 267). In fact, lobbying the Commission is part of ‘the rules of the Brussels game, and competition cases are no different in this respect from, say, a controversial draft directive which the Commissioners must vote to adopt’ (Burnside 2000: 393).

The Commission’s openness to meet interested parties is naturally extended to the many groups involved, ranging from competitors and customers to consumers and trade unions. In certain cases, these groups — mainly competitors — have been said to have a disproportionate influence on DG Competition. For example, Schneider bitterly criticised a competitor, Siemens of Germany, for having lobbied successfully behind the scenes to help to prohibit Schneider/Legrand (Orange, 2001). Equally, it is well documented that in GE/Honeywell, United Technologies of the US and others had unparalleled access to the case team. There are also other cases where the Commission’s formal case took up the submissions of third parties verbatim in the SO.

Much of the recent criticism of the Commission’s practices has therefore been levelled at the Commission defending the interests of competitors rather than consumers. Clearly, lobbying efforts have tended to seek to address this potential threat (or opportunity). Whether or not this criticism is valid, the latest series of reforms aims to ensure that merging parties do not feel that inappropriate access by third parties is affecting their case. Yet, as we shall see, the actual decision making and influencing process remain unclear, so that public affairs strategies, which address the whole informal and formal process, will continue after the reforms (Frederickson and Nourry 2003: 6).

Imperfections within the EU merger review process

As intimated above, the EU merger review decision-making process is somewhat different from the formal review process. In complex cases, where external considerations are influential, parties are often faced with an asymmetric system of persuasion. The case team takes a preliminary view of a transaction, but is assisted by a series of consultations, within the European Commission (DG Competition’s policy Directorate, other relevant Directorates-General, the Commission’s Legal Service and, in Phase II cases, a Hearing Officer and other relevant Commissioners and their staff) and externally (the member state competition authorities). All of these groups provide views, advice or opinions to DG Competition’s hierarchy. As a result, ‘the Decision which Commission ultimately produces has many contributing authors’ (Burnside 2000: 393). There are potentially additional layers, such as a peer review panel and a Chief Economist, all
housed within DG Competition. Therefore, the ‘extremely complex and varied web of relationships’ (Hatcher 1999: 271), has been amplified through the latest series of reforms. The effective involvement of all of these players requires more time than the restrictive timeframe of the EMCR permits (Heim 2003a: 32), which places an onus on the parties to understand the process and be fleet of foot in knowing who to involve.

The problem boils down to one of understanding and transparency. The fact is that the complexity of the Commission’s structure makes the point at which a decision is formed unclear. The extent to which ‘other branches of the institution have asserted themselves and with what impact, remains generally unknown’ (Burnside 2000: 390), notably as regards the exact level of influence which services outside DG Competition actually exert in merger cases. In complex cases, however, the result tends to be ‘a single packaged outcome, camouflaging different points of view’ (Burnside 2000: 390). Yet, where differing views emerge within the Commission, parties may not be aware of them. Consequently, they may not know with whom they should engage and when, in order to address concerns or counter arguments, or indeed to buttress the arguments of those in support of the parties’ position.

This should be an issue of some concern. The International Competition Network (ICN), a worldwide group of competition regulators, has recently issued their six Guiding Principles For Merger Notification and Review, one of which was transparency. The ICN believes that ‘the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review’, but notably in order to allow the parties to know the identity of the decision maker. As Burnside makes clear, it is a principle of natural justice that one should be able to hear those concerns raised within the Commission and be able to respond effectively and in good time (Burnside 2000: 393).

But it is important to remind ourselves that, in certain cases, we are not necessarily talking about the structured process set out within the EMCR, as ‘it is very clear that not all those who contribute to the decision-taking hear the parties’ point of view, within the procedures as set out in the Regulation’ (Burnside 2000: 393). This applies notably to the new checks and balances set up within DG Competition. The role of a public affairs strategy is therefore to enable companies to understand which groups within and outside the Commission have a particular influence in a particular case and, if need be, to devise lobbying strategies to assist companies in making their case forcefully.

When companies question the Commission’s accountability in merger review, the issue in question often turns on a lack of transparency in the decision-making process. In such situations, it is understandable that certain companies appeal to influential groups outside the formal process, as there is a belief that ‘there is nowhere else to go, in order to make the Commission accept the parties’ views’ (Heim 2003b: 52) and that ‘it is only where the parties feel that the system [of checks and balances] is ineffective that they seek to appeal to the wider groups involve in merger review’ (Heim 2003a: 32). The skill in public affairs is to ensure that these needs are addressed, while not alienating DG Competition. What the Commission has sought to achieve through its most recent reforms is to provide potential detractors with channels of criticism, by setting up a system to deal internally with any shortcomings; a strategy which most crisis communications experts would recognise.

The EU merger review process is only quasi-legal
Hatcher correctly highlights the need to appreciate that merger decisions ‘take account of the wider Community agenda, of which competition and the fulfilment of other objectives form a part’ (Hatcher 1999:
The Community agenda is partly dictated by the overarching obligation on the European Commission to actively promote the Single Market. Underneath that obligation lie distinct policy areas — industrial or other.

The obligation on the European Commission to promote the Single Market brings a level of industrial policy into competition considerations. For example, the European Commission’s review of the ongoing restructuring of the energy and utilities sector is affected by the need to liberalise markets, the need to ensure security of supply and for gate keepers to grant non-discriminatory access. In the information society sector, the need for open access and inter-operability also influences merger assessment. In the Telia/Telenor merger, for example (which was withdrawn shortly after regulatory approval), a condition of clearance was to unbundle the local loop.

DG Competition has also displayed a level of political sensitivity to other Commissioners’ portfolios and has sought to reconcile competition policy with core European priorities. For example, DG Competition will take due regard of policy imperatives in areas such as culture (e.g., regarding book pricing) and environment (e.g., renewable energy) (Quatremer, 2002). Other Commissioners may also bring the specificity of their portfolios to bear on competition regulation. For example, in the media sector, the European Culture Commissioner, Vivian Reding, has expressly stated that media plurality and related freedom of expression requirements would have to be safeguarded in merger cases. The net effect is that policy considerations, the natural home of public affairs, do affect the way the regulator assesses consolidation and has a bearing on the outcome of transactions in certain sectors.

A further area where companies can be faced with policy orientations which affect their case, is where DG Competition identifies an opportunity to expand competition policy through precedent. This is what Mueller et al. term ‘aggressive enforcement’, where DG Competition ‘appears more aggressive in developing new theories or expanding the application of old ones than it has been in the past’ (2002: 78). There are a series of cases one can identify where DG Competition has sought to push the boundaries of competition theory. The Airtours/First Choice decision is a case in point, where the Commission extended the theory of collective dominance, or tacit oligopolistic collusion. In this case, the classic indicators for a finding of collective dominance were set aside, enabling the Commission to apply the theory more widely and with little internal control in a series of subsequent cases. Four years later, however, the CFI struck down this precedent, and its judgment sets new and restrictive guidelines to the application of collective dominance.

In cases where policy and political issues weigh on the minds of the regulator or their advisers, the case-making effort should be ‘properly attuned to the full range of requirements of the regulatory process’ (Hatcher 1999: 275). It is therefore clear that companies need to be aware of all the factors that the regulator and their advisers take into account when assessing a case (Heim, 2001: 12) and that they factor these issues into the legal and economic arguments, as well as tailor formal submissions to particular policy arguments.

The impact of politics

The desire by companies involved in a merger to seek as much support as possible is understandable and ‘as an economy grows, and the stakes become ever larger, firms are naturally driven to seek protection and help from their governments’ (Kolasky 2002). Certainly, Henri Lachmann, the Chief Executive Officer (CEO) of Schneider, who saw his company’s merger with Legrand spectacularly withdrawn in the face of a prohibition, believed that it should be quite
normal for the French authorities to be concerned about the fate of two large French companies, in a deal of national importance. Lachmann also noted that it was the role of politicians to be concerned with the procedures and methods used by DG Competition (Orange 2001).

How far companies can generate political support for their case is a sensitive issue. Mueller et al. (2002) rightly warn against the ‘magic bullet’ of political intervention. Parties should not seek to rely on their political connections to get a deal cleared, as the EC merger review process is not a political process that can be won by political lobbying alone (Mueller et al. 2002: 81). Aggressive lobbying at the EU level is counterproductive ‘where senior policy officials are more sensitive to accusations of biased decisions’ (Dylla and Knudsen 2002: 17) and there is ample evidence that lobbying in the public eye will fail.

There has been a series of recent cases in which senior politicians have sought to publicly exert pressure on the Commission, such as the interventions by the Swedish Prime Minister in Volvo/Scania and the French President and Prime Minister interventions in Schneider/Legrand. The best known example, however, is General Electric/Honeywell, where ‘[GE’s lobbying] strategy is widely considered its biggest mistake. It publicly barraged Monti and other top officials with visits and phone calls from dignitaries, like White House chief of staff Andrew Card and CEO Welch himself, to the point where the regulators might have felt obliged to prove their independence’ (Goldhaber 2002). The intensity of political lobbying in this case forced Commissioner Monti to issue a press release rejecting the ‘politicisation of the case’, in which he decried ‘attempts to misinform the public and to trigger political intervention’ (Commission Press Release IP/01/855, 18th June, 2001). In a high-profile case such as General Electric/Honeywell, the effective handling of the public affairs strategies can make or break a deal.

The consensus is that political pressure ‘has never worked when it has been in the public eye. Applying political pressure will likely cause the Commission to conclude that the parties are seeking to undermine its authority — and thereby may poison the essential final stage of the procedure’ (Mueller et al. 2002: 81). Indeed, one can say that publicity affects the value of political intervention; the more public it is, the less legitimate it tends to appear (Heim 2003b: 52).

THE PERCEPTION OF LOBBYING
This paper has looked at the context within which the discipline of public affairs operates, and some of the issues which public affairs seeks to address. One of the questions that drive at the core of public affairs, however, is the appropriateness and legitimacy of this discipline. At the heart of this question lies the concern that lobbying (largely seen by regulators as synonymous with public affairs) can undermine the independence of the regulator and the objectivity of the process. If this were the case, there would be a risk of creating an uneven system which favours companies that can call on political support and would imply a worrying lack of transparency.

Inevitability of political interest in merger review
In 2002, William Kolasky, at the time the Deputy Assistant Attorney General at the US Department of Justice’s Antitrust Division, said that ‘the best thing that both new and old antitrust enforcement regimes can do to prevent antitrust from becoming politicized is to make sure our decisions are soundly grounded in economic theory and fully supported by the empirical and factual evidence’. The objective assessment of transactions according to clear law and policy would be the correct approach in an ideal world; however, the reality is that mergers do not take place in a vacuum, and ‘it is a fact of life that mergers
stimulate political interest’ (Burnside 2000: 392). Clearly, it is necessary to avoid a high-handed political approach to politics, but it is wrong to assume that mergers do not involve extraneous policies — industrial or other. It is equally naïve to suppose that, since no political override is foreseen in the legislation, no political input occurs’ (Burnside 2000: 392). Yet, if Burnside is correct, can it be claimed that political intervention, in the EU context, is entirely out of place in an anti-trust case and has no impact on the Commission whatsoever, or even that political considerations play no role in the examination of mergers (Commission Press Release IP/01/855, 18th June, 2001)? It would seem that this is not the case and that some Commission decisions ‘suggest that concerned firms or member states had a strong hand in informal negotiations, and that the Commission has been keener to clear deals than its criteria for analysis indicate’ (Zweifel 2003: 558). Indeed, there is sufficient evidence of effective politicking around cases to argue that political intervention and related considerations do play a role in the final outcome of certain cases.

Due to the nature of the decision-making process, the influence of politics (as opposed to policies) is difficult to gauge as ‘any political override takes place behind the curtain, rather than separately and publicly’ (Burnside 2000: 392). The concern must be that if politics do play a role in merger control decisions, there should an acceptance that such factors can play a role and that more transparency in the informal process is necessary where political factors are taken into account.

**Lobbying versus public affairs**

Kolasky, in setting out principles for effective anti-trust enforcement, stated that ‘[M]ore mature [anti-trust] agencies are increasingly confronted by lobbyists and public relations experts seeking to influence decisions, not through arguments on the competitive merits, but through the media and otherwise’ (Kolasky 2002). The first part of the statement is probably true — but the latter provides a useful insight into a regulator’s view of submissions outside the formal parameters of the process. Relevance or veracity of the argument is ignored, but rather the focus is on lobbying or media campaigns being an inappropriate delivery method. This distinction cannot be correct with regard to lobbying. Advocacy comes in many forms, and whether it is before a court, a regulator or a policy maker, it should still consist in producing cogent arguments based on sound evidence. So long as regulators are swayed by issues going beyond the forensic assessment of fact and law, and so long as the formal merger review process is seen to have structural imperfections, companies will seek to advocate their case in a manner which strikes a chord with either the regulator or those with an influence in the process.

Is there a difference between public affairs and lobbying, or is this one of perception? In the context of a legal process, such as merger review, one can make the following distinctions:

- Lobbying can be understood as enacting public affairs strategies, as public affairs is clearly a broader discipline. Lobbying specifically involves making arguments directly to relevant audiences.
- Lobbying tends to supplement legal arguments, by addressing ancillary issues of importance to the main audience. The nature of the arguments will depend largely on the interest and authority of the audience in question. As we have seen in the EU merger review process, this is often unclear. Lobbying can also support legal arguments by ensuring that those involved are familiar with the nuances of a particular case, and that the process is effectively followed.
- The target audiences can be part of the legal process in the assessment of a case, or
part of the consultation process. Target audiences may also be wholly outside of the process, but with influential audiences with an impact on the overall process.

The appropriateness of public affairs in merger cases

This is not to say that lobbying is appropriate in all cases. In certain situations, lobbying can be seen as an attempt to circumvent the legal procedures by putting inappropriate pressure on the decision makers. These situations tend to occur where the lobbying is undertaken by the companies themselves, but by other advocates on their behalf (mainly national politicians or governments). Such lobbying is one step removed from the process and these third parties may make arguments that jar with the sensitivities of the regulator and tend to be seen as irrelevant. The high-level or high-profile nature of much of this type of lobbying makes the approach inappropriate.

Public affairs should never be applied in order to affect the proper functioning of the process. In those cases where companies correctly identify a need, lobbying must nonetheless be sensitively undertaken. Officials who have a formal role in merger review (such as the Hearing Officer) sometimes feel that the willingness of senior regulators to meet with interested parties, outside of the formal stages, affects their own function and therefore the integrity of the system (Zweifel 2003: 558). What public affairs pressure is intended to achieve (whether through lobbying or other techniques), is to play the rules of the game, no matter how informal these may be, and to impose some intellectual rigour on a regulator, where companies feel that the existing checks and balances do not appear to be functioning effectively.

CONCLUSION

The existence of policy and political pressures in merger review is a fact of life, and the most effective means of addressing these pressures is for companies to apply the appropriate discipline. In fact, the benefits of public affairs activities (whether assisting companies in the substantive case or in the wider commercial ramifications) is demonstrated by market forces. It is therefore no coincidence that the majority of law firms specialising in EU merger control have in-built public affairs capabilities to deal with such issues.

A fitting conclusion, which highlights the commercial benefits of public affairs, is given by Hatcher, who stated that ‘in addition to the deployment of powerful legal and economic arguments, the support given by public affairs activity to the presentation of a complex case helped PricewaterhouseCooopers gain a licence to operate in Europe’ (Hatcher 1999: 275). In the professional services sector, which displayed oligopolistic tendencies, this was the last major consolidation allowed by the regulator and resulted in the withdrawal of the proposed KPMG/Ernst & Young merger in December 1998.

The effect of public affairs in EU merger control policy has, arguably, been considerable and beneficial. Public affairs activities have assisted in causing the Commission to reassess the checks and balances in the merger review process (partly to reduce the need for lobbying which drives at the Commission’s authority and scope of action). Its most positive developments will be to reinforce the analytical capabilities of the regulator, and to ensure that the right decisions are taken.

NOTES


2. For practical steps in the merger clearance

3. Within the EU merger review process, there are naturally a series of additional steps which can affect the progress of a case and be applied, depending on the circumstances. These include referrals of whole or part of a case back to national competition authorities, declarations of incompleteness where firms have to resubmit their filing and ‘stop the clock’ provisions to enable the Commission to gather further evidence and extensions of timetable.

4. Remedies are crucial to a successful merger review policy, and merging firms may also find that the restructuring of companies is affected by the sale of assets to alleviate competition concerns. The Commission continues to prefer structural divestments as the best means to maintain a competitive market structure, rather than prohibitions. This is notably the case where a market structure requires divestments to an up-front buyer (ie one approved in advance by the regulator) with the aim of rebalancing a market characterised by oligopolistic tendencies.


7. See the DG Competition Draft Best Practices on the conduct of EC merger control proceedings, Brussels, 19/12/2002 which can be found at http://europa.eu.int/comm/competition/mergers/others/best_practices_public_cons.pdf.

8. In fact, even a mature anti-trust system like that of the United States is not immune to claims of lobbying or political bias in merger cases. Lobbying is a standard activity before the US anti-trust agencies, the Department of Justice and Federal Trade Commission; however, both Republican and Democratic administrations have shown that they are not averse to being in favour of big business in transactions of major economic importance (Dylla and Knudsen, 2002: 17).


**References**


**DG Competition Documents**


**Commission Press Releases**


