

[Introduction]

ELEANOR FOX: Hello. I am Eleanor Fox. I am a professor at New York University School of Law. I am an NGA to the International Competition Network and it is my pleasure to introduce this module on incorporating public interest concerns into the competition law.

Many nations allow or even require the competition authority to consider public interests other than competition. In a few countries, the authorities may prohibit or condition transactions in the public interest even if the transactions are not anti-competitive. The most common usage of public interest values is in the merger law. The public interest clauses appear as well in the law of abuse of dominance and restrictive agreements.

This ITOD module concerns how to think about and analyze the public interest component of competition law when public interest clauses are already in the law.

I give a brief overview of where the causes most commonly appear, what they commonly provide, and who decides what weight they should be given. Then, our stellar team will explain how those causes are implemented in the speaker's jurisdictions and how antitrust lawyers can understand the terrain and apply the principles.

This module is not about whether nations should choose to incorporate public interest values in their competition law. The legislatures of more than a critical mass of countries have already done so. The module is about how those provisions are applied and how to engage with the problems inherent in their application.

Many nations' competition laws contain no public interest factors. The analysis is then solely a market analysis. Other nations and the European Union offer a minimal availability of public interest. In the EU merger law, for example, a member state may prioritize prudential, media concentration, and national security concerns. A number of other countries, and

especially developing countries, give a much more prominent place to public interest. Their legislation often identifies the public interests that can be considered. Employment and helping small and middle-sized enterprises are usually prime among the public interests.

In societies that have suffered grievous exclusions in the past, such as in South Africa, equitable opportunity to participate in the economy and greater spread of ownership to historically disadvantaged people are also of prime concern.

Statutes vary as to how and when the public interests are considered. By one module, the decision-making body performs the competition analysis first and weighs the public interest factors only after the competition analysis is complete. By a less transparent module, competition and public interest factors are lumped together. Also, laws vary as to whether and how the evidence of public interest is adduced. Very few pro-competitive transactions have been disallowed because of the public interest and very few anti-competitive transactions have been permitted in the public interest.

But in the case of merger reviews, mergers are commonly cleared with public interest conditions, such as disallowing retrenchment of employees for two or even three years. Some authorities, led by the South African Competition Commission, have adopted guidelines to inform the parties how the public interest factors will be taken into account.

Drawing from various ICN work product, we can conclude that transparency is an important element of due process and rule of law. Thus, the models should be as explicit as possible as to what public interest will be taken into account and at what stage they will be weighed and how much.

Now, we turn to two jurisdictions that have been leaders in the transparent application of public interest factors, South Africa, whose story will be presented by Competition

Commissioner Tembikosi Bonakele, and Kenya, whose story will be presented by Director General of the Competition Authority, Francis Wang'ombe Kariuki. After Tembi and Francis present lessons from their countries, John Fingleton, past Chair of the Irish Competition Authority and, later, of the U.K. Office of Fair Trading and former Chair of the ICN Steering Group, will reflect on how merging companies and their advisors might anticipate and take account of the public interest dimensions.

[The South African Experience]

TEMBIKOSI BONAKELE: Public interest has played a crucial role in competition policy in South Africa since at least 1999 when the new Competition Act was promulgated and this has to do with the history of competition policy and indeed the history of South Africa itself.

South Africa became a democracy after years of apartheid, apartheid played a role of excluding black people, women, and other categories from participating in the economy and so competition law, and policy was really aimed at transforming society as part of a package of legislation introduced after democracy. So it was expected that competition policy will enable black people to participate in the economy, will enable small and medium enterprises to play a more meaningful role in the economy, and also to recognize the voice of other previously marginalized groups, such as the workers.

And so our evolution of competition law is somewhat unique in this regard and some have even argued that it would have been difficult for competition policy in South Africa to be even considered and adopted without addressing some of these equity considerations.

And the law itself is a product of negotiations amongst social partners, including government; labor, as well as business and public interest provisions apply in the area of mergers, where we consider mergers, we consider classic SLC, as well as the impact of the

merger on public interest. We also consider public interest in exemptions. South Africa has provisions for exemptions from cartel behavior and some of these exemptions can be used to also facilitate public interest. But I will speak mainly in the area of mergers because this is the area where it has been mostly used.

So the provisions insofar as mergers are concerned, besides the classic competition considerations which the Competition Commission would assess in the merger, one would also consider public interest issues. And those are listed in the Act. So there is a confined list of public interests, and these are the impact of the merger on an industrial sector or region, the ability of small and medium enterprises, or historically disadvantaged firms to be competitive, the ability of national industries to become competitive.

So one has to also consider who then can participate in the South African assessment of mergers given all of these wider considerations to be made. The first category is trade unions. So South Africa has a compulsory merger notification requirement and notification must also include trade unions who organize at the fence that are part of a merger. So they must be notified that there is a merger transaction that is taking place and they must appoint a representative to participate in the merger proceedings if they so wish.

Government also has to be notified through the Minister of Trade and Industry who also may elect to either not participate or if he elects to participate, he may notify the competition authorities.

It is very, very important to underline that in South Africa, unlike in many countries that have public interest provisions, government participate as one of the stakeholders before the Competition Commission, the tribunal, and the courts. They make submissions that are assessed as evidence to be considered. So government has no power of veto by reason of public interest.

They can bring these public interests that are listed in the Act before the competition authorities and they will be assessed as evidence and be treated in the same way as all other evidence is treated. So we don't have a separate process of government determination on public interest considerations.

Indeed, this has led to a lot more transparency given the judicial oversight of the process. It has also led to precedent in cases where there has been lack of clarity about what the provisions precisely cover.

We will now talk about the legal structure. In other words, how does one go about assessing public interest in mergers in South Africa? So the first would be to consider whether a merger leads to substantial lessening of competition. This assessment would be done independent of the public interest assessment.

Once that assessment has been done, one would now, regardless of the answer you find -- in other words, whether the merger leads to substantial lessening of competition or not, you will then proceed to assess the impact of the merger on public interest. This will also be an independent assessment that looks at what would be the impact of the merger on employment, on small and medium enterprises, on historically disadvantaged firms or ability of local industries to be globally competitive.

Once a determination has been done on both these levels of assessment, if there is an adverse finding on any of the two, one would have to weigh the two. So in other words, if there is a merger that leads to substantial lessening of competition, but there are public interest benefits that will arise out of a merger, one will have to weigh the adverse effects of a merger against the public interest benefits of the merger.

Similarly, if a merger leads to negative public interest, but is pro-competitive, one would

have to weigh the public interest disadvantages or adverse effects emanating from the merger against the pro-competitive effects of a merger and arrive at a conclusion. In other words, in South Africa, an anti-competitive merger can still be justified on public interest grounds.

Equally, a merger that is not anti-competitive can still be condemned on public interest grounds.

In practice, however, as you will see as we talk about cases, most of the public interest consents arising out of a merger have been addressed through remedies, or what we call in South Africa, conditions.

How you assess public interest grounds themselves is aided by the guidelines that have been published by the Competition Commission and I am just going to talk about how that process is undertaken.

So we will consider the employment effects of a merger, but this step-by-step process will equally apply in any of those public interest grounds.

Step one is to determine the likely effect on employment. Step number two is specificity. In other words, are the employment issues emanating from the merger itself? Step number three is substantiality. This is where you consider how big is the effect, how many employees who are going to be affected and how many would be able to find jobs elsewhere. Step number four is justification. In other words, do the merging parties have justification for these jobs? The justification could include things like eliminating duplication. And step five are the remedies.

So once all of this has been done, the merging parties are given an opportunity to propose a set of remedies that will address the concerns arising from public interest.

Now, we are going to go through the consideration of some cases that have come through the South African competition authorities. Early in the days of the Competition Act, one of the cases that gave rise to public interest, in particular, employment issues, was a merger of two

mining companies through a hostile takeover bid, and that was Harmony and Gold Fields. In this case, for the first time, an expert was called to assess the impact of a mining merger on workers and the expert testimony included an assessment of what had happened in previous mining mergers as well as labor economics. According to the expert evidence, the merger would have led to retrenchment or dismissal of about 1,500 miners.

And the merging parties, the acquirer, in particular, made an undertaking that there would be no merger-specific retrenchments. And that set a tone for a lot of cases that were to happen later, and until now, this is one of the common features of remedies when the merger would lead to retrenchments or dismissal of workers.

The second case to come before the authorities was a case referred to as Momentum. Momentum established a principle that the merging parties had an obligation to assess the impact of a merger on employment in South Africa. And if they fail to do so, they faced the possibility of an adverse inference that could be made by the competition authorities. And so these two cases established that an expert can be called to assess public interest issues and, secondly, that merging parties have an obligation to make an assessment and a submission on public interest issues.

The other interesting case has been the entry of Walmart in South Africa. This case didn't give rise to competition issues as Walmart didn't have presence in South Africa, but there were significant public interest concerns. From labor, there was an argument that the merging parties had retrenched people in preparation for the merger, in other words, had reduced the workforce in order to make itself more attractive to the acquirer.

And, secondly, there was a concern that Walmart, given its global presence, would be able to source largely from international suppliers and thereby displace local suppliers.

The competition authorities and the courts in South Africa confirmed that the dismissal of workers before the merger was merger-specific. In other words, it was in preparation for the merger and was, therefore, as a result of the merger. And so there was an order that those workers had to be reinstated.

The other element involving local suppliers was resolved through a remedy that involved the merging parties creating a fund that would support local suppliers, their capacity to supply the merging firms. So in other words, suppliers who potentially could have been displaced were assisted in order to be more competitive so that they could supply and new suppliers that previously didn't exist or didn't supply the merging parties were to be created in order to get into the supply platform of Walmart.

A case that was also determined on similar grounds involved InBev acquiring SAB Miller. Now, InBev acquired SAB Miller, which was a very dominant firm in beer distribution, manufacturing and distribution in South Africa. And it also was a producer of primary imports such as barley and hops, so they were vertically integrated. They also produced crowns which are required for beer bottling. And the condition was that they must create a fund to assist entry of emerging farmers, especially black farmers, who would supply hops and barley not just to the merging parties themselves, but also to independent beer manufacturers so that you do not have the supply chain controlled by a dominant firm.

And similarly, there was an undertaking that InBev will make crowns available to competitors. There was also a commitment that fridge space would be made available to competitor products because SAB Miller had a lot of fridges that they supplied for free to taverns and they could use these to exclude competitors. And all of these commitments were made with the agreement of the merging parties in order to facilitate entry, particularly entry of small

brewers, brewers of craft beer, and so on.

So in conclusion, in South Africa, we are very happy that public interests have worked and have worked very well. One of the reasons why they have worked well is that the law is very clear. In other words, if a process is quite transparent, whether it is trade unions or government that is intervening, they will intervene in terms of very clear rules.

The second reason why it's been successful is because there has been judicial oversight. Cases have gone before the competition tribunal and before the competition appeal court and, to some extent, these have provided some guidance.

And, thirdly, the Competition Commission has promulgated guidelines that are aimed at assisting parties to comply with public interest assessments.

[The Kenyan Experience]

FRANCIS W. KARIUKI: In the assessment of mergers and acquisitions, the Competition Authority of Kenya recognizes that competition law requires the application of both competition and public interest tests. In doing so, a balanced approach is used while ensuring that the principle of merger specificity is maintained. Although the counterfactual concept is used in these assessment attempts, future changes to markets, such as entry and exit, are used to constitute the relevant counterfactual.

In furtherance to the provisions of the competition law and in relation to public interest considerations, the authority has developed guidelines to not only chaperone the analysis of public interest, but also create predictability and consistency on how such assessment is done. It is worth noting that the public interest test is conducted regardless of the competition test, but it's conducted after the latter.

Additionally, the authority is alerted to the fact that there are instances where a merger

may implicate notable public interest with different outcomes, both positive and negative. In such instances, each public interest ground will be assessed on its own accord and then a balanced approach is employed where the various outcomes contradict each other.

The public interest test focuses on the extent to which a merger will affect, one, the ability of SMEs to gain access or to be competitive in any market; two, ability of national industries to compete in international markets; and a particular industrial sector and the extent to which a proposed merger would be likely to affect employment.

Generally, in any case involving a public interest assessment, the authority will establish where there is a prima facie case adducing evidence of a relative negative impact to any of the public interest factor or factors set out under the Act. Once this has been established, the evidentiary burden shifts to the notifying parties to justify any negative impacts to the public interest factor under consideration. Any arguments on justifications must show a rational link to the concerns raised and must be substantiated by either documentary or oral evidence. The authority will then conduct a net balancing assessment to reach a conclusion.

The ability of SMEs to gain access or to be competitive in any market will involve a merger where they promote or hamper small businesses from being either effective competitors or indirectly as customer or consumer or suppliers of the parties. The employment assessment is implying to us the track record of the merging parties in relationship to labor-related issues. Even though certain negative impact on employment may be connected to an efficiency, this does not deter the parties from justifying, for any reason, that is public in nature to preserving jobs as a result of the merger.

In regard to regional competitiveness, the authority will weigh any losses to potential competition. Again, there is interest directed at maintaining the presence of the market in the

region. In assessing public interest issues, the authority relies on documented information submitted by the parties, the authorities running investigations into the merger and the views of stakeholders in the relevant markets, including regulators and competitors.

Where concerns arise, the authority will require the parties to provide remedies, which can effectively address the concerns. The remedies will be assessed for comprehensive impact, acceptableness, practicability, and appropriate duration and timing.

If, after the discussions, with the parties the authority is satisfied that they are appropriate, then the same shall be made into conditions on which the merger is approved.

[Advice for Firms]

JOHN FINGLETON: Each competition law is formed within the specific economic and institutional context of the country, its country and its legal system. The inclusion of the public interest consideration can be a legitimate and important part of a country's merger control regime. Most developed countries have public interest considerations, usually on foreign ownership, but also in sensitive areas like national security, defense and media plurality. And, indeed, these are growing.

The role of public interest considerations can vary with the specific preferences of the Government to enact the legislation. And both explicit and less well defined public interest considerations are often embedded alongside competitive assessment based on the consumer welfare standard. This variation can cause difficulties for businesses and their advisors. Companies who are familiar with reviews of where their competition is reduced to the detriment of consumers may not have encountered public interest tests, or if they have, may not be familiar with the wider variation of them that arises in developing and newly-industrializing countries with different economic priorities.

In countries where final decisions on mergers are made by politicians, broader political considerations often enter decisions implicitly. If the criteria on which such decisions are made are less clear and transparent than those for competition decisions, they can be seen externally as protections or as a form of capture by domestic rent seekers.

Where there is a requirement to public reasoned decisions, it can be easier to hold decision-makers to account on the stated public interest criteria and businesses are more likely to engage in the substance of the public interest concern. In some areas, such as national security, this may be more challenging.

Many businesses are familiar with public interest considerations in other areas of government activity, from regulation to taxation. And as such, they are well equipped to deal with such considerations. If they have well developed relationships with governments and strong lobbying functions, they may find it easier to address issues when the decision-maker is a politician than when it's an independent agency.

While it can be tempting for a competition expert to see public interest considerations as a loophole for political lobbying, this should not be assumed to be the case. But it's also important that both agencies and political decision-makers make it clear that evidence-based engagement with the substantive concerns are most likely to achieve success in almost all situations. And the best way to achieve this is to ensure that decisions are consistent with the substantive public interest test and based on evidence. Because public interest tests and the way they are implemented may vary across jurisdictions, businesses usually need trusted expert advice on the ground to understand the subtleties of the agency's likely concerns and the process of resolving them.

Businesses should be careful of advice that goes over the head of the relevant decision-

maker and lobby directly. This can backfire. How politicians deal with this type of behavior is important. Publicly articulating clearly the negative precedent effect that bad intervention could have may help in reducing inappropriate lobbying over time.

A no regret action for companies is to have a clear and accessible narrative for how the merger will benefit affected stakeholders in that country. This is true for competition decisions, but it is even more important for the public interest where the scope for considering the views of and effect on third-party stakeholders is far wider than the frame of whether competition and consumers are affected. Agencies should encourage this as it will help companies focus on proposing transactions that are truly value-creating and help screen out ones that are unlikely, at the end of the assessment process, to get approval.

One challenge that can arise with this is the possible conflict between competition, for example, synergies from a plant closure, and public interest, for example, the effect on jobs. Mergers can create winners and losers and the more a company can do to address the concerns of those who may lose out, the better than likely outcome. Failure by a company to bring stakeholders inside may result in politicians attempting to do so in a less-satisfactory manner. And even competition agencies may find that it's difficult to distinguish which pleadings by third parties are aligned with the consumer interest.

The proposed 2014 merger between Pfizer and AstraZeneca in the U.K. is an example of a merger that failed in part due to lack of positive narrative, despite the U.K. not having an explicit public interest test that covered the pharmaceutical sector. Pharmaceutical companies can be dependent on broader goodwill for the granting of licenses, grants and contracts. While the bid from Pfizer was rejected for -- by AstraZeneca for commercial reasons, the very low level of domestic public support was likely an element in that assessment.

In another case in the U.K. involving Melrose buying GKN, the government threatened a public interest intervention on the grounds of national security. In order to avoid a case being opened, Melrose offered many concessions that did not relate either to competition or national security, but did relate to wider stakeholder concerns. The government subsequently conceded the merging parties did not actually supply products that could create a national security concern, but the remedies had still been offered.

Businesses, and especially in merger situations, can exhibit optimism bias. This is often what gives them the confidence to make acquisitions. Where possible, agencies should be clear early on with firms about the risks that may arise from a merger review and the work that firms have to do to resolve such concerns. But the other side of that coin can be that business can be reluctant to engage with those risks early in the process out of fear that it may be used by internal detractors to scupper the deal. If difficult and awkward questions are not asked early on, they can become extremely damaging later in the process.

In conclusion, public interest tests in mergers are increasingly prevalent. The advice to agencies dealing with firms would be recommend the retention of good local expert advice. Number two, request early on a clear and consistent evidence-based narrative for why the merger benefits competition and the public interest and try to be as transparent as possible about the role of public interest considerations in the process and the weight of any such considerations in final decisions.

With these steps, public interest tests should pose less of an obstacle for genuine value-creating mergers.

Thank you.

[Conclusion]

ELEANOR FOX: Hi, this is Eleanor Fox with a few concluding remarks.

Thank you, Tembi, for those very important remarks – the history of transformation in South Africa and why it has been so vital for South Africa to include public interest in its competition law. And thank you for taking us through the elements of competition law that involve public interest, including employment, small and medium-sized business, and competitiveness of the economy, and also for the reference to the guidelines, which explain exactly how the public interests are applied.

And thank you, Francis, for taking us through the public interest in the competition law in Kenya and explaining how it may involve employees, workers, small and medium-sized business, and competitiveness, and for taking us through your guidelines and showing parties to transactions how they may justify their merger in view of the public interests.

And thank you, John, for reminding us of the very important elements of transparency, that agencies should be identifying what exactly are the public interests and what weight they have. And thank you also for the important insight that just because a country, a nation has public interest in its competition laws, it's not a loophole for lobbying. It's incumbent on the parties to the transaction to tell the narrative why their transaction is good for all stakeholders and takes account of the specific public interests.

For those of you particularly interested in developing countries, we refer you also to our module on developing countries, which shows how integral many of the public interests are. But we also must remind you that public interests are in most competition laws in some ways, and in addition, there may be more ways added in the future. For example, environmental sustainability is on the agendas of a number of competition agencies.

So thank you all, thank you presenters for a very good module.