

## UK Merger Control—A year’s experience of the Enterprise Act

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### (1) Introduction

The new system of UK merger control, introduced in the summer of 2003,<sup>2</sup> owes much to the system it replaced,<sup>3</sup> but also contains much that is new.<sup>4</sup> In seeking to draw lessons from one year’s experience of a new regime I shall refer to institutional structure, how we have approached cases in practice and some aspects of procedure. In giving an end-of-year assessment I shall echo the typical phrase in the school report:

‘Satisfactory progress, but the pupil has yet to be fully tested.’

### (2) Institutional structure

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,<sup>5</sup> 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 issues<sup>6</sup>) from the triangular system that operated under the Fair Trading Act, the Office of Fair Trading (OFT) and Competition Commission (CC) were kept as separate authorities, the latter essentially cast as a ‘Phase II’ body, conducting merger investigations in depth.<sup>7</sup> At first sight, therefore, the reforms might appear as a shuffling of nomenclatures, but the reality I would suggest is very different.

The regime 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’<sup>8</sup>). If it so believes, then, unless the market concerned is de minimis or customer benefits outweigh the likely loss of competition, the OFT must refer

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<sup>1</sup>Deputy Chairman, Competition Commission. All views expressed are personal.

<sup>2</sup>Enterprise Act 2002; entered into force 20 June 2003.

<sup>3</sup>Mainly contained in the Fair Trading Act 1973.

<sup>4</sup>To such an extent that one Court of Appeal judge has warned against relying on previous practice to interpret the new statute.

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

<sup>6</sup>The 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*.

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

<sup>8</sup>Enterprise Act section 33 and cf section 22 in relation to completed mergers.

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<sup>9</sup> 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. This is a simple test that my OFT colleagues should have little difficulty in applying! The OFT is under a duty to act expeditiously to avoid uncertainty.<sup>10</sup>

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 8 weeks in exceptional circumstances).

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, which in this role is required to apply the principles of judicial review rather than to hear an appeal on the merits of the case. The Hospital Software 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.

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.

### **(3) The practice**

#### **Cases**

Over the past year there have been five final CC decisions under the Enterprise Act,<sup>11</sup> two cases have reached the provisional findings stage<sup>12</sup> and some seven more are currently in progress.<sup>13</sup> Five merger references were cancelled.<sup>14</sup> At the same time, there have 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. At the tail end of last year there

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<sup>9</sup>*OFT and others v IBA Health Limited (CA)* [2004] EWCA Civ 142 (The Hospital Software case).

<sup>10</sup>Enterprise Act, section 103.

<sup>11</sup>*Stena/P&O* (6 February 2004); *Dräger/Hillenbrand* (19 May 2004); *Carl Zeiss/Bio-Rad* (17 May 2004); *FirstGroup/ScotRail* (28 June 2004); and *Archant/INM* (22 September).

<sup>12</sup>*DS Smith/Linpac* (8 September 2004), *NEG/Greater Anglia* (17 September).

<sup>13</sup>*Knauf/Superglass* (insulation); *EMAP/ABI* (building data); *Taminco/Air Products* (chemicals); *Arriva/Sovereign* (transport); *Arcelor/Corus* (hot steel pilings); *Anglo American/Johnston* (aggregates); *SDEL/Coors* (beer pumps).

<sup>14</sup>*WBB/Tarmac Central* (silica); *Unum/Swiss Life* (financial services); *AAH/East Anglian* (pharmaceuticals), *Convatec/Acordis* (speciality fibres); *National Milk Records/Cattle* (animal information services).

were also five merger cases under the Fair Trading Act, which I can only cover briefly in this paper.<sup>15</sup>

Looking first at the five completed Enterprise Act 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 an 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 an SLC on the southern route but not on the northern route. The CC proposed as remedies either prohibiting the southern 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 southern 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 southern 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 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 an 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 an 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 £500K) and the market was characterized by innovation

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<sup>15</sup> *Carlton/Granada* (7 October 2003); *Safeway* (26 September 2003); *Newsquest/INM* (21 October 2003); *Arla/Express Dairies* (23 September 2003); and *March/GUS* (22 January 2004).

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 its future intentions should the merger be allowed to proceed.

### ***FirstGroup and the Scottish Passenger Rail Franchise***

This case was referred on 13 January 2004; the final report was published on 28 June 2004 and the remedies stage, still in progress, is expected to complete in October before the Strategic Rail Authority awards 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 an 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, has been under way. As the case is not complete, I do not wish to comment further.

### ***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 an 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.<sup>16</sup> 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.

### ***Analysis***

Three of these cases involved adverse findings, none led to a complete prohibition; behavioural remedies were sought in two cases and a partial prohibition imposed in one; two were clearances.

In terms of methodology, they conform to a fairly standard pattern, as described in the CC merger control guidelines. Thus the *Stena/P&O* 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 and 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

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<sup>16</sup>See footnote 15 above and the discussion below.

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 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.

All these cases were essentially unilateral effects cases, although considerable argument was heard in *Carl Zeiss* as to whether the market was susceptible to coordinated effects. In sum, they suggest that the CC continues to conduct rigorous analysis, based on a substantial body of factual and analytical evidence, in a timely manner. It is true that these are not mega mergers, but railways, ferries and newspapers are significant parts of the UK economy.<sup>17</sup>

### **FTA cases**

These may be compared with the five cases decided under the Fair Trading Act in the latter part of 2003.

**Carlton/Granada** involved a merger of the two major commercial terrestrial TV broadcasters with the main competitive effect being found in relation to advertisers. The CC recommended, and the Government accepted, behavioural remedies, supervised by Ofcom, the sectoral regulator, and involving a designated adjudicator, to protect advertisers' interests, in preference to a prohibition or structural divestment of the parties' advertising sales business. Despite initial objections, it appears that this remedy mechanism has worked reasonably well so far, although it will be tested in the next annual round of advertising deals.

**Safeway** was a major, multi-faceted inquiry into four separate proposed bids for Safeway by the other major UK supermarket businesses. It is notable for the scope and complexity of its local retail market analysis, involving computer mapping of each Safeway store and its surrounding area, as well as for its detailed analysis of the conditions for coordinated (and unilateral) effects. The CC's recommendation, that bids by Asda, Tesco and Sainsbury's should be prohibited but that by Morrisons should be permitted, subject to some disposals, was largely accepted by the Government, and Morrisons duly proceeded to acquire Safeway.

**Newsquest/INM** was a much smaller-scale inquiry involving local newspapers in the London area, conducted under the newspaper merger provisions of the FTA. The CC recommended a partial block but left the Secretary of State to consider whether one particular title could feasibly be severed from the relevant INM business unit. Newsquest did not achieve the permitted acquisition and the business was subsequently acquired as a whole by Archant, another regional newspaper group, which was the subject of the *Archant/INM* decision, recently announced.

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<sup>17</sup>For example, the *ScotRail* franchise generated revenue of £368 million a year.

**Arla/Express Dairies** related to the supply of fresh processed milk in the UK, and had been referred to the UK under Article 9 EEC. The CC considered that the acquisition by Arla of Express Dairies' failing business, in the face of overcapacity of supply and considerable buyer power, would not restrict competition. The CC considered the possibility of coordinated effects, either tacit or explicit, but came to no adverse conclusion.

**March/GUS**, the last FTA case, was a major merger with the acquired business having annual turnover exceeding £1.5 billion. It had two aspects—home (catalogue) shopping and home delivery. In a case some years before (*Freemans/Littlewoods*), the CC had prohibited a merger in the same sector on the basis that competition from other forms of retailing was insufficient to mitigate home shopping concentration. In the 2003 case, the evidence obtained from the CC's consumer surveys suggested that this was no longer so and the CC decided accordingly. The expected effect of the merger in home delivery was less clear, but the counterfactual situation was the running down and break-up of the acquired business, to which GUS was committed and which it had a clear incentive to implement. The CC approved the merger, and the Secretary of State, as she was obliged to do, accepted this recommendation.

These were each significant cases in their way, *Carlton* and *Safeway* particularly so. We have had nothing on this scale since (certainly not in the sense of the interest shown by the media in these cases). To that extent, the potential impact of the CC's analytical capabilities and new powers on major parts of the UK economy have yet to be tested.

#### **(4) Process**

##### ***The importance of process***

Process, though by nature uninspiring, should not be underrated. 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 and fair 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 the stakes are high, and certainly similar to those in relation to substantive analysis.

##### ***How the Competition Commission operates***

For those less familiar with the form of investigation conducted by the CC, the following may be pertinent.

First, the inquiry method owes its origins to the Royal Commission model on which the original Monopolies Commission was based, some 50 years ago. This placed emphasis on oral hearings by witnesses before the full Commission (in those days numbered in single figures and comprising distinguished men from public life) and was essentially inquisitorial in nature. All decisions were taken by Ministers. This method has evolved as competition policy has matured so that extensive written questionnaires, studies and surveys now play a major part in the evidence-gathering process. The method remains inquisitorial but with a high degree of transparency enabling disputing parties to appreciate and reply on points of contention. With the expansion of its jurisdiction to include mergers and regulatory cases, the CC's own membership has increased to about 50 and inquiries are now the responsibility of particular groups of three to five members under the leadership of the Chairman or one of the three Deputies. And as already described, the CC is no longer advisory but decision-making in nature.

The inquiry group is expected to play 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. Each inquiry has an expert staff team of 15 to 20 people. The CC members now come from a variety of backgrounds. With the increasing professionalization of competition and merger control, all are expected to have familiarity with the concepts involved and each group covers a spread of necessary expert qualifications. Demands on members are therefore increasing and the days of the gifted amateur in this (or any other) area are probably over. The CC's staff are increasingly expert with a considerable career path interplay with the private sector and the professions.

The objective is to maintain a system of rigorous and expert examination conducted under open and fair conditions overseen by a group of Commissioners whom the parties may reasonably regard as their equals in experience, if not in wisdom.

## **Lessons**

Let us look at three aspects—speed, fairness and thoroughness.

### **Speed**

It is a common complaint that merger control takes too long. In my view, the CC's handling of cases under the Enterprise Act has been quick enough to pass criticism on this count. In *Stena*, the time taken was 24 weeks, in *Dräger* 22 weeks, *Carl Zeiss* 20 weeks, *First Group* 24 weeks and *Archant* 21 weeks. These are, obviously, in EC parlance, Phase II cases and the total time taken stands comparison not only with ECMR Phase II practice, but also with previous UK Fair Trading Act practice. In making that latter comparison, like must be compared with like, given that the Enterprise Act process leads to a final decision, including a decision on remedies (although detailed implementation of remedies is also needed). The comparison is therefore with the time previously taken from the reference to the Secretary of State's announcement; on that basis an average of about 22 weeks is good.<sup>18</sup>

Can we speed the process up for 'simple' or 'small' cases? It would be nice to think so. In *Dräger* and in *Carl Zeiss* the time to provisional findings was 11½ weeks, but 'small' cases can generate complex issues which require careful analysis. Given the time needed to gather facts, conduct surveys and hear all interested parties, what risks being squeezed out is the time for assessment and deliberation, which is hardly desirable. Nevertheless, this remains an area of concern to the CC.

### **Fairness**

Has the CC been fair in its proceedings? 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 course, there are issues and difficulties with this and no one claims perfection. The following points arise:

*Provisional findings.* These are a procedural innovation under which the CC publishes its findings about two-thirds of the way through the process, not only to give the parties a full opportunity to respond but also to enable a rational discussion of possible remedies (if

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<sup>18</sup>The longest of the 2003 FTA cases took 30 weeks (*Carlton/Granada*) and the shortest, limited by Article 9 ECMR, was 14½ weeks (*Arla*).

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.

*Confidentiality and transparency.* Much as we might like to, it is usually 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; 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 operated. Our current practice is to summarize the bulk of third party evidence and put that summary 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 surveys, methodology and reports are generally made freely available.

*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 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.

## ***Thoroughness***

I do not need, or want, to say much on this. The CC conducts thorough investigations and is not normally criticized 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.

## ***Ongoing issues***

Finally, let me consider some procedural issues that are still unresolved, or where the practice is still evolving. I would mention in particular the position of third parties, transparency, the counterfactual and, very briefly, judicial review.

## ***Third parties***

Much of the focus of the CC's rules of procedure is on the position of the merging parties. They are required to have the provisional findings notified to them<sup>19</sup> and it is assumed that they are the parties likely to be adversely affected. However, in cases where no SLC is found, it may be a third party whose interests are affected. Thus in *Carl Zeiss*, the main

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<sup>19</sup>CC Rules of Procedure, s10.3.

competitor, Leica, objected strongly to the proposed clearance. As a result, Leica made written comments on the provisional findings and attended an oral hearing; the main parties, not surprisingly, did not do so; the CC's rules may need to give more explicit recognition to the position of third parties in such a situation.

### ***Transparency***

The CC makes its process as transparent as it reasonably can. There remains the objection that the CC does not grant 'access to the file' in the sense understood in the ECMR or CA 98 context. This is not a closed issue, but the CC would need to be convinced that any alteration in its practice in this respect fulfilled a real, rather than a formalistic, need. Unlike those of the European Commission, CC merger procedures are not to any significant real extent 'pre-loaded' and the inquiry starts when the reference arrives. The CC will therefore tend to look more favourably at transparency improvements which do not hold up the inquiry. At the start of the inquiry, there will be no 'file' to inspect so the parallel with ECMR Phase II or with 81/82 cases is not valid anyway. It would be better for the parties to concentrate on responding to the CC's evidence and views as the inquiry develops, which are, under present procedures, disclosed to a large extent through working papers, hearings and the provisional findings. So I suspect this issue is a red herring.

### ***The counterfactual***

The CC's stress on a fair assessment of the likely counterfactual (the situation with which the merger's effects should be compared) should be noted. Whilst the starting point is the pre-merger situation, the CC will consider and assess likely alternatives. This can heavily influence the result. Thus in *Carl Zeiss*, where a leading optical microscope company acquired another, the counterfactual was not the pre-merger situation but the possible acquisition of the target business by one of the other competitors. The analysis therefore was between the merits of alternative acquisitions with no apparent reduction in competition resulting from the merger. The CC will, however, test counterfactual claims very carefully.

### ***Judicial review***

Since the introduction of the new system, no one has sought judicial review of a CC decision. However, it is assumed that such review is a probable rather than a possible event.

The CC strives to act legally, rationally and fairly and will defend its position in front of the Competition Appeal Tribunal as necessary. The CC will not regard a case going to judicial review as surprising, or as an affront. The establishment of a specialist tribunal, able to review the activities of the competition authorities, is seen as an appropriate and beneficial safeguard to the inquiry process and not as something to be feared.

But there is a paradox in this, at least in respect of review on grounds of procedural fairness. The CC's procedures now involve so much interface with the parties that it is much less likely that things will come as a surprise, or an opportunity to comment will be denied. The Enterprise Act has made applying for judicial review easier, but it may have made it potentially less rewarding. Time will tell.

## **(5) Conclusion**

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

- (1) The newly-independent decision-making authorities have been well able to deal with the merger cases that have come before them. There have been no insuperable problems, the Hospital Software case (OFT/IBA) being the nearest to a controversy.
- (2) The SLC test provides a sound basis for merger assessment, with most of the cases so far turning on unilateral effects of the merger.
- (3) 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.
- (4) The process of deciding on remedies has been successful both in timing and in substance; detailed behavioural remedies have been developed in two cases and a partial prohibition in a third.
- (5) The two-phase system, with phase II consisting of review by a team of expert officials and experienced Commissioners, has worked well.

BUT it is fair to say that none of the Enterprise Act cases has tested the CC's limits of resources or analysis. None has been particularly controversial and none has aroused any great public or political interest. The two major possible UK merger issues so far in 2004, namely the possible bid for *Marks & Spencer* by interests associated with Mr Philip Green and a possible attempt by a UK bank to buy *Abbey National* in lieu of Banco Santander, did not lead to any formal process that the UK authorities had to consider. So the end-of-year school report is indeed as I said at the beginning:

'Satisfactory progress but the pupil has yet to be fully tested.'

Thank you.

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