

The impact of the Enterprise Act one year on

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The new UK merger control régime

The new system of UK merger control, introduced in the Summer of 2003² owes much to the system it replaced,³ but also contains much that is new.⁴ In seeking to draw lessons from one year's experience of a new régime I shall refer to institutional structure, to some aspects of procedure, and then review the practice over the past year.

The Institutions

The 2003 reforms sought to take politics out of merger control. The government aimed to achieve this by enhancing the independence and status of the competition authorities and by giving them decision-making power subject to more specific judicial control. Building on the 1998 reforms,⁵ the aim was to provide powerful competition authorities, free from political interference, armed with a full range of powers. In merger control, the practice of the previous decade was made explicit with the adoption of a substantial lessening of competition (SLC) test. But in several respects, the reforms stopped short of a radical approach. First, compulsory pre-notification was not adopted; instead the UK continued to control anticipated and completed mergers. Second, although the Secretary of State was removed (at least in relation to competition issues⁶) from the triangular system that operated under the Fair Trading Act, the Office of Fair Trading (OFT) and Competition Commission

¹Deputy Chairman, Competition Commission. All views expressed are personal.

²Enterprise Act 2002; entered into force 20 June 2003.

³Mainly contained in the Fair Trading Act 1973.

⁴To such an extent that in the IBA case (see footnote 9) one Court of Appeal judge warned against relying on previous practice to interpret the new statute.

⁵The Competition Act 1998 introduced prohibitions modelled on Articles 81/82 EC.

⁶The Government retains considerable power to intervene in cases raising specific public interest issues, most obviously national security. These powers have not so far led to a Phase II investigation but the Secretary of State has intervened in a preliminary way in two defence related mergers in 2004, *General Dynamics/Alvis* and *GKN/Agusta*.

(CC) were kept as separate authorities, the latter essentially cast as a 'Phase II' body, conducting merger investigations in depth.⁷ At first sight, therefore, the reforms might appear as a shuffling of nomenclatures, but the reality I would suggest is very different.

The régime we have operated for the past year is one under which the OFT assesses mergers that fall within its jurisdiction (creating or enhancing a 25 per cent or more share of supply or involving the taking-over of an enterprise with annual turnover of £70 million or more) to see whether it believes that there are issues requiring detailed investigation (ie whether 'it is or may be the case that ... the (merger) may be expected to result in a substantial lessening of competition'⁸). If it so believes then, unless the market concerned is *de minimis* or customer benefits outweigh the likely loss of competition, OFT must refer the merger to the CC for investigation. The basis on which the OFT forms that belief has not been entirely free from doubt, but after some dispute, it is now settled by the *IBA* case⁹ that the OFT must have more than a suspicion, its belief must be reasonable and must lie somewhere between the purely fanciful and an expectation exceeding 50 per cent. The OFT is under a duty to act expeditiously to avoid uncertainty.¹⁰

The CC is required to investigate and decide whether an SLC results from a merger, and if so to decide on, and implement, remedies to address the issues identified as comprehensively as possible. It has 24 weeks in which to do so (extendable by eight weeks for special reasons).

The CC's decisions, and those of the OFT referring or clearing a merger, are reviewable at the suit of 'any person aggrieved' before the newly separate Competition Appeal Tribunal (CAT), which in this rôle is required to apply the principles of judicial review rather than to

⁷The CC also has extensive responsibilities in regulatory matters and in the investigation of markets.

⁸Enterprise Act section 33 and cf section 22 in relation to completed mergers.

⁹*OFT and others v IBA Health Limited* (CA) [2004] EWCA Civ 142.

¹⁰Enterprise Act s103.

hear an appeal on the merits of the case. The *IBA* case, already referred to, is the only merger case that has so far proceeded to judgment and that on a decision of the OFT not to refer a merger to the CC. No CC decision has yet been the subject of review by the CAT. But there is no complacency about this and the CC fully expects parties to take advantage of the rights conferred by the Enterprise Act.

The combined effect of the new decision-making powers and the enhanced scope for judicial review (no leave to apply is needed) has noticeably changed the way UK merger control operates.

First, the need to reach a decision and to give appropriate reasons has led to an even sharper focus than hitherto on producing a clear and justifiable analysis. Second, the requirement, particularly on the CC, to develop remedies to address any identified damage to competition has engendered an increased awareness that merger control involves more than merely identifying problems and that the authorities need a fuller understanding of the business environment in which mergers operate. Third, the real possibility of judicial review by a specialist tribunal has improved the process of evidence gathering as well as encouraging greater transparency of process. And from the merging parties' point of view they now deal face-to-face with the actual people who decide whether or not their merger should proceed and what remedies, if any, should be applied.

I now turn to the question of process—how the CC arrives at its decisions—and examine what has happened so far under the Enterprise Act.

The Process (i)

The importance of process

Bad process can generate a sense of grievance in merger parties out of all proportion to the business issue at stake, or even to the outcome of the merger. Good process ought to leave parties feeling that they may or may not like the view taken by an authority but at least they have been treated fairly. So it is in many ways just as important to come to a decision according to a fair process as it is to adopt a correct decision on the substance of the case.

How the Competition Commission operates

The CC operates in a particular, but arguably very effective, way that owes something to its history, but which has evolved into a model form of transparent inquisition.

The total strength of the CC membership is meant to be about 50, but inquiries are conducted by groups of three to five members under the leadership of the Chairman or one of the Deputies, with a supporting staff team.

The group of members plays an active part in the investigation from the start, visiting the facilities and sites in question, engaging with senior management and conducting evidential hearings as well as issues and remedies hearings later. The expert staff team normally comprises about 15 to 20 people. The objective is to maintain a system of rigorous and expert examination conducted under open and fair conditions by a group whom the parties may reasonably regard as their equals in experience, if not in wisdom.

The process is meant to deliver timely, fair and thorough decisions.

Timing

It is a common complaint that the merger control process takes too long. That criticism is easy to make but needs to be examined in a little more detail. The CC has, on the whole, performed well having regard to the Enterprise Act timetable of 24 weeks (with one possible extension of up to eight weeks). So far the shortest time for completion of an inquiry was in *Taminco* (19 weeks) and two cases have run to the full 24 weeks. The average is just over 22 weeks. However, recent cases are tending to bump up against the 24 weeks and in *EMAP/ABI*, the group has decided to extend by eight weeks, although it hopes to publish its report within that period.¹¹

These are, obviously, in EC parlance, Phase II cases. In comparison, the ECMR Phase II period (not really a valid comparison as the régimes are in many other respects different) is about 18 weeks (90 working days) but with a further two week period to deal with remedies and a possible three week extension in complex cases. In comparing current CC practice with previous practice under the FTA, like must be compared with like, that is with the time previously taken from the date of reference to the Secretary of State's announcement; on that basis an average of about 22 weeks, if it can be maintained, is good.¹² Also, provisional findings have been published, on average, about 14 weeks from the start. These give the parties a good indication of the progress of the inquiry. But again, that timing is coming under pressure and I will consider a further aspect of this when reviewing our practice.

The Process (ii)

Fairness

Is the CC fair in its process? I believe the answer to this is very clearly positive. The CC offers the merging parties continuous and increasing access not only to the evidence emerging during the inquiry but also to its thinking, culminating in provisional findings. Of

¹¹See Notice of 29 November 2004.

¹²On this basis the longest of the 2003 FTA cases took 30 weeks (*Carlton/Granada*) and the shortest, limited by Article 9 ECMR was 14½ weeks (*Arla*).

course there are issues and difficulties and no doubt further improvement can always be made. The following points arise:

Confidentiality and Transparency. Much as we might like to, it is normally not possible to pass one party's evidence unaltered to all the others for comment. Customers, suppliers or competitors may wish to keep anonymity, in some cases for fear of retaliation; alternatively they may wish part of their evidence to be excised on grounds of commercial confidentiality; failure to meet these concerns may limit their willingness to provide evidence at all. A method of putting a sufficient amount of such evidence to the relevant parties has to be found. Our current practice is to summarize the bulk of third party evidence and if possible publish that summary or at the least put it to the parties. Larger, more specific, submissions may be put as they stand, with as few excisions as possible. And confidentiality will inhibit too much 'drilling down' into individual survey responses, although the CC's surveys, methodology and reports are generally made freely available.

Provisional findings. These are a procedural innovation following the Enterprise Act under which the CC publishes a provisional view of its findings, and the evidence on which they are based, not only to give the parties a full opportunity to respond but also to enable a rational discussion of possible remedies (if needed) to take place. They are the culmination of the assessment process and are not a mere statement of possible issues. Their use has been generally welcomed.

Working Papers. These are developed by the CC inquiry team to inform thinking as the inquiry develops. Drafts and final versions of most papers (excluding opinion, conclusions or legal advice) will normally be shared with the parties for comment. General factual papers will normally be put on the web site; this is more difficult with analytical papers as they may rely on confidential data from the parties or elsewhere. They may, however, mutate into appendices to the provisional findings.

Hearings. These are the CC's unique feature; a lot of work goes into hearings, on all sides, but despite this undoubted burden they do allow the CC panel to engage directly with senior management of the merging parties and others and vice versa. They are not intended primarily to be a forum for obtaining factual information, but rather to air views, test arguments and provide the opportunity to 'be heard'. They are regarded by the CC as an extremely important part of the inquiry process and we seek to improve them in any way possible.

Is this enough? We think that the combination of working papers, non-confidential submissions, third party evidence and survey results gives the parties access to evidence at least equivalent to what in other processes is referred to as 'access to the file', but always open to suggestions for improvement. In particular, we are considering whether a more specific statement of 'emerging thinking', prior to the provisional findings, might give parties a more formal statement of the points they need to address. This would come after the issues statement and might even replace it. Views would be welcome.

Thoroughness

I do not need, or want, to say much on this. The CC conducts thorough investigations and is not normally criticised for cutting corners. However, the time constraints necessarily limit what is possible in a merger inquiry, in comparison for example, with a market investigation. Thus there is generally time for one round of survey work only—and quantitative and qualitative aspects will normally be elided. A merger inquiry is a project, and there is a great premium on project management, particularly in the early stages. Well prepared and co-operative main parties can assist materially in this process. Again, I will come back to this when reviewing our practice, to which I now turn.

The Practice (i)

Cases

Over the past year there have been nine final CC decisions under the Enterprise Act,¹³ two cases have reached the provisional findings stage¹⁴ and four more are at earlier stages of the process.¹⁵ Six merger references have been cancelled.¹⁶ At the same time there has been a large number of cases where the OFT did not think the issues required further investigation and has decided accordingly, giving reasons for its decision.

Looking at the completed cases, these may be described briefly as follows:

Stena and P&O

This case was referred to the CC on 22 August 2003 and the final report published on 6 February 2004. It concerned a proposed asset acquisition by Stena of ferry operations on the Irish Sea between Liverpool and Dublin and Fleetwood and Larne. The closure of P&O's Mostyn-Dublin route was contemporaneous. The inquiry focused on freight and found much price and customer differentiation with considerable barriers to entry. The CC concluded that there would be a SLC on the Liverpool–Dublin route but not on the Fleetwood–Larne route. The CC proposed as remedies either prohibiting the Dublin route transfer or promoting greater access to Dublin berths. Stena proposed an enhanced package of behavioural undertakings to mitigate the effect of the CC's findings. The CC concluded, after consultation, that only prohibition of the Dublin route merger would suffice to remedy the SLC it had identified and this was accepted by Stena; a notice of proposal to accept undertakings was issued for consultation on 7 April 2004 and, with insignificant amendments, undertakings were accepted, signed and published on 15 May 2004. The

¹³*Stena/P&O* (6 February 2004); *Dräger/Hillenbrand* (19 May 2004); *Carl Zeiss/Bio-Rad* (17 May 2004); *FirstGroup/ScotRail* (28 June 2004); *Archant/INM* (22 September); *D S Smith/Linpac* (8 September 2004); *NEG/Greater Anglia* (17 September); *Taminco/Air Products* (Chemicals) (29 November 2004); *Knauf/Superglass* (insulation) (26 November 2004).

¹⁴*EMAP/ABI* (building data); *Arriva/Sovereign* (transport).

¹⁵*Napier Brown/James budget* (sugar); *Arcelor/Corus* (hot steel pilings); *SDEL/Coors* (beer dispense equipment).

¹⁶*WBB/Tarmac Central* (silica); *Unum/Swiss Life* (financial services); *AAH/East Anglian* (pharmaceuticals), *Convatec/Acordis* (speciality fibres); *National Milk Records/Cattle* (animal information services); *Anglo American/Johnston* (aggregates).

Liverpool–Dublin route merger was also subject to investigation by the Irish Competition Authority, whose procedure was terminated without a formal decision once Stena accepted the CC's proposed remedy.

Dräger Medical and Hillenbrand Industries

This case was referred on 18 December 2003 and the final report published on 19 May 2004. It concerned the proposed acquisition by Dräger of the Air-Shields business of Hill-Rom, a Hillenbrand subsidiary. The business was the supply of neonatal warming therapy products to UK hospitals for use in labour and delivery wards and in neonatal intensive care units. Both groups sold these products in the UK through distributors and had no production facilities here. The merger was not primarily directed at the UK and, as may be expected, there was in the UK a single customer, the NHS, albeit taking various forms for procurement purposes. There were few competitors; the overlap between the parties' relevant businesses was considerable and market shares were in this case considered to be a reasonable proxy for market power. The CC found a SLC in three out of four product areas and went through a detailed process of remedy formulation, intended to arouse the latent buyer power of the NHS and to control the behaviour of the merged group in the interim. The case is significant in that the remedies involved recommendations to UK health departments and agencies and the feasibility of these recommendations had to be explored in detail before the report was published.

Carl Zeiss and Bio-Rad

This case was referred on 30 December 2003 and the final report was published on 17 May 2004. This was a proposed acquisition of the worldwide microscopy business of Bio-Rad Inc by the German group Carl Zeiss. The products concerned were advanced 3D optical microscope systems, particularly those using multiphoton techniques, where the position was heavily circumscribed by patents owned by Cornell University and exclusively licensed to Bio-Rad. These were expensive items (up to £500,000) and the market was

characterized by innovation and product differentiation. Bio-Rad's assembly facilities were located in the UK. On a comparison of the effects of the merger with the likely counterfactual, which was the sale of Bio-Rad's microscope business to another competitor, the CC found no SLC. The CC noted certain assurances given by Carl Zeiss as to their future intentions should the merger be allowed to proceed.

FirstGroup and the Scottish Passenger Rail Franchise

This case was referred in 13 January 2004; the final report was published on 28 June 2004 and the remedies stage completed on 15 October 2004, just before the Strategic Rail Authority awarded to FirstGroup the franchise to run rail services in Scotland on 17 October 2004. It concerned the proposed acquisition of the ScotRail franchise by FirstGroup. FirstGroup was confirmed as the preferred bidder in the SRA franchise award process on 11 June 2004. The CC examined issues of overlap between bus and rail transport in Scotland, particularly Glasgow and Edinburgh. It found a SLC in relation to various bus/rail route overlaps (where FirstGroup could raise prices), and more widely in relation to public transport networks in Strathclyde, Edinburgh and elsewhere in Scotland (where FirstGroup would have an incentive to exclude competitors). The CC concluded that the SLC could be addressed by behavioural undertakings and, following the publication of the report, a detailed process of articulating, negotiating and agreeing the required remedies, which include the appointment of a monitor, took place.

Archant/INM

This case was referred on 29 April 2004, provisional findings were published on 29 July 2004 and the final report published on 22 September 2004. This was a completed acquisition by a regional newspaper group, Archant, of the London local newspaper titles of International News and Media (INM). The CC had earlier considered, and partially blocked,

their acquisition by Newsquest, part of a US publishing group.¹⁷ The CC examined areas of overlap and the appropriate geographic market; it considered competitive pressure from other newspapers and other media in relation to various forms of advertising, concluding that no SLC would result.

Smith and Linpac

This was referred on 20 May 2004, provisional findings were published on 8 September and the final report published on 21 October 2004. This was a completed acquisition by DS Smith PLC of Linpac Containers Ltd and involved corrugated cardboard sheet and cases used in packaging. The inquiry focussed on possible coordinated effects in the sheet market in Great Britain, where the number of major suppliers was reduced from six to five, as well as possible effects in the cases market and, upstream, in relation to corrugated case materials (CCM). Whilst there were grounds for thinking that the sheet market was susceptible to coordinated effects the merger was found to make no significant difference and was cleared. However, the CC recommended that allegations made to it of explicit collusion be followed up by the OFT.

NEG and Greater Anglia

This merger was referred on 27 May 2004, provisional findings published on 16 September and the final report published on 4 November 2004. It concerned the completed acquisition by National Express of the Greater Anglia rail franchise. The CC considered issues relating to competition between coach and rail services on routes between London and East Anglia; and between rail services principally between London and Southend. No SLC was found and the merger was approved.

¹⁷See footnote 15 above and the discussion below.

Taminco and Air Products

This was referred on 16 July 2004, provisional findings published on 28 October and the final report published on 29 November 2004. It concerned the proposed acquisition by Taminco of Air Products and Chemicals Inc's business in methylamines and derivatives, (chemicals are used in gas and water treatment, solvents, coatings and animal nutrition). The CC accepted that Air Products was likely to exit from this sector in any event and, given the broad geographic markets and low barriers to entry, found no SLC resulting from the merger (Air Products closed its main plant during the inquiry). The merger was accordingly cleared.

Knauf and Superglass

This proposed merger was referred on 17 June 2004, provisional findings published on 7 October and the final report published on 26 November 2004. It concerned the manufacture of glass wool insulation products used mainly in loft and cavity wall insulation. The CC found that the merger would make Knauf the dominant Great Britain supplier in the relevant products and an SLC was identified both in relation to the near and longer term. The merger was prohibited as other possible remedies were considered either disproportionate or ineffective.

The Practice (ii)

How these cases were handled

Four of these cases involved adverse findings; one involved a complete prohibition and one a partial prohibition; behavioural remedies were sought in two cases; and five were cleared.

The issues considered

Most of the issues identified fell into the category of so-called 'unilateral effects' (Knauf being a particularly clear example); although there was discussion in *Carl Zeiss* as to whether the market was susceptible to coordinated effects. In *Smith/Linpac* the CC examined possible

coordinated effects in some detail and paid particular attention to the effect of the so-called competitive fringe on the outcome of any possible coordination, against a background of allegations of explicit collusion by major suppliers.

The Practice (iii)

The methodology applied

In terms of methodology the cases conform to a fairly standard pattern, as described in the CC merger control guidelines. Thus the *Stena* case identified freight services as the main problem area, and identified particular routes or ‘corridors’ across the Irish Sea. The CC commissioned a qualitative survey of 30 freight customers and a quantitative survey of 400. The results of these surveys fed directly into the CC’s conclusions on competitive effects, customer perceptions and their likely behaviour.

In *Dräger*, no survey was conducted—there was in effect a single UK customer. The high level of UK concentration involved, together with the relative insignificance of the UK businesses in relation to the merger as a whole, meant that attention soon shifted to negotiating remedies, which required detailed exchanges with other government departments.

In *Carl Zeiss*, the CC sought expert advice on the patent issues involved in this case (effectively what was the effect of patent protection on competition and possibility of entry) and took extensive evidence from users and customers as well as appointing a technical adviser.

In *FirstGroup*, the CC commissioned an economic study on bus and rail price elasticities, appointed an academic expert on transport economics and conducted a profitability study of bus and rail routes.

In *Archant* the CC commissioned qualitative and quantitative customer surveys as well as conducting detailed correlation and regression analysis to assess the likelihood of successful targeted price increases by the merged group.

In *Smith*, the CC surveyed large numbers of sheet and case customers and conducted a detailed analysis of possible coordinated effects in relation to sheet supply.

In *NEG* the CC conducted two passenger surveys on the main coach and rail routes affected and an analysis of potential profit incentives of the merged company.

In *Taminco* the case turned on market definition and assessment of the business-exit counterfactual, which the CC tested very carefully.

In *Knauf* the CC assessed future demand and capacity trends, modelled Knauf's future pricing incentives and commissioned a technical study on alternatives to glass wool.

The counterfactual

The statutory requirement to identify an SLC resulting from the merger has involved increased focus on the counterfactual (that is, what would have happened had the merger not taken place). As with the 'actual', the CC must test carefully what the alternatives might have been and, arguably, form an expectation based on the evidence before it. This sounds straightforward, but it is not necessarily so, and the task of predicting the effects of an actual merger may seem simple in comparison with identifying and predicting the effects of what might otherwise have been. But this demanding task cuts both ways. If the merging parties wish to establish that an apparently harmful merger is not so, when compared with the likely alternative, they also have to supply convincing evidence as to what that alternative might be. The emphasis on the counterfactual may have other implications for the system and I will touch on these later.

The assessment of evidence

The CC applies no hierarchy of evidence and decides in each case what weight to attach to any particular item. It is worth considering whether this is the correct approach or whether, as a matter of principle, greater weight should be attached to economic analysis than to so-called 'factual' evidence such as company documents containing statements of the parties' intention. This is not a simple issue, however, as there is no obvious or reliable way of pre-categorizing the weight and the credibility to be attached to particular items of evidence.

If, for example, as is often the case, the effect of a proposed merger depends on a comparison of its likely effects with the likely alternative (the 'counterfactual') the latter has to be tested carefully. This may involve hearing the parties concerned as to their intentions. If their statements cannot be corroborated by pre-merger documents, they may carry less weight; even more so if the documents contradict the oral statement. Equally persuasive, however, may be the CC's assessment of the economic rationality of what is claimed. If the claims fly in the face of the obvious incentives, they will have less credibility, however well documented they may be.

Similarly it is often not possible to predict with absolute certainty what a merged company with considerable market power will do. But an assessment of its incentives will carry more weight than mere promises, for example to keep prices low, unsupported by any other evidence.

Surveys

In merger cases, the CC will, whenever it is possible and appropriate, conduct or obtain a survey. This may be 'qualitative' (a small sample interviewed in depth) or 'quantitative' (a larger sample analysed in terms of response percentages) or both. The survey may assist in market definition (by testing what degree of substitution may occur in the event of a price rise) or in assessing competitive harm and views on the merger. Again, survey evidence is

not by itself decisive nor is it always convincing. In particular, statements by those surveyed as to what might be their response to hypothetical price increases may contain an element of wishful thinking. But it has the advantage of being more objective in nature than some evidence that may be advanced by the parties to, or opposing the merger. The CC attempts, wherever possible, to consult the parties about the nature and specification of surveys and to publish the methodology used and the results obtained.

Summary

This is not the place for a long debate on burden and standard of proof. Suffice it to say that the CC has to establish, arguably to the satisfaction of any reviewing court or tribunal, that an SLC is to be expected, in the sense of being more likely than not; and that this expectation must be based on convincing evidence, carefully assessed against any evidence pointing the other way: and, most importantly, this assessment must be articulated in a rational manner. This brief review of our practice suggests that the CC continues to conduct rigorous analysis, based on a substantial body of factual and analytical evidence, in a timely manner.

Remedies

As indicated, a new feature of the CC's practice is the assessment and implementation of remedies. In three of the cases over the past year the CC has identified remedies short of outright prohibition of the merger as a whole (*Stena*, *Dräger* and *ScotRail*) and the timing of the cases has included detailed elaboration of remedies. The advantages of bringing remedies 'in-house' in this way are that:

- (a) the same team that decided on the substance is charged with developing remedies that address the issues they had in mind;
- (b) the responsibility of implementing remedies helps the group assessing the case to focus on real rather than abstract detriments; and
- (c) the process is much more transparent to the parties and to the market.

Remedies practice will continue to evolve and, again, suggestions for improvement will be given careful consideration.¹⁸

The Practice (iv)

Possible Issues

There are several possible points that arise in connexion with the CC's practice so far under the Enterprise Act, but I want to mention just two:

- (a) the 'one size fits all' issue;
- (b) whether completed mergers raise any different issues from anticipated mergers and if so what the implications of this might be.

Let me re-emphasize that these points do not represent CC policy—they are simply my own thoughts as a result of a year's experience.

'One size fits all'

Generalizing broadly, the CC has a fairly standard investigation technique; indeed, this is generally regarded as a virtue. It gathers evidence, holds hearings, conducts surveys, puts issues to the parties and decides. This takes time, usually a minimum of three to four months as we have seen, and costs money, both to the taxpayer and to the parties. Some of the cases that we are asked to consider are of very small commercial value; and some raise fairly obvious competition issues which may be easily addressed, whilst some are of extreme complexity.

The question arises, whether we should be applying the same level of investigation to all of these cases.

¹⁸In June 2004 the CC conducted an extensive consultation on proposed guidelines on the application of divestment remedies in merger inquiries. Guidelines will be published in final form shortly.

I have no magic answer to this question but I would be interested to know the reactions of the business and consumer community to it; let me offer the following thoughts to go on with:

- (a) Raising the question is in no sense any reflection on OFT's reference practice; we can assume that if a reference is made, OFT have reasonable grounds, within the bounds of their own duties, to do so. What I am addressing is the process at CC stage.
- (b) In airing the possibility of a 'variable speed' inquiry process, we are not necessarily talking about a quick route to clearance; small mergers can raise 'big' issues; the question is whether the issues (big or small) can be identified more quickly when, for example, the deal value is small and the surrounding facts arguably less complex.
- (c) The CC could clearly cut down on some aspects of its process; produce fewer working papers; hold fewer hearings with third parties; concentrate on fewer, more obvious issues; but would it not then be accused of cutting corners, acting unfairly and not being sufficiently rigorous?
- (d) Cases that are cleared take up less time, as the remedies stage falls away. But, by definition, these cannot be identified in advance.
- (e) Equally, one approach might be to bring forward the remedies stage and see if an obvious remedy could address obvious issues and be agreed without a substantive finding; for example, if the parties conceded that there was an SLC would the CC have to go to the trouble of establishing one? Again, the same risk applies, and in any case I do not think the statute would permit us to conclude in this way.
- (f) And if some kind of 'fast track' process were proposed—what would be the qualifying test? Deal value? Turnover in affected products? Consent of the parties to the merger?

As I said, the CC is always interested in the views of those to whom its processes apply—or may apply—and on whose behalf they operate. It has no wish to be using public resources unnecessarily.

Completed mergers

The second issue is the treatment of completed, compared with anticipated, mergers.

The Enterprise Act deliberately left untouched the old (FTA) system of merger control applying to completed as well as to anticipated mergers.¹⁹ It even left untouched the statutory order in which the two were addressed, which deals, rather paradoxically, with completed mergers first and anticipated mergers second.²⁰

What we have had is three completed and six anticipated mergers decided. But of five cases currently in progress, three of these are completed mergers.²¹

It may be that this should be of absolutely no concern. After all, the CC has power not only to freeze a completed merger once it is referred (and its policy is to do so) but has full power to unscramble a completed merger of which it disapproves. And the control of completed mergers, with the corresponding absence of any compulsory pre-notification system has been a feature of UK merger control since its inception in 1965.

But there are also grounds for asking, at least, whether issues are beginning to arise as a consequence of the Enterprise Act reforms. Again, I have no settled view on this but the following questions occur:

- (a) Is the UK out of line with other EU countries and the ECMR, in controlling completed mergers, for any good reason?
- (b) Does the Enterprise Act, with its two separate decision stages and strong focus on an explicit competition test, paradoxically, increase the chances of a merger escaping censure?

¹⁹Fair Trading Act 1973 ss69 and 75.

²⁰Enterprise Act 2002 ss22 and 23.

²¹*Arcelor/Corus, EMAP/ABI and Napier-Brown/Budgett.*

Points to consider here include:

- The number of cases where the counterfactual situation that is argued is one of exit, closure or other forms of firm failure, sometimes reinforced by the actual closure of the relevant plant before the merger is completed.²²
- The fact that under the Enterprise Act an anti-competitive agreement to close a business is no longer defined as a merger,²³ making any requirement imposed by the CC to re-open a closed business of doubtful legality (as well as being problematic to implement in practice).

This is not to say that in any given case it would not be impossible to overcome these difficulties, but how much easier would it be to do so if the question were addressed before a merger was implemented rather than after it was completed?

I do not think I have yet got as far as concluding that the system would work better if pre-notification became a requirement. As with all changes that could have further consequences that would need careful consideration. And there is at present no appetite for further legislative change, which that would surely entail. But the question appears to be there, and will at some stage probably need to be addressed.

Conclusion

The lessons to be learnt from UK merger control in the period following the coming into force of the Enterprise Act include the following:

- (a) The newly-independent decision-making authorities have handled the first year's work successfully although none of the cases decided by the CC has been

²²Eg *Stena/P&O* (Dublin-Mostyn ferry route); *Taminco* (although this was an anticipated merger) or, under the FTA, *March/GUS*.

²³See Fair Trading Act 1973 s65(1)(b). There is no equivalent provision in the Enterprise Act 2002 and the relevant situation falls to be considered under the Competition Act 1998.

particularly high profile or controversial. The flow of cases was initially low, but has increased.

- (b) The SLC test provides a sound basis for merger assessment requiring a clear focus on the issues and some increased emphasis on the 'counterfactual' case.
- (c) The two phase system with phase II consisting of review by a team of expert officials and experienced Commissioners has worked well. Having separate authorities conducting the two phases inevitably involves some duplication but the advantages in terms of objectivity and fairness appear to outweigh this.
- (d) Procedure is transparent and fair; parties have a clear idea of the case for or against them; the publishing of provisional findings has generally been welcomed.
- (e) The CC's process for deciding on remedies has been successful both in timing and in substance.
- (f) The variety of cases referred to the CC, and the need to deploy public resources flexibly and economically, give rise to the question whether a 'one size fits all' inquiry process is sustainable, or appropriate.
- (g) Finally, there is the question whether completed mergers give rise to any different issues from those associated with anticipated mergers, and, if so, what the implications might be.

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This text reflects the position as at 6 December 2004.