Merger policy in Europe: retrospect and prospect

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Introduction

The theme of my remarks today on merger policy in Europe is almost precisely the opposite of the old story of the British newspaper headline that declared 'Fog in the Channel, Continent cut off'. Recent winds of change have dispersed much fog from merger policy both at EC level and at national level in the UK. The English Channel (as we on our side call it) has itself become smoother, and there is also the Tunnel. Perhaps the sunlit uplands are almost in reach, but we are not there yet. And a new cloud appeared over the UK this winter, making the local forecast less clear.

Last year there were two particularly important breaths of fresh air. In June, reform of UK merger law came into force. Among other things the test for public intervention in UK mergers changed from being cast in terms of the 'public interest' to asking a question very familiar to you – does the merger 'substantially lessen competition'? Just weeks ago, ministers approved a package of proposals to reform the EC merger regulation (ECMR). This includes a shift from competition analysis through the lens of 'dominance' in the original ECMR to a test that directly asks the question: does the merger 'significantly impede effective competition'?

What led to these changes? What are the prospects now? In particular, what place has economic analysis in merger appraisal in Europe? And what does all this mean for transatlantic harmony of merger review?

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Some history

Box 1 below sets out some milestones in the development of merger law and policy at EC level and in the UK up to 2000. Compared with the US, which has had merger law since 1914, merger policy in Europe developed much later, as did (non-merger) antitrust law. The US has had the substantial lessening of competition test from the start, though its interpretation of course shifted over time before becoming more or less stable in the period since the 1982 guidelines. Within Europe, at supra-national level the EC was, relatively speaking, a pioneer with antitrust but a latecomer with merger regulation: it was not until 1990 that the EC Merger Regulation came into force.

Box 1: Merger policy in the UK and the EC – some milestones

UK

1965: Merger law introduced by Monopolies and Mergers Act. Public interest test.
1973: Merger framework reformed by Fair Trading Act, which established OFT.
1984: Government announces policy of basing merger decisions primarily on competition grounds.
1998: Competition Act (in force from March 2000) brings new antitrust law (mirroring EC Articles 81 and 82) but does not cover merger law.
2003: Merger law reforms in Enterprise Act 2002 come into force. SLC test.

EC

1962: Articles 81 (anti-competitive agreements) and 82 (abuse of dominance) come into force.[2] Their application to mergers is limited and unclear.
1990: EC Merger Regulation comes into force. Test in terms of dominance.
1992: *Nestlé/Perrier*: First merger remedy obtained by the Commission based on collective dominance.
1998: *'Kali & Salz'*: ECJ upholds collective dominance under ECMR.
1998: Supplementary thresholds for determining when a merger has a 'Community dimension' and so comes within ECMR.
2004: New ECMR. Test directly in terms of effect on competition.

[2] Before the renumbering of Treaty Articles in 1999, the provisions that are now Articles 81 and 82 were respectively Articles 85 and 86. This paper employs current numbering throughout.

Evolution and law reform in the UK

A fascinating example from the early days of UK merger control, some of whose themes still resonate, was the proposal in 1968 to combine Lloyds and Barclays banks.[3] The Westminster and National Provincial banks had just announced their merger that would form the National Westminster, reducing the Big Five that had existed since 1918 to the Big Four. A merged Lloyds and Barclays would make it Three, and have nearly half the market. Competition considerations obviously argued against the merger. Among arguments in its favour were efficiency claims and, as the *Times* put it, having 'a giant to meet the American challenge' – a challenge that has still to materialise in UK retail banking.

The matter was referred to the young Monopolies Commission, which divided six to four in recommending against the merger. The decision then fell to the Government, which backed the majority view and blocked the merger. The Bank of England had been central to deliberations on the merger and inclined in its favour. But the Governor of the day, Leslie O'Brien, later said that 'looking back over the years, I am sure the Monopolies Commission were right to call a halt to bank amalgamations when they did'.

The 'public interest' criterion by which the banks merger was assessed in 1968 was still the test in UK law thirty-five years later. For example, the 2001 bank merger proposal by Lloyds TSB to acquire Abbey National, which was also blocked, was assessed under law cast in that language. Not until 20 June 2003 did 'substantial lessening of competition' (SLC in our shorthand) become the basis in law for UK merger appraisal. However, the UK system had in practical terms evolved over the years so that the change in law in 2003 entailed strong elements of continuity in practice: in many respects the reform crystallised in law how practice had developed.

From 1973 to 2003 there were three government bodies involved in UK merger appraisal:

- the Office of Fair Trading (OFT)[4]
- the Monopolies and Mergers Commission, which was renamed the Competition Commission (CC) in 1999, which is how I will refer to it, and
- the Secretary of State (SoS) for Trade and Industry, the Minister at the head of the Department for Trade and Industry (DTI).

[3] See Monopolies Commission, *Barclays Bank Ltd, Lloyds Bank Ltd and Martins Bank Ltd: a report on the proposed merger*, July 1968. The events surrounding the merger are described by Kynaston, *The City of London: A Club No More*, 2001, pages 387-390.
[4] OFT decisions were in the name of the Director General of Fair Trading until 1 April 2003, when the post of DGFT was abolished as the OFT took on its new corporate form with a Board.

The UK has no equivalent to Hart-Scott or EC notification requirements: we have a voluntary notification system. The OFT carries out first-stage scrutiny of mergers, supplementing the filings it receives with investigations of its own volition and/or based on complaints. This has typically involved looking at a total of 200-300 transactions per annum, of which a portion (around a third) turn out not to qualify for jurisdictional purposes. The OFT then used to advise the SoS on which qualifying mergers to refer to the CC for second-stage investigation. For referred mergers the CC would then conduct a detailed investigation and report to the SoS on what remedies, if any, were needed to avert detriments to the public interest. The SoS would decide on remedies and ask the OFT to secure them. So the sequence of events for a merger resulting in policy intervention used to be: OFT → SoS → CC → SoS → OFT.

Among criticisms of this system were: the central involvement of a Government Minister, the unclear place of competition considerations in a 'public interest' test, and a lack of transparency especially about merger references. Well before the 2003 reform, competition considerations generally had primacy in merger review, and the SoS almost always accepted OFT and CC recommendations on merger references and remedies. As shown in Box 2 the pace of change accelerated recently.

Box 2: Merger policy in the UK – some recent events

August 1999: Government consults on merger law reform.
Summer 2000: OFT starts publishing merger reference advice in leading cases.
October 2000: SoS states policy of accepting OFT advice on merger references save in exceptional circumstances.
July 2001: Government White Paper sets out proposals for competition and consumer law reform.
November 2002: Enterprise Act passed. Part 3 of the Act reforms merger law.
Spring 2003: OFT and CC publish merger guidelines.
June 2003: New merger law comes into force.
December 2003: CAT judgment on merger reference test.
February 2004: Court of Appeal hears OFT appeal.

With Part 3 of the Enterprise Act[5] now in force, the SoS is no longer part of the process, save for mergers that raise narrowly defined public interest issues such as national security. Merger policy is based on the SLC test. So subject to limited exceptions, the OFT must refer

[5] For an account of the merger provisions of the Act see chapter 22 of Whish, *Competition Law*, 5th edition, 2003.

to the CC merger situations where the OFT believes that 'it is or may be the case' that the merger 'has resulted or may be expected to result in a substantial lessening of competition'.

For referred mergers the CC decides whether the merger 'has resulted or may be expected to result in a substantial lessening of competition' and where appropriate determines remedies. Transparency has improved by OFT publication of merger reference decisions (which had begun in 2000 in respect of merger advice) and by the OFT and CC merger guidelines.[6]

Thus in the UK there are separate bodies – the OFT and the CC – for stage 1 and stage 2 of merger assessment. This brings the check and balance value of a fresh pair of eyes in tougher cases. The OFT and the CC are both administrative bodies: UK merger decisions are not made in the courtroom. But judicial review is not absent: OFT and CC decisions relating to mergers are subject to appeal to the Competition Appeal Tribunal (CAT), which must apply the same principles as would be applied by a court on an application for judicial review. (Previously, judicial review in merger cases was before the High Court.) Appeals may with permission be brought against CAT judgments on points of law. Later I will comment briefly on the first merger appeal to the CAT under the new law – the case of *IBA Health v. OFT* – which has raised major questions.

Reform of the EC Merger Regulation

In the Summer of 2000, as the ECMR approached its tenth birthday, the European Commission initiated review of the Regulation, initially focusing chiefly on the criteria for determining which mergers are scrutinised at EC level in Brussels rather than by national authorities. In the event, the review of the ECMR went much broader and deeper. As well as jurisdictional questions, the review embraced various procedural issues – both within the Commission and externally, e.g. in relation to commercial parties, national authorities and the courts – and also the question of the substantive test for merger appraisal, which will be my main focus here.

Stimulus for reform on jurisdictional issues came from a desire shared by competition authorities and the legal and business communities for a better way to ensure that multi-jurisdictional mergers are reviewed by the authority or authorities best placed to address them, and to avoid undue duplication and regulatory burden. The growing internationalisation of business and the prospective enlargement of the European Community were factors underlining the importance of smoother handling of multi-jurisdictional mergers, which is an issue that has also been advanced in other fora such as the OECD and the ICN.

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[6] There have also been internal procedural changes within the OFT and the CC. For example, the OFT ended the Mergers Panel, a gathering of OFT and government officials that used to discuss mergers that raised competition issues.

The question of whether a merger in Europe is best reviewed nationally or by the Commission is not well related to revenue, i.e. 'turnover' thresholds. It is the qualitative features of a merger that matter, in particular the geographic scope of the relevant markets. So the reform debate sensibly focused not on the jurisdictional turnover thresholds in Article 1 of the ECMR but on improving flexibility, for example through more effective Articles 9 and 22 (which provide for case reallocation from/to Brussels to/from member states).

Box 3: Merger policy in the EC – some recent events

Summer 2000: Commission report to Council on operation of ECMR.
July 2001: Commission prohibition of *GE/Honeywell* merger.
December 2001: Commission Green Paper on ECMR.
June 2002: CFI judgment in *Airtours* case.
October 2002: CFI judgments in *Tetra Laval* and *Schneider* cases.
December 2002: Commission publishes ECMR reform proposals. Also publishes draft guidelines on horizontal mergers.
November 2003: New ECMR agreed.
January 2004: EC horizontal merger guidelines published.
May 2004: Regulation 139/04 comes into force.

Some procedural (and substantive economic) issues were thrown into sharp perspective by major case developments that occurred during the deliberations on ECMR reform. In particular there were the controversial prohibition of the proposed acquisition of Honeywell by General Electric, which the DoJ had cleared, and the annulment of three prohibition decisions by the Court of First Instance (CFI) in Luxembourg – see Box 3.[7] Subsequent procedural reforms within the Commission's competition directorate have included the establishment of peer review panels, dissolution of the Merger Task Force as a separate unit, and the creation of a chief economist position to ensure a more central role for economic analysis.

The question of the substantive test for intervention in mergers was the most difficult issue and the last to be agreed. Under the original ECMR a merger is incompatible with the common market if and only if it 'creates or strengthens a dominant position as a result of which effective competition would be significantly impeded'. This is known for short as the *dominance test* and the CFI has confirmed that this is a cumulative two-part test.[8] In other

[7] The CFI is the lower of the two EC courts; appeal to the higher court, the European Court of Justice (ECJ), is on questions of law only.
[8] Case T-290/94, *Kaysersberg v. Commission* [1997] ECR II-2137, para. 158, confirming Case T-2/93, *Air France v. Commission* [1994] ECR-II 323, para. 79. See also Case T-5/02, *Tetra Laval v. Commission*, Judgment of 25 October 2002, paras. 120 and 146 (on appeal to the ECJ).

words, unless a merger is caught by the first part (likely to create or strengthen a dominant position), the question of the second part (whether competition would be significantly impeded as a result) did not arise. Where a merger is caught by the first part, the CFI has interpreted the second part as providing a margin of discretion on whether a merger giving rise to a potentially dominant position would breach the ECMR.[9] But the without the first part – dominance – being met, the second part – impediment to competition – could not be used to challenge a merger.

This raises an obvious problem. The concept of dominance stems from the part of competition law that deals with abuse of monopoly or dominant market power. There are numerous mergers that could seriously jeopardise competition without crossing the threshold of dominant market power as traditionally understood. In particular, one can easily think of oligopoly situations where a merger would substantially lessen competition without giving any individual firm a dominant position. Such mergers would seem to escape the net as set out in the original ECMR.

The natural response to this problem was to expand the concept of dominance to achieve the broadly agreed policy goal of guarding against all substantially anti-competitive mergers. Hence the importance that the concept of *collective dominance* came to have for EC merger policy in the 1990s. If several firms, rather than just one firm, can be found to hold a dominant position, then the dominance test might after all be able to catch oligopoly mergers of the sort just mentioned.

Within bounds, the concept of collective dominance makes sense. If two or more firms are economically linked and act *as one* – adopt a common policy – on the market, then depending on the facts it is not illogical to view them collectively as dominant even though none is so individually. In particular, it can make economic sense to view firms that are tacitly co-ordinating as collectively dominant. (Explicit collusion would of course fall foul of the competition law prohibition of anti-competitive agreements.)

The European courts have clearly endorsed this position in law.[10] In particular, the CFI in *Airtours*[11] (at para 62 of the judgment) spells out three necessary conditions for tacit co-ordination to be found to be collective dominance:

- each firm in the group must be able to know how others are behaving,
- the tacit co-ordination must be sustainable, which requires a retaliatory mechanism, and
- it must not be jeopardised by the reactions of competitors and consumers.

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[9] Case T-310/01, *Schneider v. Commission*, Judgment of 22 October 2002, paras. 321 and 380.
[10] See chapter 14 of Whish, op. cit.
[11] Case T-342/99, *Airtours plc v. Commission*, [2002] ECR II-2585.

Economic theorists of dynamic oligopoly should approve. But there are two difficulties. The first, not considered here, is the empirical difficulty of demonstrating collective dominance on the facts of cases, especially as the *Airtours* court demanded a high standard of proof (para. 63). The second problem is that, leaving single firm dominance aside, heightened tacit co-ordination is not the only way that mergers can substantially lessen competition. So if collective dominance must stay within the bounds described above, there would seem to be a potentially large problem.

In particular, mergers in oligopoly can reduce competition through non-co-ordinated effects as well as by co-ordinated effects. You do not need to be a dynamic oligopoly theorist to grasp non-co-ordinated effects. If erstwhile competitors A and B merge, the market has lost the competition between A and B. If there was a shortage of surrounding competition, this effect could lessen competition substantially in the market as a whole. For example, with A and B no longer competing, C and D might slacken their competitive efforts in the market place.

Thus we had what came to be known as the problem of the gap – i.e. the gap between the policy aim of catching all anti-competitive mergers and the ability to catch them by the concept of dominance even as extended to embrace tacit co-ordination between two or more firms. There were three approaches to the problem of the gap:

- denial – at least of its practical importance,
- verbal elasticity – give 'dominance' a sufficiently broad meaning in the context of mergers to cover non-co-ordinated effects as well as co-ordinated effects and single-firm dominance, and
- change the test from dominance to a direct effect-on-competition formulation.

The denial strategy had two variants. The first was to accept that the gap might exist in theory but to deny that there were any actual or potential mergers in it. In my experience there are certainly mergers in the gap. (But while the outcome of the ECMR review was in doubt there was a dilemma how loudly to say so.) Moreover, there are mergers that raise questions about both co-ordinated and non-co-ordinated effects; it would be artificial and undesirable to be able to address only the former.

The second variant was to deny that the courts – in particular the CFI in *Airtours* – had set a tacit co-ordination limit to the notion of collective dominance. Maybe the courts would ultimately go further and allow non-co-ordinated effects within the concept of dominance, at least in the context of mergers. However, this seemed a precarious maybe. The Commission in its *Airtours* decision had included a passage (at para 54) suggesting non-co-ordinated effects, but this point was not argued before the court. I am aware of no indications that the courts might have wanted to extend dominance to cover non-co-ordinated effects. And I struggle to see how several firms could act as one – adopt a common policy – in a non-co-

ordinated way. In any event it is questionable whether creative judicial reasoning rather than explicit legislative change would have been the best way to address the problem of the gap. Moreover, it might have undesirable consequences for the law relating to abuse of dominance (Article 82) if the meaning of dominance got too broad. Be careful what you wish for.

The second approach – verbal elasticity – was the initial strategy of the Commission. Without prejudice to the question of whether a gap existed with the ECMR as originally worded, the Commission wanted to ensure clarity that all types of anti-competitive merger were covered by the regulation. Towards the end of 2002 it therefore proposed amendments to ensure that, in the context of the merger regulation, 'dominance' had an appropriately broad meaning. This was a welcome step inasmuch as it would solve the problem of the gap. But it risked creating other problems.

In particular, there was the following dilemma. If the amendment/clarification of the meaning of 'dominance' in the context of the merger regulation carried over to Article 82, then the prohibition of abuse of dominance would appear to expand in scope rather undesirably. If, on the other hand, 'dominance' would have a different meaning for mergers than for the prohibition of abuse of dominance, then one word would have two meanings. (This prospect irresistibly called to mind Alice's question to Humpty Dumpty in Lewis Carroll's 1872 classic, *Through the Looking Glass*. Humpty Dumpty insisted that when he used a word, it meant whatever he chose it to mean. 'The question is', said Alice, 'whether you *can* make words mean so many different things'.[12]) The more straightforward way to have distinct meanings is to use distinct phrases. In particular, as some of us continued to urge, the natural move was to adopt an explicitly effects-on-competition formulation for the merger test.

A year later that came about. All along there had been much discussion about the test, especially among national competition authorities and the Commission, both privately and occasionally at public events. In the first half of 2003 there were moves to see whether a competition-based test could be devised that also retained the concept of dominance and so expressly preserved merger-related dominance case law. One such possibility was a 'SLC-or-dominance' test. In the autumn, when the debate moved towards the crucial ministerial meeting on 27 November, a proposal gained ground that was finally adopted.

Article 2(3) of the new ECMR, which will come into force on 1 May 2004, says that:
'A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market'.

[12] See my paper 'How to reform the EC merger test?', 8 November 2002, which is available via www.oft.gov.uk and in Drauz and Reynolds (eds.), *EC Merger Control: A Major Reform in Progress*, 2003, 181-183.

Recall that the original test was whether dominance would be created or strengthened as a result of which there would be a significant impediment to effective competition (SIEC). That required *both* created/strengthened dominance *and* SIEC as a result. The new test has SIEC as the key criterion, and created/strengthened dominance as a prime *instance* of SIEC. Thus the key question now relates to how a merger affects competition, not whether it reaches a threshold of dominance.

Of course this is not the end of the story. What exactly does SIEC mean? Is it the same as SLC? One interpretation is that they are synonymous. Another is that 'substantial lessening' relates to how much competition is *lost*, while 'impediment to effective competition' has to do with how much competition *remains* post-merger.[13]

Initial help in answering such questions comes from the recitals to the new ECMR, and further clarification will come over time as the case law evolves. Recital 25 says that the notion of SIEC 'should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned'. This says that SIEC extends, in a disciplined way, beyond dominance, and it makes clear that the new test covers non-coordinated effects, thus disposing of the problem of the gap.

Domestic events in the UK

The very next day after agreement was reached on the new ECMR in Brussels, the first appeal of an OFT merger decision under the new UK law was heard before the CAT in London. Rather than being an appeal by merging parties against public intervention, the appeal, which was brought by a third party, was against a merger clearance. IBA Health, a healthcare software company, appealed against the OFT decision not to refer to the CC for second-stage investigation the proposed acquisition by iSoft of Torex, two other firms in the sector.

A few days later, on 3 December, the CAT gave judgment against the OFT.[14] Central to the judgment was the CAT's interpretation of the OFT's duty to refer to the CC merger situations where the OFT believes that 'it is or may be the case' that the merger 'has resulted or may be expected to result in a substantial lessening of competition'. The OFT, following public consultation on merger guidelines, had interpreted this as meaning that a merger should be

[13] Cf. John Temple Lang's remark that 'Substantially reduced competition is not necessarily dominance: dominance is a result of how much competition is left, not how big the change has been', in 'Oligopolies and Joint Dominance in Community Antitrust Law' in Barry Hawk (ed.), *Fordham Corporate Law Institute* 2001.

[14] *IBA Health Ltd v. Office of Fair Trading* [2003] CAT 27.

referred if and only if the OFT held a belief on reasonable grounds that there was a significant prospect that the merger may be expected to result in an SLC.

The CAT judgment contains several formulations of the reference test. In essence, the OFT's understanding, is that we must refer a merger unless we are satisfied that:

(a) there is no significant prospect of the merger giving rise to a substantial lessening of competition; and
(b) any alternative view that the merger may give rise to a SLC can be confidently rejected as not credible.

Thus the test as interpreted by the CAT has two limbs, not one. Further detail is given in Box 4, which contains paragraphs 228-230 from the conclusion of the CAT judgment.

Box 4: Extract from the CAT judgment on the merger reference test

[O]n the proper construction of section 33 (1), and in particular the words 'it may be the case', the OFT had to satisfy itself not only (i) that in its own mind there was no significant prospect of a substantial lessening of competition, but also (ii) there was no significant prospect of the Competition Commission reaching an alternative view on the basis of a fuller investigation.

...[U]nder the statutory scheme in part 3 of the Act where, as here, the OFT is confronted with a real question as to whether there is a substantial lessening of competition, it is only exceptionally that the OFT should attempt to resolve the matter itself at the 'first screen' stage, rather than refer to the Commission. That is particularly so in cases involving a complex factual matrix.

...[I]n a case such as the present, where there is a real issue as to substantial lessening of competition, the onus is on the OFT to satisfy the Tribunal that it applied the right test, and that it had solid, sufficiently certain, and properly reasoned grounds for deciding that the relatively low threshold of 'may be the case' under section 33 (1), was not met.

Having considered the judgment, the OFT sought, and was granted, leave to appeal to the Court of Appeal. The main issues in the OFT's appeal are:

- the true interpretation of the test that the OFT should apply when making merger references decisions, and
- the appropriate judicial review function of the CAT in relation to OFT merger reference decisions.[15]

The appeal was heard by the Court of Appeal last week on 3 and 4 February. Judgment is awaited.

It would be inappropriate here for me to summarise the legal arguments in the case: those are for the Court of Appeal to decide. But I shall attempt to answer a question about practical consequences that has often been asked in recent weeks: will there be significantly more merger references to the CC with the reference test as interpreted by the CAT than with the test as previously operated by the OFT?

The first point to make in response is that the number of cases referred depends on the population of mergers that come forward as well as on the reference test. Indeed it is possible that the reference test has some effect on which merger propositions are advanced (as OFT experience with confidential merger guidance certainly suggests).

Leaving that point aside – i.e. for a given population of mergers – my assessment is that the number of merger references will be significantly higher on the CAT interpretation than on the prior OFT interpretation. It has been suggested that the number could double.[16] Such an estimate does not appear to me to be unreasonable. Subject to shifts in the population of mergers advanced, it would imply 20-30 references a year rather than the 10-15 typical in the past.

The personal experience on which I draw comes from merger deliberations (some on confidential cases) not only since the 3 December judgment but back to October 2000, and I have colleagues with longer experience than that. Based on experience I believe that for a significant number of mergers

- there would not be a belief that there was a significant prospect of the merger giving rise to an SLC, but
- there would be an alternative view, which could not confidently be rejected as not credible, that the merger may give rise to an SLC.

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[15] See further the OFT press release, 'OFT to appeal merger reference judgment', PN 169/03, 11 December 2003.

[16] See, for example, Malcolm Nicholson, 'Reinstate the old regime of merger control', *Financial Times*, 15 December 2003.

Alternative views about the effects of mergers on competition are very common. They are almost routinely put to us in the course of our merger inquiries, often expertly. In any case, in the interest of challenging different hypotheses, we strive to generate alternative views within the OFT. To be sure, candidate alternative views can often be dismissed as not credible, but often they cannot. This is not least because merger assessment necessarily involves judgments as to future prospects. As the physicist Nils Bohr said, 'Prediction is very difficult, especially if it's about the future'.

Another way to gauge the practical effect of different interpretations of the reference test is to note that in the past there have typically been 40 or so mergers a year that have gone through the process of formal case review meetings that we have for the more difficult cases. Broadly speaking there has been a case review meeting whenever there has been a real question as to SLC. If, as the CAT says, it is only exceptionally that such questions should be resolved at the OFT stage, then a majority – rather than, as in the past, a minority – of cases that would have gone to case review meetings would be referred to the CC on the CAT interpretation of the reference test.

Besides the OFT's assessment, practitioner comment since the CAT judgment suggests a widespread professional expectation that the propensity for cases to be referred will be significantly higher on the CAT interpretation of the reference test than before.

It must be stressed that the matter before the Court of Appeal concerns merger references from the OFT to the CC, and not how referred cases are ultimately decided by the CC. The issue arises because, unusually, the UK has separate bodies for stage 1 and stage 2 of merger assessment – a separation that has served UK competition policy well. However the matter is decided, SLC is now the basis in law – as well as in policy – for UK merger assessment, which is a thoroughly welcome development.

The role of economics

Before concluding, let me comment briefly on the importance of economics in taking forward reform of UK and EC merger law and policy, and the role of economics in case analysis henceforth. Economics has always been important. This is evident, for example, in the 1968 UK banking case mentioned earlier, in which the considerations that really counted were primarily economic.[17]

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[17] Economists, as well as economics, were important in the case. The Monopolies Commission panel contained three academic economists – Opie, Sayers and Yamey. Moreover the three politicians most central to the ultimate decision on the case – Wilson, Jenkins and Crosland – had all studied economics as part of PPE (politics, philosophy and economics) at Oxford. Today, a number of competition

Of course 1968 was also the year of the first US merger guidelines.[18] They have changed considerably over time – notably in the 1982 revision – as economics has both developed and helped reshape the law. By contrast, comprehensive merger guidelines have only just been introduced in the UK and EC regimes. In 2003, as part of the Enterprise Act regime, both the OFT and the CC published merger guidelines following extensive public consultation.[19] Just two weeks ago, as part of the review of the ECMR, horizontal merger guidelines were published for the EC merger regime.[20] Guidelines have also been a central theme of the ICN's merger work over the past year.[21] The merger guidelines being developed in a growing number of jurisdictions are squarely economics-based.

Indeed guidelines can be seen as the economics bridge between the law and the facts of cases. They say how the authorities will interpret and apply the law, particularly in respect of economic analysis, to case facts. As well as increasing transparency, guidelines may also be helpful towards international cohesion of merger analysis.

In a world of multiple sovereign jurisdictions there is no guarantee that all will adopt the same approaches. But guidelines help expose similarities and differences – e.g. concerning approaches to market definition, entry conditions, analysis of coordinated and non-coordinated effects, and efficiencies – which it is healthy to have exposed. Among other things this helps learning from each other's experiences. We in Europe have certainly learned from what has and has not worked in the US, for example. Guidelines also assist the accountability of the authorities. Do we walk the talk? Without the talk it is hard to say. Guidelines provide the talk, and the language is economics.

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authorities in Europe, including in the Commission, are headed by individuals with academic economics backgrounds.

[18] Oliver Williamson's fascinating reflections on the origins and development of the 1968 guidelines are at http://www.usdoj.gov/atr/hmerger/11257.htm.

[19] OFT, *Mergers – Substantive assessment guidance* (OFT 516, May 2003); *Mergers – Procedural guidance* (OFT 526, May 2003), at http://www.oft.gov.uk/Business/Mergers+EA02/publications.htm; Competition Commission, *Merger References: Competition Commission Guidelines* (CC2, June 2003), at http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm

[20] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 28 January 2004, at http://europa.eu.int/comm/competition/mergers/review/

[21] See ICN Merger Working Group: Analytical Framework Subgroup, *Project on Merger Guidelines, Interim Report for the second ICN annual conference in Merida*, June 2003, at http://www.internationalcompetitionnetwork.org/analysisofmerger.html

Transatlantic policy convergence

What do developments in European merger policy mean for transatlantic policy convergence? My sense is that substantively, though not procedurally, there has over time been considerable convergence, and towards what seems a sensible place given our present state of knowledge.

Looking back a generation to 1968 the US has seen stability of statute and institutions but radical change in substantive merger analysis – e.g. regarding the presumption of harm based on quantitative indices (market shares, HHIs), the introduction of unilateral effects analysis, and the role of qualitative factors such as entry and efficiencies. The UK has seen more gradual evolution of substantive approach but only very recent change of statute and institutional roles. At EC level, where there was no merger regulation before 1990, a revised regulation has just been agreed. In broad terms we now have substantive and analytical convergence of merger policy.

To support this claim I would point to the merger guidelines for the regimes, which themselves are new for the UK and EC. The sets of guidelines are not identical, and no doubt they will all evolve over time as experience and economic understanding grows. But points of difference and debate, though they may be important, are on a finer scale and in a much more transparent context than before.

It does not follow that every multi-national merger will be decided the same way in Europe as in the US. First, a merger's prospective effects on European markets might differ from its effects on US markets. Second, even people looking at the same facts and with the same aim can at times reasonably come to different conclusions.[22] Third, procedures differ. Merger assessment in Europe is by administrative procedure subject to judicial review, whereas in the US the agencies decide whether to bring a court challenge. Procedures within agencies, relationships between courts and agencies – and with them such issues as burden of proof – will no doubt evolve over time.

Ultimately, of course, merger policy is tested by cases. Sound law, guidelines and procedures are but the foundation. European merger policy, after its recent reforms, is now in a stronger position to deal with whatever the future may bring.

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[22] This is obviously true intra-jurisdictionally as well as inter-jurisdictionally. Otherwise appeals would never succeed.