INTERNATIONAL COMPETITON NETWORK
Merger Working Group
Naples, 28-29 September 2002

The Role of Public Interest in Merger Evaluation

David Lewis
Chairperson
Competition Tribunal

Those of you who have had an opportunity to read the 'exemplar' country studies that were prepared as background to the work of the analytical frameworks paper will have noticed that the South African Competition Act has built an unusually explicit public interest test into its merger evaluation criteria. The upshot is that I am often asked to speak on occasions like this about our treatment of public interest, of 'non-competition' issues. The implicit assumption is that we are unusual, even unique in our requirement to consider public interest – I'll show that we're not – or that we have developed some sort of expertise in finding the elusive balance between public interest and competition. While we have, indeed, developed some useful rules of thumb for striking this balance, I cannot pretend that these will ever eliminate an element of pure judgment that inevitably constitutes part of all public interest assessments.

I've come to treat our task in dealing with public interest in much the same way that I treat my mad uncle, in much the same way that every family treats its mad uncle – with wary respect. We may try and ignore him; we may even deny his existence. But he somehow manages to turn up, invited or not, at every major family event. For the most part he turns out be quite an amiable, agreeable old chap, but he does have the potential to behave in a very unpredictable manner, one that causes severe embarrassment to a smug, complacent family, often threatening to tear it apart and reduce its reputation and standing in the society at large. He is nevertheless often respected by the younger members of the family, who feel that he has insights about the real world lacking in the more staid leaders of the family.

Few, if any, regimes specify, let alone employ, a pure public interest test to evaluate mergers – even those competition statutes that explicitly require a consideration of public interest generally also specify that the competition impact be determined by reference to one or other of the dominant paradigms, these being the substantial lessening of competition test or the dominance test. If this conference were polled we would almost certainly find an overwhelming majority in favour of excluding public interest considerations from the process of merger evaluation. We would indeed find that most authorities – especially those from the developed countries – would deny that public interest considerations affect the outcome of their merger reviews. However on closer interrogation we are likely to find that even those who deny a role for public interest considerations may be prepared to admit that considerations like efficiency and international competitiveness and even employment and regional impact influence their merger evaluation. And they have the strangest ways of forcing themselves on to the agenda. I am struck by the apparent furor in the United States surrounding Nestle's attempt to purchase Hershey and the fact that a state attorney general was able to persuade a high court judge to indict, at least temporarily, the process, pleading that the impact of the transaction on the community needed to be considered. I realize that there are special circumstances surrounding Hershey but, where public interest is concerned, the circumstances are always special. I feel pretty certain that most competition officials would not support this intervention. I have no idea how this current legal battle will interact with the ultimate competition evaluation. However, in the face of this level of expressed public interest, I do not envy the anti-trust official her exercise of prosecutorial discretion especially if the competition evaluation turns out to be a marginal call. In short, the mad old uncle that is public interest will come knocking on the door and when he does there is

nowhere to hide. We have to find some way of living with him – no public agency that relies on public support can escape the influence of a strongly held public interest.

I readily concede that public interest considerations weigh more heavily in developing countries than they do in developed countries. The reasons for this are instructive: first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries. While credibility will certainly not be achieved by bending to the whim of every interest group, nor will it be secured by a competition authority that refuses to take direct account of major national economic problems and aspirations. Hence, in a country like South Africa while we in the competition authorities may well understand the pitfalls in balancing competition and public interest, we equally recognise that a competition statute that simply ignored the impact of its decisions on employment or on securing a greater spread of black ownership, would consign the act and the authorities to the scrap heap. It occurs to me that in a country like the US the unusual standing enjoyed by anti-trust derives not only from the integrity and technical competence of the agencies and officials but also from the strongly held perception that anti-trust protects the weak from the powerful. This view may not find much resonance in current, orthodox anti-trust thinking but the fact is that it secures anti-trust's place in the mind of the nation and the legislators and it enables the authorities to take unpopular decisions. Developing country agencies have a long way to go in achieving this credibility and it will not be achieved by standing aloof from those issues that most engage popular sentiment.

The paper poses the two correct questions that have to be asked in any examination of the role of public interest considerations in merger evaluation. These are:

- Should non-competition 'public interest' objectives have weight in merger decisions? Or can those objectives be pursued better by other policy instruments?

- If non-competition objectives are given weight in merger analysis, who is to judge them?

I have already partly answered the former. If the question were to be posed in a university classroom the answer would be a resounding 'no'. However, in the real world I think that we have little choice but to grapple with public interest considerations. Public interest considerations are embodied in most competition regimes insofar as they provide for carve outs for a range of sectors – the media, banking, defense being the most common carve outs. In these circumstances the competition authority would generally retain jurisdiction over the competition elements of the merger although a negative decision by the sector regulator on grounds of say promoting media diversity or financial stability or national ownership of strategic assets would trump a positive outcome on the competition evaluation; and conversely a negative outcome on the competition evaluation would trump a positive outcome from the sector regulator on the public interest evaluation. The respective regulators utilize wholly distinct criteria – the competition regulator utilizes competition criteria while the sector regulator evaluates the impact on public interest. In order to obtain approval under these circumstances both hurdles have to be crossed. There are however instances where jurisdiction is removed from the competition authorities. For example, in South Africa and, it appears, Canada, the Minister of Finance may assert sole jurisdiction over a banking merger. This seems to be driven by the largely unreasonable fear that a merger prohibition on competition grounds may lead to a banking collapse and induce systemic instability in the financial system. In this case the Ministry of Finance effectively reserves to itself the right to permit a merger regardless of the impact on competition.

In addition many regimes, especially developing country regimes, impose a public interest test on those merger decisions that fall squarely within the jurisdiction of the competition authorities.

Again, the South African legislation has a very explicit public interest test that requires the Tribunal, the adjudicative agency, to balance its competition evaluation – a substantial lessening of competition test - against the transaction's impact on a number of specified public interest factors these being the impact on a region, on employment, on international competitiveness and on promoting the spread of Black ownership. Hence it is conceivable that a transaction that is found to substantially lessen competition may nevertheless be approved because this effect is outweighed by its positive impact on, say, international competitiveness. Or conversely, a transaction that passes muster on competition grounds may nevertheless have conditions imposed upon it or may even be prohibited because it impacts negatively on, say, employment.

The uncertainty that a public interest evaluation introduces is significantly ameliorated by the specific content that the Act gives to public interest – it is not, as it often is, an infinitely elastic concept but is specifically limited by the Act's definition. Moreover, the primacy of the competition evaluation is secured by the structure of the Act which provides that the competition evaluation is completed as the prior step in the decision making process and, hence, that the public interest test is conducted through the filter of a completed competition finding. This structure accordingly underpins a developing jurisprudence that tends to have the principal decision – to prohibit or allow a merger – taken on competition grounds with the public interest considerations possible accounting for the imposition of conditions carefully crafted to ameliorate the negative public interest impact. Also the Competition Tribunal has held quite explicitly that the protection that the Competition Act gives to the specified categories of public interest is ancillary to the protection offered by other legislation specifically directed at protecting those elements of public interest. Hence employees threatened by a merger are well advised to show that they have sought the protection of the Labour Relations Act before invoking the Competition Act in their defense. By the same token employers who have ignored these obligations are likely to be reminded of them when appearing before the Competition Tribunal.

As to the identity of the decision maker, most regimes appear to prefer a separation between the identity of the competition decision maker and the public interest decision maker. I am not certain how I feel about this. In our regime the decision is unified with the competition authority taking both the competition decision and the public interest decision and then balancing them and taking the final decision over which there is no ministerial override. There are advantages. Firstly, it means that the decision making body is acutely sensitive to the competition implications of the transaction whereas a Minister or other public official may be tempted, particular in a society with an underdeveloped competition culture, to give undue weight to the strength of the social forces supporting the public interest in question. Secondly, argument before the Competition Tribunal is held in open session and accessible to the public and its decisions have to be reasoned and public thus significantly reducing the likelihood of lobbying that will inevitably accompany a regime of political decision-making.

I think in the end the identity of the decision maker should be determined by the impact of the alternative models on the credibility of the competition authorities. Hence in Germany, the Minister's decision to override the decision of the Bundeskartellsampt may serve to emphasise the independence of the latter body thus further strengthening the credibility of the competition authority and raising the level of public debate and pressure on the public interest decision maker. In a developing country, with little experience of independent regulatory authorities, the same situation is more likely to be understood as evidence of the toothlessness of the competition authority thus lowering the standing of the body and further encouraging lobbying. For most developing countries I would opt for placing the decision in the hands of the competition authorities. This at least ensures that competition criteria will be treated seriously and it ensures that the competition authorities are not treated as mere advisory bodies capable of being ignored whenever politically convenient.

In summary then, we should take a pragmatic view of the introduction of public interest factors into a competition analysis. It is not evidence of a fatally compromised competition regime. In one

way or another it is a feature of most regimes and, in those regimes where it is a particularly strong feature, serious consideration of the public interest by the competition authorities is likely to underpin the credibility of fledgling authorities. Moreover, it is possible to structure the evaluation in such a way that competition considerations occupy pride of place in the ultimate decision, indeed, in such a way that the competition authorities are able to use the public interest investigation to educate key public stakeholders about competition, rather than have them massively constrain the application of competition law.