Principles, Powers and Priorities
- enforcing competition law in cases of mergers and acquisitions.

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Introduction.

As you may be aware since this conference was organised a date was set for the hearing of the Statoil / Conoco appeal against the Ministerial order prohibiting their merger. I am sure therefore that you will appreciate that it would be highly inappropriate for me to comment directly or indirectly on any of the issues which might arise in that case. My comments today are confined to a discussion of general policy issues arising in merger control and all statements in the paper about the positive and negative effects of mergers are intended to be general in their nature. I would stress that it is important not to read anything I might say as being a comment on the forthcoming case.

My task today is a wide ranging one in attempting to provide an overview of how mergers should be dealt with from a competition policy perspective. It is perhaps an opportune time to have a seminar which focuses on the issue of dealing with mergers under competition law. Legislation is currently before the Dail to for provide for increased enforcement of the Competition Act. The Minister for Enterprise and Employment has announced his intention to establish a group to review the treatment of mergers following the passage of this legislation. Quite recently in the UK the Secretary of State for Industry caused a major surprise by rejecting the findings of the Monopolies and Mergers Commission and blocking two major proposed mergers in the electricity industry. One immediate effect was that large sums of money were wiped off the value of shares. At the outset I should perhaps nail my colours to the mast. Mergers can in certain circumstances have an adverse effect on competition. As restrictions on competition are generally harmful for consumers, for overall economic welfare and for employment prospects, an effective merger control regime is an essential element of competition law and policy and it is for this reason that merger controls exist in most developed countries. Having said that, I think it is only fair to point out that many mergers may not be harmful to competition and may be beneficial to the economy. The challenge therefore is to devise a regime which can prevent mergers which have anti-competitive effects without imposing too great a burden on those which are beneficial.

Merger controls are essentially a precautionary measure. They exist to prevent firms reducing the degree of competition in the market by eliminating competitors (horizontal mergers) because reductions in competition are harmful to overall economic welfare. It is important to recognise that other types of mergers may also pose problems from a competition perspective. Vertical mergers involve firms integrating into upstream (input) or downstream (final product) markets. Such mergers may be prompted by a desire to block rivals' access to essential raw materials or to block access to retail outlets, forcing competitors to establish their own distribution network, thereby raising their costs. Vertical integration may also reflect the fact that a vertically integrated firm can secure significant economies of scope and can reduce transactions costs. Mergers between firms in different industries would appear less likely to pose a threat to competition, although there may be the risk that the merged firm will use profits in one sector to finance predatory pricing in another. Some commentators argue that reciprocal buying arrangements between various divisions in a conglomerate, might also pose a threat to competition. The present paper focuses primarily on the question of horizontal mergers since these are more frequently seen to pose problems from a competition perspective than vertical or conglomerate mergers.

The Rationale for Mergers.

Mergers and take-overs take place for a large number of reasons. Cable, [1986], for example, noted that empirical research had failed to develop a single dominant motive for mergers. Mergers between firms may be designed to optimise the benefits of complementary strengths and to take advantage of economies of scale and scope. Economies of scale arise where unit costs are reduced due to an increase in firm size. The merged firm will be able to re-organise its activities, closing the least efficient plants and retaining or even expanding the more efficient units. Mergers can also achieve efficiencies in respect of administration, marketing and other ancillary activities, since the size of such operations in the merged firm may well be less than the combined size of such operations in the two firms prior to the merger. As against this, however, larger firms may well suffer from increased levels of internal bureaucracy with consequent negative effects on performance.

Mergers can also provide an important discipline for poor managerial performance. Mergers and take-overs allow control of assets to be transferred to owners who believe that they will be able to make more productive use of them, i.e. they can operate them more profitably than the existing owners and managers. The possibility of a transfer of control is seen as providing an important spur to efficiency in modern business firms which are seen to suffer from a serious principle-agent problem, because of the separation of ownership and control. The threat of take-overs provide an important discipline on management to maximise efficiency since their position is likely to be in doubt in the event of any take-over. Therefore it is argued that mergers and take-overs can play a useful and important role in increasing efficiency, thereby adding to overall economic welfare. If you like, mergers are themselves part of the competitive process with more efficient firms acquiring less efficient ones. Critics, however, argue that the market for corporate control may not work very efficiently in the real world. It is far easier for a larger firm to take-over a smaller one than the other way around, regardless of the relative efficiency of the two firms. Research shows that large inefficient firms are far more likely to survive than smaller more profitable ones, a result which is at variance with the view that mergers encourage efficiency. [Singh, 1993] Models of the market for corporate control also assume that share prices are efficient, in that they provide an accurate indicator of the fundamental value of businesses. This is unlikely to be true because the market is characterised by information asymmetries as internal management knows more about the business than anyone on the outside. It is also argued that the threat of take-over can prompt short-term behaviour by management as a means of guarding against take-over, so that the threat of a take-over will not act as a spur to efficiency.

By definition, however, mergers between rival firms lead to a reduction in the number of competitors in a market, at least in the short-run. In particular, if there are entry barriers, mergers can lead to increased industry concentration and possibly increased market power, thereby reducing competition, in which case there are likely to have a detrimental impact on overall economic welfare. It has to be recognised that mergers may in fact be prompted by a desire to lessen competition and indeed to establish a dominant if not an outright monopoly position. Scherer and Ross [1990] note that the desire to achieve or strengthen monopoly power played a prominent role in the US horizontal merger wave that took place around the turn of the century. The *New York Times,* for example, quoted Thomas Edison as stating that the creation of the General Electric Company in 1892 was based on such considerations

> 'Recently there has been sharp rivalry between [Thomson-Houston and Edison General Electric], and prices have been cut so that there has been little profit in the manufacture of electrical machinery for anybody. The consolidation of the companies....will do away with a competition which has become so sharp that the product of the factories has been worth little more than ordinary hardware.' [*New York Times*, 21 February 1892][1]

Many of the early US antitrust cases such as *Northern Securities*[2] and *Standard Oil*[3] were concerned with mergers. As Wiedenfeld [1927] noted:

> 'The substitutability between mergers and cartels as alternative means of securing market power explains the strength of the American merger boom of 1899-1900 in comparison to the British. In the United States the anti-trust legislation of 1890 made cartel agreements more difficult and therefore encouraged mergers.'

It is because mergers can have anti-competitive effects, indeed they may represent an alternative to a cartel, that merger controls are necessary from a competition policy perspective.

[1] Cited in Scherer and Ross [1990].
[2] *United States v. Northern Securities Co. et. al.*, 193 US 197 (1904).
[3] *Standard Oil Company of New Jersey et. al. v. United States*, 221 US 1 (1911).

Evidence on Merger Outcomes.

There has been considerable empirical research into the effects of mergers indicating that mergers tend to produce mixed results. Magenheim and Mueller [1988], for example, found that, while target firm shareholders enjoyed short-term gains, shareholders in (normally larger) acquiring firms appeared to lose out over the longer term as the share-price tended to decline following the merger. Commenting on a study of post-merger company performance by Ravenscraft and Scherer [1987] which covered almost 6,000 US mergers concluded between 1950 and 1976, Scherer and Ross [1990, p.173] observed that:

> 'The picture that emerges is a pessimistic one: widespread failure, considerable mediocrity, and occasional successes.'

The study found for example that around 47 per cent of acquired business units were subsequently sold off. While these units had enjoyed profits above their industry norms prior to the merger, they recorded negative profits in the year prior to sell-off, indicating a serious decline in performance. In the case of UK mergers Meeks [1977, p.66] concluded that:

> '..efficiency gains, which in public policy statements have been assumed to be the saving grace of growth by takeover, cannot....be relied upon: strong evidence was reported that the efficiency of the typical amalgamation, did not improve after merger...it actually appears to have declined.'

Similarly Kay [1996] noted that:

> 'Mostly we would be better off if the executives involved spent more time minding the store rather than negotiating to buy each other's stores. There is now a wide range of academic studies of post-merger performance which points to the conclusion that, taken as a whole, merger activity adds little or no value.'

Of course it is not job of competition policy or a competition authority to protect firms from making bad decisions. It may be as Kay suggests that:

> 'Companies with too much money are itching to hand it to merchant bankers or the shareholders of target firms.'

That is arguably a concern for the owners of such firms and no one else. However, reduced efficiency is an indication that competitive pressures are not as strong as they might be and that, I would suggest, is a matter of concern from a national economic perspective.

It is frequently argued in support of mergers in Ireland that only firms which are so large as to be dominant in the domestic market will be capable of competing with larger foreign firms in international markets. On that basis it is argued that the establishment of dominant firms should be permitted and indeed perhaps encouraged and that domestic competition considerations should be subordinated to the need to promote 'national champions'. Baldrige [1985] notes that such arguments were an important factor in causing the decline in antitrust activity against mergers under the Reagan administration. Arguments that large firms will be better equipped to compete on world markets are undermined by evidence that dominant or monopoly firms frequently prove to be inefficient and thus less capable of competing internationally. Several US studies have contrasted the performance of entities such as US Steel, General Motors and IBM with the likes of Standard Oil and AT&T which were broken up as a result of antitrust actions. Shepherd [1994, p.204] observed that:

> 'The divestiture that AT&T was forced to accept is widely credited - by AT&T's own top officials as well as most antitrust scholars - with improving its performance.'

Ten years after the break-up of AT&T and the decision not to pursue an antitrust action against IBM, the *Wall Street Journal* reported that:

> 'In October 1982, AT&T and IBM were running neck-and-neck for the honor of being the biggest US stock. The government had just ordered the break-up of AT&T, while leaving giant IBM intact....Ten years later, AT&Ts stock has been a winner. Counting the seven Baby Bells, whose shares were distributed to AT&T holders in 1984, AT&Ts stockmarket value soared 272 per cent form October 1982 to October 1992. And IBM? Its market value fell 20 per cent.'[4]

Shepherd [1994] concluded that, in the case of both General Motors and IBM, their dominant position simply fostered inefficient behaviour. General Motors was far less efficient than its smaller Japanese rivals and suffered a serious loss of market share once Japanese producers began to compete in the US market. Adams and Brock [1994, p.243] found that:

> 'The presumption that massive corporate size and high market concentration are conducive to good economic performance is no more than that - an a priori assumption unsubstantiated by the facts. To the contrary, the weight of the evidence shows that noncompetitive industry structure breeds noncompetitive industry behaviour, and culminates in noncompetitive performance.'

In support of this they also cite the experience of US Steel, GM and IBM. They note how US Steel was created almost overnight by the consolidation of 180 formerly independent plants. The result, they argue, was the creation of an inefficient technologically backward firm with a bloated bureaucracy which has suffered large declines in market share and required sustained government protection to survive. In contrast smaller independently owned minimills flourished and are highly profitable. In the case of Europe, Geroski and Jacquemin [1985, p.175] concluded that policies of promoting national champions pursued by various EU member states 'may have left Europe with a population of sleepy industrial giants who were ill-equipped to meet the challenge of the 1970s and 1980s.'

[4] *Wall Street Journal,* 19.11.92

Identifying the Problem Cases

In a literal sense, because a merger will result in the elimination of a competitor from the market, it will have some adverse effect on competition, at least in the short-run. In reality there is clearly a difference between the impact of a merger in a market with say 100 firms of roughly equal size and one with a relatively small number of firms. The Competition Authority clearly indicated in its decision in Woodchester[5] that the mere reduction in the number of competitors or enlarged market share of the merged entity was not sufficient to establish a lessening of competition. The Authority indicated in that decision and subsequently in Scully-Tyrrell[6] that unless the market following the merger was likely to be fairly concentrated it would not regard the merger as offending against Section 4(1) of the Competition Act. Specifically in the latter decision it indicated that, in the event of a horizontal merger, if the four firm concentration ratio following a merger was less than forty per cent it would see no need for any further analysis.[7] Thus to begin with if the relevant market after the merger is not highly concentrated there is no problem and, in the case of mergers notified under the Competition Act, the clear implication is that there will be no need for further analysis of the actual merger. Even where the market is found to be concentrated following the merger the Authority indicated that it would not consider it to be offensive in the absence of barriers to entry by new firms or if there was a significant level of competition from imports. Again if either of these conditions are met, on the basis of the Authority's decisions, there will be no need for further inquiry.

Even where mergers are found likely to have a significant adverse impact on competition, they may be justified in certain circumstances. Most competition enforcement regimes recognise that a merger which has significant anti-competitive effects should be permitted if it would also result in improvements in efficiency that outweigh the anti-competitive effects of the transaction. The view that merger analysis should focus on the trade-offs between any increase in market power and economies of scale, was developed by Williamson [1968]. The Williamson model represented a useful and influential means of analysing mergers but suffered from some serious limitations. In particular it was a static, partial equilibrium model which failed to take account of dynamic effects of mergers on technical progress, investment, growth and other factors. Nevertheless it is standard practice among competition agencies in many countries to consider whether the anti-competitive effects of a merger which is deemed problematical, are likely to be outweighed by efficiency gains arising as a result of the merger. In practice there have been few

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[5] Competition Authority Decision No. 6 of 4.8. 92.

[6] Competition Authority Decision No. 12 of 29.1.93 .

[7] The Authority also indicated that where the data was available it would use the Herfindahl-Hirschman Index to assess the level of market concentration.

cases in OECD countries in which the efficiencies defence, as it is known, was cited by a competition agency or court as the basis for a decision to approve a merger. In many jurisdictions there is considerable onus on the parties arguing that a merger should be permitted on efficiency grounds to ‘articulate in detail the nature and size of the expected efficiencies, and to bear the burden of proving that achieving the efficiencies is probable and not reasonably attainable by less anticompetitive means.’ [OECD, 1996] As Kay [1996] observes:

> ‘If companies used the argument that it would be too difficult to identify specific benefits, that would tell us everything we need to know about the real merits of their proposals.’

Most countries also require the parties to show that the efficiencies cannot be achieved by less anti-competitive means.

> ‘It is difficult to argue on the one hand, that entry into the relevant market is easy, and on the other, that the claimed efficiencies cannot be achieved by internal expansion or an alternative merger.’ [OECD, 1996]

The Authority has not to date approved an anti-competitive merger on the basis of the efficiencies defence.

A merger or take-over may also provide a means of preventing company collapse. Scherer and Ross [1990] observe that there are unlikely to be large numbers of such cases as acquiring firms normally seek healthy acquisition targets and not basket cases. Nevertheless take-overs of so-called failing firms do occur and frequently such mergers may be permitted even though they might lead to a significant diminution of competition. The failing firm issue has arisen in respect of a number of mergers considered by the Competition Authority. The failing firm defence has been accepted as justifying an otherwise anti-competitive merger under US law since the 1930s. The US Department of Justice Merger Guidelines outline the main features of the failing firm defence as it applies under that countries competition laws.

> ‘The "failing firm defense" is a long-established, but ambiguous, doctrine under which an anti-competitive merger may be allowed because one of the merging firms is "failing". Because the defense can immunize significantly anticompetitive mergers, the Department will construe its elements strictly.
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> The Department is unlikely to challenge an anticompetitive merger in which one of the merging firms is allegedly failing when: (1) The allegedly failing firm probably would be unable to meet its obligations in the near future; (2) it would probably not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good faith efforts to elicit reasonable alternative offers of

acquisition of the failing firm that would both keep it in the market and pose a less severe danger to competition than does the proposed merger.'

The guidelines state that the fact that an offer is less than the proposed transaction does not make it unreasonable. Indeed any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. It is also necessary to show that, in the absence of the merger, the assets of the failing firm would leave the market.

The Authority refused a certificate in IDG/Cooley[8] but accepted the failing firm argument in Barlo/Veha.[9] In its report on *Tribune Newspapers*, the majority of the Authority recommended against allowing Independent Newspapers from increasing its share holding in *The Sunday Tribune*, while recognising that there was a distinct risk that this could lead to the closure of that newspaper.

Merger Control in Ireland.

Under the Mergers, Takeovers and Monopolies (Control) Act 1978, as amended by the Competition Act 1991, responsibility for deciding whether or not to permit mergers involving firms above a certain size lies with the Minister for Enterprise and Employment. The 1978 Act operates by making automatically void any transaction within its scope which is not notified. Ireland is unusual, but not unique, among OECD countries in having a merger jurisdiction where notification is a precondition to validity of the transaction.[10] Failure to notify creates an 'eternal shadow on title' to the transferred shares. The Act applies to all mergers, as defined, where the value of the gross assets of two of the enterprises involved exceeds £10m, or the turnover of two enterprises exceeds £20m.

The Competition Authority stated in Woodchester that, in its view, a merger was not automatically outside the scope of the Competition Act by virtue of its having been approved under the Mergers Acts. Indeed it has found that some mergers actually did offend.[11] The Authority's approach has been criticised on the grounds that it has created a double jeopardy for mergers in that even mergers approved by the Minister under the Mergers Acts, could be in

[8] Competition Authority decision no. 285, 25 February 1994.

[9] Competition Authority decision no. 302, 25 March 1994.

[10] According to Whish and Wood [1994] who surveyed merger control regimes in 24 OECD countries, notification was a precondition to validity in only Ireland, Germany and Portugal.

[11] The Authority indicated in its decision in *Woodchester* that mergers were not automatically excluded under the Act. It subsequently decided in *Irish Distillers/Cooley, op. cit.* and *David Allen/Adsites,* Competition Authority decision no. 381, 15. December 1994 that those mergers offended against Section 4(1).

breach of Section 4(1), and by implication, Section 5, of the Competition Act. Such an interpretation, if correct means that third parties, notably competitors, could initiate court proceedings to block or possibly unscramble a merger. This clearly results in some degree of uncertainty. It is clear that the Authority's views as expressed in its decisions, indicate that only a very small number of mergers are likely to be caught by Section 4(1). In fact the Authority has found only two mergers to be anti-competitive out of about thirty or so which have been decided under the Competition Act.

The first merger found to be offensive by the Competition Authority under Section 4 of the Competition Act concerned an agreement whereby Irish Distillers Group agreed to make an offer for the whole of the existing share capital of Cooley Distillery, subject to obtaining valid acceptances for shares representing more than 50 per cent of such issued share capital and to certain other conditions. IDG had been the only producer of Irish whiskey for many years. Cooley was established in 1987 and acquired an alcohol plant owned by a state company, Ceimici Teo, which was in liquidation. The Authority concluded that, if the arrangements proceeded, any possibility of Cooley becoming a competitor would have been eliminated, while it was unlikely that any other new entrant would emerge. It noted that the acquisition would not result in the retention of the assets within the industry since IDG's stated intention was to close Cooley's production and storage facilities.

The only other merger found by the Authority to offend against Section 4(1) *per se* involved an acquisition by David Allen, a firm with a 56 per cent share of the large outdoor poster market, of a smaller rival.[12] The parties had a combined market share of 64 per cent. The Authority considered that large outdoor advertising posters constituted a distinct product market and the market following the merger would have been highly concentrated, while there was clearly no possibility of competition from imports. The Authority also concluded that it would not be easy for new firms to enter the market. In addition it noted that since the larger firm had begun to market the poster sites of the smaller firm in conjunction with its own, there was evidence of a significant increase in poster rental prices.

Toward a More Rational Treatment of Mergers.

From a public policy perspective the rationale for merger control is to identify and, where appropriate stop, those mergers which would have an adverse effect on competition as these would adversely affect the interests of consumers and, possibly other firms, but otherwise to put the minimum difficulties in the way of all other mergers. At the outset one might argue

[12] The Authority has refused certificates to a small number of other mergers on the grounds that the non-compete provisions contained in agreements went beyond what was necessary to secure the transfer of goodwill to the purchaser.

whether there was a need to have specific merger controls at all. Section 5 of the Competition Act prohibits an abuse of a dominant position by one or more undertakings. It does not prohibit dominant positions only the abuse of such market power. It could be argued therefore that if there is legislation in place prohibiting an abuse of a dominant position, then there is no need to worry about preventing the acquisition of market power by mergers. Such arguments are mistaken. In reality in many circumstances it is likely to be easier to prevent the establishment of a dominant position at the outset, rather than to try and control the exercise of market power subsequently. For that reason merger controls are a necessary part of the competition law armoury.

There appears to be a significant number of unnecessary notifications under the Mergers Acts. Coupled with this there is an overlap between the Mergers Acts and the Competition Act which again may involve some degree of unnecessary notification, although in practice this does not appear to be all that significant. This overlap also raises the threat of blocking actions by rivals in the Courts under the Competition Act. It is difficult to see what could be done to reduce the number of unnecessary notifications under the Mergers Acts. The notification thresholds appear relatively straightforward and the Department issues guidelines to firms. If in fact the reason for such notifications is the high penalties for failure to notify then obviously a relaxation of such penalties might ease this problem but at a risk of reducing compliance.

Under the Competition Amendment Bill the Competition Authority will have the power to issue category certificates. In the short-term a category certificate could represent a useful means of reducing the need to notify harmless mergers under the Competition Act and thus in the short-run this should reduce the need for double notification. The Authority has decided to begin preparing such a category certificate. There are some difficulties. Before finalising such a certificate the Authority would propose to seek comments from interested parties. Whether this can be done in anticipation of the legislation is a thorny question.

Looking further ahead and in this case, I would emphasis that the views expressed here are my own, clearly some reform is called for. In other countries mergers are dealt with primarily by competition authorities. It is recognised that competition considerations, while being of major importance, are not the only ones which arise in respect of mergers. Thus, for example, in Germany the relevant minister may overrule a decision by the Bundeskartellamt to block a merger. Recently in the UK the CBI have called for a similar sort of regime to be introduced. Nevertheless, the primary emphasis is on competition and such a regime merits detailed consideration. It is important that decisions under any new regime should be subject to the same overall time limits as apply under the Mergers Acts. Thus under such a regime the Authority or whatever agency is responsible, would have to decide within thirty days of receipt of all relevant information, whether the merger required a detailed examination, the same time period as presently afforded to the Minister for deciding whether or not to make a referral. If it decided that a more detailed examination was required this would have to be completed within a further thirty days. The Authority could refuse approval to a merger which it considered would lead to a significant lessening of competition. The final decision would rest with the Minister who could reject the Authority's findings by putting an Order before the Dail either permitting or prohibiting a merger contrary to the Authority's recommendations. Any such order would have to be put before the Dail within thirty days of the announcement of the Authority decision. The aim of this proposal is to increase transparency and ensure that competition considerations are fully considered in all merger cases. As it involves the same time limits as under the present arrangements, there is no obvious reason why such a scheme would not deal with legitimate business concerns, while allowing greater transparency.

In my view Section 5 of the Competition Act should continue to apply to mergers as this would guard against the type of situation which emerged in Cooley which was outside the scope of the Mergers Act. However, once the Authority has responsibility for enforcement of the Competition Act, consideration might be given to amending the Act so that private actions would not be permitted under Section 5 in the case of mergers. A similar provision applies under the New Zealand Commerce Act. Such a provision would ensure that while the Authority could take action where there was a genuine competition concern, business rivals could not initiate court proceedings, perhaps some time after the merger had been completed, in an attempt to inflict harm on the merged firm. In such circumstances, where the Authority considered that the proposed arrangements would not infringe Section 5 it could issue a form of comfort letter indicating that it saw no need for action. As against that it may be argued that private rights of action should be retained in order to guard against cases where there is genuine competitive harm to a third party.

Generally competition regimes use one of two alternative tests in deciding whether or not a merger should be permitted on competition grounds. These may be referred to as the 'substantial lessening of competition' test or the 'dominance' test. The former is self explanatory and involves a lower threshold at which a merger would be considered problematical. The latter approach would only prohibit mergers which establish or strengthen a dominant position. My own preference would be for the former test since this would be more capable of dealing with oligopoly situations, although the EU has certainly attempted to bring such situations within the ambit of a dominance test.

In recent years the tendency has developed in some jurisdictions of exploring whether a problem merger can be modified so as to overcome the threat to competition. Howe [1995] outlined the benefits of such a ‘fix-it-first’ approach. Generally this would involve the parties giving binding undertakings. It would appear desirable that any new regime would provide for formal ways of doing this. Specifically whatever regulatory authority is responsible it should be able to explore with the parties involved ways of overcoming any concerns it might have regarding potential adverse implications for competition, although it will not always be possible to modify a merger in a way that would make it acceptable. Indeed it would appear desirable if this could be done at either stage of the process. These would usually involve making structural adjustments, e.g. agreeing to divest themselves of certain assets within a set period of time in return for approval of the merger. Theoretically undertakings could apply to future behaviour, but these raise problems of ongoing policing and involve a form of more direct regulation. For these reasons behavioural undertakings are less satisfactory. Obviously a mechanism would need to be provided to ensure that any undertakings were complied with. At present under the Mergers Act, the Minister may only make an Order imposing conditions following a referral to the Authority.

Conclusions.

The primary, and indeed in most instances the only, rationale for merger control is a competition one, to protect against the adverse effects of a reduction in competition. In deciding whether or not to allow a merger, other factors arguably should be balanced against the competition considerations. While that is undoubtedly true, there is a need to place greater emphasis on competition in assessing mergers, as a merger regime which does not place considerable weight on competition matters is largely a pointless exercise. Indeed in the Financial Times recently John Kay argued that the onus of proof under UK law should be reversed in mergers so that firms would be required to prove that proposed mergers were in the public interest. Although the Competition Act contains a prohibition on abuse of dominance, such a provision of itself, may not be a wholly effective way of preventing reductions in competition. Merger controls are based on the recognition that, on occasion, it is better to prevent a dominant position being established at all, rather than attempt to police it subsequently.

References.

Adams, W. And Brock, J.W., [1994], Revitalising a Structural Antitrust Policy, *Antitrust Bulletin,* Vol. XXXIX, No.1, (Spring), pp.235-73.

Baldrige, [1985], Rx for Export Woes: Antitrust Relief, *Wall Street Journal,* 15 October 1985.

Cable, J.R., [1986], Industry in M.J. Artis ed., *The UK Economy,* London, Weidenfeld and Nicholson.

Geroski, P.A. and Jacquemin, A., [1985], Industrial Change, Barriers to Mobility and European Industrial Policy, *Economic Policy,* (November).

Howe, M., [1995], Mergers: A Fix it First Approach, *mimeo.*

Kay, J.A., {1996], Down-payment required to curb bid fever, *Financial Times,* 26 April 1996.

Magenheim, E.P. and Meuller, D.C., [1988], Are Acquiring Firm Shareholders Better Off After an Acquisition, in J. Coffee, L. Lowenstein and S. Rose-Ackerman (eds.), *Knights, Raiders and Targets: The Impact of the Hostile Takeover,* New York, Oxford University Press.

Meeks, G., [1977], *Disappointing Marriage: A Study of the Gains from Merger,* Cambridge, Cambridge University Press.

OECD, [1996], *Competition Policy and Efficiency Claims in Horizontal Agreements,* Competition Law and Policy Committee, Roundtables on Competition Policy, No.4.

Ravenscraft, D.J. and Scherer, F.M., [1987], *Mergers, Sell-Offs and Economic Efficiency,* Washington, Brookings Institute.

Scherer, F.M. and Ross, D., [1990], *Industrial Market Structure and Economic Performance,* New York, Houghton-Mifflin, 3rd edition.

Shepherd, W.G., [1994], Antitrust Repelled, Inefficiency Endured: Lessons of IBM and General Motors for Future Antitrust Policies, *Antitrust Bulletin,* Vol. XXXIX, No.1, (Spring), pp.203-34.

Singh, A., [1993], Regulation of Mergers: A New Agenda in R. Sugden ed., *Industrial Economic Regulation: A Framework and Exploration,* London, Routledge.

Whish, R. And Wood, D., [1994], *Merger Cases in the Real World: A Study of Merger Control Procedures,* Paris, OECD.

Wiedenfeld, K., [1927], *Cartels and Combines,* Geneva, League of Nations.

Williamson, O.E., [1968], Economies as an Antitrust Defence: The Welfare Trade-Offs, *American Economic Review,* Vol.58, pp.18-36.