POLICY ROUNDTABLES

Substantive Criteria used for Merger Assessment

2002

Introduction

The OECD Competition Committee debated substantive criteria used for merger assessment in October 2002. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Gary Hewitt for the OECD, written submissions from Australia, Brazil, the Czech Republic, the European Commission, Finland, France, Germany, Hungary, Ireland, Italy, Korea, Lithuania, Mexico, the Netherlands, New Zealand, Norway, Spain, the United Kingdom, the United States, as well as an aide-memoire of the discussion.

Overview

To decide if a merger should be blocked, conditioned or approved, three basic types of substantive test are employed: i) a dominance test (will the merger create or strengthen a dominant position?); ii) an SLC test (will the merger produce a substantial lessening of competition?); or iii) a public interest test (will the merger have a negative effect on the public interest?), This third test is not a competition test like the other two; it can include a number of non competition criteria such as effects on employment or regional development. Competition authorities tend to focus on one of the two competition tests in reviewing mergers.

The discussion highlighted the absence of general consensus concerning the overall superiority of either the dominance or the SLC tests. Whether or not anticompetitive mergers are more likely to be blocked under one or the other competition tests remains highly debatable.

The adoption of a common merger test, particularly for mergers affecting international markets, would be a significant contribution to the strengthening of international co-operation among competition authorities.

Related Topics

OECD Council Recommendation on Merger Review (2005)
International Co-operation in Transnational Mergers (2001)

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SUBSTANTIVE CRITERIA USED FOR THE ASSESSMENT OF MERGERS

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Substantive Criteria used for Assessment of Mergers which was held by the Competition Committee in October 2002.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les critères de fond utilisés pour l'évaluation des fusions, qui s'est tenue en octobre 2002 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the delegate submissions and the background paper, all of which focused heavily on comparing the application of the create or strengthen a dominant position test (dominance test) and the substantive lessening of competition test (SLC test) to horizontal mergers, a number of key points emerge:

(1) *There are no pure or completely standardised dominance or SLC tests. Moreover, many jurisdictions employ a mix of the two and some include aspects of a public interest test. These nuances should be borne in mind when considering general statements comparing or contrasting the dominance and SLC tests.*

Many members of the European Union come close to employing a "standardised" dominance test because they have adopted language similar to that found in the European Commission's Merger Regulation. The European Commission's test can be regarded, however, as a hybrid dominance/SLC test because after referring to creating or strengthening a dominant position, the test continues with: "…. as a result of which effective competition would be significantly impeded in the common market…."

There is a tendency to treat the US merger test as being the arch-typical example of an SLC test. The critical part of Section 7 of the Clayton Act, however, does not actually specify a straightforward SLC test. Instead it proscribes acquisitions the effect of which: "…may be substantially to lessen competition, or to tend to create a monopoly." As with the European Commission's test, this one also mixes elements of the dominance and SLC tests.

In actual practice, the European Commission has downplayed the second branch of its test, and the United States enforcement agencies have concentrated on the SLC effect rather than the "tend to create a monopoly" element. Brazil, France and Korea may therefore be better examples of countries applying hybrid SLC-dominance tests.

(2) *There is no general consensus concerning the overall superiority of either the dominance or SLC test, and the same is true regarding specific supposed advantages or disadvantages of both tests.*

The closest delegates got to consensus was the oft repeated proposition that the exact wording of the merger test is not as important as how it is applied. But the point was made that if and when mergers are challenged in court, the specific wording of the test takes on considerable importance.

(3) *Market shares and concentration indices generally play a larger role in merger review in jurisdictions employing dominance as contrasted with SLC tests. This difference is not inherent though in the tests themselves.*

Market share and concentration thresholds are employed in applying both dominance and SLC tests including through the use of various presumptions concerning anticompetitive effect. Competition authorities using either dominance or SLC tests typically stress, however, that such presumptions are rebuttable and do not substitute for fact based economic analysis.

(4) There is considerable debate over whether or not there is a significant set of anticompetitive mergers that are more likely to be blocked under an SLC as compared with a dominance test.

There was rough agreement that mergers likely to reduce competition by facilitating anticompetitive co-operation (i.e. "co-ordinated effects"), would probably be blocked under either test provided, as is normally the case, dominance is defined to include collective dominance. Similarly there was a rough consensus that either test would permit blocking mergers creating or strengthening single firm dominance. These are special cases of a more general category of mergers presenting a significant risk of "unilateral effects". Such mergers are expected to harm competition through the merging parties cutting output post-merger by more than the sum total of any increase in output by their competitors. In comparing dominance and SLC tests it is crucial to note that a merger can produce unilateral effects even if the new enterprise does not have the largest share of the market, or at least falls well short of the market share normally associated with single firm dominance.

While there was no dispute that the SLC test is able to block all mergers expected to produce unilateral effects, there was considerable disagreement about whether the same can be said of the dominance test if such mergers do not create or strengthen single firm dominance. This debate essentially concerns the degree to which the collective dominance concept can and should be extended to cover unilateral effects.

At least in some jurisdictions, collective dominance may be legally restricted to situations where there are either structural links among the principal suppliers and/or various economic pressures strongly encouraging a group of oligopolists to act approximately as if they were a single dominant firm. Where there is such a restriction on the meaning of collective dominance, it may not be possible block a merger expected to produce unilateral effects in the absence of structural links.

Mergers creating or strengthening single dominance would be expected to lead to cuts in output. Analogously, when a merger produces co-ordinated effects, each of the co-ordinating firms, including the merging parties, would cut output post-merger. There is no such analogy in the case of unilateral effects resulting from a merger believed to create or strengthen a collective dominant position held by a set of non-structurally linked oligopolists. In such a case only the merging firms would be predicted to cut output. Unless their competitors were capacity constrained, one would expect them to increase outputs. It might therefore be difficult to extend the collective dominance concept to cover unilateral effects arising post-merger among a group of non-structually linked oligopolists.

Despite difficulties in making the analogy between single and collective dominance in the type of situation just described, proponents of the dominance test point out that collective dominance has already evolved considerably in the jurisprudence. One should refrain therefore from pre-judging what courts would do if they were asked to apply collective dominance to a merger associated with unilateral effects but without structural links among the collectively dominant firms. People on this side of the debate argue that Airtours was not such a case and should not be read as closing the door to appropriate further development of the collective dominance concept within the European Union.

If the legal difficulties involved in applying collective dominance to certain mergers likely to produce unilateral effects prove too great, an alternative approach might be to lower the dominance threshold, including possibly lowering the market shares at which single dominance is presumed. The problem with this approach is that it may lead to markets in which more than one firm can be treated as enjoying single dominance, an idea that courts might find very difficult to accept.

Even if it is granted that the SLC test can in theory stop a larger set of anticompetitive mergers than a dominance test, it does not follow that many mergers fall into the gap identified, or that they are particularly harmful. This is an issue that is very difficult to plumb. Some contributions did refer, however, to actual anticompetitive merger examples that ostensibly would have proved more difficult to block under the dominance (including collective dominance) as compared with SLC test. When it was argued that there are not likely to be many such cases, delegates were reminded that few mergers are blocked in any event.

(5) The dominance and SLC tests could produce differences not merely in the probability that certain anticompetitive mergers will be blocked, but also in legal certainty. This could affect firms' willingness to plan even inoffensive mergers.

Points relating to legal certainty arose several times in the course of the roundtable discussion and were made by proponents of both the dominance and SLC tests.

Some oral and written contributions stressed that the flip side of the supposed greater flexibility, and comprehensiveness plus superior grounding in economics of an SLC test was the greater legal uncertainty the SLC test might impose on business. Some proponents of the SLC test accepted that point, but countered that SLC jurisdictions generally provide statutory criteria for assessing whether competition has been substantially lessened, and supplement that with detailed merger guidelines in order to increase legal certainty.

Two arguments were advanced to support the proposition that the dominance rather than SLC test is actually the less legally certain test. First, the dominance test is supposedly less grounded in economics, hence not as predictably tied to the public policies underlying competition law. Against that view, it was pointed out that industrial organisation economics is challenging to understand and subject to change hence itself a source of legal uncertainty. The second legal certainty argument advanced against the dominance test was its supposed tendency to promote mis-characterisation. It is maintained that competition authorities in dominance jurisdictions struggle to characterise as co-ordinated effects what are really unilateral effects. This is supposedly motivated by a desire to avoid the problems that might be encountered in trying to establish that collective dominance can be applied to block mergers having unilateral effects. To the extent such mis-characterisation actually occurs, it will tend to create legal uncertainty.

In defence of the dominance standard, it was argued that dominance including collective dominance has a clear legal meaning, especially when buttressed by legal presumptions based on market shares. Mexico maintained that the dominance test, with its presumed structural bias, is both more legally certain than an SLC, and easier to apply, a point of special importance in jurisdictions that have only recently adopted competition laws. In Europe, the Court of First Instance's decision in Airtours has clarified the meaning of collective dominance at least in regard to the treatment of co-ordinated effects under the European Commission's Merger Regulation.

It was generally agreed that whatever the respective legal certainty merits of the dominance and SLC tests, there would be a loss in such certainty in the period following a switch in tests. Courts would be forced to attach significance to the change, so accumulated jurisprudence would no longer be directly applicable. Of relevance to this point, Australia reported that for about two years after it switched from a dominance to an SLC test, the rejection rate in reviewed mergers increased from roughly three to four percent to something between six and seven percent. Australia believed this temporary increase was because businesses and their legal advisers were learning the meaning of the new test.

The oft-repeated argument that any differences between the dominance and SLC tests are less important than how they are applied seems particularly pertinent to the legal certainty issue. What really counts is that the test be clearly understood and consistently applied. Legal certainty will tend to be greater in jurisdictions which provide statutory language and/or detailed enforcement guidelines identifying the principal criteria that will be considered (and possibly setting out some clear safe-harbours), and detailed reasons for case decisions, including decisions not to oppose mergers that were subject to detailed review.

(6) *In theory, an efficiency defence can be employed with either a dominance or SLC test. In practice, such defences seem more typical of SLC jurisdictions, and even when not explicitly provided, an efficiency defence may be implicit in an SLC test.*

SLC jurisdictions applying their test to block mergers that will probably raise prices have a built in efficiency criterion. If efficiencies take the form of reductions in marginal costs, they could be large enough to prevent a post-merger price increase despite an increase in market power.

Several delegates stated that differences in how efficiencies are treated are not that important given that, in practice, virtually all jurisdictions are very reluctant to approve mergers based on expected efficiencies. There was general agreement that efficiencies are difficult to assess and are less likely to be realised the more a merger reduces competition.

(7) *To the extent that dominance and SLC tests are found in other sections of competition statutes, there can be overlaps in jurisprudence with potentially important effects on merger review and on how other parts of the competition statute are applied.*

The most common and probably important overlap occurs in jurisdictions applying a dominance test in merger review. The concepts of single and collective dominance developed in such review can affect how abuse of dominance provisions are applied and *vice versa*. This could prove to be quite unhelpful. In particular, dominance test jurisdictions might wish to lower the threshold of what constitutes dominance in order to block certain anticompetitive mergers, especially those having unilateral effects. Before doing so, however, they will have to consider how this will tend to widen the scope of their abuse of dominance prohibitions. Moreover, a finding that a merger either leverages or strengthens a previously unidentified dominant position could have important ramifications for subsequent application of the abuse of dominance prohibition to the merging parties. Such a finding of dominance could presumably trigger increased scrutiny of the firms' conduct under abuse of dominance prohibitions. This point applies as well to mergers where the dominance is of a collective nature. In that case the ramifications affect not just the merging parties, but the whole group of firms sharing the collectively dominant position.

Before leaving the overlap issue, it is important to note that it also has a positive side. An overlap will presumably speed the development of jurisprudence that in turn makes a positive

contribution to reducing the legal uncertainty associated with both merger review and the other provisions relying on a similar threshold.

(8) *International co-operation among competition authorities, particularly as regards mergers affecting international markets, would be facilitated by the adoption of a common merger test.*

This point could support either the dominance or SLC test depending on the group of countries for which co-operation and convergence is deemed particularly important. Within the European Union, for example, there is now a reasonable degree of convergence on a fairly standardised dominance test. The co-operation this should encourage may be even more desirable after the greater decentralisation of merger enforcement expected to go into effect sometime in 2004.

This brings things back full circle to the issue of just how important differences in tests are. For international convergence in results, and for encouraging the co-operation facilitating such convergence, there are other factors that could be just as or even more important than the test. Differences in objectives, the threshold applied for judging how much market power is too much, the analytical approach used to analyse market power, and the way in which efficiencies are factored into merger review are equally fruitful areas to explore in order to secure greater convergence in results.

SYNTHÈSE

Par le Secrétariat

Les discussions au cours de la table ronde, les contributions des délégués et la note de référence, toutes consacrées pour l'essentiel à la comparaison entre l'application du critère de la création ou du renforcement d'une position dominante (critère de la position dominante) et celle du critère de la réduction sensible de la concurrence (critère de RSC) aux fusions horizontales, ont fait ressortir un certain nombre de points-clés :

(1) *Il n'existe pas de critère de la position dominante ou de critère de RSC « pur » ou complètement normalisé. En outre, de nombreux pays utilisent un mélange des deux et certains y incluent certains éléments du critère de l'intérêt public. Ces nuances doivent être gardées à l'esprit lorsqu'on envisage de comparer à titre général le critère de la position dominante et le critère de RSC.*

De nombreux États membres de l'Union européenne utilisent quasiment un critère de la position dominante « normalisé », parce qu'ils ont adopté un langage similaire à celui utilisé dans le Règlement relatif aux fusions de la Commission européenne. Le critère de la Commission européenne peut être considéré comme un hybride des deux critères « position dominante/RSC » parce que après s'être référé à la création ou au renforcement d'une position dominante, le texte poursuit en visant : « … [une position dominante] ayant comme conséquence qu'une concurrence effective serait entravée de manière significative dans le marché commun… ».

On a tendance à considérer le critère de fusion en vigueur aux Etats-Unis comme l'archétype d'un critère de RSC. Or, dans l'extrait le plus important de sa partie 7, la Loi Clayton ne définit en fait aucun critère de RSC strict, mais interdit les acquisitions qui auraient pour conséquence « de réduire sensiblement la concurrence, ou risqueraient de créer un monopole ». Comme dans le cas du critère de la Commission européenne, des éléments des deux critères (position dominante et RSC) sont mêlés.

Dans la pratique, la Commission européenne a donné moins d'importance au second volet de son critère, et les autorités américaines se sont concentrées davantage sur les conséquences de réduction sensible de la concurrence que sur le risque de création d'un monopole. En conséquence, le Brésil, la France et la Corée offrent peut-être de meilleurs exemples de pays appliquant des critères hybrides.

(2) *Il n'existe pas de consensus général sur la supériorité globale d'un critère par rapport à l'autre, et ceci vaut également pour les avantages ou inconvénients spécifiques supposés de ces deux critères.*

La seule chose sur laquelle les délégués soient à peu près parvenus à un consensus est la proposition, souvent répétée, que le libellé exact du critère importe moins que la manière dont il est en réalité appliqué. Mais il a été souligné que dans les cas où des fusions étaient contestées devant un tribunal, le libellé spécifique des critères prenait une importance considérable.

(3) *Les parts de marché et les indices de concentration jouent généralement un plus grand rôle lors de l'examen des fusions dans les pays qui utilisent le critère de dominance que dans ceux qui ont recours au critère RSC. Cette différence n'est toutefois pas aux critères eux-mêmes.*

Les parts de marché et les seuils de concentration sont utilisés aussi bien pour l'application de l'un ou de l'autre critère, y compris par l'usage de diverses hypothèses concernant les conséquences anticoncurrentielles. Toutefois, les autorités de la concurrence qui utilisent soit le critère de la position dominante, soit le critère de RSC soulignent généralement que ces hypothèses peuvent être réfutées et qu'elles ne remplacent pas une analyse économique fondée sur des faits objectifs.

(4) *Un débat animé existe pour savoir si oui ou non un grand nombre de fusions anti-concurrentielles sont plus susceptibles d'être bloquées suite à la mise en œuvre du critère de RSC que suite à l'application du critère de la position dominante.*

Tous ont été globalement d'accord sur le fait que les fusions susceptibles de réduire la concurrence en facilitant une coopération anticoncurrentielle (« effets coordonnés ») seraient probablement bloquées quelque soit le critère utilisé à condition, comme c'est normalement le cas, que la définition de la position dominante recouvre aussi la position dominante collective. De la même façon, il y a eu dans l'ensemble un consensus sur le fait que l'un comme l'autre critère permettait de bloquer les fusions créant ou renforçant la position dominante d'une entreprise unique. Il existe des cas particuliers où l'on est en présence d'une catégorie plus générale de fusions présentant un risque important « d'effets unilatéraux ». De telles fusions risquent de nuire à la concurrence si les parties qui fusionnent procèdent après la fusion à une diminution de production supérieure à la somme de l'augmentation éventuelle de la production de la part de leurs concurrents. Lorsque l'on compare le critère de la position dominante et le critère de RSC, il est fondamental de ne pas perdre de vue qu'une fusion peut produire des effets unilatéraux même si la nouvelle entreprise issue de la fusion ne possède pas la plus grosse part du marché, ou du moins est très loin de la part de marché normalement associée à la domination exercée par une seule entreprise.

Si personne n'a contesté que le critère de RSC pouvait permettre de bloquer toutes les fusions risquant d'avoir des effets unilatéraux, en revanche, la question de savoir si cela vaut également pour le critère de la position dominante dans les cas où les fusions n'ont pas pour effet de créer ou de renforcer la position dominante d'une seule entreprise fait l'objet d'un profond désaccord. Ce débat concerne essentiellement l'ampleur avec laquelle la notion de domination collective peut, et doit, être étendu aux effets unilatéraux.

Dans certains pays au moins, la position dominante collective peut être juridiquement limitée aux situations dans lesquelles il existe des liens structurels entre les principaux fournisseurs et/ou diverses pressions économiques qui encouragent fortement un groupe d'oligopolistes à agir approximativement comme s'ils constituaient une entreprise dominante unique. Lorsque des restrictions sont mises à la définition de la position dominante collective, il peut être impossible de bloquer une fusion risquant de provoquer des effets unilatéraux en l'absence de liens structurels.

Les fusions qui ont pour conséquence de créer ou de renforcer une position dominante simple devraient logiquement aboutir à des réductions de la production. Par analogie, lorsqu'une fusion produit des effets coordonnés, chacune des entreprises participant à cette coordination, y compris les parties à la fusion, vont diminuer la production après la fusion. Il n'existe pas d'analogie similaire dans le cas des effets unilatéraux résultant d'une fusion censée créer ou renforcer une

position dominante collective détenue par un ensemble d'oligopolistes n'ayant pas de liens structurels. Dans ce cas, seules les entreprises qui fusionnent vont probablement diminuer la production. Sauf contraintes de capacités, on peut s'attendre à ce que leurs concurrents augmentent leur production. En conséquence, il serait sans doute difficile d'étendre la notion de position dominante collective aux effets unilatéraux observés après une fusion parmi un groupe d'oligopolistes non liés structurellement.

En dépit des difficultés rencontrées pour établir une analogie entre la position dominante simple et la position dominante collective dans les types de situations qui viennent d'être décrits, les tenants du critère de la position dominante font valoir que la position dominante a déjà évolué considérablement dans la jurisprudence. Il faut en conséquence se garder de préjuger de ce que les tribunaux feraient si on leur demandait d'appliquer le critère de la position dominante collective à une fusion entraînant des effets unilatéraux, mais sans liens structurels entre les entreprises collectivement dominantes. Les partisans de cet argument soutiennent que l'exemple Airtours ne rentrait pas dans cette catégorie et ne devrait pas être interprété comme fermant la porte à une élaboration appropriée de la notion de position dominante collective au sein de l'Union européenne.

Si les difficultés juridiques qu'entraînerait l'application du test de position dominante collective à certaines fusions susceptibles d'avoir des effets unilatéraux se révèlent trop importantes, une autre approche possible pourrait consister abaisser le seuil de dominance, notamment si possible à réduire les parts de marché laissant présumer une domination simple. Une telle approche présente toutefois un problème, celui de risquer d'aboutir à des marchés où l'on considérerait qu'il y a plus d'une entreprise qui exerce une position dominante simple, notion que les tribunaux auraient sans doute du mal à admettre.

Même si l'on admet que le critère de RSC peut en théorie arrêter un nombre plus important de fusions anticoncurrentielles que le critère de la position dominante, il ne s'ensuit pas que de nombreuses fusions correspondent aux difficultés identifiées, ou qu'elles sont particulièrement dommageables. Cette question est très difficile à trancher. Certaines contributions contenaient ainsi des exemples réels de fusions anticoncurrentielles qui, à l'évidence, auraient été plus faciles à bloquer grâce au critère de RSC que grâce au critère de la position dominante (y compris de position dominante collective). Lorsque certains ont avancé qu'il y avait probablement peu d'affaires de ce type, il a été rappelé aux délégués que très peu de fusions étaient bloquées de toute façon.

(5) Les critères de position dominante et de RSC peuvent avoir des résultats différents, non seulement du point de vue de la probabilité avec laquelle certaines fusions anticoncurrentielles pourraient être bloquées, mais aussi du point de vue de la certitude juridique. Ceci risque d'affecter la volonté des entreprises de prévoir des fusions, même inoffensives.

La question de la certitude juridique a été posée plusieurs fois au cours de la table ronde, et ce aussi bien de la part de tenants du critère de la position dominante que de la part de partisans du critère de RSC.

Certaines contributions orales et écrites ont souligné que la supériorité supposée du critère de RSC tenant à sa plus grande souplesse, à son caractère plus exhaustif et à un meilleur ancrage économique avait comme revers la plus grande incertitude juridique qu'il pourrait faire peser sur les entreprises. Certains partisans du critère de RSC ont accepté cet argument, mais lui ont opposé que les pays appliquant le critère de RSC prévoient généralement des critères obligatoires

permettant d'évaluer si la concurrence a été fortement réduite, et leur adjoignent en outre des lignes directrices détaillées de manière à accroître la certitude juridique.

Deux arguments ont été avancés en faveur de la proposition selon laquelle c'est en fait le critère de la position dominante, et non le critère de la RSC, qui apporterait le moins de certitude du point de vue juridique. Premièrement, le critère de la position dominante serait moins fondé économiquement, et en conséquence lié de manière moins prévisible aux stratégies des pouvoirs publics qui sous-tendent le droit de la concurrence. Pour réfuter cette assertion, il a été souligné que l'économie des organisations industrielles est difficile à comprendre et sujette à des fluctuations, et donc elle-même source d'incertitude. Le second argument de certitude juridique opposé au critère de la position dominante est sa tendance supposée à favoriser une mauvaise caractérisation des opérations. Certains soutiennent que dans les pays qui appliquent de critère de la position dominante, les autorités de la concurrence s'efforcent à tout prix de qualifier d'effets coordonnés des effets qui sont en réalité unilatéraux. Ces efforts seraient dictés par la volonté d'éviter les problèmes qui pourraient surgir si l'on essaye d'appliquer un critère de position dominante collective pour bloquer des fusions ayant des effets unilatéraux. Si une telle caractérisation impropre était constatée dans la réalité, ceci tendrait à créer une incertitude juridique.

Les partisans du critère de la position dominante ont fait valoir, pour le défendre, que la position dominante, y compris la position dominante collective, avait une signification juridique claire, en particulier lorsqu'elle est étayée par des présomptions juridiques fondées sur les parts de marché. Le Mexique a soutenu que le critère de la position dominante, avec son orientation structurelle présumée, était à la fois plus certain juridiquement que le critère de RSC, et plus facile à mettre en œuvre, argument particulièrement important dans les pays n'ayant adopté que très récemment une législation sur la concurrence. En Europe, la décision du Tribunal de première instance dans l'affaire Airtours a clarifié la signification de la position dominante collective, au moins en ce qui concerne le traitement des effets coordonnés en vertu du Règlement relatif aux fusions de la Commission européenne.

Il a été généralement admis que quels que soient les mérites respectifs du critère de la position dominante et du critère de RSC en matière de certitude juridique, le fait de passer d'un critère à un autre serait suivi d'une période d'incertitude plus grande. Les tribunaux seraient obligés d'attacher de l'importance à un tel changement, et la jurisprudence accumulée ne serait plus directement utilisable. Sur ce point, l'Australie a d'ailleurs indiqué que lorsqu'elle était passée du critère de la position dominante au critère de RSC, le taux de rejet des fusions examinées était passé de trois à quatre pour cent à quelque six - sept pour cent pendant une période de deux ans. L'Australie estime que cette augmentation temporaire s'explique par le temps nécessaire pour que les entreprises et leurs conseilleurs juridiques prennent toute la mesure de la signification de ce nouveau critère.

L'argument souvent mis en avant selon lequel les différences éventuelles entre le critère de la position dominante et le critère de RSC sont moins importantes que la manière dont ils sont appliqués semble particulièrement pertinent en ce qui concerne la question de la certitude juridique. En effet, ce qui compte, c'est que le critère soit bien compris et appliqué de manière constante et cohérente. La certitude juridique sera forcément plus grande dans les pays qui imposent un langage obligatoire et/ou qui fournissent des directives de mise en œuvre détaillées identifiant les principaux critères à prendre en compte (et éventuellement qui définissent des régimes de protection clairs), et dans lesquels les décisions rendues sont motivées de manière détaillée, notamment les décisions de ne pas s'opposer à des fusions ayant fait l'objet d'un examen approfondi.

(6) *En théorie, un moyen de défense fondé sur l'efficience peut être utilisé avec les deux critères. Dans la pratique en revanche, de tels moyens de défense semblent plus courants dans les pays utilisant le critère de RSC, et même lorsque cela n'est pas explicitement indiqué, un moyen de défense fondé sur l'efficience peut être implicite dans un critère de RSC.*

Les pays qui utilisent le critère de RSC pour bloquer des fusions risquant probablement d'entraîner des hausses de prix disposent déjà d'un critère d'efficience « interne ». En effet, si les efficiences prennent la forme de réduction des coûts marginaux, il se peut que celles-ci soient assez importante pour empêcher une hausse des prix après la fusions en dépit de l'accroissement du pouvoir de marché.

Plusieurs délégués indiquent que les différences dans la manière dont les efficiences sont traitées ne sont pas si importantes que cela étant donné que dans la pratique, quasiment tous les pays sont très réticents à approuver des fusions fondées sur des efficiences attendues. Tous sont généralement d'accord pour dire que les efficiences sont difficiles à évaluer et que plus une fusion va réduire la concurrence, moins il est probable que ces efficiences seront avérées.

(7) *Dans la mesure où les critères de position dominante et de RSC se retrouvent dans d'autres parties des règlements sur la concurrence, il peut y avoir des chevauchements dans la jurisprudence ayant des conséquences potentiellement importantes sur l'examen des fusions et sur la manière dont d'autres parties des règlements sur la concurrence seront appliqués.*

Le chevauchement le plus courant et probablement le plus important est observé dans les pays qui appliquent le critère de la position dominante dans l'examen des fusions. Les notions de position dominante simple et collective développées au cours d'un tel examen peuvent affecter la manière dont les dispositions relatives à l'abus de position dominante sont appliquées, et inversement, ce qui risque d'être à l'arrivée fort peu utile. En particulier, il peut arriver que des pays appliquant le critère de la position dominante souhaitent abaisser le seuil fixé pour une position dominante de manière à bloquer certaines fusions anticoncurrentielles, en particulier celles qui auraient des effets unilatéraux. Toutefois, avant de la faire, elles devront étudier de quelle manière un tel abaissement aura tendance à élargir le champ d'application de leurs dispositions interdisant les abus de position dominante. En outre, une conclusion selon laquelle un fusion démultiplierait ou renforcerait une position dominante encore non identifiée pourrait avoir des ramifications importantes pour l'application ultérieure de l'interdiction de l'abus de position dominante aux parties à la fusion. En fait, on peut penser qu'une telle conclusion déclencherait une surveillance accrue du comportement des entreprises du point de vue de l'interdiction de l'abus de position dominante. Ceci vaut également pour les fusions où la position dominante est de nature collective. Dans ce cas, les ramifications n'affectent pas seulement les parties à la fusion, mais visent l'ensemble des entreprises qui occupent collectivement une position dominante.

Avant de clore le chapitre du chevauchement, il est important de noter qu'il peut aussi avoir des conséquences positives. De fait, on peut supposer qu'un tel chevauchement accélérera le développement de la jurisprudence, ce qui aura une incidence positive sur la réduction de l'incertitude juridique liée à l'examen des fusions et autres autres dispositions reposant sur un seuil similaire.

(8) *L'adoption d'un critère commun pour les fusions faciliterait la coopération internationale entre les autorités de la concurrence, en particulier pour ce qui concerne les fusions affectant les marchés internationaux.*

Cette assertion peut venir à l'appui soit du critère de la position dominante, soit du critère de RSC selon le groupe de pays pour lequel la coopération et la convergence apparaissent comme particulièrement importants. Au sein de l'Union européenne, par exemple, on observe aujourd'hui un degré de convergence raisonnable sur un critère de la position dominante relativement normalisé. La coopération qu'une telle convergence devrait encourager sera sans doute encore plus souhaitable après la plus grande décentralisation de l'application de la législation sur les fusions qui devrait entrer en vigueur en 2004.

Ceci nous ramène à notre point de départ, à savoir quelle est l'importance réelle des différences entre les critères. Pour aboutir à une convergence internationale dans les résultats, et pour favoriser la coopération qui ouvrirait la voie à une telle convergence, il y a d'autres facteurs qui sont peut-être aussi importants, voire plus importants, que les critères eux-mêmes. Les différences d'objectifs, les seuils appliqués pour apprécier un excès de pouvoir de marché, l'approche utilisée pour analyser le pouvoir de marché et la manière dont les efficiences sont prises en compte dans l'examen d'une fusion sont des domaines qu'il serait tout aussi utile d'explorer de manière à garantir une plus grande convergence dans les résultats.

BACKGROUND NOTE

By the Secretariat

1. Introduction and main findings

In considering the competition effects of a merger, most competition authorities apply some variant of two common tests. The first focuses on whether a merger is likely to create or strengthen a dominant position (dominance test). The alternative test requires an assessment of whether a merger is likely to substantially lessen competition (SLC test). This paper explores whether there are significant differences between these tests. More precisely, is the choice of competition test likely to lead to different outcomes in respect of any definable types of mergers?

This paper will not consider the arguments for and against a public interest or benefit standard (including some form of ministerial over-ride). It should be noted, however, that such broader standards universally incorporate an assessment of the likely effect of a merger on competition and this is generally accorded great weight in determining whether or not challenge a merger. That weight is more likely to increase than decrease in future.[1]

The relative attractiveness of the two main competition tests is not simply a matter of academic debate. The European Commission is currently considering switching from a dominance to an SLC test. Its decision presumably will have a significant influence on whether various EU Member states retain or change their substantive test. It is also worth noting that in 2001 New Zealand changed from a dominance to an SLC test, and Australia did the same in 1993.[2]

In referring to the SLC test, this paper will pay special attention to how it is applied in the largest SLC jurisdiction, the United States. US law and experience have had considerable influence on other jurisdictions, and the US also has published detailed merger guidelines. As for the dominance test, the focus will be on Germany and the European Union, respectively the second largest and largest dominance jurisdictions. More attention will be devoted to Germany because it has published merger guidelines describing its enforcement policies while, at the time of writing, the European Union has not. While the United States, the European Union and Germany provide an adequate background for elucidating the main issues; it must be noted that there can be significant variations across countries in how both these tests have been articulated. Moreover, there is good reason to believe that how a merger review test is applied is at least as important as how it is formulated, and application of even the same formulation can also vary considerably across jurisdictions.

This paper benefit from a German Federal Cartel Office ("Bundeskartellamt") discussion paper prepared for a conference with university professors focused on comparing the SLC and dominance tests.[3] That study closely examined the merger review regimes in Australia, the European Union, Germany and the United States. It also considered actual merger enforcement experience in the latter three jurisdictions, and reviewed the reasons advanced for making changes in New Zealand and the United Kingdom. Its principal conclusion was:

> It is undisputed that the competition authorities under consideration do sometimes come to differing results in the practical application of their merger control regulations. However, the analysis made here of the substantial contents of the SLC test and the MD [market dominance] test as well as of the practical application of the two approaches rather suggests that differing evaluations or decisions are due to other factors. Some of the factors that should be mentioned in this context are for example potential differences in the competition policy "schools" or purposes of protection, political or personnel influences, different approaches in defining the relevant market, the willingness to apply new economic theories, the requirements of the courts or other control instruments.[4]

This conclusion is well considered and supported, despite the omission of a significant United States merger and a European court decision, i.e. the United States Staples/Office Depot merger and the European Court of First Instance decision in Airtours/First Choice (a decision post-dating the German discussion paper).[5] It is also echoed in the European Commission's Green Paper launching review of its Merger Regulation.[6] The European Commission nevertheless thought that given the increasingly international scope of merger activity the time was ripe to debate the merits of the two tests.[7] A debate is certainly warranted and tends to show that the choice of tests is significant even if other factors may be equally or more important in explaining divergent merger decisions in SLC and dominance jurisdictions.

1.1 Main Findings

This paper's main findings are:

- If the dominance test is interpreted to include only single firm dominance, it would catch significantly fewer anticompetitive mergers than an SLC test. The subsequent bullet points in this list assume the dominance test includes single as well as collective dominance.

- Almost all the inherent differences between the dominance and SLC tests used in merger review have to do with different thresholds applied to determine if likely harmful effects are sufficiently serious to warrant blocking a merger. In particular, a merger that increases market power may not create the state of dominance. This means that in markets where there is no dominance pre-merger, the dominance test may be unable to block a merger that the SLC would stop. It is also true, however, that in markets where there is dominance pre-merger, the "strengthening" branch of the dominance test could be used to block harmful mergers that the SLC test might not be able to stop. This is because "strengthening" could be taken to include more than simply an increase in market power, i.e. it could extend to preserving existing levels of market power or other harmful effects that cannot easily be modelled in market power terms.

- In practice, the gaps in coverage between the two tests arising because of differences in thresholds could be largely eliminated through sufficient "flexibility" in application. For the SLC test, sufficient "flexibility" could probably be obtained by adding or simply making more explicit a "prevent" branch to the SLC test, i.e. block mergers that likely prevent or lessen competition substantially. For the dominance test the necessary additional flexibility may require a more extreme and potentially difficult to obtain, given existing jurisprudence, approach including one or more of the following:

    1. weakening the definitional link between market power and dominance;

2. varying the approach to market definition depending on the type of merger being reviewed;

3. consistently adopting particularly narrow market definitions;

4. adopting different dominance thresholds for single and collective dominance;

5. lowering the market power threshold required to find dominance;

6. extending collective dominance to cover anticompetitive oligopolistic inter-dependence falling short of "co-ordinated effects".

A number of these "solutions" would pose problems of their own and/or prove difficult to implement.

- Even if the SLC and dominance tests are flexibly applied so that they are very likely to reach the same decision in any reviewed merger, this does not mean they will have equivalent effects on economic efficiency. There are two reasons for this:

1. Assuming courts insist on similar definitions for dominance in both merger review and abuse of dominance cases, a flexible dominance test could have the effect of expanding the scope of abuse of dominance prohibitions. Such an expanded scope could have a chilling effect on a range of practices likely to be procompetitive when practised by firms having little market power, e.g. some forms of discounting, price discrimination, exclusive selling, market restrictions, and tied selling.

2. The two tests could be associated with different levels of legal certainty. The one with the greater legal certainty would also have the smaller impact in terms of discouraging beneficial mergers from ever being proposed.

1.2 Plan of the paper

The paper begins by comparing the United States (SLC) and German (dominance) approaches to merger review and commenting on the importance of including joint or collective dominance within the rubric of the dominance test. It then discusses at length the alleged superior coverage of the SLC compared to dominance tests in certain mergers plus claims that have been made in the opposite direction. Following that, the paper considers some jurisprudential and related policy issues, and possible differences in the tests as concerns reliance on economic analysis, flexibility and legal certainty. The paper concludes with a number of summary observations.

This paper is heavily focused on horizontal mergers. These account for the great bulk of anticompetitive mergers. Moreover, an assumption is made that mergers can harm competition in two basic ways, i.e. through "unilateral" and "co-ordinated effects" (defined immediately below). One can consider how a merger test would treat these effects without detailing the very different ways in which they may arise in horizontal, vertical and conglomerate mergers.[8]

1.3 Distinguishing between co-ordinated and unilateral effects

In terms of merger review, this important distinction received its first extensive elaboration in an earlier edition of the United States Horizontal Merger Guidelines ("US Guidelines").[9] The distinction has since spread to other jurisdictions including the European Union and New Zealand.[10]

The US Guidelines actually refer to "co-ordinated interaction" and "unilateral effects". Co-ordinated interaction and an overview of how it is assessed are described thus:

> A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in co-ordinated interaction that harms consumers. Co-ordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion, and may or may not be lawful in and of it.
>
> Whether a merger is likely to diminish competition by enabling firms more likely, more successfully or more completely to engage in co-ordinated interaction depends on whether market conditions, on the whole, are conducive to reaching terms of co-ordination and detecting and punishing deviations from those terms. (13 – 14, emphasis added)

The most important point to note here is that co-ordinated interaction extends beyond formal collusion or a concerted practice. It also includes tacit collusion that might not in itself be illegal, i.e. mere conscious parallelism. How far that runs, however, depends on exactly what is meant by "accommodating reactions". In specific, if it is expected that a merged entity will raise its prices and cut output post-merger, and its competitors will also raise their prices but increase their quantities sold, is that an "accommodating reaction"? We think not. The competitors are essentially taking advantage of the merged firm's price increase rather than co-operating with it. This view of "accommodating reactions" appears to be consistent with how Professor Willig, one of the US Guidelines draftsmen, views the distinction between what he refers to as co-ordinated and unilateral effects:

> It may be useful as a matter of terminology to divide theories of possible anticompetitive effects of mergers into two categories: unilateral effects and co-ordinated effects. Unilateral effects are changes in the actions of the merging firms that would be profitable for them as a result of the merger if the non-parties did not alter their actions or if the non-parties reacted unilaterally themselves. Co-ordinated effects are changes in the actions of the merging firms that would be profitable for them as a result of the merger only if the changes are accompanied by alterations in the actions of the non-parties that are motivated in part by fears of reprisals. The leading example of co-ordinated effects is the elevation of prices charged by the merging firms, along with those charged by the non-parties, where the merger enables tacit collusion to become stable. Here, the price increases are profitable because deviation by a firm would likely trigger retaliatory price decreases. A unilateral effect would arise, in contrast, when a merger between sellers of close substitutes impels them to raise prices profitably whether or not rivals in fact follow. In essence, unilateral effects are those that arise when all market participants undertake unilateral actions, whereas co-ordinated effects arise from the anticipation of co-ordinated actions and reactions.[11] (emphasis added)
>
> The US Guidelines introduce a discussion of "unilateral effects" by noting that:
>
> A merger may diminish competition even if it does not lead to increase likelihood of successful co-ordinated interaction, because merging firms may find it profitable to alter their behaviour unilaterally following the acquisition by elevating price and suppressing output. Unilateral

> competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.[12]

In the US Guidelines unilateral effects basically include all anticompetitive effects not characterised as "co-ordinated interaction". This is the meaning "unilateral effects" will also have in this paper. In particular, unilateral effects will refer to all increases in market power arising without co-ordination based on fear of retaliation. Unilateral effects therefore extend to what some might call oligopolistic interaction.

Although the US Guidelines treat co-ordinated and unilateral effects separately, they do not exclude both being present in the same merger even as regards the same product market.[13] It is likely, however, that one of these effects dominates so that one could say that the expected post-merger price increase is due to one set of effects or the other.[14] Nevertheless, when working out a suitable remedy, the nature of both threats to competition may need to be addressed.

2. Comparison of the US and German approaches

The US Guidelines develop in considerable detail its SLC test and the German "Principles of Interpretation"[15] ("German Guidelines") provide the same kind of overview of the German dominance test. A rough overview of the pertinent portions of these two sets of guidelines is provided in the Appendix.

The comparison undertaken here touches only on points closely connected with the different substantive tests. The primary objective is not to compare the two countries' approaches, but rather to isolate any differences that would be quite difficult to eliminate without converging to a common test.

2.1 Objectives and the role of market power

The US Guidelines cast merger review within the larger context of preserving the free enterprise system, plus improving the competitiveness of American firms "…and the welfare of American consumers."[16] The German Guidelines refer to using merger review to maintain competitive markets and to preserve the freedom of action "…of other firms and consumers." Differences at this level may be relatively minor when it comes to dealing with actual cases. The US Guidelines proceed, however, to spell out more specific objectives, i.e. "…mergers should not be permitted to create or enhance market power or to facilitate its exercise", with market power (by sellers) being equated to the "…ability profitably to maintain prices above competitive levels for a significant period of time."[17] While the German Guidelines do not contain a more specific formulation of the above noted objective, it has been argued that the dominance test itself echoes the "create or enhance market power" language found in the US Guidelines, i.e. that dominance and market power are roughly equivalent. Referring to the US and Australian merger guidelines which define an SLC in terms of market power, a Bundeskartellamt discussion paper essentially argued that market power is the ability to act in a manner unconstrained by effective competition and is therefore closely related to the concept of dominance.[18]

Later in the same discussion paper, reference is made to the essential similarities in the criteria used in merger review in Germany, the European Union, the United States and Australia and to the grounds for proposed reforms in the United Kingdom and New Zealand. The paper claims that: "These similarities are above all due to the fact that both types of prohibition criteria ultimately have the same prime objective, i.e. to prevent undesirable market power."[19]

2.2 An important difference in thresholds and related approaches to efficiencies

The view that market power and dominance are roughly synonymous seems to be reflected in the German Guidelines where frequent references are made to "market power" when it would seem that "dominance" could have been cited instead. This seems to reflect a view that market power is the main factor to consider in determining whether a dominant position is created or strengthened. That is not the same as equating dominance with any level of market power.[20]

An SLC may be taken to refer to any material, non-transitory creation or increase in market power. In short hand form; a merger can be said to be likely to result in an SLC if it is expected to result in any price increase.[21] Such an increase in market power and thus in price would commonly, but not necessarily (as we will see in section VI below), occur whenever a merger strengthens a dominant position. The same rough equivalence need not obtain when there is no single or collective dominance either before or after a merger. In such a situation, a merger leading to an SLC may not necessarily create enough market power to amount to creating what would normally be regarded as a dominant position. If it did, there would be a real possibility that two or more different size firms could be found to be simultaneously "dominant" in the same market, something that courts might find very difficult to accept. The threshold issue is at the heart of a potentially important gap in terms of the dominance test's ability to prohibit some mergers regarded as anticompetitive in the sense of materially harming consumer interests. A recent Bundeskartellamt paper outlining the German approach to merger review ("German Merger Framework paper") clearly acknowledges this gap. It does not, however, believe that it warrants closing:

> In principle both prohibition criteria refer to the same facts. They merely approach the problem from different sides. If competition is defined as the absence of paramount positions of power, the market dominance test focuses on the paramount position of power whereas the SLC test examines the intensity of competition.
>
> However, looking at the theoretical concepts of the two tests – which must be distinguished from the precise shape these concepts will take in different national legal systems – the difference to be noticed is that the market dominance test defines an "upper limit" up to which individual scope of action with regard to mergers may reach and which is largely independent from the intensity of competition previously established. However, based on its general approach the SLC test focuses on a rate of change relating to the intensity of competition. According to this definition and irrespective of their different presumption thresholds and the different ways in which they are concretised, the two criteria thus cannot lead to the same results in each possible constellation. If e.g. the SLC test stipulates that the intensity of competition may only be reduced by a "certain rate" (whatever the definition of this rate may be), the market dominance threshold will not necessarily be reached. The concept of substantial lessening of competition gives reason to assume that a reduction of the intensity of competition to a certain extent should be dealt with by an authority even if the market merely moves from a state of extremely high intensity of competition to a medium, not yet dangerous level.
>
> In this respect the Bundeskartellamt's view is that the market dominance test should be preferred. In merger control a mere reduction of the intensity of competition without the creation of a dominant position is not a condition that would give rise to concerns. In dynamic competitive processes imbalances and also fluctuations in the intensity of competition will constantly occur anyway. There is only reason for concern if the advantage one company gains over others by means of a merger reaches a level where the remaining competitive forces alone can no longer is expected to wear away the market power achieved. Such a condition is covered exactly by the criterion of "market dominance". As a rule we will not find market dominance if a position of power is still exposed to substantial competition, even if this competition is not as intense as it

> used to be. In such a situation there is no reason for the state to deal with a reduction of intensity of competition.[22]

The same general points are made in the German Merger Framework paper when discussing efficiencies. This discussion opens with the statement: "The Bundeskartellamt is of the opinion that, at least in cases of clear market dominance, mergers cannot be cleared solely on the basis of efficiency gains."[23] This is immediately qualified, however, by noting that if a ministerial authorisation is applied for, as provided in the competition statute, the efficiency criterion could be "applied as a competition-unrelated criterion in the ministerial authorisation." The absence of an efficiency defence is justified in terms of the goal of protecting competition; i.e. ensuring those mergers do not create dominant positions. That in turn is "[b]ased on the conviction that in the long term free competition also increases welfare…." The German Merger Framework paper takes the view that where there is market dominance "…the freedom of action of other market participants is excessively and probably permanently restricted with the result that competition loses its effect as a steering and control mechanism."[24] It is also pointed out that where competition is lacking, the merged entity will not experience long term pressure to maintain any efficiency gains linked to the merger.

The German Merger Framework paper fully acknowledges the possibility that efficiencies could be associated with such a large drop in marginal costs that the immediate post-merger profit maximising price is lower than the pre-merger price despite the merger creating a dominant position. It notes, however, that:

> The Bundeskartellamt does not take a likely reduction in the price following a merger as sufficient proof of the future functioning of competition. In such a situation the companies would be free to make commitments which would reduce the expected restraint of competition and maintain the efficiency gain. If the competitive concerns of the Bundeskartellamt could be dispelled in this way, this would render a prohibition unnecessary.[25]

Summing up to this point, there are significant differences between US and German merger review frameworks as regards objectives, thresholds and treatment of efficiencies. Only one of these, i.e. thresholds, seems to be directly caused by the difference in substantive tests. It is worth noting in passing, however, that differences in objectives may be one reason why Germany has opted for a dominance test.

Jurisdictions with dominance tests are free to adopt objectives consistent with interpreting dominance in terms of market power and market power in terms of the power to raise prices. Germany appears to have gone a good distance down that road. It is unclear; however, that the state of dominance (as opposed to a strengthening of dominance) can be found whenever a merger will lead to any material increase in price relative to the price that would have prevailed in the absence of the merger. In particular, as regards single dominance, the German Guidelines appear to contemplate there being only one dominant firm in any well-defined antitrust market.[26]

2.3 Thresholds and the European Commission's approach to dominance in merger review

Germany is not alone among dominance regimes as regards the threshold issue. When considering whether the European Commission's (EC's) decision in Airtours/First Choice[27] represented an attempt to read the SLC test into the EC's Merger Regulation, a former high level official of the Commission commented:

> It is not easy to see how this would work, because the Regulation is based on the idea of creating or strengthening dominance, and at least in theory dominance either exists or it does not. The Regulation as it is now written would not easily apply to a merger merely by reference to the fact that it made the market substantially less competitive than it had previously been. The Regulation is based on the result (dominance or increased dominance), rather than the significance of the change resulting from the merger. Substantially reduced competition is not necessarily dominance: dominance is a result of how much competition is left, not how big the change has been.[28]

Several commentators have noted that this may leave a significant gap in what the EC can prohibit in the way of mergers likely to produce unilateral effects, a point returned to in sections IV and V of this paper. For example, Motta (2000, 202) noted:

> Consider for instance a situation where very few firms would be left in the industry after a merger, but none of them has enough market power to be considered dominant, and it is also very unlikely that they would collude (i.e. they are not jointly dominant). In such a situation, economic theory suggests that, if there are no efficiency gains, the merging firms will unilaterally increase their prices, and that the merger will be detrimental (although the merging firms will not become dominant and there will be no co-ordinated behaviour after the merger). Yet the EC policy of merger control would not prohibit such a merger… [S]howing that a merger has adverse consequences on competition or that it would increase prices is not enough to block it: under the Merger Regulation, the finding of a dominant position is a necessary condition for prohibiting a merger.
>
> There is therefore a large gap in EC merger control: all mergers which allow firms to unilaterally raise prices but do not create or reinforce dominant positions cannot be prohibited. In other words, mergers which are detrimental to welfare will be declared compatible with the Common Market because they do not give rise to dominance. (omitting references)

2.4 Different assumptions regarding market resilience and degrees of reliance on market shares

Although the different treatment in the US and German Guidelines as regards efficiencies is quite striking, this does not seem inherent in the tests themselves. Instead, it is more properly attributed to a quite different view about the resilience of markets, i.e. the ability of firms and consumers to change their behaviour so as to undo increases in market power. The German view seems to be that above some level of market power, i.e. the dominance threshold, that resilience is so reduced that it is unlikely to be able to generate effective competition. It logically follows from that view that even if efficiencies will likely produce short run reductions in price, they will not in the end benefit consumers.

In addition to differences in objectives, thresholds and the consideration of efficiencies, there is an obvious difference between the US and German approaches as concern reliance on market shares. Considerable detail about this is provided in the Appendix. The US approach leans towards using concentration data to set up safe harbours, while the German approach inclines towards basing presumptions of illegality on high market shares. Both make it clear, however, that market shares are generally not dispositive and emphasise that other relevant factors must also be considered.

Different presumptions based on market shares and concentration data, while certainly important, do not seem inherent in the different substantive tests. If they were it would be difficult to explain, for example, why the EC's Merger Regulation adopts a dominance test, but does not contain presumptions based on market shares either as safe harbours or in terms of establishing dominance.

2.5 A dominance test does not inherently extend to collective dominance

The comparison we have been making would be incomplete without noting that both the US SLC and the German dominance tests go well beyond prohibiting only mergers likely to produce unilateral effects. Instead, both the US and Germany will apply their tests to block mergers likely to produce co-ordinated effects. There would be no reason to suspect otherwise of an SLC test, but the same cannot be said of a dominance test. The European Union, New Zealand and Australia all have or had statutory dominance tests making no explicit reference to collective (or joint) dominance.

In the case of the European Union, it took almost ten years before the courts confirmed that the EC's Merger Regulation (ECMR) applied to collective as well as single firm dominance.[29] Australia and New Zealand were not as fortunate. Their dominance tests in merger review were applied only to single firm dominance. The result was that mergers could not be blocked simply because they created a strong likelihood of co-ordinated effects. This was one of the reasons why the competition authorities in both countries argued in favour of replacing their dominance tests with an SLC test.[30]

The fact that most if not all jurisdictions employing a dominance test define it to include collective as well as single dominance does not mean an equal capability to block mergers that threaten to raise price because of co-ordinated effects. This point takes us back to the earlier mentioned threshold issue. It will now be addressed in more detail in the next three sections of the paper.

3. Mergers likely to produce co-ordinated effects – can a dominance test catch all of them?

It is uncontroversial that an SLC test can be used to block mergers that are likely to harm consumers by increasing the ability and incentive of a group of oligopolists to raise price in some kind of co-ordinated fashion.[31] Will a dominance test, i.e. its collective dominance branch, also be able to block all such mergers? To begin answering this question, we make four initial simplifying assumptions that will subsequently be subject to some examination:

1. structural links among a group of oligopolists are not necessary to create what the law regards as collective dominance – instead, it is sufficient that market conditions are such as to make it likely that the group will co-ordinate their competitive strategies;

2. dominance is synonymous with a certain threshold level of market power;

3. market power is synonymous with an ability profitably to take action harming consumers, i.e. the power, in short hand terms, profitably to raise prices above or further above competitive levels for a significant period of time; and

4. a likelihood of co-ordinated effects is synonymous with a likelihood that prices will be set at or above the level that would be charged by a firm enjoying what the law would regard as single dominance.

Under these assumptions, whenever a merger is likely to produce co-ordinated effects, it is also likely to create or strengthen collective dominance.

The first of our four assumptions need not apply in all dominance jurisdictions. It does appear to hold, however, in the European Union, i.e. the largest jurisdiction with a dominance test. In upholding the Commission's decision to block the Gencor/Lonrho merger, the Court of First Instance (CFI) noted that

collective dominance requires economic links among the collection of firms with structural links merely being an example of the required relationships. The CFI elaborated on this as follows:

> …there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.[32]

This is sufficient, especially in light of the subsequent CFI decision in Airtours, discussed below, to demonstrate that structural links are not inherently part of collective dominance. The same can probably be said of our second listed assumption. We cannot cite a clear supporting example, however, beyond again noting the German Guidelines references to market power. The third assumption is presumably non-controversial, at least in the sense that it can as readily be accepted in dominance as in SLC jurisdictions.

The fourth listed assumption recalls our earlier discussion concerning differences in thresholds. An SLC test can be used to prohibit all mergers leading to a material increase in price. A dominance test cannot unless "dominance" equates to the level of market power required to raise prices any material amount above competitive levels. That low a threshold may not be permitted under the competition laws of at least some dominance jurisdictions, in particular those where the same thresholds must be used for single and collective dominance, and courts would not tolerate finding that two or more firms have single dominant positions in the same market.

It is interesting that the German Guidelines analyse "oligopolistic dominance" (roughly analogous to collective dominance) in two parts: internal competition among the oligopolists, and external competition. External competition is relevant when, in addition to the oligopolists, there are other firms competing in the market. As noted in this paper's Appendix, German external competition analysis is closely similar to what is involved in determining whether a single firm is dominant. Presumably then, a group of oligopolists facing competition from some fringe firms would not be considered dominant unless it exercised the same degree of market power required to find that a single firm enjoys a dominant position.[33] This could be well above the level required to produce an SLC. Where the group of oligopolists faces no external competitors, then the group could perhaps be considered a kind of monopoly and therefore to have sufficient market power to be regarded as dominant. Even that, however, is not a foregone conclusion.

It is not obvious that, with or without what the German Guidelines refer to as "external competition", co-ordinated effects will be reflected in a price roughly equal to the monopoly price. Even a price equal to the level that a dominant firm would set cannot simply be assumed. There are two reasons for this. To begin with there could be significant cost and other heterogeneities that frustrate agreement on what the price should be. In theory, co-ordinating oligopolists could solve this problem by agreeing to make side-payments. Competition law could, however, make it too risky to agree on such side payments or at least render such agreements unenforceable. The problems go further, however, than firms simply being unable to agree on setting a price at or above the dominant firm level. The co-ordinating firms may also find it difficult to sustain such a price level even if it were initially attained.[34] We conclude then that a merger could raise prices through co-ordinated interaction without necessarily raising them to a level

sufficient to argue that the collectively dominant firms jointly enjoy at least the degree of price raising power normally associated with single dominance.

There are at least two ways to resolve the potential gap in coverage between SLC and dominance tests as concerns some mergers likely to create co-ordinated effects. One is to considerably reduce the threshold market power required for collective dominance. The second is to move away from making some minimum level of market power a necessary condition for finding collective dominance.

The first option of lowering the dominance threshold could require lowering it very far indeed. It would have to be set at the level of market power associated with being able to raise price more than a *de minimis* amount for more than a transitory period of time above competitive levels. It is arguably possible, at least given the definition of dominance applied under European Union competition law, to go that low.[35]

The problem with lowering the dominance threshold in collective dominance cases is that courts may insist on similar thresholds being used for both single and collective dominance. Assuming that courts do insist on such consistency, setting the market power threshold at the SLC level in collective dominance cases could mean having to accept in another case that several firms each enjoy single dominance in the same antitrust market. This would probably prove difficult for courts to accept, especially if one of the "dominant" firms has a smaller market share than another. In any event, competition authorities would have very good reason to be reluctant to lower the dominance threshold. They may not wish to open the door to creating over-broad abuse of dominance prohibitions.

If sufficiently lowering the market power threshold is not an acceptable option, there remains the possibility of jettisoning the market power criterion, or at least de-emphasising its importance. One could move in this direction by relying on structural considerations such as presumptions based on market shares. The problems with doing this, and presumably doing the same for single dominance, are that it risks moving merger review further away from the important objective of enhancing economic efficiency and probably reducing legal certainty as well. This may be unacceptable in some dominance jurisdictions. Dropping or de-emphasising the role of market power in determining dominance would also tend to make international co-operation in merger review more difficult and to produce divergent decisions in cases involving markets that are international in scope.

Based on the recent decision of the European CFI in Airtours/First Choice, it could be argued that the CFI has specified a method of applying the collective dominance concept that effectively equates it with what the US SLC test addresses as co-ordinated interaction thereby side-stepping the difference in thresholds we have been highlighting. The following portions of that decision are particular pertinent:

> A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may…arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC (see, to that effect, Gencor v Commission, paragraph 277) and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.
>
> As [Airtours] has argued and as the Commission has accepted in its pleadings, three conditions are necessary for a finding of collective dominance as defined:

- first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. As the Commission specifically acknowledges, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

- second, the situation of tacit co-ordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. As the Commission observes, it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In this instance, the parties concur that, for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, to that effect, Gencor v Commission, paragraph 276);

- third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.[36] (emphases added)

The three enumerated conditions closely track the factors discussed in the US Guidelines in terms of assessing the likelihood of a merger producing co-ordinated interaction. It is important to note, however, that the CFI did not refer to the above conditions as the three necessary and together sufficient conditions for establishing collective dominance. It was not necessary for the CFI to go that far to decide the Airtours appeal. Instead, its grounds for overturning the Commission's decision to block the merger turned on holding that there was an insufficient factual basis to establish the three necessary conditions. Addressing the sufficiency issue in a future case decision, especially one where collective dominance did not exist pre-merger, would arguably require a court to come to grips with the problems inherent in equating the market power thresholds of the dominance and SLC tests.

4. Mergers likely to produce unilateral effects in differentiated product markets – will some of this slip by a dominance test?

A merger creating or strengthening a dominant position and resulting in higher prices could clearly be blocked under both a dominance and an SLC test. It may also be true that a merger likely to raise price through co-ordinated effects may be reached applying either test. But what if a merger likely to raise price through unilateral effects occurs in a market in which there is no dominant position either before or after the merger. While such a merger could be blocked by an SLC test, could it also be blocked using a dominance test? That is the question we focus on in this and the next section of the paper.

In both dominance and SLC jurisdictions, merger review typically includes an initial screen revolving around determining existing and post-merger concentration levels in markets affected by the merger. To apply the screen, one or more markets must first be defined. Some jurisdictions, including

both the US and the European Union, define markets using the hypothetical monopolist approach. This involves expanding the geographical and product space covered by the market definition until one has identified a specific type of minimum size market. This is the market in which, if there were a monopolist seller, that seller would find it profitable to raise price by some arbitrary percent (five percent in the US) above competitive levels. That price rise threshold is greater than the price rise that may trigger finding an SLC. It is therefore possible for a merger that does not create either a monopoly or even a dominant position within a market defined using say a five percent threshold to grant the merged entity the power profitably to raise price sufficiently to constitute an SLC, i.e. raise prices considerably less than five percent.

The US Guidelines described two generic situations in which unilateral effects might arise. The first, dealt with in this section of the paper, refers to markets where firms sell differentiated products. The second, featured in the next section of the paper, deals with markets for homogeneous products, i.e. where suppliers are distinguished primarily by having different capacities. Perhaps the capacity distinction is better thought of as cost differences.[37]

The US Guidelines note that in differentiated product markets, "…competition may be non-uniform (i.e., localised), so that individual sellers compete more directly with those rivals selling closer substitutes." They continue with:

> A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales loss due to the price rise merely will be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable premerger. Substantial unilateral price elevation in a market for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their first and second choices, and that repositioning of the non-parties' product lines to replace the localised competition lost through the merger be unlikely. The price rise will be greater the closer substitutes are the products of the merging firms, i.e., the more the buyers of one product consider the other product to be their next choice.
>
> A merger is not likely to lead to unilateral elevation of prices of differentiated products if, in response to such an effect, rival sellers likely would replace any localised competition lost through the merger by repositioning their product lines.
>
> In markets where it is costly for buyers to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers they consider. If either of the merging firms would be replaced in such buyers' consideration by an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral elevation of prices.[38]

Asked about the possibility that a differentiated product merger could be caught as anticompetitive under an SLC test but slip through a dominance screen, dominance jurisdictions might respond that the gap would disappear if a low enough threshold of dominance were applied or the link between dominance and market power weakened. We noted in the previous section that these options are basically unattractive and/or infeasible from the legal point of view. In the case of differentiated product mergers, there is, though, a third way to close the gap. A dominance jurisdiction could simply adopt a suitably narrow market definition in cases where unilateral effects are a real issue in a market with differentiated products. All that is necessary is a market definition that includes only the closest neighbours in product space, i.e. the firms that strongly and mutually constrain pricing by each member of

the group. The initial broader market definition and derived concentration screen are, after all, strictly preliminary constructs. If a merger presents a real threat of higher prices, it may be quite proper to regard the price increase as applying over a narrower market, or sub-market, than was defined at the initial screening stage.

Reaching the desired conclusion by exceptionally resorting to some approach to market definition yielding exceptionally narrow markets would pose a serious problem. Such an "exceptional", some might even say ad hoc approach to market definition will reduce legal certainty and thereby discourage transactions producing beneficial mergers. Alternatively, a competition authority could choose to avoid this problem by always applying a narrow market definition, but that again raises problems of its own.

Consistently adopting narrow market definitions could mean that many mergers involving substitute products are analysed as conglomerate mergers making it necessary to treat horizontal effects as various kinds of portfolio effects.[39] That might mean accepting an unnecessarily high degree of legal uncertainty due to the fact that the jurisprudence on portfolio effects is less well established than that pertaining to horizontal mergers.[40] In addition, if narrow market definitions are consistently employed in merger review, how is one to ensure the same approach will not carry over into the application of abuse of dominance prohibitions? This very significant point will be developed further below.

Not only might SLC jurisdictions be able to avoid the overly narrow market definition quandary, they might even be able to dispense entirely with market definition in mergers likely to produce unilateral effects in differentiated product markets.[41] Baker and Salop (2001, 348) state:

> It is now widely accepted among economists that unilateral effects analysis does not strictly require a single discrete relevant market to be defined with the ssnip [small but significant non-transitory increase in price] test; demand elasticities and diversion ratios are sufficient.

With the SLC approach, at least as practised in the US, a merger can presumably be blocked simply by demonstrating a good likelihood that prices will increase post-merger. In some situations that might be directly demonstrable using econometric evidence. The prohibition of the United States Staples/Office Depot merger is a case in point.

Staples/Office Depot turned largely on the theory that three office products superstores provided a competitive constraint on one another's pricing (were close neighbours in differentiated product space), and were not similarly constrained by smaller distributors. A merger between Staples and Office Depot was therefore expected to produce unilateral effects. The Federal Trade Commission (FTC) presented econometric and other evidence showing that prices would probably rise if the number of superstores were reduced from three to two. That evidence essentially reflected the fact that pre-merger prices were higher in markets where one or two of the three superstores were absent.[42] It did not appear to be critical in this case for the FTC to argue high market shares in a controversially narrow market, i.e. office products superstores. One is left wondering whether a similar approach could be taken in jurisdictions employing a dominance test. Presumably a market must always be defined in order to establish dominance and, as already noted, the mere ability to raise price does not necessarily equate with dominance. Moreover, it might not always be easy to defend the use of a narrow market definition in order to rely on statutory presumptions of dominance.[43]

Even if a theoretical gap between the dominance test and the SLC is conceded as regards mergers likely to lead to unilateral effects in differentiated product markets, this may be a weak reason for changing the test if there will be few such mergers. The European Commission, for example, has stated:

> One of the more specific hypothetical questions that has occasionally been raised about the reach of the dominance test in the Merger Regulation is the extent to which it would allow for effective control in some specific situations where firms unilaterally may be able to raise price and thus exercise market power. The type of example that tends to be cited is of a merger between the second and third largest players in a market, where these firms are the closest substitutes. In such a scenario the merging firms may remain smaller than the existing market leader. The argument goes that the SLC-test would be better adapted to addressing such a situation, in particular if the market characteristics would not be conducive to a finding of collective dominance. While interesting as a hypothetical discussion, the Commission has so far not encountered a situation of this kind.[44]

Some might regard, however, the temporarily blocked and later aborted US Heinz/Beech-Nut merger as a real world example of what the European Commission has not so far had to face.[45]

The Heinz/Beech-Nut merger concerned the US nation-wide prepared baby food market in which Gerber had maintained a 65-70 percent market share, while Heinz and Beech-Nut each had 15-20 percent, "…but were never found on the same supermarket shelf and only rarely even in the same metropolitan area."[46] On its face this was a three to two merger with, in Commissioner Leary's words, "…a very low probability for entry."[47] The parties apparently argued that: "…Heinz and Beech-Nut did not really compete with one another because each was strong in different areas of the country, with minimal horizontal overlaps." This view was rejected by the US Federal Trade Commission (FTC) and the US Court of Appeals, District of Columbia Circuit. The Court found a high enough probability of both co-ordinated and unilateral effects to grant the FTC's application for a preliminary injunction to block the merger, which was later abandoned. The unilateral effect analysis concerned reduced competition between Heinz and Beechnut to be second on the shelf (i.e. to be offered along with Gerber).

5. Mergers likely to produce unilateral effects in homogeneous product markets – will some of these slip by a dominant test?

We turn now to the other generic example of unilateral effects described in the US Guidelines:

> Where products are relatively undifferentiated and capacity primarily distinguishes firms and shapes the nature of their competition, the merged firm may find it profitable unilaterally to raise price and suppress output. The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.
>
> This unilateral effect is unlikely unless a sufficiently large number of the merged firm's customers would not be able to find economical alternative sources of supply, i.e., competitors of the merged firm likely would not respond to the price increase and output reduction by the merged firm with increases in their own outputs sufficient in the aggregate to make the unilateral action of the merged firm unprofitable. Such non-party expansion is unlikely if those firms face binding capacity constraints that could not be economically relaxed within two years or if existing excess capacity is significantly more costly to operate than capacity currently in use.[48] (emphasis added)

The kind of merger just described is expected to lead to post-merger price increases despite an increase in output by competitors. If the market were highly competitive both before and after the merger, the increase in competitors' outputs would be sufficient to render a price increase unprofitable.

Mergers likely to produce unilateral effects in homogeneous products markets can clearly be blocked under an SLC test. As previously noted, the same cannot be said concerning a dominance test. There could be mergers likely to raise prices, without co-ordination among oligopolists, in markets where there is no dominant position before or after a merger. It is noteworthy that the US thirty-five percent market share threshold is considerably below what US courts would generally require in a Sherman Act, s.2 monopolisation case,[49] and is also below the levels typically associated with dominance in cases brought under the European Union's Article 82.[50]

A straightforward unilateral effect merger could be thought of as one that creates or strengthens a leading but not necessarily dominant firm. Unilateral effects could occur as well in the absence of a leading firm. For example, a merger could lead to a price rise by a group of non-co-operating oligopolists. This could be described as a price rise occasioned by a merger that creates or alters oligopolistic interdependence. Such a price rise would nevertheless be classified in the unilateral effect category because it arises simply out of rational, individual responses to a more concentrated market. The expected price rise does not depend on a realistic threat of retaliation by the merging parties against firms that do not imitate their post-merger price increase. Moreover, unlike the case of a merger likely to create co-ordinated effects, only the merged entity is expected to cut output below what its separate parts were in total producing pre-merger. Although its rivals are expected to raise their prices as a rational response to what the merged firm likely will do, they will actually be taking advantage of the price rise by maintaining or increasing their outputs. If they or a group of new entrants had sufficient capacity, output would in fact be expanded by the merged entities' competitors to the point that prices would be brought down to pre-merger levels. If that were likely to be the situation post-merger, unilateral effects would not be expected to arise in the first place.

A more complete picture of unilateral effects can be obtained by examining another SLC jurisdiction's merger guidelines. Following an introduction to "unilateral market power" similar to what is found in the US Guidelines, the New Zealand merger guidelines continue with:

> In addition, economic theories of oligopoly based on Nash equilibrium also predict that as the number of firms in a market shrinks, their independent efforts to maximise profits, whilst observing how much the others produce or charge, will cause price to rise increasingly above the competitive level. In these types of markets, when concentration is already high, a merger is likely to result in a further elevation of price that might amount to a substantial lessening of competition.[51] (emphasis added)

Although cast in less rigorous terms, this language recalls that the Cournot oligopoly model predicts that any merger not producing efficiencies (i.e. a lower marginal cost curve) will raise price.[52]

There are at least three ways to close the coverage gap we have found between the SLC and dominance test in the case of mergers producing unilateral effects in markets featuring homogeneous products. We have already considered and critiqued the first two, i.e. lower the threshold used to define single firm dominance, and adopt a notion of dominance that does not strongly depend on market power. The third possibility is that a dominance test jurisdiction could possibly apply the collective dominance concept to block mergers likely to produce unilateral effects even though a single dominant firm is not created or strengthened.

Writing after the Commission's decision to block the Airtours/First Choice merger, Kloosterhuis commented that:

> According to EC case law the essence of the role of merger control with respect to joint dominance is to prevent the creation or strengthening of market structures which can give rise to an interaction or interdependence of firms leading to anticompetitive market outcomes. It is however not yet clear to what kind of behaviour of firms oligopolistic interaction should lead before we can come to the conclusion that joint dominance in the sense of community law exists.[53]

He proceeded to deal at some length with the Cournot model, which he referred to as "the oligopoly model in economic theory", roughly characterising it as involving oligopolistic interaction. In Kloosterhuis'view:

> …it follows from the more recent [European Commission] cases that it is an analysis of non-co-operative behaviour [such as that postulated in a Cournot model] which forms the heart of the assessment of joint dominance in merger cases. Thus, the Commission has acknowledged that an anticompetitive market outcome may well be the result of unilateral behaviour based on an individual rationality of the involved firms. It is not clear whether this approach is already fully recognised by the European courts.[54]

Airtours/First Choice was one of the Commission (as opposed to court) decisions Kloosterhuis was referring to.

The Airtours/First Choice merger would have reduced the number of major players from four to three. The market appeared to be one in which these firms initially set their quantities of tour packages to offer, and later competed on price. The Commission believed that the merger would probably lead to post-merger quantity reductions. There is some doubt about whether the Commission's predictions depended on the existence of some kind of retaliatory mechanism to punish firms who failed to reduce their quantities following the merger.[55] Be that as it may, at the Court of First Instance, the Commission presented this as a co-ordinated effects case, i.e. one in which some type of retaliatory mechanism would be necessary. In formulating the three conditions alluded to earlier in this paper, the Court of First Instance clearly decided that collective dominance, at least as argued in Airtours/First Choice, required a retaliatory mechanism. It remains open, though perhaps unlikely, that a European court could re-visit this issue and decide that the collective dominance concept can be applied as well to block mergers leading to unilateral effects.

The earlier cited CFI decision in Gencor/Lonrho provides little indication of a willingness to extend collective dominance to pure unilateral effects. In the previously cited excerpt from paragraph 276 of that decision, the Court referred not only to an ability to "anticipate" rivals' reactions, but also to a situation in which oligopolists are "strongly encouraged to align their conduct in the market". Each oligopolist would co-operate in this fashion because it would be "aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative".

Despite the legal difficulties that the EC might face in doing to, there are arguments in favour of extending the reach of collective dominance so that it catches all anticompetitive effects arising through oligopolistic inter-dependence, regardless of whether they involve unilateral or co-ordinated effects. This is not simply because such mergers are harmful. It is also desirable for the sake of legal certainty.

In most oligopolies each of the large suppliers will be well aware of its interdependence with the other large sellers. It will consequently set its competitive strategy bearing in mind what it believes (not necessarily knows) its rivals are currently doing. Assuming a special kind of static approach to the market, and that oligopolists compete primarily in quantities rather than prices, an oligopolist will tend to produce a larger output the lower the quantity it believes will be offered by its rivals. In so doing the firm would be acting "non-co-operatively", but nevertheless in an inter-dependent fashion. Such behaviour could lead to an equilibrium price somewhere between the competitive and monopoly levels. All this is quite different from what one would expect if the situation is changed so that each oligopolist knows what its rivals are doing and will be doing in future, and has sufficient excess capacity to be able to "punish" them should they try to expand their market shares. That situation opens the door to various forms of "co-operative" behaviour that could result in prices being pushed considerably above the non-co-operative level.[56]

Economic theory relating to conduct in oligopoly markets reveals a wide range of possible outcomes. It is exceedingly difficult to differentiate between situations where a merger will or will not tip the balance from a non-co-operative equilibrium with prices above competitive levels (unilateral effects), in favour of a co-operative equilibrium and still higher prices (co-ordinated effects). This point has been emphasised by Frédéric Jenny who sums it up with:

> The methodology to be followed for assessing whether a merger creates a collective dominant position is thus far from clear if one considers that such a concept of collective dominant position only applies to situations of co-operative oligopoly.[57]

If the assessing methodology is unclear, any legal principles or rules making a distinction between unilateral and co-ordinated effects will tend to be either unclear, thus sacrificing a degree of legal certainty, or arbitrary in the sense of partially breaking the link between competition policy and economic efficiency. Such rules will nevertheless be necessary if collective dominance cannot be extended to catch unilateral effects arising in mergers where the merging parties do not have a dominant position either before or after they merge.

Perhaps the dilemma we are probing is not as serious as it first seems. Dominance jurisdictions might have good reason for simply ignoring a gap in coverage as concern mergers producing unilateral effects but not associated with creating or strengthening a single firm dominant position. As one commentator has noted, strict application of the SLC test to such mergers could evolve towards a merger policy that prohibits all oligopolies.[58] Fingleton (2002, 6) also sounds a cautionary note:

> …such an approach could, especially if improperly applied, be used to limit oligopolistic mergers generally. This would be inefficient, especially as we know from the work of Sutton and others that higher market concentration may be driven by rivalry and efficiency.
>
> There is a danger that this could be seen as an attack on all mergers that increase concentration. I believe that there is an argument here, but that it needs to be clearly ring-fenced. Specifically, control of [mergers in homogeneous products market mergers likely to produce unilateral effects] should only be contemplated when competition is clearly in quantity rather than price. Part of this test would focus on whether quantities can be freely chosen outside of, but fixed during, the pricing period.

Fingleton considers that the Airtours/First Choice and the US Heinz/Beech-nut mergers might have been good examples of cases in which an extension of collective dominance would have been appropriate.[59] In the latter case, this was based on Fingleton's implicit assumptions that this merger was anticompetitive and could not have been blocked solely because of likely co-ordinated effects.

Jenny points out that: "…if one considers that the concept of collective dominant position can also apply to situations of non-co-operative oligopolies, it becomes easier to understand how a merger could strengthen a collective dominant position."[60] (emphasis added) He then underscores and qualifies that with:

> Indeed in such an instance it would be enough to show that logically the post-merger market equilibrium is likely to be further removed from the competitive equilibrium than the pre-merger equilibrium. However, a precise demonstration of why this should happen in each particular case is needed because it is not always obvious that the disappearance of one oligopolist will lead the remaining oligopolists to increase their price and reduce quantity. If the oligopolists behave like Cournot oligopolists, all have some excess capacity and all have the same discount rate, it may well be that a merger between two of the oligopolists will lead to a market equilibrium which will be further removed from the competitive equilibrium than the initial situation. But if the oligopolists behave like Bertrand oligopolists [i.e. set prices rather than quantities based on what their rivals are doing], there is no reason to believe that the post-merger equilibrium will be different after the merger. Thus it is not so easy to establish the proof of the reinforcement of a collective dominant even if one has a wide concept of collective dominant position.[61]

Reinforcing what Jenny has said, it is difficult to imagine a court either prohibiting or upholding a decision to block or condition a merger simply because the conditions set out in some model of non-co-operative oligopoly are demonstrably satisfied.[62] Hard evidence that prices will likely rise post-merger would almost certainly prove necessary, and this is just as true under the SLC as under the dominance test. The point is that such evidence should be enough in an SLC jurisdiction, but might not suffice where a dominance test is applied, especially if collective dominance cannot be extended to cover anticompetitive interaction falling short of co-ordinated effects.

Should dominance jurisdictions go down the route of widening the coverage of collective dominance to catch what we have referred to as borderline unilateral effect mergers? The answer depends in the first place on the wisdom of likely having a considerably lower market power threshold for collective as opposed to single dominance, something which does not seem to be justified if economic efficiency is the objective of merger review. Even if that hurdle is surmounted, a difficult question would have to be faced. In particular, are the welfare losses associated with mergers producing unilateral effects but not single firm dominance sufficiently large to offset the enforcement costs required to prosecute them, plus the costs associated with an increased chilling effect (i.e. greater discouragement of beneficial mergers)? This is a difficult question that different jurisdictions could justifiably answer differently. All we can offer are three comments:

1. The enforcement costs needed to prohibit borderline mergers may be higher than average because the smaller the actual anticompetitive effects of a merger, the harder it might be to prove they are both material and likely. This argues in favour of ignoring the gap between the SLC and dominance tests as regards certain unilateral effects.

2. It might be necessary to lower the collective dominance threshold very far indeed if the coverage gap is to be totally eliminated.

3. The force of the above points is reduced when it is noted that, as is presumably done in jurisdictions with an SLC test, prosecutorial discretion could be used to ensure a good balance is struck.

6. Mergers where the dominance test might be stricter than the SLC test

In comparing the coverage of the dominance and SLC tests, we have so far concentrated on situations where the dominance test, principally because of threshold problems, might fail to block anticompetitive mergers. One can also imagine situations where, again because of threshold peculiarities, the SLC test fails to stop a merger that would be blocked with a dominance test. Two types of cases arise in this regard. The first concerns markets where a series of small mergers is underway. The second applies to cases in which a merger will not likely produce a post-merger decrease in competition, but will instead tend to preserve a currently less than competitive market.

Turning first to the series of small mergers situation, it is conceivable that each such merger would not be large enough to produce an SLC or to strengthen a dominant position. A gap in coverage between the two tests could nevertheless emerge if the mergers gradually increased the weight of a firm that initially was not dominant. At some point, one of the mergers would presumably be sufficient to create a dominant position and so be blocked under a dominance test. The practical effect of this point would be considerably larger in jurisdictions where market share presumptions are relied on in order to prove dominance.

The importance of the potential gap related to chains of small mergers may not be great. It seems quite improbable that as more and more small firms are acquired there will remain a sufficiently large pool of them to permit still another take-over that is not big enough to trigger an SLC. If that point is reached before the next merger will create a dominant firm, the SLC not the dominance test would prove to have the greater stopping power.

Turning to something probably more important than the chain of small mergers situation, consider a merger in a market where there is currently little competition due to high barriers to entry and competitors being subject to tight capacity constraints. In such a situation, the merger could arguably produce no change in competition and no SLC. The same issue could present itself in a more controversial guise. In the pre-merger situation, a set of oligopolists might simply have chosen, without entering some illegal arrangement, not to compete. If it is difficult to argue that the merger would make things worse, it might be hard as well to demonstrate that the merger produces an SLC. This possibility may have arisen in the United States Heinz/Beech-Nut merger in which it was apparently significant that there were regions where the merging parties had historically not competed but potentially could have done so. Referring to the idea that a strategically inspired lack of regional over-lap could mean there was no SLC, Federal Trade Commissioner Thomas Leary stated:

> It appeared likely that the regional patterns evolved through decades of essentially passive competition (tacitly acknowledged by the parties), under which Heinz and BeechNut failed to challenge one another aggressively. It would be perverse to permit parties to merge just because they have not chosen to compete hard in the past.[63]

In a footnote Leary added: "We would give short shrift to an analogous argument that a merger is unlikely to cause much incremental harm because supra-competitive prices are already prevalent in the industry."

There is another perhaps more common situation in which a merger may not likely reduce current levels of competition, yet still qualify as anticompetitive. There are a considerable number of markets featuring both price regulation and a dominant incumbent. Such a firm could resort to mergers as a way of protecting its market position, especially if it believes that changes in regulation might soon render the market more competitive. Even without that incentive, the incumbent might find mergers attractive if they eliminate firms that a regulator could compare to the incumbent in order to justify lowering regulated

prices. When a merger by a dominant regulated firm is reviewed for competition effects, the merging parties could argue that since prices will be regulated after the merger, there will either be no price rise or any rise cannot be attributed to the merger. This could pose a problem for SLC jurisdictions if they strictly equate an SLC with a merger induced price increase.

Provided one of the merging parties were already dominant, whether regulated or not, dominance jurisdictions could find it easier to block mergers which will likely facilitate preserving market power even if they do not increase or extend it.[64] The strengthening branch of the dominance test could be interpreted as either increasing market power, or merely rendering existing market power more long lasting or resistant to erosion.[65] Increasing market power could be roughly equated to an SLC. So could an extension of time over which existing market power is likely to persist, i.e. future prices are higher with the merger than without it.[66] Simply reducing the chances that at any point in time a dominant position is likely to be eroded could possibly escape characterisation as a substantial lessening of competition, or at any rate be difficult to prove under that test.

Finally, consider potential competition cases, e.g. pre-emptive mergers in which a dominant firm takes over a firm poised to enter the market. Both dominance and SLC jurisdictions could treat this as a merger that increases market share thus raising suspicions that market power has also been increased. The merger might nevertheless be easier to block with a dominance test assuming its strengthening branch refers to more than expanding market power.

SLC jurisdictions could perhaps close all or most of the potential gap we have been discussing by adding a "prevent" branch to their test. In Canada, for example, a merger can be blocked if it, "…prevents or lessens, or is likely to prevent or lessen, competition substantially."[67] A prevent branch could presumably catch situations where a merger either prolongs the existence of market power or renders it more impervious to erosion at any point in time.

Some SLC jurisdictions might reject adding a prevent element to their test in order to reduce a possible gap in coverage in favour of a dominance test, especially since a prevent element may already be implicit in their SLC test. Actually spelling out a prevent branch could risk moving too far in the direction of blocking mergers that "entrench" rather than increase market power. Such an extension could unduly discourage procompetitive mergers. Some SLC jurisdictions might also be concerned that opening the door to "entrenchment" theories could facilitate treating merger induced efficiency gains as a reason to block rather than approve a merger.

Some five years ago there was a particularly high profile cross-border merger in which the United States and the European Commission reached different decisions. We are referring to Boeing's takeover of McDonnell Douglas. A Bundeskartellamt discussion paper briefly described this case and the reasons for the different decisions:

> In 1997, the merger of Boeing and McDonnell Douglas (MDD)**,** two American manufacturers of large-capacity commercial aircraft, was cleared both by the [United States Federal Trade Commission - FTC] and the European Commission. The project was judged as unproblematic by an FTC majority at an early stage. The Commission, on the other hand, which had already prepared a prohibition, only cleared the merger after the parties had made commitments at the last minute. The merger led to a reduction in the number of suppliers in the relevant market from three to two companies. Boeing's market share increased from just over 60 percent to around 70 percent while Airbus, as the only remaining competitor, held about 30 percent. Both competition authorities were of the opinion that no further competitive impulses were to be expected from MDD although it was not a failing firm, since the company did not stand a chance in the competition for new orders. In contrast to the FTC the European Commission still judged

> the merger as critical since it would have strengthened Boeing's dominant position. According to the Commission this was due to the extension of the clientele, advantages which could possibly be achieved in the new business with Boeing aircraft by maintaining and repairing those MDD aircraft still in operation, and the possibility of using technical know-how from MDD's military line of business for the civil sector. These strengthening effects were – in the view of the Commission – only ruled out by the commitments made by the companies. Such considerations were irrelevant for the FTC decision, however. The FTC did not examine whether Boeing held a dominant position and how the merger would affect the relationship with Airbus in terms of competition. (emphasis added)[68]

Perhaps the FTC did not consider the supposed strengthening of Boeing's market position relative to Airbus because of the interpretation the US competition authorities give to the SLC test. The take-over of a firm which is not and will not become a competitive force in the market cannot lessen competition if lessening is not defined to include further insulating a market position from rivals' competitive strategies. In contrast, such entrenchment of existing market power is included within what the EC considers to be a strengthening of dominance. [69]

In sum, probably the most significant area where a dominance test could prove stricter than an SLC test stems from the wide interpretation that at least some jurisdictions may be willing to give to the notion of strengthening a dominant position. This could include a merger-induced increase in a dominant firm or group of firms' power to preserve rather than extend market power. Perhaps this gap could be largely eliminated by adding a "prevent" branch to the SLC test, a change that may not enjoy universal support among SLC jurisdictions. Adding a prevent branch would also help plug the other coverage gaps mentioned in this section, with the exception of the chain of small mergers scenario. These other gaps appear considerably more hypothetical in nature, however, than the difference linked to an expansive interpretation of the strengthening branch of the dominance test.

7. Jurisprudential and Policy Related Issues

At several points we have noted that one way to solve the apparent threshold related gap in coverage between the dominance and SLC tests is simply to lower the dominance threshold. We have also surmised that it would be difficult to reduce the threshold for collective dominance without doing the same for single dominance, and that in either case lower thresholds for merger review could affect the enforcement of abuse of dominance prohibitions. With particular reference to European Union competition law, Richard Whish states: "There is no doubt that both the [Merger Regulation] and Article 82 apply to collective as well as to individual dominance, and the ECJ's judgment in Compagnie Maritime Belge seems to regard the concepts as having the same content in each case."[70]

Abuse of dominance prohibitions involve an important policy trade-off that risks being upset if the dominance threshold is lowered to the point where it essentially equals the degree of market power present when a merger is likely to produce an SLC.[71] This is especially important in jurisdictions where forceable break-up could be the penalty for abusing a dominant position.[72] In some jurisdictions, abuse of dominance prohibitions can be applied without proving much, if anything, in the way of a net anticompetitive effect. This kind of strict approach could save enforcement resources and enhance legal certainty. At the same time, however, a strict enforcement approach risks prohibiting strategies such as price discrimination, discounting and tying which are likely to be procompetitive unless practised by a firm with considerable market power. This risk is higher the lower the threshold set for dominance. Hence the need for a sensitive policy trade off which could constrain lowering thresholds to ensure similar coverage between dominance and SLC tests applied to mergers. Dominance equated to the power profitably to raise

prices above competitive levels, i.e. the lowest level of market power that could still give rise to an SLC, could result in a poor trade off indeed.

Richard Whish notes the possibility that the European Commission has in fact lowered the threshold in merger cases to the point that it is already applying an SLC test:

> The Commission has been finding 'dominance' in some cases under the ECMR at market shares below 40 percent, and even below 30 percent. The 15th Recital of the ECMR, which does not have legal force but which gives a strong signal as to the way in which the Commission should proceed in the analysis of mergers, states that where the combined market share of the undertakings concerned in a concentration does not exceed 25 percent in the common market or in a substantial part of it, this is an indication that the concentration is compatible with the common market. However, dominance has been established above the 25 percent threshold but where the predicted market shares were quite low: for example, in REWE/Meinl[73] at 37 percent; in Hutchinson/ECT/RMPM[74] at 36 percent; and in Carrefour/Promodes[75] at less than 30 percent. The Commission also looks for possible 'indirect effects' that would arise from mergers, and sometimes concludes that dominance will be created or strengthened without any accretion of market share. For example in Telia/Telenor[76] the Commission was concerned that the merged entity would have an increased ability and incentive to eliminate actual and potential competition from third parties, to bundle products across a wider geographical area and to leverage sales. In Air Liquide/BOC/Air Products[77] the Commission was concerned that the merged entity would have an unparalleled distribution network in Europe, which would have given it additional power to deter others from market entry. Where the Commission investigates mergers in the 'new economy' it may wish to take commitments to overcome the possibility of 'transient dominance' while a new market becomes established and while existing barriers to entry are reduced. For example, in Vodafone Airtouch/Mannesmann[78] commitments were accepted for a period of three years which, effectively, would give third parties access to the merged entity's pan-European mobile telephone network.
>
> Decisions such as these reveal the flexible way in which the Commission has adapted and applied the dominance test in Article 2(3) of the ECMR, with the consequence that many more transactions have been found to give rise to problems of dominance in recent years than was the case in the (understandably fairly cautious) early cases under the Regulation. One interesting question that arises from this is whether the Commission, in practice, is already applying a SLC test, albeit that it must write its decisions on the basis of dominance?[79]

An important potential problem not yet touched on concerning the dominance test runs in the opposite direction to the focus so far. The jurisprudence under abuse of dominance prohibitions could affect how dominance is defined in a merger test. Richard Whish notes that in Gencor v. Commission, the CFI stated:

> …the main objective in exercising control over concentrations at Community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market. Community jurisdiction is therefore founded, first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position, and not on the need to control directly possible abuses of a dominant position.[80]

Whish deduces that this paves the way for replacing the dominance test by an SLC test and simultaneously provides additional reason to do so:

> The key point made in this passage is that merger control is not intended to control future abuses. The fact that the CFI talks of the need to avoid the establishment of uncompetitive market structures 'which may create or strengthen a dominant position' is understandable, given the vocabulary of Article 2(3) of the ECMR as it is currently drafted; however the Court's meaning would not have been any different if it had said that the reason for merger control is to prevent mergers which would result in 'market structures in which competition will be significantly lessened'.
>
> Not only is there no logical or necessary link between the substantive test for mergers and the control of abusive behaviour, there is much to be said for detaching the two tests from one another. Such a detachment could serve the useful purpose of making clearer that merger control is about maintaining effective competition in markets, and not about predicting future abusive conduct.[81]

Before leaving this topic, it is worth noting that in some SLC jurisdictions the SLC test is applied in parts of the competition law besides those dealing with mergers. In the United States, for example, an SLC element is included in the Robinson-Patman Act price discrimination prohibition.[82] Canada too uses an SLC threshold in one of its price discrimination prohibitions and for prohibitions relating to predatory pricing, exclusive dealing tied selling and market restrictions. The US does not include the SLC threshold in its monopolisation provisions. Canada does include an SLC threshold in its abuse of dominance law, i.e. a prohibited abusive practice must produce an SLC, but there is no prohibition unless the perpetrator has what is essentially a dominant position.[83] It is unlikely that the US and Canada are the only SLC jurisdictions that have SLC language featured in non-merger provisions of their competition statutes.

8. Reliance on economic analysis, flexibility and legal certainty

Several commentators have stated that the SLC test is better grounded in economics and/or is inherently more flexible than the dominance test.[84] The claim regarding reliance on economics seems to depend, however, on accepting the questionable notion that "competition" is well defined in economics, [85] while simultaneously rejecting the idea that dominance is simply the absence of competition. It would probably be more accurate to argue that, comparatively speaking, SLC jurisdictions have generally given a more market power based interpretation to their test and have generally relied less on market share presumptions. This is particularly true of SLC jurisdictions that roughly equate the test with the likelihood that a merger will raise prices.

Similar points can be made as regards flexibility, indeed reliance on economics and inherent flexibility are sometimes discussed together.[86] If dominance is given a largely structural interpretation, and especially if it is applied with greater reliance on establishing certain market shares, then it seems clear that a dominance test is both less sensitive to economic effects and, aside from its strengthening branch, less flexible than an SLC test. But a lower emphasis on economic effects is not inherent in the dominance test, and neither is a heavy reliance on structural indicia such as market shares.

The European Commission in its Green Paper proposing a discussion of the EC Merger Regulation explicitly addresses the economics, flexibility and legal certainty issues when discussing substantive tests:

> Since the adoption of the Merger Regulation in 1989, the application of the notion of dominance has evolved, allowing it to be adapted both to developments in economic theory and to refinements of the now available econometric tools to measure market power. This implies that merger assessment today can be less reliant on the rather blunt and imprecise market share test

> than it was ten years ago. The fact that the dominance test has undergone such an evolution is natural, and Article 2 has so far proved sufficiently flexible to accommodate an effects analysis made on the basis of more sophisticated micro-economic tools, instruments and models developed by econometric and industrial organisation research.
>
> The perhaps most well-known example of this evolution is the European courts' interpretation of the Merger Regulation's competition test as applying to situations of collective dominance, in the judgments of the Court of Justice and the Court of First Instance in the Kali und Salz and Gencor cases.
>
> It has nevertheless been suggested that the SLC-test might be closer to the spirit of the economically-based analysis undertaken in merger control and less (legally) rigid than the dominance test. As such, some consider it better adapted to an effective merger control, in particular in the context of growing industrial concentration. At the same time, it has also been suggested that adopting the more open-ended SLC-test would lead to a greater degree of legal uncertainty.[87]

Richard Whish, who advocates that the European Commission replace its dominance test with an SLC test, takes note of the legal certainty issue but casts it in a wider context:

> One anxiety about a move from the dominance test to SLC is that this will give the Commission greater discretion than it has at the moment under the dominance test: that it will result in more mergers being prohibited (or modified) as a result of Commission intervention; and that the 'flexibility' of the concept will create greater uncertainty for the merging parties and their advisers.
>
> He then addresses this as follows:
>
> The SLC test, if it is introduced, must be framed in such a way that parties and their advisers will be able to predict how it will be applied in practice by the Commission. This is precisely why the test must be soundly rooted in economics. The words 'substantial lessening of competition' will not be sufficient in themselves to capture the policy underlying merger control and to give it practical expression. The legislation, and any accompanying Notice or Guidelines (which will certainly be necessary), must spell out the purpose behind the SLC test, the objectives that are intended to be achieved and the factors to be taken into account in the analysis of cases; and it will be necessary to explain how a series of issues – most obviously unilateral effects, co-ordinated effects (tacit collusion), indirect effects, potential competition, 'portfolio' and 'range' effects, vertical mergers, efficiencies and failing firms - will be dealt with; furthermore it would be important to provide guidance on the notion of 'substantial', in particular to explain how accretions of market shares will be regarded where a merger will lead to an increase in a market share that is already large. The SLC test should not come into effect until clear guidance on all of these issues is available.[88]

Any difference in legal certainty between the two tests could also be dealt with by adopting the practice of describing why a competition authority has decided to either approve, condition or disallow a merger. This and the measures Whish has described are already being used in many SLC jurisdictions and probably help explain why there does not seem to be much evidence that the SLC test is associated with a serious legal certainty problem. The high level of merger activity in SLC jurisdictions also seems to cast doubt on any chilling effect in terms of discouraging beneficial mergers.

This paper has several times flagged a point that has important implications for the legal certainty issue. It is that the dominance test in particular may need more flexibility if it is to catch all the harmful mergers that could be stopped by the SLC test. In particular it may be necessary to take one or more of the following steps:

- weaken the definitional link between market power and dominance;
- vary the approach to market definition depending on the type of merger being reviewed, i.e. adopt particularly narrow markets in the case of mergers likely to produce unilateral effects in markets featuring differentiated products;
- consistently adopt particularly narrow market definitions;
- adopt different dominance thresholds for single and collective dominance;
- lower the market power threshold required to find dominance; and/or
- ensure collective dominance covers anticompetitive oligopolistic inter-dependence falling short of co-ordinated effects.

The first four items on this list could well reduce legal certainty and they, together with the fifth option, suffer from other significant problems as well. The first option could reduce legal certainty by diminishing the utility of jurisprudence developed in enforcing the non-merger parts of a competition statute. Those parts may well be interpreted and applied with a view to keeping market power in check. In addition, moving away from market power will mean that merger review will be less focused on the economic efficiency objective that is probably one of the primary objectives in merger review in all jurisdictions. Moreover, as earlier noted, de-emphasising market power might make international co-operation more difficult. The second option will introduce legal uncertainty by requiring a prediction as to what approach to market definition will be used in any particular merger. It could also create suspicions that merger review in particular cases may be driven more by a desire for a particular result than exclusive attention to proven facts. In addition, there will be less jurisprudence to refer to in predicting how each approach will be applied. Consistently adopting narrow market definitions would resolve these issues but might also create a difficulty of its own. It could produce a need to apply complex portfolio analyses such as that used in conglomerate mergers. Broader market definitions would instead support the application of the more straightforward and predictable approach used for horizontal mergers.[89] Adopting different dominance thresholds for single and collective dominance could again reduce legal certainty by splitting the jurisprudence applying to both. In addition, there could be considerable doubt that courts would permit such a divorce, further reducing legal certainty until that question is clearly settled. As regards the fifth option, we have already noted that lowering the market power threshold required to find dominance could have significant harmful effects in widening the scope of abuse of dominance prohibitions. Finally, turning to the sixth option, it is far from clear that courts in dominance jurisdictions will be willing to stretch collective dominance to cover all forms of oligopolistic inter-dependence tending to raise price post-merger.

In contrast to what has just been noted, the one suggested means of increasing the flexibility of the SLC test, i.e. ensuring or clarifying that it includes a prevent branch, would probably increase rather than reduce legal certainty and does not appear to create any significant problems of its own.

In sum, when the total picture is examined and note taken of the salutary effects, under either test, of publishing both detailed merger guidelines and a high percentage of merger decisions, and possibly

including assessment criteria in the competition statute, it could turn out that neither competition test has a significant edge in terms of legal certainty.

9. Summary Remarks

We have argued that a merger can harm consumers and be blocked by an SLC test despite the fact that the merger does not create or strengthen a dominant position. We have also argued that there could be mergers strengthening rather than creating dominance that might more easily be blocked with a dominance rather than an SLC test. In general, the SLC test is likely stricter as regards anticompetitive mergers occurring in markets where there is an absence of either single or collective dominance before the merger, while the reverse may be true in respect of anticompetitive mergers that strengthen pre-existing dominance.

A large part of the coverage gap that might favour the dominance test could be narrowed or eliminated through adding or simply making more explicit a "prevent" branch to the SLC test. This would not only plug much of the gap, it would also do so without creating its own significant problems.

Turning to anticompetitive mergers that could more easily be blocked by the SLC as compared with the dominance test, this paper has identified and criticised six ways to close much or all of that gap. They are listed towards the end of the previous section of the paper. All were found to involve significant legal or policy problems. To begin with, it must be noted that courts could prove very reluctant to extend collective dominance to block mergers where "non-co-operative" oligopolistic inter-dependence (i.e. behaviour neither explicitly nor tacitly involving collusion) will tend to result in higher prices post-merger. In addition, courts may resist de-linking the definitions for single and collective dominance and, partly because of that, resist as well lowering market power thresholds associated with either collective or single dominance. Courts will presumably be reluctant to open the door to finding that more than one different sized firm enjoys single firm dominance in a properly defined antitrust market.

There is another considerably more serious de-linking issue. Courts may be unwilling to de-link the definitions of dominance applied in merger review and in abuse of dominance cases. This means that competition authorities will want to be very cautious about attempting to lower the market threshold associated with dominance in merger review. Doing so could upset the balance incorporated in abuse of dominance prohibitions. Dominance is a vitally necessary element in these prohibitions because the practices they are intended to stop could well be procompetitive when employed by non-dominant firms. Downgrading dominance to a level of market power sufficient to support an SLC sized price rise above competitive levels would largely do away with the dominance screen and result in enforcing abuse of dominance prohibitions in a way that causes more harm than good.

Continuing with the de-linking theme, it should be noted that weakening the link between market power and dominance could have two negative effects. It could de-emphasise the important economic efficiency objective, and it could possibly reduce legal certainty. Negative effects on legal certainty might also be expected from four of the other five listed means of widening the scope of the dominance test applied in merger review. The only exception is the last mentioned item, i.e. ensuring collective dominance catches both non-co-operative and co-operative behaviour.

Adding sufficient flexibility to ensure that both competition tests are equally likely to block harmful mergers does not mean the tests would have equivalent economic effects. For full equivalence, both tests must also have the same impact in terms of promoting legal certainty, thus avoiding the chilling effect of discouraging beneficial mergers.

It is very difficult to choose between the tests when it comes to legal certainty. We have noted that the dominance test may be inherently less flexible, hence superior on the legal certainty standard. We have also argued, however that this advantage may be reduced or even reversed in favour of the SLC test when one considers the effects of modifications required to ensure both tests have equal power to block harmful mergers. In any case, it may well be that if jurisdictions publish detailed guidelines, describe their merger review decisions (including at least some of the ones they choose not to challenge or modify), and possibly provide statutory criteria for their competition tests, there would probably be very little if anything to choose between the competition tests as regards legal certainty.

When comparing some aspects of the US and German approaches to merger review, we noted that the different thresholds inherent in the SLC and dominance tests appear to be linked to different objectives, or perhaps more precisely, to different underlying views concerning the resilience of markets. The German approach, and the dominance test itself, could be described as very *laissez-faire* for mergers in markets where there is no dominance either before or after a merger, but very strict where there is dominance pre-merger. A similar philosophy appears to characterise EC merger review. In his recent review of the divergent US and EC decisions in the General Electric/Honeywell merger, Götz Drauz, head of the EC's Merger Task Force, observed:

> I believe that most readers will agree that the purpose of merger control is to prevent the accumulation of excessive market power by one firm or a small number of firms. Additionally, merger control needs to be concerned with the preservation of competitive market structures, which may then benefit the consumer as a result of competition. Having said that, I would hope that you also agree that where competitors are squeezed out, marginalised, or driven out of the market, they cannot offer any credible competitive constraint to the dominant merged firms. In other words, and subject to exceptional cases such as natural monopolies, there can be no effective competition without competitors. This is the reverse side of the so frequently heard adage that antitrust is not about protecting competitors.[90] (emphasis added)

Consider also three excerpts from what William Kovacic, General Counsel to the US FTC, said in the course of examining trans-Atlantic differences in the Boeing/McDonnell Douglas merger:

> The heavy reliance on customer perspectives suggests how the US competition officials are less inclined to draw decisive inferences about the amenability of a market to post-merger exclusion from the sheer size of the merged enterprise or the bulk of its financial resources. The EC's methodology readily inferred competitive hazards from the combined Boeing-MDC market share and financial resources and did not address possibilities for effective counterstrategy by Airbus, the aircraft buyers, or suppliers to the aircraft producers. On the whole, US merger policy gives more weight to the resilience and adaptability of firms that the merged entity might try to oppress.
>
> Compared to the US regime, the EC is more doubting that efficiencies and the adaptability of rivals, customers, and suppliers adequately offset the competitive hazards posed by establishing or reinforcing a dominant position.
>
> Like US policy in the 1960s and early 1970s, EC merger policy today is sceptical of efficiency arguments and acutely wary of concentrated markets. It misrepresents EC policy to say that these perspectives betray a basic decision to protect competitors without regard to consumer interests. Rather, EC policy continues to place more faith in structural criteria as predictors of future consumer well-being.[91] (emphasis added)

To the extent the above citations from Drauz and Kovacic correctly describe EC policy, one could conclude that the thresholds inherent in a dominance test are well suited to the EC's objectives and basic assumptions about market dynamics. And one cannot simply presume that competition dynamics in markets, other than those that are truly international in nature, are the same on both sides of the Atlantic.

Although there may well be important differences between the dominance and SLC tests, this does not mean that reformers should look exclusively in that direction. Other topics deserving attention, and somewhat connected to the test issue, include: the objectives of merger review; the weight given to competition effects relative to the other factors found in public benefit tests; the degree to which market power versus structural or other considerations are determinative in applying a competition test; the role played by efficiencies; the extent to which the general assessment framework is adapted with respect to failing firm mergers; and the degree of discretion enjoyed by the competition authority. It is unlikely that the type of competition test adopted would outrank many of the items on that list. Otherwise put, the particular formulation of the competition test is probably not as important as the way it is applied.

Appendix

A review of aspects of the United States and German merger guidelines relevant to appreciating and comparing their substantive tests

United States

The United States Horizontal Merger Guidelines ("US Guidelines") present the enforcement policy of the US antitrust authorities concerning section 7 of the Clayton Act, section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act. Section 7 of the Clayton Act reads:[92]

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. (emphasis added)

Section 1 of the Sherman Act prohibits mergers if they constitute a "contract combination or conspiracy in restraint of trade";[93] and section 5 of the Federal Trade Commission Act does the same for mergers constituting an "unfair method of competition".

The US Guidelines begin with a broad purpose statement:

> Central to the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines is a recognition that sound merger enforcement is an essential component of our free enterprise system benefiting the competitiveness of American firms and the welfare of American consumers. Sound merger enforcement must prevent anticompetitive mergers yet avoid deterring the larger universe of procompetitive or competitively neutral mergers.[94]

A more precise purpose is later articulated as follows:

> …mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating performance of a monopolist, by either explicitly or implicitly co-ordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-co-ordinated conduct -- conduct the success of which does not rely on the concurrence of other firms in the market or on co-ordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.[95]

In brief, the US Guidelines apply an SLC test that is designed to prevent the creation or enhancement of market power roughly characterised as raising price above, or further above competitive levels. Since the pre-merger price is unlikely to be below the competitive level, an oft heard short hand for

the US merger test is that mergers which are likely to raise price by a non-negligible amount for a significant period of time will be prohibited.

The US Guidelines have a good deal to say about how markets will be defined, market shares assigned and concentration estimated. This is because the prevailing level of concentration and changes in it are believed to be an important factor in determining whether a merger will tend to increase market power. Three levels of concentration, calculated in terms of HHI[96], are presented and some loose deductions made concerning each:

1. Post-merger HHI below 1 000 (this is the level that would prevail if a market were served by ten equal sized competitors): "The Agency regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis."

2. Post-merger HHI between 1 000 and 1 800, i.e. moderately concentrated. Mergers in this range leading to an increase of less than 100 points are "…unlikely to have adverse competitive consequences and ordinarily require no further analysis." If the merger will instead produce more than a 100 point increase in HHI, it could "…potentially raise significant competitive concerns depending on the factors set forth in [subsequent sections] of the Guidelines."

3. Post-merger HHI above 1 800 (2 000 would correspond to five equal sized competitors), highly concentrated. Mergers producing less than 50 points increase in HHI, are "…unlikely to have adverse consequences and ordinarily require no further analysis." Above a 50 point increase in HHI "…raise significant concerns, depending on the factors set forth in [subsequent sections] of the Guidelines." Mergers producing more than 100 point increases in HHI will be presumed to "…likely…create or enhance market power or facilitate its exercise." This presumption can be rebutted by "…a showing that factors set forth in [subsequent sections] of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise…."[97]

With the exception of the refutable presumption found at the end of point 3, these thresholds basically set up safe harbours rather than articulate presumptions that a merger will produce an SLC. It should be noted, however, that something approximating another presumption is dealt with in the context of discussing "unilateral effects". This applies when the merger falls outside of the safe-harbours mentioned above, plus:

> …the merging firms have a combined market share of at least thirty-five percent, and where data on product attributes and relative product appeal show that a significant share of purchasers of one mergining firm's product regard the other as their second choice, then market share data may be relied upon to demonstrate there is a significant share of sales in the market accounted for by consumers who would be adversely affected by the merger.[98]

In accord with the general avoidance of market share based presumptions, the Guidelines stress that:

> ...market share and concentration data provide only the starting point for analysing the competitive impact of a merger. Before determining whether to challenge merger, the Agency also will assess the other markets factors that retained competitive effects, as well as entry, efficiencies and failure.[99]

The now somewhat dated but still in force United States (Department of Justice) "Non-horizontal Merger Guidelines", make considerably more reference to market shares and concentration data. In every case but one, these data are employed to articulate a safe harbour below an HHI of 1 800 (in the acquired firm's market) rather than to set out a presumption of an SLC.[100]

Returning to the US Guidelines, after the material relating to concentration levels, two basic ways in which a merger could create or enhance market power or facilitate its exercise are described, i.e. co-ordinated interaction and unilateral effects. These are extensively described in the introduction to this paper so will not be developed here.

The US Guidelines finish up with a look at efficiencies and the special issues arising when one of the merging parties is in danger of imminent failure. In both cases, the burden of proof is shifted from the competition agencies to the merging parties. In that sense, both can be referred to as "defences" which can save an otherwise anticompetitive merger. Neither is pertinent unless the merger, without considering either the effects of alleged efficiencies or imminent failure, is likely to produce an SLC.

In general terms, the US competition authorities will consider whether or not "merger-specific"[101], "cognisable" efficiencies are likely "…sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market."[102] In order to be "cognisable", the merging parties must "…substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger specific." [103] Were it not for this shifting of burden of proof, it would seem that there would be no need to deal with efficiencies at the end of the Guidelines. They would instead presumably be considered along with everything else that is weighed to determine whether a merger would be likely to increase prices.

The material relating to failing firm spells out what the parties must establish to qualify for the defense. Essentially they must prove that failure is truly imminent and that if the merger is blocked, the assets belonging to the failing firm will probably exit the market. This includes showing that the failing firm "…has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger."[104]

Germany

In a recent description of its analytical framework for merger review ("German Merger Framework paper"), the Bundeskartellamt noted that:

> Under Section 36(1) of the ARC [Act against Restraints of Competition], a merger is to be prohibited by the Bundeskartellamt "if it is expected to create or strengthen a dominant position."[105]

The Bundeskartellamt's "Principles of Interpretation" (unofficial translation), which we will refer to as the "German Guidelines", describe its merger review objectives in the following terms:

> The task of merger control is to counter an "excessive" concentration of firms. The aim here is to maintain competitive market structures and ensure that the scope of action of companies is sufficiently controlled and does not impinge on the substantive freedom of action of other firms and consumers. Merger control should therefore combat any risk to competition that may arise

> from a change in market structure resulting from a concentration (so-called "structural approach").[106]

Dominance is clearly central to the German approach and includes both "single-firm" and "oligopolistic dominance". The German Merger Framework paper begins with single-firm dominance described as follows:

> The concept of market dominance is put into concrete terms in Section 19(2) of the ARC, where an undertaking, which either has no competitors (first option) or is not exposed to any substantial competition (second option) or has a paramount market position in relation to its competitors (third option), is presumed to be dominant. The first variant is of practically no great significance because the complete absence of competition can only be presumed in the most exceptional cases. Whilst the first and second variants determine the certain absence of (substantial) competition, the expectation that the restraint of competition will most probably lead to a standstill in competition in the further course of developments is enough to determine a paramount market position. The third variant is thus the most significant in merger control.
>
> A paramount market position exists if an undertaking's scope of action is not sufficiently controlled by its competitors due to market or company-related structural criteria. Company mergers strengthen a paramount market position if the competitive conditions on the affected market become even worse as a result.
>
> Section 19(2) sentence no. 1(2) of the ARC stipulates the major factors which should be taken into account when examining a paramount market position. The market share always forms the basis for assessing market power. A dominant position is presumed to exist within the meaning of Section 19(3) of the ARC if one undertaking has a market share of at least one third. Apart from market share the law stipulates the following assessment criteria: financial power, access to supply or sales markets, links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the area of application of this Act, the ability to shift supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings. This list is not conclusive. In examining a merger the Bundeskartellamt has to make an overall appraisal of all the criteria.[107]

It is significant that the presumption of single dominance above a one-third share is refutable.[108] Moreover, the German Guidelines draw attention to a list of factors to be examined in order to determine whether there is a dominant position. The list reflects the view that:

> …as a rule the market position of a company cannot be judged solely by examining structural criteria (e.g. market share, existing or potential competition), but only by taking all the relevant aspects of a case into account. As a result in some cases even concentrations with large market shares are not prohibited because other structural factors such as efficient, potential competition from abroad and a strong demand side of the market are expected to ensure that the scope of action of the merging parties will be sufficiently controlled.[109]

Right after discussing market shares, the German Guidelines turn to "Assessment of resources, in particular financial strength". In terms of pages devoted to this, only market shares and barriers to entry receive more attention in the section devoted to single firm dominance. The section on resources is introduced with:

> Superior financial strength may provide a firm with a scope of action, in particular as regards the

> use of parameters of competition such as price, investment, research and advertising. The same applies for example to a comprehensive production programme or range of products, or resources that are specific to a particular sector or market, in particular technological resources. Superior resources result in a paramount market position if they limit the alternatives available to buyers and if they have discouraging and deterrent effects on competitors. In some cases, profits can be transferred and losses can be balanced out from one market to another. Such effects manifest themselves in existing competitors refraining from engaging in active competition and potential competitors refraining from entering the market.
>
> The assumption that superior resources are actually used has to be well substantiated. They are not taken into account in markets where they have only secondary significance. In this connection, the practice of the courts focuses on market relevance and business objectives, for example diversification strategies. The allegation that the merger control assessment of a firm's financial strength was speculative can be invalidated if resource potential, a strong interest in using resources, market relevance of the resource potential and limited opportunities for existing and potential competitors to react coincide.[110]

An important point to note from the above is the implicit assumption that single firm dominance would only attach to one firm in any well-defined antitrust market. The merged firm appears to be compared to all rather than just some of its competitors.

After dealing with single-firm dominance, the German Merger Framework paper turns its attention to oligopolistic dominance described as follows:

> According to Section 19(2) sentence 2 of the ARC, two or more undertakings are dominant insofar as they jointly satisfy the conditions of market dominance and no substantial competition exists between them. Therefore, in assessing an oligopolistic situation it is first examined whether the conditions of internal competition favour anticompetitive parallel conduct. The presumption thresholds for oligopolistic dominance lie at a combined market share of 50 percent in the case of a maximum of three companies or two-thirds for a maximum of five companies. Advantages in market share and resources as well as interlocks or economic interdependence between the oligopolists and outsiders are of particular significance as regards external competition. Additional criteria applied in the assessment of oligopolistic dominance include the level of market transparency, the homogeneity of the products and actual competitive activity in the market. A comprehensive appraisal of all the significant conditions of competition should also be made and considered in assessing collective dominance.[111]

In the German Guidelines, oligopolistic dominance is introduced by considering general oligopolistic interdependence which, it is noted, could give rise to a wide range of outcomes from intense "oligopolistic competition" through to "non-competitive or only partly competitive oligopolies". This is elaborated upon as follows:

> Oligopolistic interdependence may for example lead to the price reductions of an oligopolist prompting its competitors also to reduce their prices in order to avoid losing customers. The result would be lower prices and lower profits for all suppliers. If the suppliers are aware of these interactions, they will try to avoid a situation of this kind in which all suppliers lose out. They will make use of their competitive parameters, aware of the possible reactions of their competitors. Even without any formal agreements this mutual consideration may lead to the members of the oligopoly acting like a collective monopoly. The concepts of game theory, as well as the decision-making practice of the competition authorities, have worked out a series of factors that can lead to the oligopolists following the unwritten code of conduct described above.

> This requires in particular the possibility of retaliatory action to prevent mavericks from circumventing this oligopolistic code of conduct, with the aim, for example, of exploiting the gap between the oligopoly price and marginal costs. Whether this retaliatory action is possible depends in particular on the individual market conditions.[112] (emphasis added)

Towards the end of describing the "definition of oligopolistic dominance in German merger control", the German Guidelines state:

> The most important factors as far as the creation of oligopolistic dominance is concerned - this includes situations where single-firm dominance is replaced by oligopolistic dominance - are the conditions of competition after the merger. The overall assessment of the post-merger conditions of competition must show that it is likely that the oligopoly will adopt conscious parallelism in future. There must be a strong probability that the substantial competition that was established, or at least assumed, prior to the merger will no longer exist after the merger. The indication that substantial competition was present before the merger will have less impact, the more the conditions of competition in the market concerned are changed as a result of the merger.
>
> As far as the strengthening of oligopolistic dominance is concerned, it has to be examined whether the conditions of competition can be expected to deteriorate further. The evidence required to establish that such strengthening has taken place is less, the greater the degree of market concentration (see section on single-firm dominance).
>
> It is not necessary for establishing oligopolistic dominance to prove that the members of the oligopoly have been actively colluding. On the contrary, the mere fact that the members of the oligopoly adapt their behaviour to the market conditions may lead to anticompetitive parallel conduct that results in the oligopoly becoming dominant. This is consistent with the fact that markets showing signs of cartel agreements run a particularly high risk of oligopolistic dominance and that interlocks are an important criterion for examining oligopolistic dominance.[113]

The German Guidelines material has separate sections dealing with the examination criteria as regards internal and external competition. The internal competition analysis basically concentrates on assessing the probability that, assuming they are not constrained by firms outside, a group of oligopolists will be able to replace competition among them with some form of co-ordination. The primary factors examined in making that assessment are: market shares; "power relations in the oligopoly"; various "interlocks" among the oligopolists; the ability of buyers to control the exercise of seller market power; and market phase. The external competition analysis is closely similar to what is involved in determining whether a single firm is dominant, with the oligopolists being treated as a single firm.[114]

The German Guidelines also address the issue of what constitutes a strengthening of "paramount position"; i.e. the most common form of single dominance and the only one for which strengthening would seem to be particularly pertinent. The Guidelines state:

> Company mergers strengthen a paramount market position if the competitive conditions on the affected market become even worse as a result. In addition to determining the existence of a paramount market position it must then also be examined whether the existing uncontrolled scope of action is extended, and efficient competition will thus become even less likely. The same factors are used to establish the creation and strengthening of a dominant position.
>
> A company's position is already strengthened if it is better able to ward off follow-up competition after the merger than before, and is able to maintain or secure its dominant market

position as a result. The more the market concerned is already being dominated, the less the need to prove that a dominant position is being strengthened. Even small changes in the factors determining market power are enough to establish the strengthening effect if there is already a high concentration in the market. It is not absolutely necessary in these cases for the market shares to increase. The strengthening of a company's position may also be due to other increases in resources. The Federal Supreme Court considered, for example, that even small structural changes in vertical mergers in the energy supply sector (e.g. by means of securing existing supply contracts under company law) were sufficient strengthening elements due to the high degree of concentration in this sector. In the "Kali+Salz/PCS" case the elimination of a potential competitor and the dominant company's greater potential to defend itself against new competitors entering the market were decisive in establishing that its dominant position would be strengthened.

Having a greater influence on a target company e.g. by means of changing from joint to exclusive control, may also strengthen a dominant position to the extent that the resources of the dominant company have even greater competitive effects. On the other hand, a dominant position is not strengthened if the competitive appraisal establishes that the market shares and turnovers of the acquired company were already fully attributable to the purchasing company before the merger, i.e. no corresponding competitive effects will arise as a result of the purchaser acquiring additional rights or resources.[115]

In contrast with the US Guidelines, there is nothing in the German Guidelines concerning an efficiencies defence or exception. There is, however, a "failing company defence". This amounts to a special case of there being no causal link between a merger and the creation or strengthening of a dominant position. To benefit from the defence, the parties must provide evidence that failure is imminent and that the acquiring firm will gain the whole of the acquired company's market position in the event of such failure. They must also show that there is no other "…party willing to acquire the firm which, if successful in realising its merger plan, would lead to less restraint of competition."[116]

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NOTES

1. Price stability, regional development and employment, fairness to small business and a host of other public policy goals can be included in a public interest standard. It is highly debatable that merger review is the best instrument for pursuing a hodge-podge of such objectives especially as it is very difficult to articulate proper tradeoffs among them and between each and the objective of promoting economic efficiency through competition. A public interest test also inevitably introduces a good deal of subjective judgement and with it extra uncertainty and delay into merger review. The result could be that some beneficial mergers may never be proposed even if they could pass muster under the test.

2. In addition, the United Kingdom recently compared the two as possible replacements for its current public interest test. See United Kingdom (2000).

3. Bundeskartellamt (2001).

4. Ibid. p. 35, omitting reference.

5. *Airtours plc v. Commission of the European Communities*, Case T-342/99, Court of First Instance, June 6, 2002.

6. Paragraph 167 of European Commission (2001) in part reads: "In conclusion, experience in applying the dominance test has not revealed major loopholes in the scope of the test. Nor has it frequently led to different results from SLC-test approaches in other jurisdictions."

7. See loc. cit.

8. It is interesting that the United States submission [see United States (2002)] to the International Competition Network's September 28, 2002 discussion on the substantive test in merger review sticks to the US *Horizontal* Merger Guidelines. The German submission [see Bundeskartellamt (2002)] to the same discussion concentrated heavily on horizontal merger concerns. Possible differences between horizontal, vertical and conglomerate are similarly absent from consideration in the Australian submission [see Australia (2002)] for that meeting, and the same is true for the remaining submission from South Africa [Lewis (2002)].

9. See United States (1997c).

10. See, respectively, Europe Economics (2001, 7) and New Zealand (2001). Canada also makes a distinction that is very close to the same thing – see Director of Investigation and Research (1991).

11. See Willig (1991, 292-293). A similar focus on fear of rivals' reactions also features in Europe Economics (2001, 49) where we read:

> Co-ordinated effects are so called because even though firms may be acting independently from each other, as in the case of tacit collusion, they reach a 'co-ordinated' outcome. The merged firm is only able to raise its prices if its rivals match this increase and if every firm in the oligopoly fears a return to competitive prices and profits if it undercuts its rivals.

Roughly the same distinction is also made by a former and current European Commission official working for the Merger Task Force:

> In simple terms unilateral effects enable a company, because of the change in market structure resulting from the absorption of a competitor, to increase prices unilaterally after a merger, even if the

> remaining companies were to seek to compete. Co-ordinated effects on the other hand are those effects where a company's ability to increase prices depends on the actions of its competitors. In other words co-ordinated effects involve some degree of accommodation by competitors whereas unilateral effects do not. [Christensen and Rabassa (2001, 229)] (references omitted)

12. United States (1997c, section 2.2 at page 15).

13. Referring to both the main classes as well, presumably, as the separate situations described within each, the US Guidelines state:

> Because an individual merger may threaten to harm competition through more than one of these effects, mergers will be analysed in terms of as many potential adverse competitive effects as are appropriate. [United States (1997c, section 2.0 at page 13)]

14. Europe Economics (2001, 62-63, reference omitted) pointed out that:

> Unilateral and co-ordinated effects lead to different equilibrium outcomes following a merger and, although unilateral effects are expected to occur with all horizontal mergers, in certain circumstances when market conditions allow, co-ordinated effects are more likely to occur. Both effects cannot occur at once, however. That is, either the merger leads to another Cournot or Bertrand equilibrium or to a collusive one, with the first two situations representing unilateral effects and the latter co-ordinated effects.
>
> There may be situations where both types of effects of the merger appear to occur simultaneously. For instance, there might be a real world sequence in which a merger initially only has unilateral effects, that is, the immediate post merger equilibrium is non-collusive, but, with subsequent learning, etc., this may be displaced by tacit collusion. Also, in principle, the merger might lead to tacit collusion amongst outsiders, even though the merged firm still sets its prices unilaterally. The first situation, however, may be thought of as a merger which has co-ordinated effects, albeit not immediately realised, and the second possibility is perhaps too contrived to worry about.
>
> In effect, therefore, it does not make economic sense to mix unilateral and co-ordinated effects in merger analysis by attributing the outcome of a merger partly to unilateral effects and partly to co-ordinated effects.
>
> Nevertheless, merger control should involve an analysis of both effects. An analysis of unilateral effects will show the likelihood of a significant increase in prices even without any collusion. If the unilateral effects are negligible but the structure and other characteristics of the market suggest a likelihood of collusive conduct between the remaining firms in the market after the merger, then an analysis of co-ordinated effects will also be appropriate. A merger may thus be blocked on one count or the other.

15. See Bundeskartellamt (2000).

16. United States (1997c, 1).

17. United States (1997c, section 0.1 at p. 3).

18. The discussion paper stated:

> Market power, in turn, is defined as the possibility to act differently from what would be expected under the conditions of effective competition. This would mean, however, that the SLC test assesses precisely this "scope of action which is not *sufficiently* controlled by competition" which is usually used to define "dominant position" in European merger control and "paramount market position" as a

special case of the dominant position under the ARC. [Bundeskartellamt (2001, 14) references omitted and emphasis added]

19. Ibid. p. 34.

20. This distinction may help explain, for example, why the section outlining how buyer power is to be factored into the analysis is entitled, "Counterbalancing market power".

21. This implicitly assumes that quality has remained constant and that a reduction in innovation can be equated to an increase in price (quality adjusted) above what it would have been had innovation not been reduced.

22. Bundeskartellamt (2002, 13-14).

23. Ibid. p. 3.

24. Ibid. p. 4.

25. Ibid. p. 5.

26. . That shows up for example, in their discussion of how the merged firm's resources compare to those of its "competitors", i.e. presumably all its competitors. See Bundeskartellamt (2000, 15).

27. *Airtours/First Choice*, Case IV/M.1524, Commission Decision of 22 September 1999, OJ [2000] L93/1.

28. Temple Lang (2002, 309).

29. The critical cases were: *France v. Commission* (Kali und Salz), cases C-68/94 and 30/95 [1998] ECR I-1375; and [1998] 4 CMLR 829; and *Gencor v. Lonrho*, case T-102/96 [1999] ECR II-753, [1999] 4 CMLR 971.

30. Australia (1991a and b) discuss a number of mergers which the Australian Trade Practices Commission (since incorporated into the Australian Competition & Consumer Commission) suspected were uncompetitive but could not block using a single dominance test. New Zealand's competition authority had similar concerns – see New Zealand (1999, 13-17).

31. Co-ordinated effects could instead manifest themselves as a reduction in non-price competition. To simplify the exposition, we are assuming that such a reduction can be treated as equivalent to some level of price increase.

32. *Gencor v. Lonrho*, case T-102/96, Court of First Instance judgement of March 25, 1999, para. 276.

33. See Bundeskartellamt (2000, II. B. 2 at pp. 48-49).

34. Replacing competition with co-ordination among a group of oligopolists will not long endure unless the co-ordinating firms can effectively dissuade cheating on their anticompetitive arrangement. The higher the price, other things equal, the higher the incentive to cheat, and presumably the greater would be the opportunity loss imposed by a return to the non-co-operative price level. While the attraction of cheating and the weight of the sanction may well both rise proportionally as the "agreed" price moves up, there is no necessary reason to expect an improved ability to detect cheating at a higher as opposed to a lower price. It is therefore possible, that a group of co-ordinating oligopolists will be able to raise price but fall short of being able to raise and sustain prices to the level a single dominant firm would set.

35. For the purposes of Article 82 (the European Union's abuse of dominance prohibition) applied in a single dominance case, the European Court of Justice stated that a dominant position:

> …relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. [As cited in Whish (2001, 152) – *United Brands v. Commission* case 27/76 [1978] ECR 207, [1978] 1 CMLR 429].

Depending on the meaning given to "appreciable", the power to raise price to an SLC level could arguably be taken as proof that a firm, or a group of firms, have the power "…to behave to an appreciable extent independently of its [their] competitors, customers and ultimately of its [their] consumers."

36. *Airtours plc v. Commission of the European Communities*, Case T-342/99, judgment of the Court of First Instance, June 6, 2002, paragraphs 61 and 62.

37. See Starek and Stockum (1995, 803).

38. United States (1997c, sections 2.21 and 2.212 at pages 15-17), references and headings omitted.

39. A possible example is the *Guinness/Grand Metropolitan* merger, Case No. IV/M.938, OJ [1998] L 288/24, [1997] 5 CMLR 760.

40. See Fingleton (2002, 7-8) for a portfolio effects related critique of employing overly narrow product definitions.

41. For a discussion of this point, see Camesasca and Van den Bergh (2002, 153-155), and Werden and Froeb (1996). For the view that market definition is less important as regards mergers in differentiated product markets, but probably cannot be dispensed with, see Shapiro (1996).

42. For further comment on *Staples/Office Depot*, see Baker (1998).

43. See Camesasca and Van den Bergh (2002) for further discussion of the special difficulties in applying merger review to differentiated product oligopolies using a structuralist approach, i.e. placing a high level of reliance on market share analysis, an approach that seems closer to a dominance than SLC test.

44. European Commission (2001, para. 166).

45. For the US Court of Appeals, District of Columbia Circuit order granting a preliminary injunction blocking the merger, see Federal Trade Commission v. Heinz, 246 F.3d 708, 345 US App. D.C. 364.

46. Kolasky (2001, 82).

47. Leary (2002, 1).

48. United States (1997c, section 2.22 at p. 17).

49. See Scher (1999), ss. 125-126.

50. See Whish (2002, 153-156).

51. New Zealand (2001, 31).

52. Spector (2001) points out that with a one-shot Cournot model (i.e. homogeneous product markets, firms compete on price, and each oligopolist sets output assuming its rivals will hold their outputs constant), and assuming flat or rising marginal cost curves, any profitable merger failing to generate technological synergies (cost savings other than lower fixed costs) must harm consumers through higher prices, irrespective of entry conditions in the industry. He also notes that: "Only if large-scale entry is likely near pre-merger prices is it legitimate not to challenge a merger. Otherwise, the likelihood and magnitude of merger-specific synergies should be addressed. If these synergies are found to be unlikely or very small, a merger should be prevented even if some entry appears likely." (13)

53. Kloosterhuis (2001, 80-81).

54. Ibid. p. 87.

55. There are two key paragraphs of the Commission's decision that merit full citation:

> 55. In its Statement of Objections, the Commission identified certain features of market structure and operation which had been identified as making anticompetitive outcomes, and in particular collective dominance, more likely. Airtours considers that, in effect, none of these indicators are present and that, furthermore, it would be impossible for the major suppliers to 'retaliate' in the event that one of them tried to win market share from the others by increasing capacity and offering lower prices. However the Commission did not suggest, nor does it consider, that all of the features have to be present and/or aggravated by the merger in order for collective dominance to arise in a given case. Nor does it regard a *strict retaliation mechanism*, such as that proposed by Airtours in its reply to the Statement of Objections, as a necessary condition for collective dominance in this case; *where, as here, there are strong incentives to reduce competitive action, coercion may be unnecessary*. However, in any case, as set out below, the Commission does not agree that there is no scope for retaliation in this market. Rather there is considerable scope for retaliation, which will only increase the incentives to behave in an anticompetitive parallel way. [emphasis added]

Since it does not rule out the need for some kind of retaliatory mechanism, the above paragraph leaves considerable doubt about whether the Commission was seeking to extend collective dominance beyond catching mergers likely to result in co-ordinated interaction. The next often cited paragraph is less ambiguous, but still not totally clear on this point:

> 150. As set out in the introductory section the Commission does not consider that it is necessary to show that the market participants as a result of the proposed merger would behave as if there were a cartel, with a tacit rather than explicit cartel agreement…. In particular, it is not necessary to show that there would be a *strict* punishment mechanism. What matters for collective dominance in the present case is whether the degree of interdependence between the oligopolists is such that it is rational for the *oligopolists* to restrict output, and in this sense reduce competition in such a way that a collective dominant position is created. [emphasis added]

It could be argued that *provided* the Commission takes the view that co-ordinated interaction involves only explicit and tacit collusion, it was clearly intending to extend collective dominance to catch some instances of unilateral effects as well. Against that view, it is notable that the Commission does not maintain there is no need to show a punishment mechanism exists, only that there is no need to show a *strict* punishment mechanism. Moreover, the situation the Commission has in mind is one where oligoplists (plural) will restrict output. If there are only unilateral effects present, one would expect only the merging parties to reduce output. The other oligopolists would either increase output or, if they are capacity constrained, leave output unchanged.

On the basis of paragraphs 55 and 150, it is possible to deduce that the Commission was simply trying to ease its burden of proof of establishing the existence of an appropriate retaliatory mechanism, something it apparently had difficulty doing in the merger before it.

56. This paragraph has merely scratched the surface of a complex and evolving literature in oligopoly theory.

Economists have developed a range of models concerning the ways in which oligopolists interact. These models differ in their assumptions concerning things like whether there is a single or repeated interaction among suppliers, what each firm knows and when concerning what its rivals are doing, the ability of firms to credibly communicate with each other, and the firms' cost structures (i.e. capacities and sunk, fixed and marginal costs).

Merger analysis relies on a handful of model types. One of these refers to a one-period Cournot game, i.e., the firms make decisions on quantity, do not learn from the past, and cannot use a strategy that depends on acting differently in different periods. Variants of the one-period Cournot model are most commonly applied when products are homogeneous. This is the type of model that predicts that four firms will price higher than five, and higher marginal cost is a credible commitment to reduce output. The Cournot model lies behind the standard analysis of unilateral effects of mergers in homogenous product markets.

Another type of model is built on a one-period Bertrand game, i.e., where the firms make decisions on price, do not learn from the past, and cannot use a strategy that depends on acting differently in different periods. This is most commonly used when products are heterogeneous. This is the type of model that predicts that the closer are the merging parties' offerings in "product space", the more the merger will tend to raise price. The Bertrand model supplies the analytical framework typically used in exploring unilateral effects of mergers in differentiated product markets.

A third type of model allows for a particular type of multi-period, multi-firm strategy, i.e., it permits firms to collude (tacitly or explicitly) and to punish each other if there is cheating on the collusion. This type of model makes explicit assumptions about what firms know about their 'rivals', and when they know it. In other words, this is the model behind the co-ordinated effects theory applied in merger review.

The limitations of these game-theoretic models as a basis for making real policy decisions are obvious. Perhaps the least attractive feature is that, if the Cournot or Bertrand games are extended to become repeated games (where the one-period game is repeated over and over again with the same firms), then the firms can use multi-period strategies and the equilibrium price indicated by the model could lie anywhere between marginal costs and the monopoly price.

57. Jenny (2002, 370).

58. Niels (2001, 172).

59. Fingleton (2002, 4-6).

60. Jenny (2002, 370). Jenny implicitly assumes that both the "create" and "strengthen" elements of the dominance test should apply to both single and collective dominance. He therefore proposes that strengthening collective dominance be found to occur if a merger will likely move the non-co-operative equilibrium price closer to the monopoly level.

The idea that the strengthening branch of the dominance test is vacuous as regards collective dominance unless non-co-operative behaviour is included is based on a further implicit assumption (see p. 369 of Jenny's article) that co-operative behaviour always produces a monopoly level price. If that were so, a merger that improves co-operation among oligopolists would not strengthen collective dominance in the sense of leading to a higher price. We have already noted, however, that pre-merger co-ordinated behaviour may not succeed in raising prices to the monopoly level.

61. Ibid. p. 370.

62. This is especially pertinent as regards theories of competitive harm built on a Cournot model. For some of the apparent shortcomings of the Cournot model, e.g. it is a one shot game model, yet two periods are implied in each supplier assuming that rivals' outputs will remain unchanged, see Shapiro (1989). Shapiro is unconvinced that this difficulty can be addressed without recourse to full-blown dynamic models. Although such dynamic models might address the theoretical issues, they would leave antitrust authorities with a much more complex and difficult to prove story of competitive harm.

63. Leary (2002, 2).

64. For this difference to be significant, it is unnecessary that one of the pre-merging parties be dominant pre-merger. Pre-merger collective dominance would be sufficient. A merger could preserve the market power wielded by a group of oligopolists just as much as it could preserve the market power of a single dominant firm.

65. The German Guidelines express this as follows:

> A company's position is already strengthened if it is better able to ward off follow-up competition after the merger than before, and is able to maintain or secure its dominant market position as a result. The more the market concerned is already being dominated, the less the need to prove that a dominant position is being strengthened. Even small changes in the factors determining market power are enough to establish the strengthening effect if there is already a high concentration in the market. [Bundeskartellamt (2000, I. A. 2.2 at pp. 8-9), reference omitted]

66. At least one jurisdiction, New Zealand, explicitly specifies that in assessing the likelihood of an SLC it compares two future scenarios, i.e. with and without the merger – see New Zealand (2001, section 1.2). An SLC jurisdiction is free instead merely to compare the present situation with what is expected if the merger is permitted to proceed. Such a restrictive choice, though, could also be made by a dominance jurisdiction. It is not inherent in either test.

67. *Competition Act*, R.S., 1985, c. C-34 (as amended), s. 92(1). The Canadian Merger Guidelines expound on this as follows:

> Similarly, competition can be prevented by conduct that is either unilateral or interdependent. Competition can be prevented as a result of unilateral behaviour where a merger enables a single firm to maintain higher prices than what would exist in absence of the merger, by hindering or impeding the development of increased competition. [Director of Investigation and Research (Competition Commissioner) (1991, sec. 2.3 at page 4)]

Crampton (1990, 357) states: "It is important to recognise that there are situations where competition may be "prevented", but not "lessened", and *vice versa*." He then refers to mergers that would eliminate a potential competitor before adding: "Similarly, the pre-emptive acquisition of a poorly performing competitor that would otherwise have been acquired by either a third (vigorous) competitor in the market, or a new entrant, could substantially prevent the development of future competition which would have arisen but for the merger."

Canada is not alone among SLC jursdictions in having a prevent branch in its test. Australia's Trade Practices Act, 1974, section 4G states: "For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition." In addition, according to a letter to the author from an official working in New Zealand's Regulatory and Competition Policy Branch (Ministry of Economic Development), section 3(2) of New Zealand's Commerce Act "…provides that references to the lessening of competition include references to the hindering or preventing of competition."

68. Bundeskartellamt (2001, 22) references omitted.

69. For more on *Boeing/McDonnell Douglas*, see Kovacic (2001). For a discussion of similar contentious issues, see two views of the *General Electric/Honeywell* merger provided by James (2001) and Monti (2001).

70. Whish (2002, 17) references omitted. The reference to *Compagnie Maritime Belge* is "Cases C- 95/96 and C-396/95…[2000] 4 CMLR 1076".

71. For examples of concerns about the negative effects of increasing the scope of abuse of dominance provisions, see Hampton (2002, 9).

72. Fingleton (2002, 9-10) raises the spectre of forced break-ups being applied under European Union competition law to remedy non-co-operative supra-competitive pricing in an oligopolised homogeneous product market. He notes that structural remedies are being mooted for inclusion in the replacement for the European Commission's Regulation 17/62.

73. Case No IV/M.1221 OJ [1999] L 274/1, [2000] 5 CMLR 256.

74. Case No IV/M.1412.

75. Case No COMP/M.1684.

76. Ibid. paras 155-167.

77. Case No COMP/M.1630.

78. Case No COMP/M.1795.

79. Whish (2002, 15-16).

80. Case T-102/96 [1999] ECR II-743, [1999] 4 CMLR 971, para. 106, as cited in Which (2002, 11).

81. Whish (2002, 11-12).

82. See American Bar Association (1992, 413) for a discussion of the "competitive injury" element in a *Robinson-Patman Act*, s.2(a) case.

83. See *Competition Act*, R.S., 1985, c. C-34 (as amended), s. 79(1).

84. See United Kingdom (2000, paras. 2.17, 2.18 and 2.21) and Whish (2002, 12 & 17). Heimler (2002, 9) shares this view, but this should not be taken to mean that he favours the SLC over the dominance test.

85. In discussing the contribution of competition to economic efficiency, John Vickers acknowledges that: "Although the concept of competition has always been central to economic thinking… it is one that has taken on a number of interpretations and meanings, many of them vague." [Vickers (1995, 3)]

86. In recently describing the evolution of US antitrust law, Assistant Attorney General Charles James writes:

> One thing that seems clear after reviewing this list of antitrust theories that have been embraced and then discarded is that there has been a consistent trend over the last thirty years towards an increasing focus on economics, efficiency and consumer welfare. By remaining sufficiently flexible to incorporate the latest in economic thinking into our analysis, we have now refined our enforcement policies to the point where we are better able than ever to target transactions and practices that the antitrust laws are meant to address. [James (2002a, 9)]

87. European Commission (2001, paras. 163-165).

88. Whish (2002, 13-14). The competition laws of SLC jurisdictions such as Australia, Canada, New Zealand and South Africa provide lists of what Whish has referred to as "the factors to be taken into account in the analysis of cases…." A South African submission to the International Competition Network noted that: "By incorporating a non-exhaustive list of review criteria in the Act, we have managed to combine the flexibility of a substantial lessening of competition system with a requisite degree of certainty. The criteria listed in the Act will inevitably be supplemented by guidelines once the system has a wider experience of merger review." [Lewis (2001, 11)]

89. For more on this point, see n. 40 supra.

90. Drauz (2002, 904). Some readers might wonder whether Drauz, in the first cited sentence, intends "prevent the accumulation of excessive market power" to apply simply to the attainment of a certain "excessive" level of market power, or instead means it to include as well the process of getting to that level. The sentence would likely enjoy wider agreement under the latter as compared to former interpretation.

91. Kovacic (2001, 861 & 862-863), references omitted.

92. 15 U.S.C. Section 18 (1988).

93. 15 U.S.C. Section 1 (1988).

94. United States (1997c, 1).

95. Ibid. section 0.1 at page 3.

96. Herfindahl-Hirschman Index, i.e. 10,000 times the sum of the squares of the market shares of firms in the market.

97. The quoted material in these three points is drawn from United States (1997c, section 1.51, pp. 11-12).

98. Ibid. section 2.211 at page 16.

99. Ibid., section 2.0 at page 13.

100. United States (1984, sections 4.131, 4.134, 4.213, 4.221and 4.222). The exception is found in 4.134, which can trump 4.131. Section 4.1 pertains to mergers eliminating specific potential entrants. Section 4.134 states that: "The Department is likely to challenge any merger satisfying the other conditions in which the acquired firm has a market share of 20 percent or more.

101. See United States (1997c, section 4 at p. 20).

102. Ibid. section 4 at p.21.

103. Ibid.

104. Ibid. section 4 at p. 22.

105. Bundeskartellamt (2002, 2).

106. Bundeskartellamt (2000, I.A.1. at p.4).

107. Bundeskartellamt (2002, 2-3).

108. Ibid. section I.B.1.1.1 at p. 11.

109. Ibid. section I.A.1, pp. 4-5, reference omitted.

110. Ibid. section I.B.2 at pp. 15-16, references omitted.

111. Bundeskartellamt (2002, 3).

112. Bundeskartellamt (2000, II. A. 1 at pp. 39-40) references omitted.

113. Ibid. II. A. 2, at pp. 41-42, references omitted.

114. See Bundeskartellamt (2000, II. B. 2 at pp. 48-49).

115. Ibid. I. A. 2.2 at pp. 8-9, references omitted.

116. Ibid., I.B.10 at p. 38.

NOTE DE RÉFÉRENCE

Par le Secrétariat

1. Introduction et conclusions principales

Lorsqu'elles examinent les effets d'une fusion sur la concurrence, la plupart des autorités de contrôle de la concurrence appliquent une variante quelconque de l'un ou l'autre des deux critères habituels. Le premier de ces critères s'applique à déterminer si une fusion est susceptible de créer ou renforcer une position dominante (critère de la position dominante). Le critère alternatif exige d'évaluer si une fusion est susceptible de diminuer substantiellement la concurrence (critère SLC). Ce document recherche s'il existe des différences significatives entre ces critères. Plus précisément, le choix du critère de la concurrence est-il susceptible de conduire à des résultats différents en présence de types définissables d'opérations de fusion ?

Ce document n'examinera pas les arguments qui militent pour ou contre une norme fondée sur l'intérêt public ou le bénéfice tiré par la collectivité (laquelle suppose également une certaine forme d'arbitrage ministériel). Il convient toutefois de noter que ces normes plus larges intègrent toujours une évaluation de l'effet probable d'une opération de fusion sur la concurrence, et que cet aspect pèse généralement d'un poids très lourd lorsqu'il s'agit de décider de contester ou non une fusion. Ce poids est plus susceptible d'augmenter que de diminuer à l'avenir.[1]

L'intérêt relatif des deux principaux critères de la concurrence n'est pas seulement affaire de débat académique. La Commission Européenne envisage actuellement de passer d'un critère de la position dominante à un critère SLC. Sa décision aura probablement une influence déterminante sur celle des différents Etats membres de l'Union Européenne, quant à l'opportunité de conserver ou de modifier leur critère de contrôle. Il convient également de noter qu'en 2001, la Nouvelle Zélande est passée du critère de la position dominante au critère SLC, et que l'Australie avait fait de même en 1993.[2]

Dans les développements qu'il consacre au critère SLC, ce document accordera une attention toute particulière aux Etats-Unis, qui constituent la plus grande sphère juridictionnelle d'application du critère SLC. La législation et l'expérience américaines ont eu une influence considérable sur d'autres systèmes juridictionnels, et les Etats-Unis ont également publié des lignes directrices détaillées en matière de fusions. En ce qui concerne le critère de la position dominante, l'accent sera mis sur l'Allemagne et l'Union Européenne, qui sont respectivement la seconde et la première plus grande sphère juridictionnelle d'application de ce critère. Nous consacrerons une plus grande attention à l'Allemagne, car elle a publié des lignes directrices en matière de fusions décrivant ses politiques d'application du contrôle des fusions, tandis que l'Union Européenne ne l'a pas fait, à la date où nous publions ce document. Bien que les Etats-Unis, l'Union Européenne et l'Allemagne fournissent une base appropriée pour élucider les questions essentielles en cause, il convient de noter qu'il peut se produire des variations significatives d'un pays à l'autre dans la manière dont ces critères ont été articulés. En outre, il existe de bons motifs de penser que la manière dont un critère de contrôle des fusions est appliqué est au moins aussi importante que la manière

dont il est formulé, et que l'application d'une même formulation peut également varier considérablement d'un pays à l'autre.

Ce document bénéficie de l'apport d'un document de discussion de l'Office fédéral allemand des ententes ("Bundeskartellamt"), préparé en vue d'une conférence avec des professeurs d'université, consacrée à la comparaison des critères SLC et de position dominante.[3] Cette étude a examiné en détail les régimes de contrôle des fusions en Australie, dans l'Union Européenne, en Allemagne et aux Etats-Unis. Elle a également examiné l'expérience réelle de ces trois systèmes juridictionnels en matière de contrôle des fusions, et étudié les motifs avancés pour procéder à des changements en Nouvelle-Zélande et au Royaume-Uni. Sa conclusion principale est la suivante :

> Il est incontesté que les autorités de contrôle de la concurrence en cause parviennent parfois à des résultats divergents dans l'application pratique de leurs réglementations en matière de contrôle des fusions. Toutefois, l'analyse ici faite du contenu substantiel du critère SLC et du critère de la position dominante, et l'étude de l'application pratique des deux approches, suggèrent plutôt que les évaluations ou décisions divergentes sont dues à d'autres facteurs. Ces facteurs tiennent, par exemple, aux différences potentielles séparant les différentes « écoles » de politique de concurrence, à la disparité des objectifs de protection de la concurrence, à la diversité des influences politiques ou personnelles, à la diversité des approches adoptées pour la définition du marché pertinent, à la volonté d'appliquer de nouvelles théories économiques, aux exigences posées par les tribunaux ou à d'autres instruments de contrôle.[4]

Cette conclusion repose sur une étude solide et bien documentée, en dépit de l'omission d'une opération de fusion significative aux Etats-Unis et d'un arrêt du Tribunal de Première Instance des Communautés Européennes, à savoir respectivement la fusion Staples/Office Depot aux Etats-Unis et l'arrêt du Tribunal de Première Instance dans l'Affaire Airtours/First Choice (décision postérieure à l'étude allemande).[5] Elle est également reprise dans le Livre Vert de la Commission des Communautés Européennes sur la révision de son Règlement sur les Fusions.[6] La Commission des Communautés Européennes a néanmoins considéré, compte tenu de l'internationalisation croissante des opérations de fusion, que le temps était venu de débattre des mérites respectifs des deux critères.[7] Ce débat est certainement justifié et tend à démontrer que le choix de critères est décisif, même si d'autres facteurs peuvent être tout aussi importants, voire plus importants, pour expliquer des décisions divergentes en matière de contrôle des fusions, adoptées dans des pays ayant opté pour le critère SLC et des pays ayant opté pour le critère de la position dominante.

1.1 Conclusions Principales

Les conclusions principales de ce document sont les suivantes :

- Si le critère de la position dominante est interprété de manière à n'inclure la domination que d'une seule entreprise, il mettra obstacle à un nombre de fusions anticoncurrentielles significativement inférieur à celui du critère SLC. Les points suivants de cette liste retiennent en postulat que le critère de la position dominante inclut à la fois la position dominante individuelle et la position dominante collective.

- La quasi-totalité des différences inhérentes au critère de la position dominante et au critère SLC, utilisés dans le contrôle des fusions, tient à la différence des seuils appliqués pour déterminer si les effets dommageables probables sont suffisamment graves pour justifier de bloquer une fusion. En particulier, une fusion qui augmente le pouvoir de marché n'est pas nécessairement constitutive d'un état de domination du marché. En d'autres termes, sur les

marchés où il n'existe aucune position dominante avant la fusion, le critère de la position dominante peut s'avérer incapable de bloquer une fusion que le critère SLC bloquerait. Toutefois, il est également vrai que sur les marchés où il existe une position dominante avant la fusion, la branche "renforcement" du critère de la position dominante pourrait servir à bloquer des fusions dommageables que le critère SLC pourrait être incapable d'arrêter. En effet, cet aspect de "renforcement" pourrait être élargi, de telle sorte qu'il ne viserait pas seulement une augmentation du pouvoir de marché, mais s'étendrait à la préservation des niveaux existants de pouvoir de marché ou à contrecarrer d'autres effets préjudiciables qui ne peuvent pas être aisément modélisés en termes de pouvoir de marché.

- En pratique, les différences de couverture entre les deux critères, découlant de ces différences de seuils, pourraient être largement éliminées par une "souplesse" suffisante dans leur application. Pour le critère SLC, cette "souplesse" suffisante pourrait probablement être obtenue en ajoutant, ou simplement en rendant plus explicite une branche "empêchement" au critère SLC, de telle sorte que ce dernier permette de bloquer les fusions qui sont susceptibles d'empêcher ou de réduire la concurrence dans une mesure substantielle. Pour le critère de la position dominante, cette souplesse supplémentaire pourrait exiger une approche plus extrême, potentiellement difficile à obtenir, compte tenu de la jurisprudence existante, incluant une ou plusieurs des mesures suivantes :

  1. alléger le lien entre pouvoir de marché et position dominante sur le marché dans la définition de ces deux concepts ;

  2. modifier l'approche de la définition du marché en fonction du type de fusion contrôlé ;

  3. adopter uniformément des définitions du marché particulièrement étroites ;

  4. adopter des seuils de position dominante différents selon qu'il s'agit d'une position dominante individuelle ou collective ;

  5. abaisser le seuil de pouvoir de marché exigé pour conclure à l'existence d'une position dominante ;

  6. étendre le concept de position dominante collective pour couvrir les situations d'interdépendance oligopolistique anticoncurrentielle en l'absence d'"effets coordonnés".

  Nombre de ces "solutions" devraient poser des problèmes en soi et/ou s'avérer difficiles à mettre en application.

- A supposer même que les critères SLC et de la position dominante soient appliqués de manière souple, de telle sorte qu'il soit très probable que leur application conduise à la même décision dans le cadre du contrôle d'une fusion, cela ne signifie pas qu'ils produiront des effets équivalents sur l'efficience économique, et ce pour deux raisons :

  1. Si les tribunaux insistent pour appliquer des définitions similaires de la position dominante, à la fois pour le contrôle des fusions et les affaires d'abus de position dominante, un critère souple de position dominante pourrait avoir pour effet d'étendre le champ des interdictions d'abus de position dominante. Ce champ étendu pourrait "refroidir" nombre de pratiques susceptibles d'encourager la concurrence, lorsqu'elles émanent d'entreprises détenant un faible pouvoir de marché, par exemple, certaines

formes d'escomptes, de prix discriminatoires, de vente exclusive, de restrictions d'accès au marché, et de vente liée.

2. Les deux critères pourraient s'accompagner de degrés différents de sécurité juridique. Celui qui présenterait le plus haut degré de sécurité juridique serait également celui qui découragerait le moins les initiatives de proposition de fusions bénéfiques.

1.2 Plan du document

Ce document commence par comparer l'approche américaine (SLC) et allemande (position dominante) du contrôle des fusions et commente l'importance d'inclure le concept de position dominante conjointe ou collective dans le critère de la position dominante. Il évoque ensuite longuement la prétendue supériorité de couverture du critère SLC par rapport aux critères de la position dominante dans certaines fusions, et les théories soutenant le contraire. Il examine ensuite certaines questions jurisprudentielles et certaines questions politiques connexes, et les différences pouvant opposer ces critères en ce qui concerne l'analyse économique sous-jacente, la souplesse et la sécurité juridique. Il se termine par plusieurs observations sommaires.

Ce document se concentre fortement sur les fusions horizontales. Elles représentent en effet la grande majorité des fusions anticoncurrentielles. En outre, ce document part de l'hypothèse que les fusions peuvent nuire à la concurrence de deux manières principales, c'est-à-dire par des effets "unilatéraux" et par des effets "coordonnés" (définis immédiatement ci-dessous). On peut étudier la manière dont un critère de fusion traitera ces effets, sans détailler les multiples manières différentes dont ils se produisent dans des fusions horizontales, verticales et conglomérales.[8]

1.3 Distinction entre effets coordonnés et unilatéraux

En termes de contrôle des fusions, cette distinction importante a été élaborée pour la première fois de manière détaillée dans une précédente édition des United States Horizontal Merger Guidelines (Lignes Directrices des Etats-Unis en matière de Fusions Horizontales) ("Lignes Directrices U.S.").[9] Cette distinction s'est depuis étendue à d'autres systèmes juridictionnels, y compris l'Union Européenne et la Nouvelle-Zélande.[10]

Les Lignes Directrices US font concrètement référence à une "action coordonnée" et à des "effets unilatéraux". L'interaction coordonnée et la manière dont elle est évaluée peuvent être décrites en ces termes :

> Une fusion peut diminuer la concurrence en permettant aux entreprises vendant sur le marché pertinent de s'engager plus probablement, avec plus de succès ou plus complètement dans une interaction coordonnée qui nuit aux consommateurs. L'interaction coordonnée consiste en actions d'un groupe d'entreprises qui ne sont profitables à chacune d'elles qu'en conséquence des réactions conciliantes des autres. Ce comportement inclut une collusion tacite ou expresse, et peut ou non être légale en soi.
>
> La question de savoir si une fusion est susceptible de diminuer la concurrence en permettant à des entreprises de s'engager plus probablement, avec plus de succès ou plus complètement dans une interaction coordonnée dépend du point de savoir si les conditions du marché, considérées dans leur ensemble, conduisent à parvenir à des conditions de coordination et à détecter et sanctionner les déviations par rapport à ces conditions. (13 – 14, soulignage ajouté)

Le point le plus important à noter à ce propos est que l'interaction coordonnée va au-delà de la collusion formelle ou d'une pratique concertée. Elle inclut également la collusion tacite, qui peut ne pas être illégale en soi, c'est-à-dire un simple parallélisme conscient. Cependant, l'ampleur de cette collusion tacite dépend de ce qu'il convient exactement d'entendre par "réactions conciliantes". En particulier, s'il est prévu que l'entité issue de la fusion augmentera ses prix et réduira sa production après la fusion, et si ses concurrents augmentent également leurs prix mais augmentent les quantités vendues, est-ce une "réaction conciliante" ? Nous ne le pensons pas. Les concurrents prennent essentiellement avantage de l'augmentation de prix de l'entreprise issue de la fusion, plutôt que de coopérer avec elle. Cette conception des "réactions conciliantes" semble rejoindre la manière dont le Professeur Willig, l'un des rédacteurs des Lignes Directrices US, voit la distinction entre ce qu'il appelle les effets coordonnés et les effets unilatéraux :

> Il peut être utile, en matière de terminologie, de diviser les théories sur les effets anticoncurrentiels possibles des fusions en deux catégories : effets unilatéraux et effets coordonnés. Les effets unilatéraux sont les changements intervenant dans les actions des entreprises fusionnant, qui leur seraient profitables en conséquence de la fusion, si les entreprises qui ne sont pas parties à la fusion ne modifient pas leurs propres actions ou réagissent elles-mêmes de manière unilatérale. Les effets coordonnés sont les changements intervenant dans les actions des entreprises fusionnant qui ne leur seraient profitables en conséquence de la fusion qu'à condition que ces changements s'accompagnent de changements dans les actions des entreprises qui ne sont pas parties à la fusion, qui sont partiellement motivés par la crainte de représailles. L'exemple type d'effets coordonnés est l'augmentation des prix appliqués par les entreprises fusionnant, s'accompagnant de hausses des prix appliqués par les entreprises qui ne sont pas parties à la fusion, si la fusion permet à la collusion tacite de devenir stable. En l'occurrence, les hausses de prix sont profitables car toute déviation par une entreprise déclencherait probablement des baisses de prix à titre de mesure de rétorsion. Par contraste, il y aura effet unilatéral si une fusion entre des vendeurs qui sont les substituts les plus proches les pousse à augmenter les prix de manière profitable, indépendamment du point de savoir si leurs rivaux suivent ou non. Par essence, les effets unilatéraux sont ceux qui se produisent lorsque tous les acteurs du marché entreprennent des actions unilatérales, tandis que les effets coordonnés découlent de l'anticipation d'actions et de réactions coordonnées.[11] (soulignage ajouté)

Les Lignes Directrices US introduisent le débat sur les "effets unilatéraux" en notant ce qui suit :

> Une fusion peut diminuer la concurrence même si elle n'engendre pas une probabilité accrue d'interaction coordonnée réussie, car les entreprises fusionnant peuvent juger profitable de modifier leur comportement unilatéralement après l'acquisition, en augmentant les prix et en supprimant la production. Les effets concurrentiels unilatéraux peuvent surgir dans une multitude de contextes différents. Dans chaque contexte, d'autres facteurs particuliers décrivant le marché pertinent affectent la probabilité d'effets concurrentiels unilatéraux. Les contextes diffèrent selon les caractéristiques essentielles qui distinguent les entreprises concernées et façonnent la nature de leur concurrence.[12]

Dans les Lignes Directrices US, les effets unilatéraux incluent fondamentalement tous les effets anticoncurrentiels qui ne se caractérisent pas comme une "interaction coordonnée". C'est également la signification qu'auront les "effets unilatéraux" dans ce document. En particulier, les effets unilatéraux viseront tous les accroissements du pouvoir de marché intervenant sans coordination, par crainte de représailles. Les effets unilatéraux s'étendent donc à ce que l'on pourrait appeler l'interaction oligopolistique.

Bien que les Lignes Directrices US traitent séparément les effets coordonnés et les effets unilatéraux, elles n'excluent pas que les deux soient présents dans le cadre de la même fusion, y compris sur le marché du même produit.[13] Il est cependant probable que l'un de ces effets domine, de telle sorte que l'on peut dire que l'augmentation de prix prévisionnelle après la fusion est due à l'un ou l'autre de ces ensembles d'effets.[14] Néanmoins, l'adoption d'une décision appropriée suppose de tenir compte de la nature de ces deux menaces pour la concurrence.

2. Comparaison des approches américaine et allemande

Les Lignes Directrices US développent de manière extrêmement détaillée le critère SLC adopté aux Etats-Unis, et les "Principes d'Interprétation"[15] allemands ("Lignes Directrices Allemandes") consacrent également des développements détaillés au critère de la position dominante allemand. Un bref aperçu des passages pertinents de ces deux jeux de lignes directrices est joint en Annexe au présent document.

La comparaison qui va suivre évoque uniquement des points étroitement liés à ces deux critères de fond. L'objectif essentiel n'est pas de comparer les approches des deux pays, mais plutôt d'isoler toutes différences qu'il serait très difficile d'éliminer sans converger vers un critère commun.

2.1 Objectifs et rôle du pouvoir de marché

Les Lignes Directrices US replacent le contrôle des fusions dans le contexte plus large de la préservation du système de libre entreprise, et de l'amélioration de la compétitivité des entreprises américaines "…et du bien-être des consommateurs américains."[16] Les Lignes Directrices allemandes évoquent le contrôle des fusions comme un moyen de maintenir des marchés compétitifs et de préserver la liberté d'action "…d'autres entreprises et des consommateurs." Les différences observées à ce niveau peuvent être relativement mineures lorsqu'il s'agit de traiter de cas concrets. Les Lignes Directrices US énumèrent toutefois des objectifs plus spécifiques, à savoir : "…les fusions ne doivent pas être autorisées si elles visent à créer ou augmenter le pouvoir de marché ou à faciliter son exercice", le pouvoir de marché (des vendeurs) étant défini comme la "…capacité à maintenir avec profit des prix au-dessus de niveaux concurrentiels pendant une période de temps significative"[17] Bien que les Lignes Directrices allemandes ne contiennent pas une formulation plus spécifique de l'objectif mentionné ci-dessus, il a été soutenu que le critère de la position dominante fait lui-même écho aux mots "créer ou augmenter le pouvoir de marché" que l'on trouve dans les Lignes Directrices US, de telle sorte que les concepts de position dominante et de pouvoir de marché sont approximativement équivalents. Faisant référence aux lignes directrices US et australiennes qui définissent une SLC en termes de pouvoir de marché, un document rédigé pour discussion par le Bundeskartellamt a soutenu, pour l'essentiel, que le pouvoir de marché est la capacité à agir d'une manière libre, non assujettie aux contraintes découlant d'une concurrence effective, et qu'elle est donc étroitement liée au concept de position dominante.[18]

Le même document pour discussion fait ensuite référence aux similitudes essentielles des critères appliqués pour le contrôle des fusions en Allemagne, dans l'Union Européenne, aux Etats-Unis et en Australie, et aux motifs des réformes proposées au Royaume-Uni et en Nouvelle-Zélande. Il ajoute que : "Ces similitudes sont surtout dues au fait que les deux types de critères d'interdiction ont finalement le même objectif essentiel, à savoir faire barrage à tout pouvoir de marché indésirable."[19]

2.2 Une différence importante dans les seuils et les approches corrélatives des efficiences

L'opinion selon laquelle la puissance de marché et la position dominante sur le marché sont pratiquement synonymes semble être reflétée dans les Lignes Directrices Allemandes, qui font de fréquentes références à la "puissance sur le marché" alors qu'elles auraient pu plutôt citer la "position dominante". Cette situation semble refléter l'opinion selon laquelle la puissance de marché est le principal facteur à considérer pour déterminer si une position dominante est créée ou renforcée. Cela n'équivaut pas à assimiler la position dominante à n'importe quel niveau de puissance de marché.[20]

Une SLC peut être le signe de la création ou de l'augmentation substantielle et non temporaire de la puissance de marché. En résumé, on peut dire qu'une fusion est susceptible d'entraîner une SLC s'il est prévisible qu'elle entraînera une hausse des prix. [21] Cette augmentation de la puissance de marché et, corrélativement, cette hausse des prix, surviendront généralement, mais non pas nécessairement (comme nous le verrons à la section VI ci-dessous), dans le cas où une fusion renforce une position dominante. La même équivalence approximative n'existe pas nécessairement lorsqu'il n'existe aucune position dominante individuelle ou collective, que ce soit avant ou après la fusion. Dans cette situation, une fusion conduisant à une SLC ne crée pas nécessairement une puissance de marché suffisante pour équivaloir à créer ce qui serait normalement considéré comme une position dominante. Si tel était le cas, il serait réellement possible que deux entreprises ou davantage, de taille différente, soient jugées simultanément "dominantes" sur le même marché, conclusion que des tribunaux pourraient juger très difficile à accepter. La question du seuil est au cœur d'une lacune potentiellement importante entachant la capacité du critère de la position dominante à interdire certaines fusions considérées comme anticoncurrentielles, dans la mesure où elles lèsent gravement les intérêts des consommateurs. Un récent document du Bundeskartellamt exposant l'approche allemande du contrôle des fusions ("Document Cadre Allemand sur les Fusions") reconnaît clairement cette lacune, mais considère qu'elle ne justifie pas pour autant d'abandonner ce critère :

> En principe, les deux critères d'interdiction se réfèrent aux mêmes faits. Ils ne font qu'approcher le problème sous des angles différents. Si la concurrence est définie comme l'absence de positions prééminentes de puissance, le critère de la position dominante se concentre sur la position prééminente de puissance, tandis que le critère SLC examine l'intensité de la concurrence.
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> Toutefois, si l'on considère les concepts théoriques sous-jacents aux deux critères – qui doivent être distingués de la forme précise que ces concepts prendront dans différents systèmes juridiques nationaux – la différence à observer tient au fait que le critère de la position dominante sur le marché définit la "limite supérieure" que peut atteindre le champ d'action individuel en matière de fusions, et qui est largement indépendante de l'intensité de la concurrence préalablement établie. En revanche, et sur la base de son approche générale, le critère SLC se focalise sur un taux de changement relatif à l'intensité de la concurrence. Selon cette définition et indépendamment de leurs différents seuils de présomption et des différentes manières dont ils se concrétisent, les deux critères ne peuvent donc pas conduire aux mêmes résultats dans chaque constellation possible. Par exemple, si le critère SLC stipule que l'intensité de la concurrence ne peut être réduite que d'un "certain taux" (quelle que puisse être la définition de ce taux), le seuil de la position dominante sur le marché ne sera pas nécessairement atteint. Le concept de diminution substantielle de la concurrence justifie de supposer qu'une autorité tiendra compte de toute réduction de l'intensité de la concurrence dans une certaine mesure, même si le marché ne fait que passer d'un état d'extrême intensité de la concurrence à un état de concurrence moyenne, qui n'a pas encore atteint un niveau dangereux.
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> A cet égard, le Bundeskartellamt estime qu'il convient de préférer le critère de la position dominante. En matière de contrôle des fusions, une simple réduction de l'intensité de la

> concurrence, sans la création d'une position dominante, ne constitue pas une situation inspirant des inquiétudes. Compte tenu du dynamisme des processus de concurrence, il est inévitable que des déséquilibres et des fluctuations de l'intensité de la concurrence se produisent constamment et de toute manière. Une seule situation justifie de s'inquiéter, à savoir celle dans laquelle l'avantage conquis par une société sur les autres au moyen d'une fusion atteindrait un niveau tel que les forces concurrentielles restantes ne pourraient plus résister, seules, à la puissance de marché ainsi créée. Cette situation est très exactement couverte par le critère de la 'position dominante sur le marché. En principe, nous ne conclurons pas à l'existence d'une position dominante sur le marché si la position de puissance est toujours exposée à une concurrence substantielle, quand bien même cette concurrence ne serait-elle pas aussi intense qu'elle l'était auparavant. Dans cette situation, il n'existe aucun motif pour lequel l'Etat devrait s'occuper de cette réduction de l'intensité de la concurrence.[22]

Le Document Cadre Allemand sur les Fusions évoque les mêmes points généraux dans ses développements consacrés aux efficiences. Il ouvre la discussion par la déclaration liminaire suivante : "Le Bundeskartellamt estime, qu'à tout le moins dans des cas de position dominante sur le marché flagrante, les fusions ne peuvent pas être approuvées au seul motif qu'elles permettent des gains d'efficience."[23] Toutefois, cette déclaration est immédiatement nuancée par la réserve suivante : si une autorisation ministérielle est sollicitée, comme le prévoit le droit de la concurrence, le critère d'efficience peut être « appliqué comme un critère sans lien avec la concurrence dans l'autorisation ministérielle." Le fait que l'efficience ne puisse pas être invoquée comme moyen de légitimation de la fusion est justifié par l'objectif de protéger la concurrence, c'est-à-dire de garantir que les fusions ne créent pas des positions dominantes. A son tour, cet objectif se "[f]onde sur la conviction qu'à long terme, la libre concurrence accroît également le bien-être des consommateurs…." Le Document Cadre Allemand sur les Fusions estime qu'en présence d'une position dominante sur le marché "…la liberté d'action d'autres intervenants sur le marché est restreinte de manière excessive et probablement permanente, avec cette conséquence que la concurrence ne produit plus ses effets de mécanisme de régulation et de contrôle."[24] Il convient également de souligner qu'à défaut de concurrence, l'entité issue de la fusion ne sera soumise à aucune pression à long terme la contraignant à maintenir tous gains d'efficience liés à la fusion.

Le Document Cadre Allemand sur les Fusions reconnaît pleinement la possibilité que les gains d'efficience liés à une réduction si massive des coûts marginaux soient tels que le prix maximisant les profits, pratiqué immédiatement après la fusion, soit inférieur au prix pratiqué avant la fusion, bien que la fusion crée une position dominante. Il note toutefois que :

> Le Bundeskartellamt ne considère pas une réduction probable du prix, consécutive à une fusion, comme une preuve suffisante du bon fonctionnement futur de la concurrence. Dans cette situation, les sociétés seraient libres de prendre des engagements qui réduiraient les restrictions prévisionnelles de concurrence et maintiendraient le gain d'efficience. Si les inquiétudes du Bundeskartellamt peuvent être dissipées de cette manière, une interdiction deviendrait inutile.[25]

Pour conclure sur ce point, il existe des différences significatives entre les systèmes américain et allemand de contrôle des fusions en ce qui concerne les objectifs, les seuils et le traitement des efficiences. Seule l'une de ces différences, à savoir les seuils, semble être directement causée par la différence de critères de fond. Il importe cependant de noter, au passage, que des différences d'objectifs peuvent expliquer pourquoi l'Allemagne a opté pour un critère de position dominante.

Les systèmes juridictionnels ayant opté pour des critères de position dominante sont libres d'adopter des objectifs compatibles avec l'interprétation de la position dominante en termes de puissance de marché, et de la puissance de marché en termes de pouvoir d'augmenter les prix. L'Allemagne semble avoir parcouru beaucoup de chemin en ce sens. Cependant, il n'est pas clairement établi que l'on puisse

conclure à l'existence d'une position dominante (par opposition avec le renforcement d'une position dominante) dans tous les cas où une fusion conduira à une augmentation de prix importante par rapport au prix qui eût été appliqué en l'absence de la fusion. En particulier, en ce qui concerne la position dominante individuelle, les Lignes Directrices Allemandes semblent prévoir qu'il ne puisse y avoir qu'une entreprise dominante sur tout marché antitrust bien défini.[26]

2.3 Les seuils et l'approche de la position dominante par la Commission Européenne dans le cadre du contrôle des fusions

L'Allemagne n'est pas la seule, parmi les systèmes ayant retenu le critère de la position dominante, à soulever la question du seuil. Examinant si la décision de la Commission des Communautés Européennes dans l'affaire Airtours/First Choice[27] représentait une tentative visant à considérer que le Règlement CEE relatif au contrôle des opérations de concentration entre entreprises (« Règlement sur les Fusions ») contient le critère SLC, un ancien fonctionnaire de haut niveau de la Commission a formulé les commentaires suivants :

> Il n'est pas facile d'imaginer comment cela fonctionnerait, au double motif que le Règlement repose sur l'idée de créer ou renforcer une position dominante, et, qu'en théorie au moins, la position dominante existe ou non. Le Règlement, dans son texte actuel, ne s'appliquera pas aisément à une fusion pour la simple raison qu'elle a rendu le marché substantiellement moins concurrentiel qu'il ne l'était avant. Le Règlement se fonde sur le résultat (position dominante ou position dominante accrue), plutôt que sur l'importance du changement résultant de la fusion. Une concurrence substantiellement réduite n'est pas nécessairement révélatrice d'une position dominante : la position dominante résulte de l'ampleur de la concurrence résiduelle, et non de l'ampleur du changement intervenu.[28]

Plusieurs commentateurs ont noté que cette situation peut créer un vide significatif dans le pouvoir de la Commission Européenne d'interdire des fusions susceptibles de produire des effets unilatéraux, et nous reviendrons sur cette question dans les sections IV et V de ce document. A titre d'exemple, Motta (2000, 202) fait observer ce qui suit :

> Imaginons par exemple une situation dans laquelle un très petit nombre d'entreprises demeureraient dans l'industrie après une fusion, sans qu'aucune d'elles détienne une puissance suffisante sur le marché pour être considérée comme dominante, et avec une très faible probabilité de collusion entre elles (de telle sorte qu'elles ne soient pas conjointement dominantes). Dans une telle situation, la théorie économique suggère qu'en l'absence de gains d'efficience, les entreprises fusionnant augmenteront unilatéralement leurs prix, et que la fusion aura des effets préjudiciables (en dépit du fait que les entreprises fusionnant ne deviendront pas dominantes et qu'il n'y aura aucun comportement coordonné après la fusion). Néanmoins, la politique communautaire de contrôle des fusions n'aboutira pas à interdire une telle fusion …. [D]émontrer qu'une fusion a des conséquences défavorables sur la concurrence ou qu'elle provoquera une hausse des prix ne suffit pas à la bloquer : en vertu du Règlement sur les Fusions, le fait de constater l'existence d'une position dominante est la condition nécessaire pour interdire une fusion.
>
> Il existe donc une lacune importante dans le contrôle communautaire des fusions: toutes les fusions qui permettront à des entreprises d'augmenter unilatéralement les prix mais qui ne créent ni ne renforcent pas des positions dominantes ne peuvent pas être interdites. En d'autres termes, des fusions qui sont préjudiciables au bien-être des consommateurs seront déclarées compatibles

avec le Marché Commun car elles ne donnent pas naissance à une position dominante. (références omises)

2.4 Différentes hypothèses relatives à la résilience du marché et degrés de prise en compte des parts de marché

Bien que les différences de traitement des efficiences dans les Lignes Directrices US et les Lignes Directrices Allemandes soient tout à fait frappantes, il ne semble pas qu'elles soient inhérentes aux critères eux-mêmes. Elles résultent plus certainement d'une vision très différente de la résilience des marchés, c'est-à-dire la capacité des entreprises et consommateurs à modifier leur comportement de manière à annuler les accroissements de la puissance de marché. La vision allemande semble être qu'au-dessus d'un certain niveau de puissance de marché, c'est-à-dire le seuil de domination, cette résilience est réduite au point qu'il est improbable qu'elle puisse générer une concurrence effective. Il s'ensuit logiquement qu'à supposer même que des efficiences puissent produire des réductions de prix à court terme, elles ne bénéficieront pas, in fine, aux consommateurs.

Outre des différences dans les objectifs, les seuils et le traitement des efficiences, il existe une différence flagrante entre les approches américaine et allemande en ce qui concerne la prise en compte des parts de marché. L'Annexe consacre des développements très détaillés à cette question. L'approche américaine tend à utiliser les données sur la concentration pour créer des ports sûrs, tandis que l'approche allemande incline à fonder les présomptions d'illégalité sur de fortes parts de marché. Toutefois, ces deux approches confirment que les parts de marché ne sont généralement pas décisives, et soulignent que d'autres facteurs pertinents doivent également être pris en considération.

Les différentes présomptions fondées sur les données relatives aux parts de marché et à la concentration, bien que certainement importantes, ne semblent pas inhérentes aux différents critères de fond. Si elles l'étaient, il serait difficile d'expliquer, par exemple, pourquoi le Règlement CEE sur les Fusions adopte un critère de position dominante, mais ne contient pas de présomptions fondées sur des parts de marché, considérées comme des ports sûrs ou des moyens d'établir une position dominante.

2.5 Le critère de la position dominante ne s'étend pas intrinsèquement à la position dominante collective

La comparaison que nous avons faite serait incomplète si nous ne faisions pas observer que tant le critère SLC américain que le critère de la position dominante allemand vont beaucoup plus loin que l'interdiction des seules fusions susceptibles de produire des effets unilatéraux. En effet, ces critères servent, dans les deux cas, à bloquer des fusions susceptibles de produire des effets coordonnés. Il n'y aurait aucun motif de suspecter qu'il en soit autrement pour un critère SLC, mais on ne peut pas en dire de même du critère de la position dominante. L'Union Européenne, la Nouvelle-Zélande et l'Australie ont ou avaient tous des critères légaux de la position dominante ne faisant aucune référence explicite à la domination collective (ou conjointe).

Dans le cas de l'Union Européenne, il a fallu près de dix ans avant que les tribunaux ne confirment que le Règlement CEE sur les Fusions s'appliquait tant à la position dominante collective qu'à celle détenue par une seule entreprise.[29] L'Australie et la Nouvelle-Zélande n'ont pas été aussi chanceuses. Leurs critères de la position dominante n'ont été appliqués, dans le cadre du contrôle des fusions, qu'aux cas de position dominante individuelle. En conséquence, il n'a pas été possible de faire échec à des fusions au seul motif qu'elles créaient une forte probabilité d'effets coordonnés. C'est l'une des raisons pour

lesquelles les autorités de contrôle de la concurrence des deux pays se sont prononcées en faveur du remplacement de leurs critères de la position dominante par un critère SLC.[30]

Le fait que la plupart des systèmes juridictionnels employant un critère de la position dominante, sinon tous, le définissent comme incluant à la fois la domination collective et individuelle, ne signifie pas que leurs autorités aient la capacité de bloquer des fusions qui menacent de provoquer une hausse des prix en raison d'effets coordonnés. Ce point nous ramène à la question des seuils, déjà évoquée plus haut. Nous allons l'examiner de manière plus détaillée dans les trois sections suivantes de ce document.

3. Fusions susceptibles de produire des effets coordonnés – le critère de la position dominante peut-il les appréhender toutes ?

Il n'est pas controversé qu'un critère SLC peut permettre de bloquer des fusions qui sont susceptibles de nuire aux consommateurs, en accroissant la capacité et l'incitation d'un groupe d'entreprises oligopolistiques à augmenter les prix d'une manière coordonnée sous une forme ou une autre.[31] Le critère de la position dominante, - c'est-à-dire sa branche relative à la domination collective -, pourra-t-il également bloquer toutes ces fusions ? Pour commencer à répondre à cette question, nous formulons quatre hypothèses simplificatrices initiales qui seront ensuite soumises à un examen :

- il n'est pas nécessaire qu'il existe des liens structurels au sein d'un groupe d'entreprises oligopolistiques pour créer ce que la loi considère comme une domination collective – il suffit au contraire que les conditions du marché soient telles qu'il est probable que le groupe coordonnera ses stratégies compétitives ;

- la position dominante est synonyme d'un certain niveau-seuil de puissance de marché ;

- la puissance de marché est synonyme de capacité à prendre, de manière profitable, des mesures nuisant aux consommateurs, c'est-à-dire, en bref, le pouvoir d'augmenter les prix au-dessus ou largement au-dessus des niveaux des prix de la concurrence pendant une période de temps significative ; et

- la probabilité d'effets coordonnés est synonyme de probabilité que les prix soient fixés au niveau ou au-dessus du niveau qui serait appliqué par une entreprise détenant ce que la loi considèrerait comme une position dominante individuelle.

En vertu de ces hypothèses, dans tous les cas où une fusion est susceptible de produire des effets coordonnés, elle est également susceptible de créer ou de renforcer une position dominante collective.

La première de nos quatre hypothèses ne doit pas nécessairement s'appliquer dans tous les systèmes juridictionnels appliquant le critère de la position dominante. Toutefois, elle semble devoir prévaloir dans l'Union Européenne, c'est-à-dire la plus grande sphère juridictionnelle d'application du critère de la position dominante. Pour confirmer la décision de la Commission de bloquer la fusion Gencor/Lonrho, le Tribunal de Première Instance (TPI) a relevé que la position dominante collective exige des liens économiques entre le groupe d'entreprises concernées, les liens structurels n'étant qu'un exemple des relations exigées en la matière. Le TPI a développé cette thèse dans les termes suivants :

> …sur le plan juridique ou économique, il n'existe aucune raison d'exclure de la notion de lien économique la relation d'interdépendance existant entre les membres d'un oligopole restreint à l'intérieur duquel, sur un marché ayant les caractéristiques appropriées, notamment en termes de concentration du marché, de transparence et d'homogénéité du produit, ils sont en mesure de

> prévoir leurs comportements réciproques et sont donc fortement incités à aligner leur comportement sur le marché, de façon notamment à maximiser leur profit commun en restreignant la production en vue d'augmenter les prix. En effet, dans un tel contexte, chaque opérateur sait qu'une action fortement concurrentielle de sa part destinée à accroître sa part de marché (par exemple une réduction de prix) provoquerait une action identique de la part des autres, de telle sorte qu'il ne retirerait aucun avantage de son initiative. Tous les opérateurs auraient donc à subir la baisse du niveau des prix.[32]

Cela suffit, spécialement à la lumière de la décision subséquente du TPI dans l'affaire Airtours, évoquée ci-dessous, à démontrer que l'existence de liens structurels ne forme pas partie inhérente d'une position dominante collective. On peut probablement en dire de même de notre seconde hypothèse précitée. Toutefois, nous ne pouvons pas citer un exemple justificatif flagrant, si ce n'est de noter de nouveau les références des Lignes Directrices Allemandes à la puissance de marché. La troisième hypothèse est probablement non controversée, à tout le moins dans le sens où elle peut être tout aussi aisément acceptée dans les systèmes juridictionnels qui appliquent le critère de la position dominante que dans ceux qui appliquent le critère SLC.

La quatrième hypothèse précitée rappelle notre discussion précédente sur les différences de seuils. Un critère SLC peut être utilisé pour interdire toutes les fusions conduisant à une hausse de prix importante. Un critère de la position dominante ne le peut pas, à moins que la "position dominante" ne soit assimilée au niveau de puissance de marché exigé pour hausser les prix dans une mesure importante par rapport aux niveaux de prix de la concurrence. Un seuil si bas risque de ne pas être toléré en vertu du droit de la concurrence des systèmes juridictionnels appliquant le critère de la position dominante, ou du moins de certains d'entre eux, en particulier ceux où les mêmes seuils doivent être appliqués pour apprécier l'existence d'une position dominante individuelle et collective, et les tribunaux ne tolèreraient pas de constater que deux entreprises ou davantage détiennent une position dominante individuelle sur le même marché.

Il est intéressant de noter que les Lignes Directrices Allemandes analysent la "position dominante oligopolistique" (approximativement analogue à la position dominante collective) en la scindant en deux éléments : concurrence interne entre les membres de l'oligopole, et concurrence externe. La concurrence externe entre en ligne de compte si d'autres entreprises se font concurrence sur le marché, outre les membres de l'oligopole. Comme le fait observer l'Annexe à ce document, l'analyse allemande de la concurrence externe est très similaire à l'analyse opérée pour déterminer si une seule entreprise détient une position dominante. Dans ces conditions, il est probable qu'un groupe oligopolistique affrontant la concurrence de certaines entreprises marginales ne sera pas considéré comme détenant une position dominante, à moins qu'il n'exerce le même degré de puissance de marché que celui exigé pour conclure qu'une seule entreprise jouit d'une position dominante.[33] Ce degré de puissance pourrait être largement supérieur au niveau exigé pour produire une SLC. Si le groupe oligopolistique n'affronte aucun concurrent externe, il pourra peut-être être considéré comme une sorte de monopole, détenant une puissance de marché suffisante pour être considéré comme dominant. Toutefois, même cette conclusion n'est pas réglée d'avance.

Il n'est pas évident qu'avec ou sans ce que les Lignes Directrices Allemandes appellent une "concurrence externe", des effets coordonnés se reflèteront dans un prix approximativement égal à un prix monopolistique. Même un prix égal au niveau qu'une entreprise dominante fixerait risque tout simplement de ne pas être accepté, et ce pour deux raisons. Pour commencer, il pourrait exister des hétérogénéités significatives, en termes de coûts et autres, qui feraient échec à tout accord sur ce que doit être le prix. En théorie, les membres d'un oligopole se coordonnant pourraient résoudre ce problème en acceptant d'effectuer des paiements de « rallonge ». Toutefois, le droit de la concurrence pourrait rendre trop risqué d'effectuer ces paiements de « rallonge », ou, à tout le moins, rendre ces accords inexécutoires. Les

problèmes vont plus loin, cependant, que la simple incapacité des entreprises à s'entendre sur la fixation d'un prix égal ou supérieur au niveau de prix de l'entreprise dominante. Les entreprises se coordonnant pourront également juger difficile de soutenir ce niveau de prix, même s'il avait été initialement atteint.[34] Nous en concluons donc qu'une fusion pourrait provoquer une hausse des prix par une interaction coordonnée, sans les augmenter nécessairement à un niveau suffisant pour soutenir que les entreprises détenant une position dominante collective disposent au moins du degré de pouvoir de hausse des prix normalement associé à une position dominante individuelle.

Il existe au moins deux manières de résoudre le problème du vide potentiel de couverture des critères SLC et de la position dominante, en ce qui concerne certaines fusions susceptibles de créer des effets coordonnés. L'une d'elles consiste à réduire considérablement le seuil de puissance de marché exigé pour affirmer l'existence d'une position dominante collective. Le second consiste à ne plus faire de l'existence d'un certain niveau minimum de puissance de marché une condition nécessaire pour affirmer l'existence d'une position dominante collective.

La première option, qui consiste à abaisser le seuil de position dominante, pourrait exiger de l'abaisser à un niveau réellement très faible. Il faudrait le fixer au niveau de la puissance de marché associée à la capacité à augmenter les prix au-dessus des niveaux de la concurrence, pour un montant supérieur au montant *de minimis* et pendant une période de temps plus que temporaire. On peut soutenir qu'il est possible, au moins compte tenu de la définition de la position dominante appliquée en vertu du droit communautaire de l'Union Européenne, de l'abaisser à ce niveau.[35]

L'abaissement du seuil de position dominante, dans les affaires impliquant une position dominante collective, pose cependant un problème : en effet, les tribunaux peuvent insister pour appliquer des seuils similaires, à la fois pour les positions dominantes individuelles et pour les positions dominantes collectives. A supposer que les tribunaux insistent sur cette uniformité, la fixation du seuil de puissance de marché au niveau SLC, dans des affaires de position dominante collective, pourrait conduire à devoir accepter, dans une autre affaire, que plusieurs entreprises jouissent chacune d'une position dominante individuelle sur le même marché antitrust. Cela s'avérerait probablement difficile à accepter pour les tribunaux, surtout si l'une des entreprises "dominantes" détient une part de marché plus faible qu'une autre. En toute hypothèse, les autorités de contrôle de la concurrence auraient un très bon motif d'être réticentes à abaisser le seuil de position dominante. Elles pourraient ne pas souhaiter ouvrir la porte à des excès dans l'interdiction des abus de positions dominantes.

Si l'abaissement suffisant du seuil de position dominante ne constitue pas une option acceptable, il demeure la possibilité d'abandonner le critère de la puissance de marché, ou, du moins, d'en réduire l'importance. On pourrait aller dans cette direction en se fondant sur des considérations structurelles, notamment des présomptions fondées sur les parts de marché. Néanmoins, le fait d'adopter cette démarche, et, probablement, le fait d'adopter la même démarche pour la position dominante individuelle, poseraient des problèmes car elle risquerait d'éloigner le contrôle des fusions de l'objectif important d'améliorer l'efficience économique et réduirait probablement également la sécurité juridique. Cette dérive pourrait être inacceptable dans certains systèmes juridictionnels ayant adopté le critère de la position dominante. Abandonner ou réduire le rôle de la puissance de marché pour déterminer l'existence d'une position dominante tendrait également à rendre plus difficile la coopération internationale en matière de contrôle des fusions, et à produire des décisions divergentes dans des affaires impliquant des marchés de taille internationale.

Sur la base de la récente décision du TPI des Communautés Européennes dans l'affaire Airtours/First Choice, on pourrait soutenir que le TPI a spécifié une méthode d'application du concept de position dominante collective qui l'assimile à ce que le critère SLC américain considère comme une

interaction coordonnée, esquivant ainsi la différence de seuils que nous avons mise en lumière. Les passages suivants de cette décision sont particulièrement pertinents :

> Une situation de position dominante collective entravant de manière significative la concurrence effective dans le marché commun ou une partie substantielle de celui-ci peut donc intervenir à la suite d'une concentration lorsque, compte tenu des caractéristiques mêmes du marché en cause et de la modification qu'apporterait à sa structure la réalisation de l'opération, celle-ci aurait comme résultat que, prenant conscience des intérêts communs, chaque membre de l'oligopole dominant considérerait possible, économiquement rationnel et donc préférable d'adopter durablement une même ligne d'action sur le marché dans le but de vendre au-dessus des prix concurrentiels, sans devoir procéder à la conclusion d'un accord ou recourir à une pratique concertée au sens de l'Article 81 CE (voir, en ce sens, l'arrêt Gencor/ Commission, précité, point 277), et ce sans que les concurrents actuels ou potentiels, ou encore les clients et les consommateurs, puissent réagir de manière effective.
>
> Comme [Airtours] l'a fait valoir et comme la Commission l'a admis dans ses mémoires, trois conditions sont nécessaires pour qu'une situation de position dominante collective ainsi définie puisse être créée :
>
> - en premier lieu, chaque membre de l'oligopole dominant doit pouvoir connaître le comportement des autres membres, afin de vérifier s'ils adoptent ou non la même ligne d'action. Comme la Commission l'admet expressément, il ne suffit pas que chaque membre de l'oligopole dominant soit conscient que tous peuvent tirer profit d'un comportement interdépendant sur le marché, mais il doit aussi disposer d'un moyen de savoir si les autres opérateurs adoptent la même stratégie et s'ils la maintiennent. La transparence sur le marché devrait, dès lors, être suffisante pour permettre à chaque membre de l'oligopole dominant de connaître, de manière suffisamment précise et immédiate, l'évolution du comportement sur le marché de chacun des autres membres ;
>
> - en deuxième lieu, il est nécessaire que la situation de coordination tacite puisse se maintenir dans la durée, c'est-à-dire qu'il doit exister une incitation à ne pas s'écarter de la ligne de conduite commune sur le marché. Comme le fait observer la Commission, ce n'est que si tous les membres de l'oligopole dominant maintiennent un comportement parallèle qu'ils peuvent en profiter. Cette condition intègre donc la notion de représailles en cas de comportement déviant de la ligne d'action commune. Les parties partagent ici l'idée que pour qu'une situation de position dominante collective soit viable, il faut qu'il y ait suffisamment de facteurs de dissuasion pour assurer durablement une incitation à ne pas s'écarter de la ligne de conduite commune, ce qui revient à dire qu'il faut que chaque membre de l'oligopole dominant sache qu'une action fortement concurrentielle de sa part destinée à accroître sa part de marché provoquerait une action identique de la part des autres, de sorte qu'il ne retirerait aucun avantage de son initiative (voir, en ce sens, arrêt Gencor/Commission, précité, point 276) ;
>
> - en troisième lieu, pour démontrer à suffisance de droit l'existence d'une position dominante collective, la Commission doit également établir que la réaction prévisible des concurrents actuels et potentiels ainsi que des consommateurs ne remettrait pas en cause les résultats attendus de la ligne d'action commune [36] (soulignage ajouté)

Les trois conditions énumérées sont étroitement parallèles aux facteurs discutés dans les Lignes Directrices US, en termes d'évaluation de la probabilité qu'une fusion produise une interaction coordonnée. Toutefois, il est important de noter que le TPI n'a pas visé les conditions ci-dessus comme les

trois conditions nécessaires et simultanément suffisantes pour établir l'existence d'une position dominante collective. Le TPI n'a pas eu besoin d'aller aussi loin pour statuer sur le recours Airtours. Il a fondé son annulation de la décision de la Commission de bloquer la fusion sur le motif qu'il existait une base factuelle insuffisante pour établir les trois conditions nécessaires. Pour traiter de cette question de la suffisance dans une future décision de justice, particulièrement dans une affaire où la position dominante collective n'aurait pas existé avant la fusion, il faudrait que le tribunal saisi s'attaque aux problèmes inhérents à l'assimilation des seuils de puissance de marché, dans le cadre du critère de la position dominante et celui du critère SLC.

4. Fusions susceptibles de produire des effets unilatéraux sur des marchés de produits différenciés – certaines d'entre elles échapperont-elles au blocage en vertu du critère de la position dominante ?

Il est clair qu'une fusion créant ou renforçant une position dominante et provoquant une hausse des prix pourrait être bloquée, tant en vertu du critère de la position dominante qu'en vertu du critère SLC. Il se peut également qu'une fusion susceptible d'entraîner une hausse des prix par des effets coordonnés puisse être stoppée en vertu de l'un ou l'autre critère. Mais quid si une fusion susceptible de provoquer une hausse des prix par des effets unilatéraux survient sur un marché où il n'existe aucune position dominante, que ce soit avant ou après la fusion ? Cette fusion, qui pourrait être bloquée en appliquant un critère SLC, pourrait-elle également être bloquée en appliquant un critère de position dominante ? Telle est la question sur laquelle nous nous concentrerons dans cette section et la section suivante de ce document.

Dans les deux systèmes juridictionnels, à savoir position dominante et SLC, le contrôle des fusions commence habituellement par un criblage initial, visant à déterminer les niveaux de concentration existant et post-fusion sur les marchés affectés par la fusion. Ce criblage suppose la définition préalable d'un ou plusieurs marchés. Certains systèmes juridictionnels, y compris à la fois les Etats-Unis et l'Union Européenne, définissent les marchés en utilisant une approche monopoliste hypothétique. Cela implique d'étendre la sphère géographique et le champ des produits couverts par la définition du marché, jusqu'à ce que l'on ait identifié un type spécifique de marché à taille minimum. Il s'agit du marché où, s'il existait un vendeur en situation de monopole, ce vendeur jugerait profitable d'augmenter le prix d'un certain pourcentage arbitraire (cinq pour cent aux Etats-Unis) au-dessus des niveaux concurrentiels. Ce seuil de hausse de prix est supérieur à la hausse de prix qui peut déclencher la constatation d'une SLC. Il est donc possible qu'une fusion qui ne crée ni un monopole ni une position dominante, dans un marché défini en utilisant par exemple un seuil de cinq pour cent, confère à l'entité issue de la fusion le pouvoir d'augmenter profitablement les prix, dans une mesure suffisante pour constituer une SLC, c'est-à-dire le pouvoir d'augmenter les prix dans une mesure considérablement inférieure à cinq pour cent.

Les Lignes Directrices US décrivent deux situations génériques dans lesquelles des effets unilatéraux peuvent se produire. La première, traitée dans cette section de ce document, vise les marchés où des entreprises vendent des produits différenciés. La seconde, exposée dans la section suivante de ce document, traite des marchés de produits homogènes, c'est-à-dire lorsque les fournisseurs se distinguent essentiellement par des capacités différentes. Cette distinction en termes de capacité fait peut-être davantage autorité que le concept de différences de coûts.[37]

Les Lignes Directrices US notent que sur des marchés de produits différenciés, "…la concurrence peut être non-uniforme (c'est-à-dire, localisée), de telle sorte que des vendeurs individuels concurrencent plus directement les rivaux sont les substituts les plus proches." Elles ajoutent :

> Une fusion entre entreprises opérant sur un marché de produits différenciés peut diminuer la concurrence, en permettant à l'entreprise issue de la fusion de réaliser un profit par une hausse

> unilatérale du prix de l'un et ou l'autre produits au-dessus de son niveau antérieur à la fusion. Certaines des pertes de ventes dues à la hausse de prix seront simplement dérivées au profit du produit du partenaire de la fusion, et, en fonction des marges relatives, la neutralisation de ces pertes de ventes par le biais de la fusion pourra rendre la hausse de prix profitable, quand bien même n'aurait-elle pas été profitable avant la fusion. Une hausse unilatérale substantielle du prix sur un marché de produits différenciés exige que les consommateurs considérant les produits des entreprises fusionnant comme leurs premier et second choix, représentent une part significative des ventes sur le marché, et qu'il soit peu probable que les entreprises extérieures à la fusion repositionnent leurs lignes de produits pour remplacer la concurrence localisée perdue du fait de la fusion. La hausse de prix sera d'autant plus grande que les produits des entreprises fusionnant seront les substituts les plus proches, c'est-à-dire plus les acheteurs d'un produit considèreront que l'autre produit est leur second choix immédiat.
>
> Une fusion n'est pas susceptible de conduire à une hausse unilatérale des prix de produits différenciés si, en réponse à cet effet, les vendeurs rivaux sont capables de remplacer la concurrence localisée perdue du fait de la fusion en repositionnant leurs lignes de produits.
>
> Sur les marchés où il est coûteux pour les acheteurs d'évaluer la qualité du produit, les acheteurs qui envisagent d'acheter auprès des deux parties à la fusion peuvent limiter le nombre total de vendeurs auxquels ils envisagent de faire appel. Si ces acheteurs envisagent de remplacer l'une des entreprises parties à la fusion par un vendeur aussi compétitif auquel ils ne songeaient pas auparavant, la fusion n'est pas susceptible de conduire à une hausse unilatérale des prix.[38]

Interrogés sur la possibilité qu'une fusion sur un marché de produits différenciés puisse être jugée anticoncurrentielle en vertu d'un critère SLC, mais échapper à cette qualification en vertu du critère de la position dominante, les systèmes juridictionnels ayant opté pour ce dernier critère pourraient répondre que cette lacune disparaîtrait si un seuil de position dominante assez faible était appliqué, ou si le lien entre position dominante et puissance de marché était affaibli. Nous avons noté dans la précédente section que ces options sont dans l'ensemble peu attrayantes et/ou infaisables d'un point de vue juridique. Dans le cas de fusions impliquant des produits différenciés, il existe néanmoins un troisième moyen de combler cette lacune. Un système juridictionnel ayant opté pour le critère de la position dominante pourrait simplement adopter une définition du marché suffisamment étroite, dans les cas où les effets unilatéraux sont un réel problème sur un marché de produits différenciés. Il faudrait seulement donner une définition du marché qui inclue uniquement les plus proches voisins dans l'espace-produits, c'est-à-dire les entreprises qui imposent fortement et mutuellement la fixation des prix par chaque membre du groupe. La définition initiale assez large du marché, et le criblage de concentration qui en est dérivé, ne sont, après tout, que des constructions strictement préliminaires. Si une fusion présente une réelle menace de hausse des prix, il peut être tout à fait approprié de considérer que la hausse des prix s'applique sur un marché ou sous-marché plus étroit que celui défini lors de la phase initiale de criblage.

Cela étant, il serait très problématique de parvenir à la conclusion souhaitée en recourant exceptionnellement à une certaine approche de la définition du marché, si cette approche aboutit à définir des marchés exceptionnellement étroits. En effet, cette approche "exceptionnelle", d'aucuns pourraient même dire *ad hoc*, de la définition du marché, réduirait le degré de sécurité juridique et, dès lors, découragerait des transactions produisant des fusions bénéfiques. Alternativement, une autorité de contrôle de la concurrence pourrait choisir d'éviter ce problème en appliquant toujours une définition étroite du marché, mais cela poserait également des problèmes en soi.

L'application uniforme de définitions étroites du marché pourrait signifier que de nombreuses fusions impliquant des substituts les plus proches sont analysées comme des fusions conglomérales, imposant de traiter les effets horizontaux comme des formes diverses d'effets « de portefeuille ».[39] Cela

pourrait impliquer d'accepter un degré inutilement élevé d'insécurité juridique, en raison du fait que la jurisprudence sur les effets de portefeuille est moins bien établie que celle relative aux fusions horizontales.[40] En outre, si des définitions étroites du marché sont uniformément employées dans le contrôle des fusions, comment garantir que la même approche ne sera pas transposée aux interdictions d'abus de position dominante ? Ce point très important sera plus amplement développé ci-dessous.

Les systèmes juridictionnels qui appliquent un critère SLC pourraient non seulement éviter les difficultés liées à l'application d'une définition excessivement étroite du marché, mais pourraient même se dispenser totalement d'une définition du marché dans des fusions susceptibles de produire des effets unilatéraux sur des marchés de produits différenciés.[41] Baker & Salop (2001, 348) écrivent à ce sujet :

> Il est désormais largement admis parmi les économistes que l'analyse des effets unilatéraux n'exige pas impérativement de définir un seul marché discret pertinent, à l'aide du critère ssnip [hausse légère mais significative et non temporaire du prix] ; les élasticités de la demande et les ratios de diversion suffisent.

L'approche SLC, à tout le moins telle qu'elle est pratiquée aux Etats-Unis, permet vraisemblablement de bloquer une fusion en démontrant simplement qu'il existe une bonne probabilité que les prix augmenteront après la fusion. Dans certaines situations, il est possible de le démontrer directement à l'aide de preuves économétriques. L'interdiction de la fusion Staples/Office Depot aux Etats-Unis l'illustre clairement.

La décision Staples/Office Depot repose largement sur la théorie que trois hypermarchés de produits de bureau exerçaient une pression concurrentielle sur leur politique de prix mutuelle (ils étaient proches voisins dans un espace de produits différenciés), et ne subissaient pas une pression similaire de la part de petits distributeurs. Il était donc prévisible qu'une fusion entre Staples et Office Depot produise des effets unilatéraux. La Federal Trade Commission (FTC)(Commission Fédérale du Commerce) a présenté des preuves économétriques et autres démontrant que les prix augmenteraient probablement si le nombre d'hypermarchés était réduit de trois à deux. Ces preuves reflétaient essentiellement le fait que les prix avant fusion étaient plus élevés sur les marchés dont un ou deux des trois hypermarchés étaient absents. [42] La FTC n'a pas jugé décisif en l'espèce d'invoquer l'existence de parts de marché importantes sur un marché étroit, dont la définition serait sujette à controverse, à savoir les hypermarchés de produits de bureau. On peut se demander si une approche similaire pourrait être adoptée dans les systèmes juridictionnels appliquant un critère de position dominante. Il est probable qu'un marché doive toujours être défini afin d'établir l'existence d'une position dominante, et, comme nous l'avons déjà noté, la simple aptitude à augmenter le prix n'est pas nécessairement synonyme de position dominante. En outre, il peut ne pas être toujours facile de défendre l'utilisation d'une définition étroite du marché pour s'appuyer sur des présomptions légales de position dominante.[43]

Même si l'on admet une différence théorique de couverture entre le critère de la position dominante et le critère SLC, en ce qui concerne les fusions susceptibles de conduire à des effets unilatéraux sur des marchés de produits différenciés, cela ne constitue pas un motif suffisant pour modifier le critère, si ces fusions sont peu nombreuses. La Commission Européenne, par exemple, considère que :

> L'une des questions plus hypothétiques qui ont parfois été soulevées quant à la portée du critère de la position dominante dans le Règlement est celle de savoir s'il permettrait un contrôle effectif lorsque les entreprises sont capables de majorer les prix unilatéralement et donc d'exercer un pouvoir de marché. Le type d'exemple généralement cité est celui d'une concentration entre les deuxième et troisième acteurs d'un marché où ces entreprises sont les substituts les plus proches. Dans un tel scénario, les entreprises parties à une concentration peuvent rester d'une taille inférieure à celle de la première entreprise du marché. Certains font valoir que le critère SLC

> serait mieux adapté dans ce cas, notamment si les caractéristiques du marché ne permettent pas de détecter une position dominante collective. Quel que soit l'intérêt de cette discussion théorique, la Commission n'a toutefois pas encore rencontré de situation de ce genre.[44]

A cet égard, on pourrait citer la fusion américaine Heinz/Beech-Nut, temporairement bloquée puis avortée, comme un exemple concret du genre de situation que la Commission n'a pas encore rencontré.[45]

La fusion Heinz/Beech-Nut concernait le marché américain des aliments pour bébés, dont Gerber détenait 65-70 pour , tandis que Heinz et Beech-Nut détenaient chacun 15-20 pour cent [ces marques] ne coexistaient jamais dans un même supermarché, et ne coexistaient même que rarement dans la même zone métropolitaine."[46] Il s'agissait donc d'une fusion faisant passer les acteurs du marché de trois à deux, avec, pour reprendre les termes du Commissioner Leary, "…une très faible probabilité d'entrée."[47] Les parties ont apparemment soutenu que : "…Heinz et Beech-Nut ne se faisaient pas réellement concurrence, car chacun détenait une position de force dans des régions différentes du pays, avec des chevauchements horizontaux minimes." Cet argument a été rejeté par l'US Federal Trade Commission (FTC) et la Cour d'Appel américaine, Circuit du District de Columbia. La Cour a reconnu l'existence d'une probabilité assez forte d'effets coordonnés et unilatéraux pour faire droit à la requête de la FTC, sollicitant une injonction provisoire de blocage de la fusion, laquelle a ensuite été abandonnée. L'analyse des effets unilatéraux a porté sur la réduction de la concurrence entre Heinz et Beech-Nut en vue de devenir la seconde marque en supermarché (c'est-à-dire en vue d'être offerte parallèlement à Gerber).

5. Fusions susceptibles de produire des effets unilatéraux sur des marchés de produits homogènes – certaines d'entre elles échapperont-elles au blocage en vertu du critère de la position dominante ?

Nous en venons à présent à l'autre exemple générique d'effets unilatéraux décrits dans les Lignes Directrices US :

> Sur des marchés où les produits sont relativement indifférenciés et où la capacité fait la différence essentielle entre les entreprises et façonne la nature de leur concurrence, l'entreprise issue de la fusion peut juger profitable d'augmenter unilatéralement le prix et de supprimer une partie de la production. La fusion fournit à l'entreprise issue de la fusion une base de ventes plus large, qui lui permet de tirer profit de la hausse de prix en résultant, et simultanément d'éliminer un concurrent sur lequel les clients auraient autrement détourné leurs achats. Si les entreprises fusionnant détiennent une part de marché combinée d'au moins trente-cinq pour cent, elles peuvent juger profitable d'augmenter le prix et de réduire la production conjointe au-dessous du total de leurs productions avant la fusion, car les marges perdues sur les ventes abandonnées peuvent être compensées par la hausse de prix pratiquée sur la base de ventes fusionnées.
>
> Cet effet unilatéral est improbable à moins qu'un nombre suffisamment important de clients de l'entreprise issue de la fusion ne soit dans l'impossibilité de trouver des sources d'approvisionnement économiques alternatives, c'est-à-dire à moins que les concurrents de l'entreprise issue de la fusion ne puissent pas répondre à la hausse de prix et à la réduction de la production, opérées par l'entreprise issue de la fusion, par des augmentations de leurs propres productions suffisantes au total pour rendre l'action unilatérale de l'entreprise issue de la fusion non profitable. Cette expansion des entreprises extérieures à la fusion est improbable si elles sont soumises à des contraintes impérieuses en matière de capacité, qui ne peuvent pas être supprimées économiquement dans les deux ans, ou si la gestion de la capacité excédentaire

> existante est significativement plus coûteuse que celle de la capacité actuellement utilisée.[48] (soulignage ajouté)

Il est prévisible que le type de fusion décrit plus haut conduise à des hausses de prix après la fusion, en dépit d'un accroissement de la production par les concurrents. Si le marché était hautement concurrentiel, tant avant qu'après la fusion, l'accroissement de la production des concurrents suffirait à rendre la hausse de prix non profitable.

Les fusions susceptibles de produire des effets unilatéraux sur des marchés de produits homogènes peuvent, de toute évidence, être bloquées en vertu d'un critère SLC. Comme nous l'avons fait observer précédemment, on ne peut pas en dire autant à propos d'un critère de la position dominante. En effet, certaines fusions susceptibles d'entraîner une hausse des prix, sans coordination entre oligopolistes, peuvent se produire sur des marchés où il n'existe aucune position dominante, avant ou après la fusion. Il convient de noter que le seuil américain de trente-cinq pour cent de part de marché est considérablement inférieur à ce que les tribunaux américains exigent généralement dans les affaires de monopolisation impliquant l'Article 2 du Sherman Act,[49] et est également inférieur aux niveaux habituellement liés à une position dominante, dans les affaires impliquant l'Article 82 du Traité sur l'Union Européenne.[50]

On pourrait penser qu'une fusion produisant des effets unilatéraux est une fusion qui crée ou renforce une entreprise prééminente, mais non nécessairement dominante. Or, des effets unilatéraux peuvent également se produire en l'absence d'une entreprise prééminente. Par exemple, une fusion peut provoquer une hausse de prix pratiquée par un groupe d'oligopolistes sans coopération entre eux. Cette situation pourrait être décrite comme une hausse de prix causée par une fusion qui crée ou modifie une interdépendance oligopolistique. Cette hausse de prix doit néanmoins être classifiée dans la catégorie des effets unilatéraux, car elle découle simplement de réponses rationnelles individuelles à un marché plus concentré. La hausse de prix prévisionnelle ne dépend pas d'une menace réaliste de représailles par les parties fusionnant, à l'encontre des entreprises qui n'imitent pas leur hausse de prix post-fusion. En outre, contrairement à ce qui se passe dans une fusion susceptible de créer des effets coordonnés, il faut s'attendre à ce que seule l'entité issue de la fusion réduise sa production au-dessous de ce qu'étaient les éléments séparés de cette production au total, avant la fusion. Bien qu'il faille s'attendre à ce que ses rivaux augmentent leurs prix en réaction logique à ce que l'entité issue de la fusion est susceptible de faire, ces rivaux tireront effectivement avantage de la hausse de prix en maintenant ou augmentant leurs productions. Si eux-mêmes ou un groupe de nouveaux entrants ont une capacité suffisante, la production des concurrents de l'entité issue de la fusion sera augmentée au point que les prix redescendent aux niveaux qui étaient les leurs avant la fusion. Si telle est la situation probable après la fusion, des effets unilatéraux ne seraient pas censés de produire de prime abord.

On peut trouver une description plus complète des effets unilatéraux dans les lignes directrices sur les fusion d'un autre système juridictionnel ayant adopté le critère SLC. A la suite d'une introduction consacrée au "pouvoir de marché unilatéral", similaire à celle que l'on trouve dans les Lignes Directrices US, les lignes directrices sur les fusions de la Nouvelle-Zélande poursuivent en ces termes :

> En outre, les théories économiques sur l'oligopole, fondées sur l'équilibre de Nash, prévoient également qu'en cas de diminution du nombre d'entreprises présentes sur un marché, leurs efforts indépendants pour maximiser les profits, tout en observant combien les autres produisent ou facturent, provoqueront une hausse continuelle des prix au-dessus du niveau concurrentiel. Sur ces types de marchés, où la concentration est déjà importante, une fusion est susceptible de provoquer une nouvelle hausse de prix qui pourrait équivaloir à une diminution substantielle de la concurrence.[51] (soulignage ajouté)

Bien qu'il soit formulé en termes moins rigoureux, ce texte rappelle le modèle d'oligopole de Cournot, qui prévoit que toute fusion ne produisant pas d'efficiences (c'est-à-dire un abaissement de la courbe des coûts marginaux) provoquera une hausse de prix.[52]

Il existe au moins trois moyens de combler la lacune de couverture que nous avons observée entre le critère SLC et le critère de la position dominante, dans le cas de fusions produisant des effets unilatéraux sur des marchés de produits homogènes. Nous avons déjà examiné et critiqué les deux premiers de ces moyens, à savoir abaisser le seuil utilisé pour définir la position dominante d'une seule entreprise, et adopter un concept de position dominante qui ne dépende pas fortement du pouvoir de marché. Le troisième moyen permettrait à un système juridictionnel ayant adopté le critère de la position dominante d'appliquer le concept de la position dominante collective pour bloquer des fusions susceptibles de produire des effets unilatéraux, quand bien même n'entraîneraient-elles pas la création ou le renforcement d'une seule entreprise dominante.

S'exprimant après la décision de la Commission de bloquer la fusion Airtours/First Choice, Kloosterhuis a formulé les commentaires suivants :

> Selon la jurisprudence communautaire, le rôle du contrôle des fusions en matière de position dominante collective a pour essence d'empêcher la création ou le renforcement de structures de marché qui puissent donner lieu à une interaction ou une interdépendance d'entreprises, conduisant à des résultats anticoncurrentiels sur le marché. Toutefois, le type de comportement auquel doit aboutir l'interaction d'entreprises oligopolistiques, avant que nous puisions parvenir à la conclusion qu'il existe une position dominante collective, au sens du droit communautaire, n'est pas encore clairement défini.[53]

Kloosterhuis consacre ensuite de longs développements au modèle de Cournot, qu'il évoque comme "le modèle d'oligopole de la théorie économique", en le caractérisant comme impliquant une interaction oligopolistique. Selon Kloosterhuis :

> …il découle des toutes dernières décisions [de la Commission Européenne] que l'analyse du comportement non-coopératif [tel qu'il est postulé dans le modèle de Cournot] est au cœur de l'évaluation d'une position dominante collective dans les affaires de concentration. Ainsi, la Commission a reconnu qu'un résultat anticoncurrentiel sur le marché peut parfaitement être la conséquence d'un comportement unilatéral fondé sur la rationalité individuelle des entreprises impliquées. Il n'est pas certain que cette approche soit déjà pleinement reconnue par les tribunaux européens.[54]

La décision Airtours/First Choice est l'une des décisions de la Commission (par opposition à la Cour) auxquelles Kloosterhuis fait référence.

La fusion Airtours/First Choice aurait réduit le nombre d'acteurs majeurs de quatre à trois. Apparemment, les entreprises opérant sur ce marché fixaient initialement les quantités de vacances à forfait qu'elles offriraient, et se faisaient ensuite concurrence sur les prix. La Commission a estimé que la fusion entraînerait probablement des réductions quantitatives après la fusion. On peut se demander si les prévisions de la Commission dépendaient de l'existence d'un certain type de mécanisme de représailles pour punir des entreprises qui ne réduiraient pas leurs quantités à la suite de la fusion.[55] Quoi qu'il en soit, auprès du Tribunal de Première Instance, la Commission a présenté la fusion comme une opération produisant des effets coordonnés, c'est-à-dire impliquant nécessairement des possibilités de représailles. En formulant les trois conditions auxquelles nous avons fait allusion précédemment, le Tribunal de Première Instance a clairement décidé que la position dominante collective, à tout le moins telle qu'elle a été soutenue dans l'affaire Airtours/First Choice, exigeait un mécanisme de représailles. Cela étant, il est

possible, bien que peut-être improbable, qu'une juridiction européenne puisse revisiter cette question et décider que le concept de position dominante collective peut également être appliqué pour bloquer des fusions provoquant des effets unilatéraux.

L'arrêt précité du TPI dans l'affaire Gencor/Lonrho donne peu d'indication d'une volonté d'étendre la position dominante collective à des effets purement unilatéraux. Dans l'extrait reproduit ci-dessus du paragraphe 276 de cet arrêt, le Tribunal a évoqué non seulement une aptitude à "prévoir" les réactions des rivaux, mais également une situation dans laquelle les membres d'un oligopole sont "fortement incités à aligner leur comportement sur le marché". Chaque membre d'un oligopole coopérera de cette manière car il "sait qu'une action fortement concurrentielle de sa part destinée à accroître sa part de marché (par exemple une réduction de prix) provoquerait une action identique de la part des autres, de sorte qu'il ne retirerait aucun avantage de son initiative".

En dépit des difficultés juridiques que la Commission des Communautés Européennes pourrait rencontrer pour ce faire, plusieurs arguments militent en faveur de l'extension de la portée de la position dominante collective, de telle sorte qu'elle embrasse tous les effets anticoncurrentiels découlant d'une interdépendance oligopolistique, indépendamment de la question de savoir s'ils impliquent des effets unilatéraux ou coordonnés. Ce n'est pas seulement parce que ces fusions sont dommageables. C'est également souhaitable pour les besoins de la sécurité juridique.

Dans la plupart des oligopoles, chacun des grands fournisseurs aura parfaitement conscience de son interdépendance avec les autres grands vendeurs. Il définira donc sa stratégie concurrentielle en fonction de ce qu'il croit (et non pas nécessairement de ce qu'il sait) que ses rivaux font actuellement. En supposant un type spécial d'approche statique du marché, et en supposant que des oligopolistes se fassent concurrence principalement sur les quantités plutôt que sur les prix, un oligopoliste tendra à augmenter sa production d'autant plus qu'il pensera que la quantité offerte par ses rivaux sera faible. Ce faisant, l'entreprise agira de manière "non-coopérative", mais néanmoins interdépendante. Ce comportement pourrait conduire à un prix d'équilibre, quelque part entre le niveau concurrentiel et le niveau monopolistique. Cette situation est totalement différente de celle qui pourrait se produire si les circonstances changeaient, de telle sorte que chaque oligopoliste sache ce que font et feront ses rivaux à l'avenir, et dispose d'une capacité excédentaire suffisante pour les "punir" s'ils tentent d'accroître leurs parts de marché. Cette situation ouvre la porte à différentes formes de comportement "coopératif" qui pourraient avoir pour conséquence de faire monter les prix considérablement au-dessus du niveau non-coopératif.[56]

La théorie économique relative à la conduite sur des marchés oligopolistiques révèle un vaste éventail de résultats possibles. Il est excessivement difficile d'opérer une différence entre des situations où une fusion fera ou non pencher la balance, d'un équilibre non-coopératif caractérisé par des prix supérieurs aux niveaux concurrentiels (effets unilatéraux), en faveur d'un équilibre coopératif et de prix encore plus élevés (effets non-coordonnés). Ce point a été souligné par Frédéric Jenny qui le résume en ces termes :

> La méthodologie à suivre pour évaluer si une fusion crée une position dominante collective est donc loin d'être claire, si l'on considère que ce concept de position dominante collective ne s'applique qu'à des situations d'oligopole coopératif.[57]

Si la méthodologie d'évaluation est obscure, tous les principes ou règles juridiques qui opèreront une distinction entre les effets unilatéraux et les effets coordonnés tendront soit à être obscurs, sacrifiant ainsi un certain degré de sécurité juridique, soit à être arbitraires en ce sens qu'ils rompraient partiellement le lien entre politique de concurrence et efficience économique. Ces règles seront néanmoins nécessaires si la position dominante collective ne peut pas être étendue pour saisir les effets unilatéraux découlant de

fusions, lorsque les parties fusionnant n'occupent pas une position dominante soit avant soit après leur fusion.

Le dilemme que nous examinons n'est peut-être pas aussi sérieux qu'il le semble à première vue. Il se peut que les systèmes juridictionnels qui appliquent le critère de la position dominante aient une bonne raison d'ignorer tout simplement les lacunes de ce critère en ce qui concerne les fusions qui produisent des effets unilatéraux, mais qui ne créent ni ne renforcent pas la position dominante d'une seule entreprise. Comme l'a noté un commentateur, une application rigoureuse du critère SLC à ces fusions pourrait évoluer vers une politique de fusions qui interdise tous les oligopoles.[58] Fingleton (2002, 6) lance également un avertissement :

> …cette approche pourrait, spécialement si elle est appliquée de manière inappropriée, être utilisée pour limiter les fusions oligopolistiques en général. Cela serait inefficace, d'autant que nous savons, d'après les travaux de Sutton et d'autres que la rivalité et l'efficience peuvent être les moteurs d'une plus forte concentration du marché.
>
> Le danger existe que cette approche soit considérée comme une attaque dirigée contre toutes les fusions qui accroissent la concentration. Je pense qu'il s'agit d'un argument de poids, mais qu'il doit être clairement délimité. Plus précisément, le contrôle des [fusions opérées sur un marché de produits homogènes, susceptibles de produire des effets unilatéraux] ne devrait être envisagé que si la concurrence porte clairement sur la quantité plutôt que sur le prix. Une partie de ce critère s'attacherait à déterminer si des quantités peuvent être librement choisies en dehors de la période de fixation des prix, mais sont fixées pendant cette période.

Fingleton considère que la fusion Airtours/First Choice et la fusion américaine Heinz/Beech-nut pourraient avoir fourni d'excellents exemples d'affaires dans lesquelles une extension de la position dominante collective aurait été appropriée.[59] Dans la dernière affaire, Fingleton suppose implicitement que cette fusion était anticoncurrentielle et n'aurait pas pu être bloquée uniquement en raison d'effets coordonnés probables.

Jenny souligne que : "…si l'on considère que le concept de position dominante collective peut également s'appliquer à des situations d'oligopoles non coopératifs, il devient plus facile de comprendre comment une fusion pourrait renforcer une position dominante collective."[60] (soulignage ajouté) Il le met en évidence et le nuance dans les termes suivants :

> Dans ce cas en effet, il suffirait de démontrer que l'équilibre du marché, tel qu'il existera après la fusion est logiquement susceptible de s'écarter davantage de l'équilibre concurrentiel que l'équilibre qui existait avant la fusion. Toutefois, il est nécessaire de démontrer précisément pourquoi cela devrait se produire, dans chaque cas particulier, car il n'est pas toujours évident que la disparition d'un oligopoliste conduise les oligopolistes restants à augmenter leur prix et à réduire la quantité. Si les oligopolistes se comportent comme des oligopolistes de Cournot, qui ont tous une certaine capacité excédentaire et pratiquent tous le même taux d'escompte, il est parfaitement possible qu'une fusion entre deux des oligopolistes conduise à un équilibre du marché qui sera plus éloigné de l'équilibre concurrentiel que dans la situation initiale. En revanche, si les oligopolistes se comportent comme des oligopolistes de Bertrand [c'est-à-dire fixent des prix plutôt que des quantités sur la base de ce que font leurs rivaux], il n'existe aucune raison de croire que l'équilibre post-fusion sera différent après la fusion. Ainsi, il n'est pas si facile d'établir la preuve du renforcement d'une position dominante collective, même si l'on a une conception large de la position dominante collective.[61]

Pour renforcer les propos de Jenny, il est difficile d'imaginer qu'un tribunal interdise une fusion, ou confirme une décision bloquant une fusion, ou assortisse une fusion à des conditions, au simple motif qu'il est démontré que les conditions fixées dans un certain modèle d'oligopole non-coopératif sont satisfaites.[62] Il est pratiquement certain que des preuves solides d'une hausse probable des prix après la fusion, et la remarque vaut à la fois sous l'empire du critère SLC et celui de la position dominante. Il est vrai que des preuves jugées suffisantes devant une juridiction appliquant le critère SLC pourraient ne pas suffire devant une juridiction appliquant le critère de la position dominante, particulièrement si le concept de position dominante ne peut pas être étendu pour couvrir l'interaction anticoncurrentielle en l'absence d'effets coordonnés.

Que se passera-t-il si les juridictions appliquant le critère de la position dominante prennent le parti d'élargir le champ de la position dominante collective afin de pouvoir appréhender ce que nous avons visé comme des fusions à effets unilatéraux limites ? La réponse dépend en premier lieu de l'opportunité d'abaisser considérablement le seuil de pouvoir de marché pour une position dominante collective, par opposition à une position dominante individuelle, abaissement qui ne semble pas justifié si l'efficacité économique est l'objectif du contrôle des fusions. A supposer même que cet obstacle soit surmonté, il resterait une question difficile à affronter. En particulier, les pertes liées à des fusions qui produisent des effets unilatéraux mais ne créent pas une position dominante individuelle, en termes de préjudice causé aux consommateurs, sont-elles assez importantes pour compenser les coûts nécessaires pour engager des poursuites, et les coûts liés à l'accroissement d'un effet « refroidissant » (c'est-à-dire un effet dissuasif accru décourageant des fusions bénéfiques) ? Il s'agit d'une question délicate, à laquelle différentes juridictions pourraient à bon droit répondre différemment. Nous ne pouvons formuler que trois commentaires :

- Les frais de poursuite nécessaires pour interdire des fusions limites pourraient être supérieurs à la moyenne. En effet, plus les effets anticoncurrentiels réels d'une fusion sont faibles, et plus il pourra être difficile de prouver qu'ils sont à la fois essentiels et probables. Cet argument justifie d'ignorer la lacune de couverture entre le critère SLC et le critère de la position dominante en ce qui concerne certains effets unilatéraux.

- Il pourrait être nécessaire d'abaisser le seuil de la position dominante collective à un niveau réellement très bas, si l'on voulait éliminer totalement cette lacune de couverture.

- La force des points ci-dessus est réduite lorsque l'on observe, comme le font généralement les juridictions appliquant un critères SLC, que le pouvoir discrétionnaire de poursuites peut être exercé pour garantir un bon équilibre.

6. Fusions pour lesquelles le critère de la position dominante pourrait être plus strict que le critère SLC

Pour comparer la couverture respective du critère de la position dominante et du critère SLC, nous nous sommes jusqu'à présent concentrés sur des situations où le critère de la position dominante, principalement en raison de problèmes de seuil, pourrait échouer à bloquer des fusions anticoncurrentielles. On peut également imaginer des situations où, ici encore en raison de particularités liées au seuil, le critère SLC ne réussirait pas à stopper une fusion qui seraient bloquées en appliquant le critère de la position dominante. Deux types de cas surviennent à cet égard. Le premier concerne des marchés où une série de petites fusions est en cours. Le second s'applique à des cas où une fusion ne sera pas susceptible de produire une diminution de la concurrence après la fusion, mais tendra plutôt à préserver un marché qui est actuellement moins que concurrentiel.

Pour en venir d'abord à la série de petites fusions, il est concevable que chacune de ces fusions ne serait pas assez vaste pour produire une SLC ou renforcer une position dominante. Une différence de couverture entre les deux critères pourrait néanmoins émerger si les fusions accroissaient graduellement le poids d'une entreprise qui n'occupait pas initialement une position dominante. A un moment ou un autre, l'une des fusions serait probablement suffisante pour créer une position dominante, et, ce faisant, être bloquée en vertu du critère de la position dominante. L'effet pratique de cette situation serait considérablement plus important dans les juridictions qui se fondent sur des présomptions de parts de marché pour prouver la position dominante.

En réalité, cette différence potentielle de couverture peut ne pas revêtir une grande importance dans une situation de chaîne de petites fusions. En effet, il semble tout à fait improbable qu'au fur et à mesure de l'acquisition d'un plus grand nombre de petites entreprises, il restera un « pool » suffisamment grand de ces entreprises pour permettre encore une nouvelle absorption , qui ne soit pas assez massive pour déclencher une SLC. Si ce point est atteint avant que la fusion suivante ne crée une entreprise dominante, c'est le critère SLC, et non le critère de la position dominante, qui aurait le plus grand pouvoir de blocage.

Pour aborder à présent une question probablement plus importante que la chaîne de petites fusion, envisageons une fusion sur un marché où il existe actuellement peu de concurrence, en raison des barrières importantes à l'entrée sur le marché, et du fait que les concurrents sont soumis à de fortes contraintes de capacité. Dans cette situation, on pourrait soutenir que la fusion ne modifiera pas les conditions de concurrence et ne provoquera pas une SLC. La même question pourrait se présenter sous un aspect plus controversé. Dans la situation de pré-fusion, un ensemble d'oligopolistes pourrait simplement avoir choisi, sans conclure aucun accord illégal, de ne pas se faire concurrence. S'il est difficile de soutenir que la fusion empirerait les choses, il pourrait être tout aussi difficile de démontrer que la fusion produit une SLC. Cette possibilité peut s'être produite dans la fusion américaine Heinz/Beech-Nut, dans laquelle il était apparemment significatif qu'il existait des régions où les parties fusionnant ne s'étaient pas concurrencées historiquement, mais auraient pu potentiellement ce faire. Commentant l'idée qu'un manque de chevauchement régional, inspiré par des raisons stratégiques, pouvait signifier qu'il n'y avait pas de SLC, le Federal Trade Commissioner Thomas Leary a écrit ce qui suit :

> Il apparaît probable que les modèles régionaux ont évolué au fil de décennies de concurrence essentiellement passive (tacitement reconnue par les parties), en vertu de laquelle Heinz et Beech-Nut se sont abstenues de se défier agressivement. Il serait pervers de permettre aux parties de fusionner uniquement parce qu'elles avaient choisi de ne pas de concurrencer durement par le passé.[63]

Dans une note bas de page, Leary a ajouté : "Nous repousserons un argument analogue, selon lequel une fusion ne serait pas susceptible de causer des dommages supplémentaires importants à la concurrence, au motif que des prix supra-concurrentiels prévalent déjà dans l'industrie."

On peut citer une situation peut-être plus courante, dans laquelle une fusion, qui ne serait pas susceptible de réduire les niveaux actuels de concurrence, se qualifierait néanmoins comme une fusion anticoncurrentielle. Il existe un nombre considérable de marchés caractérisés à la fois par une réglementation des prix et une entreprise dominante. Cette entreprise pourrait recourir à des fusions comme un moyen de protéger sa position sur le marché, plus particulièrement si elle estime que des changements de réglementation pourraient bientôt rendre le marché plus concurrentiel. En l'absence même de ce stimulant, cette entreprise pourrait juger les fusions attrayantes si elles éliminent des entreprises qu'une autorité réglementaire pourrait comparer à cette entreprise, afin de justifier une réduction des prix réglementés. En cas de contrôle des effets concurrentiels d'une fusion opérée par une entreprise réglementée dominante, les parties fusionnant pourraient arguer qu'étant donné que les prix seront réglementés après la fusion, il n'y aura aucune hausse de prix ou cette hausse ne pourra pas être imputée à

la fusion. Cela pourrait poser un problème pour les juridictions appliquant le critère SLC, si elles assimilent strictement une SLC à une hausse de prix induite par une fusion.

Sous réserve que l'une des parties fusionnant ait déjà détenu une position dominante, réglementée ou non, les juridictions appliquant le critère de la position dominante pourraient juger plus facile de bloquer des fusions qui sont susceptibles de faciliter la préservation du pouvoir de marché, quand bien même n'auraient-elles pas pour effet de l'accroître ou de l'étendre.[64] La branche "renforcement" du critère de la position dominante peut être interprétée de deux manières, à savoir l'accroissement du pouvoir de marché, ou le simple fait de rendre le pouvoir de marché plus durable ou résistant à l'érosion.[65] L'accroissement du pouvoir de marché pourrait être approximativement assimilé à une SLC. Il pourrait en être de même d'une prolongation de la période pendant laquelle le pouvoir de marché est susceptible de persister, c'est-à-dire la situation dans laquelle les prix futurs seront supérieurs, du fait de la fusion, à ce qu'ils seraient sans elle.[66] La simple réduction des chances qu'à un moment quelconque une position dominante soit susceptible d'être érodée, pourrait peut-être échapper à la caractérisation en tant que diminution substantielle de la concurrence, ou en tout cas être difficile à prouver en vertu de ce critère.

Enfin, il faut envisager les cas de concurrence potentielle, par exemple des fusions préventives dans lesquelles une entreprise dominante absorbe une entreprise prête à entrer sur le marché. Qu'elles appliquent le critère de la position dominante ou le critère SLC, les juridictions saisies pourraient traiter cette opération comme une fusion qui accroît la part de marché, faisant ainsi soupçonner que le pouvoir de marché a également été accru. La fusion pourrait néanmoins être plus facile à bloquer en appliquant le critère de la position dominante, considérant que sa branche "renforcement" vise plus que l'expansion du pouvoir de marché.

Les juridictions SLC pourraient peut-être combler tout ou partie de la lacune potentielle que nous avons évoquée en ajoutant une branche "empêchement" à leur critère. Au Canada, par exemple, une fusion peut être bloquée si elle "…empêche ou diminue sensiblement la concurrence ou aura vraisemblablement cet effet."[67] Une branche « empêchement » pourrait probablement couvrir des situations dans lesquelles une fusion soit prolonge l'existence du pouvoir de marché, soit le rend plus imperméable à l'érosion à un moment quelconque.

Certaines juridictions SLC pourraient refuser l'idée d'ajouter un élément "empêchement" à leur critère, pour réduire la lacune potentielle de couverture en faveur d'un critère de la position dominante, particulièrement au motif que cet élément pourrait déjà être implicite dans leur critère SLC. L'inclusion explicite d'une branche « empêchement » pourrait entraîner le risque d'aller trop loin dans la voie du blocage de fusions qui "retranchent" plutôt qu'elles n'augmentent le pouvoir de marché. Cette extension pourrait décourager indûment des fusions pro-concurrentielles. Certaines juridictions SLC pourraient également s'inquiéter du fait que l'ouverture à des théories de "retranchement" risquerait de faciliter le traitement des gains d'efficience induits par une fusion comme un motif de bloquer plutôt que d'approuver une fusion.

Voici cinq ans, une fusion transnationale de très grande envergure a donné lieu à des décisions différentes aux Etats-Unis et devant la Commission des Communautés Européennes. Nous faisons allusion à l'absorption de McDonnell Douglas par Boeing. Un document pour discussion du Bundeskartellamt a brièvement décrit cette affaire et les motifs des décisions différentes :

> En 1997, la fusion de Boeing et McDonnell Douglas (MDD)**,** deux constructeurs américains d'avions gros porteurs, a été autorisée à la fois par la Federal Trade Commission (Commission Fédérale du Commerce) américaine (FTC) et par la Commission Européenne. Le projet a été jugé non problématique à la majorité de la FTC à un stade précoce de son examen. En revanche, la Commission, qui avait déjà préparé une décision d'interdiction, n'a autorisé la fusion qu'après

> que les parties aient pris certains engagements de dernière minute. La fusion a conduit à une réduction du nombre de fournisseurs sur le marché pertinent, de trois à deux entreprises. La part de marché de Boeing s'est accrue, pour passer d'un peu plus de 60 pour cent à environ 70 pour cent, laissant à Airbus, seul concurrent restant, une part d'environ 30 pour cent. Les deux autorités de contrôle de la concurrence ont estimé qu'il ne fallait plus attendre aucune impulsion concurrentielle de MDD, bien qu'il ne s'agisse pas d'une entreprise en déclin, car la société n'avait plus aucune chance de gagner de nouvelles commandes face à ses concurrents. Contrairement à la FTC, la Commission Européenne a néanmoins jugé la fusion critique, au motif qu'elle renforcerait la position dominante de Boeing. Selon la Commission, ce renforcement proviendrait de l'extension de la clientèle, et des avantages qui pourraient être réalisés dans ce secteur d'activité par la flotte de Boeing, grâce à la maintenance et à la réparation des avions MDD encore en service, et à la possibilité d'exploiter le savoir-faire technique de MDD dans le secteur militaire, en le mettant au service des activités dans le secteur civil. La Commission a estimé que seuls les engagements pris par les entreprises en cause permettraient d'éliminer ces effets de renforcement. En revanche, ces considérations ont été jugées non pertinentes par la FTC. La FTC n'a pas examiné si Boeing détenait une position dominante et comment la fusion affecterait les relations avec Airbus en termes de concurrence. (soulignage ajouté)[68]

Il est possible que la FTC n'ait pas considéré le renforcement supposé de la position sur le marché de Boeing par rapport à Airbus, en raison de l'interprétation que les autorités américaines de contrôle de la concurrence donnent au critère SLC. L'absorption d'une entreprise qui n'est pas et ne deviendra pas une force concurrentielle sur le marché ne peut pas diminuer la concurrence si la diminution n'est pas définie comme incluant le cas d'isolement supplémentaire d'une position sur le marché par rapport aux stratégies concurrentielles des rivaux. En revanche, ce retranchement de la position existante sur le marché est inclus dans ce que la Commission Européenne considère comme un renforcement de la position dominante. [69]

En résumé, le domaine le plus significatif où le critère de la position dominante pourrait s'avérer plus rigoureux que le critère SLC provient de l'interprétation large que certaines juridictions au moins pourraient vouloir faire du concept de renforcement d'une position dominante. Cette interprétation pourrait inclure l'accroissement, induit par la fusion, du pouvoir d'une entreprise dominante ou d'un groupe d'entreprises de préserver plutôt que d'étendre sa puissance de marché. Cette lacune pourrait être largement éliminée en ajoutant une branche "empêchement" au critère SLC, changement qui pourrait ne pas recevoir un soutien unanime de la part des juridictions SLC. L'adjonction d'une branche « empêchement » contribuerait également à pallier les autres lacunes de couverture mentionnées dans cette section, à l'exception du scénario de la chaîne de petites fusions. Cependant, ces autres lacunes semblent de nature considérablement plus hypothétique que la différence induite par une interprétation expansive de la branche « renforcement » du critère de la position dominante.

7. Questions Jurisprudentielles et Politiques

A plusieurs reprises, nous avons noté qu'un moyen de résoudre la lacune de couverture, liée à la question du seuil, observée entre le critère de la position dominante et le critère SLC, consisterait simplement à abaisser le seuil de la position dominante. Nous avons également conjecturé qu'il serait difficile de réduire le seuil de la position dominante collective sans faire de même pour la position dominante individuelle, et que dans l'un et l'autre cas, l'abaissement des seuils en matière de contrôle des fusions pourrait affecter l'application des interdictions d'abus de position dominante. Faisant particulièrement référence au droit de la concurrence de l'Union Européenne, Richard Whish écrit : "Il ne fait aucun doute que tant le [Règlement sur les Fusions] que l'Article 82 s'appliquent aussi bien à la

position dominante collective qu'à la position dominante individuelle, et l'arrêt de la CJCE dans l'affaire Compagnie Maritime Belge semble considérer que ces deux concepts ont le même contenu dans chaque cas."[70]

Les interdictions d'abus de position dominante impliquent un compromis politique important qui risquerait d'être bouleversé si le seuil de la position dominante était abaissé au point où il équivaudrait pratiquement au degré de pouvoir de marché existant lorsqu'une fusion est susceptible de produire une SLC.[71] Cet élément est particulièrement important dans les juridictions où le démembrement forcé peut constituer la sanction d'un abus de position dominante.[72] Dans certaines juridictions, les interdictions d'abus de position dominante peuvent être appliquées sans devoir rapporter beaucoup de preuves, sinon aucune, d'un effet anticoncurrentiel net. Ce type d'approche stricte pourrait économiser des frais de procédure et accroître la sécurité juridique. Simultanément, toutefois, cette approche stricte risque d'interdire des stratégies comme des prix discriminatoires, des escomptes et des ventes liées, qui sont susceptibles d'être pro-concurrentielles à moins d'être pratiquées par une entreprise détenant un pouvoir de marché considérable. Ce risque sera d'autant plus grand que le seuil fixé pour la position dominante sera bas. D'où la nécessité d'un compromis politique habile qui puisse contraindre à abaisser les seuils afin de garantir une couverture similaire dans l'application du critère de la position dominante et du critère SLC aux fusions. En effet, le fait d'assimiler la position dominante au pouvoir d'augmenter les prix de manière profitable au-dessus des niveaux concurrentiels, c'est-à-dire le plus bas niveau de pouvoir de marché pouvant encore donner lieu à une SLC, pourrait aboutir à un piètre compromis.

Richard Whish note la possibilité que la Commission Européenne ait en fait abaissé le seuil, dans les affaires de fusion, au point d'appliquer déjà un critère SLC :

> Dans certains cas, la Commission a constaté une 'position dominante' en vertu du Règlement sur les Fusions en présence de parts de marché inférieures à 40 pour cent, voire même inférieures à 30 pour cent. Le 15ème considérant du Règlement sur les Fusions, qui n'a pas force juridique mais donne un signal fort de la manière dont la Commission doit procéder dans l'analyse des fusions, stipule que le fait que la part de marché combinée des entreprises concernées par une concentration n'excède pas 25 pour cent dans le marché commun ou une partie substantielle de celui-ci, constitue une indication que la concentration est compatible avec le marché commun. Cependant, la position dominante a été reconnue au-dessus du seuil de 25 pour cent même en présence de parts de marché prévisibles assez faibles : par exemple, dans REWE/Meinl[73] à 37 pour cent ; dans Hutchinson/ECT/RMPM[74] à 36 pour cent ; et dans Carrefour/Promodes[75] à moins de 30 pour cent. La Commission recherche également les effets indirects possibles qui pourraient découler de fusions, et parvient parfois à la conclusion qu'une position dominante sera créée ou renforcée sans aucun accroissement de la part de marché. Dans l'affaire Telia/Telenor[76], par exemple, la Commission était préoccupée par le fait que l'entité issue de la fusion ait une capacité et une incitation accrues à éliminer la concurrence réelle et potentielle de tiers, à lier des produits dans une zone géographique plus large et à peser sur les ventes. Dans l'affaire Air Liquide/BOC/Air Products[77] , la Commission était préoccupée par le fait que l'entité issue de la fusion ait un réseau de distribution sans parallèle en Europe, qui lui aurait conféré un pouvoir supplémentaire d'empêcher des tiers d'entrer sur le marché. Si la Commission enquête sur des fusions intervenant dans la 'nouvelle économie, elle pourra souhaiter imposer des engagements pour éviter la possibilité d'une 'position dominante passagère', pendant la période d'établissement d'un nouveau marché et de réduction des barrières existantes à l'entrée. Dans l'affaire VodafoneAirtouch/Mannesmann[78], par exemple, des engagements ont été acceptés pour une période de trois ans qui permettra effectivement aux tiers d'accéder au réseau de téléphonie mobile pan-européen de l'entité issue de la fusion.
>
> Des décisions comme celles-ci révèlent la souplesse avec laquelle la Commission a adapté et appliqué le critère de la position dominante posé par l'Article 2(3) du Règlement sur les Fusions,

> avec cette conséquence qu'un nombre beaucoup plus important de transactions ont été jugées susciter des problèmes de position dominante ces dernières années, par rapport au nombre d'affaires antérieures jugées (avec une prudence aisément compréhensible) sur le fondement du Règlement. Cette observation pose une question intéressante, qui est celle de savoir si la Commission applique déjà, en pratique, un critère SLC, bien qu'elle doive motiver ses décisions sur la base du critère de la position dominante ?[79]

Il convient à présent d'évoquer un important problème potentiel, que nous n'avons pas encore abordé à propos du critère de la position dominante, et qui va dans la direction opposée à l'axe de réflexion jusqu'alors adopté. La jurisprudence sur les interdictions d'abus de position dominante pourrait affecter la manière dont la position dominante est définie dans un critère de contrôle des fusions. Richard Whish note que dans l'affaire Gencor/ Commission, le TPI a constaté ce qui suit :

> …le but principal du contrôle des concentrations au niveau communautaire est de s'assurer que les phénomènes de restructuration des entreprises ne donnent pas lieu à la création de positions de pouvoir économique pouvant entraver de manière significative la concurrence effective dans le marché commun. La compétence communautaire se fonde donc, en premier lieu, sur le besoin d'éviter la création de structures de marché susceptibles de créer ou de renforcer une position dominante et non pas sur la nécessité de contrôler directement d'éventuels abus de position dominante.[80]

Whish en déduit que cette affirmation ouvre la voie au remplacement du critère de la position dominante par un critère SLC, et fournit simultanément une raison supplémentaire de ce faire :

> Le point essentiel ressortant de ce passage est que le contrôle des fusions n'a pas pour intention de contrôler de futurs abus. Le fait que le TPI parle de la nécessité d'éviter la création de structures de marché non-concurrentielles, qui pourraient créer ou renforcer une position dominante, est compréhensible compte tenu du vocabulaire de l'Article 2(3) du Règlement sur les Fusions, tel qu'il est actuellement rédigé ; toutefois, la signification de ce passage de l'arrêt du TPI n'aurait en rien été différente s'il avait déclaré que le but du contrôle des fusions était d'empêcher des fusions qui entraînent des structures de marché dans lesquelles la concurrence sera significativement diminuée.
>
> Non seulement il n'existe aucun lien logique ou nécessaire entre le critère de fond du contrôle des fusions et le contrôle des comportements abusifs, mais il existe beaucoup d'arguments militant pour détacher les deux critères l'un de l'autre. Ce détachement pourrait servir un but utile, c'est-à-dire clarifier le fait que le contrôle des fusions vise à maintenir une concurrence effective sur des marchés, et non pas à prévoir un futur comportement abusif.[81]

Avant de quitter ce sujet, il convient de noter que dans certains systèmes juridictionnels SLC, le critère SLC est également appliqué dans certaines dispositions du droit de la concurrence, autres que celles traitant des fusions. Aux Etats-Unis, par exemple, un élément SLC est inclus dans l'interdiction des pratiques de prix discriminatoires posées dans la Loi Robinson-Patman.[82] Le Canada utilise également un seuil SLC dans l'une de ses dispositions interdisant les pratiques de prix discriminatoires et dans ses dispositions prohibant les pratiques de prix prédatrices, la distribution exclusive, les ventes liées et les restrictions entravant l'accès au marché. Les Etats-Unis n'incluent pas le seuil SLC dans leurs dispositions sur la monopolisation. Le Canada inclut un seuil SLC dans sa loi sur les abus de position dominante ; dès lors, une pratique abusive prohibée doit produire une SLC, mais aucune interdiction ne s'applique à moins que l'auteur de la pratique n'occupe ce qui constitue essentiellement une position dominante.[83] Il est improbable que les Etats-Unis et le Canada soient les seuls systèmes juridictionnels SLC évoquant le

concept de SLC dans d'autres dispositions de leur droit de la concurrence que celles consacrées aux fusions.

8. Ancrage dans l'analyse économique, flexibilité et sécurité juridique

Plusieurs commentateurs ont affirmé que le critère SLC est mieux ancré dans la réalité économique et/ou est intrinsèquement plus flexible que le critère de la position dominante.[84] L'affirmation relative à l'ancrage dans l'économie semble toutefois dépendre de l'acceptation d'un postulat contestable selon lequel la "concurrence" est bien définie en économie, [85] tout en rejetant simultanément l'idée que la position dominante est simplement l'absence de concurrence. Il serait probablement plus exact de soutenir que, comparativement parlant, les juridictions SLC ont généralement donné une interprétation plus axée sur le pouvoir de marché à leur critère, et se sont en général moins fiées à des présomptions relatives à la part de marché. Cela est particulièrement vrai des juridictions SLC qui assimilent le critère à la probabilité qu'une fusion augmentera les prix.

Des arguments similaires peuvent être formulés en ce qui concerne la flexibilité, dans la mesure où l'ancrage dans l'économie et la flexibilité intrinsèque sont parfois discutés ensemble.[86] Si la position dominante est interprétée de manière largement structurelle, et plus particulièrement *si* elle est appliquée en étant très tributaire de l'établissement de certaines parts de marché, il semble clair qu'un critère de la position dominante sera à la fois moins sensible aux effets économiques, et, à part sa branche renforcement, moins flexible qu'un critère SLC. Cependant, l'importance accrue accordée aux effets économiques n'est pas inhérent au critère de la position dominante, non plus qu'une forte dépendance à l'égard d'indices structurels comme les parts de marché.

La Commission Européenne, dans son Livre Vert sur la révision du Règlement CEE sur les Fusions, traite explicitement des questions économiques, de flexibilité et de sécurité juridique dans ses développements sur les critères juridiques de contrôle des fusions :

> Depuis l'adoption du Règlement en 1989, l'application de la notion de position dominante s'est adaptée à l'évolution de la théorie économique et aux raffinements apportés aux instruments économétriques actuels pour mesurer le pouvoir de marché. En d'autres termes, l'évaluation des opérations de concentration est maintenant moins tributaire qu'il y a dix ans du critère des parts de marché, assez grossier et imprécis. Il est tout naturel que le critère de la position dominante ait évolué de cette manière et l'article 2 s'est montré jusqu'à présent suffisamment souple pour permettre d'analyser les effets des opérations à l'aide de modèles et d'instruments microéconomiques plus complexes mis au point par des recherches économétriques et d'organisation industrielle.
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> L'exemple sans doute le plus connu de cette évolution est l'interprétation donnée par les juridictions européennes au critère de la concurrence du Règlement, jugé applicable dans des situations de position dominante collective, comme en témoignent les arrêts rendus par la Cour de Justice et le Tribunal de première instance dans les affaires Kali und Salz et Gencor.
>
> Certains ont néanmoins fait valoir que le critère SLC serait plus proche de l'esprit de l'analyse économique menée en matière de contrôle des concentrations et serait moins rigide (sur le plan juridique) que le critère de la position dominante. Par conséquent, ils considèrent qu'il convient mieux à un contrôle efficace des concentrations, notamment dans le contexte d'un développement du phénomène de concentration sur le plan industriel. D'autres ont indiqué à l'inverse que l'adoption du critère SLC diminuerait la sécurité juridique. [87]

Richard Whish, qui préconise que la Commission Européenne remplace son critère de la position dominante par un critère SLC, prend note de la question de la sécurité juridique mais la replace dans un contexte plus large :

> Notre inquiétude à propos du passage du critère de la position dominante au critère SLC est qu'il donnera à la Commission un plus grand pouvoir discrétionnaire que celui dont elle dispose actuellement en vertu du critère de la position dominante ; qu'il conduira à faire interdire (ou modifier) un plus grand nombre de fusions en conséquence de l'intervention de la Commission ; et que la 'flexibilité' du concept créera une plus grande incertitude pour les parties fusionnant et leurs conseillers.

Il développe ensuite ce point dans les termes suivants :

> Le critère SLC, s'il est introduit, doit être cadré de telle sorte que les parties et leurs conseillers puissent prévoir comment il sera appliqué en pratique par la Commission. C'est précisément pourquoi le critère doit être solidement ancré dans la réalité économique. Les mots 'diminution substantielle de la concurrence' ne seront pas suffisants en eux-mêmes pour traduire la politique sous-jacente au contrôle des fusions et lui donner son expression pratique. La législation, et toute Notice ou toutes Lignes Directrices l'accompagnant (qui seront certainement nécessaires), doivent énoncer le but sous-jacent au critère SLC, les objectifs qui doivent être atteints et les facteurs à prendre en compte dans l'analyse des affaires ; et il sera nécessaire d'expliquer comment sera traitée une série de questions – au premier rang desquelles les effets unilatéraux, les effets coordonnés (collusion tacite), les effets indirects, la concurrence potentielle, les effets de portefeuille et les effets marginaux, les fusions verticales, les efficiences et les entreprises en faillite - ; en outre, il serait important de donner des explications sur la notion de substantiel, en particulier d'expliquer comment les accroissements des parts de marché seront considérés si une fusion conduit à augmenter une part de marché qui est déjà importante. Le critère SLC ne devrait pas entrer en vigueur avant que des explications claires sur toutes ces questions ne soient disponibles.[88]

Toute différence de sécurité juridique entre les deux critères pourrait également être traitée en adoptant l'habitude de décrire pourquoi une autorité de contrôle de la concurrence a décidé d'approuver, de subordonner à des conditions ou de ne pas autoriser une fusion. Cette mesure, et les mesures décrites par Whish sont déjà utilisées dans de nombreuses juridictions SLC et aident probablement à expliquer pourquoi il ne semble pas qu'il existe beaucoup de preuves que le critère SLC soit associé à un grave problème de sécurité juridique. Le haut niveau d'activités de concentration dans les juridictions SLC semble également jeter le doute sur l'existence d'un effet refroidissant, en termes de découragement de fusions bénéfiques.

Ce document a, à plusieurs reprises, mis en exergue un point qui a des implications importantes en termes de sécurité juridique, à savoir que le critère de la position dominante, en particulier, peut nécessiter plus de souplesse s'il veut appréhender toutes les fusions dommageables qui pourraient être stoppées par le critère. En particulier, il peut être nécessaire de prendre l'une ou plusieurs des mesures suivantes :

1. alléger le lien entre pouvoir de marché et position dominante sur le marché dans la définition de ces deux concepts ;

2. modifier l'approche de la définition du marché en fonction du type de fusion contrôlé ;

3. adopter uniformément des définitions du marché particulièrement étroites ;

4. adopter des seuils de position dominante différents selon qu'il s'agit d'une position dominante individuelle ou collective ;

5. abaisser le seuil de pouvoir de marché exigé pour conclure à l'existence d'une position dominante ;

6. étendre le concept de position dominante collective pour couvrir les situations d'interdépendance oligopolistique anticoncurrentielle en l'absence d'effets coordonnés.

Les quatre premiers points de cette liste pourraient fort bien réduire la sécurité juridique et également souffrir, comme la cinquième option, d'autres problèmes significatifs. La première option pourrait réduire la sécurité juridique en diminuant l'utilité de la jurisprudence élaborée dans l'exécution des dispositions du droit de la concurrence qui ne sont pas consacrées aux fusions. Ces disposition pourraient parfaitement être interprétées et appliquées en vue de tenir le pouvoir de marché en échec. En outre, l'abandon du concept de pouvoir de marché signifierait que le contrôle des fusions serait moins focalisé sur l'objectif d'efficience économique, qui est probablement l'un des principaux objectifs du contrôle des fusions dans toutes les juridictions. Qui plus est, et comme nous l'avons déjà noté, le fait d'accorder une importance secondaire au pouvoir de marché pourrait rendre la coopération internationale plus difficile. La seconde option introduira une insécurité juridique en exigeant de prévoir quelle approche de la définition du marché sera utilisée dans une fusion particulière. Elle pourrait également faire soupçonner que, dans certains cas particuliers, le contrôle des fusions soit davantage mû par le désir de parvenir à un résultat particulier que par une attention exclusive portée aux faits établis par des preuves. En outre, il y aura moins de jurisprudence à laquelle se référer pour prévoir comment chaque approche sera appliquée. L'adoption uniforme de définitions étroites du marché résoudrait ces questions, mais pourrait également créer une difficulté en soi. Elle pourrait engendrer la nécessité d'appliquer des analyses complexes de portefeuilles, du type de celles qui sont effectuées dans les fusions conglomérales. Au contraire, des définitions plus larges du marché soutiendraient l'application de l'approche plus simple et plus prévisible utilisée pour les fusions horizontales.[89] L'adoption de différents seuils de position dominante, selon qu'il s'agit d'une position dominante individuelle ou collective, pourrait également réduire la sécurité juridique en divisant la jurisprudence qui s'applique aux deux. En outre, il est éminemment douteux que des tribunaux permettraient un tel divorce, qui réduirait encore la sécurité juridique jusqu'à ce que cette question soit clairement réglée. En ce qui concerne la cinquième option, nous avons déjà noté que l'abaissement du seuil de pouvoir de marché requis pour constater l'existence d'une position dominante pourrait produire des effets dommageables significatifs, en élargissant le champ des interdictions d'abus de position dominante. Enfin, en ce qui concerne la sixième option, il n'est pas du tout certain que les tribunaux des juridictions appliquant le critère de la position dominante soient désireux d'étendre la position dominante collective afin de couvrir toutes les formes d'interdépendance oligopolistique tendant à provoquer une hausse des prix après la fusion.

Par contraste avec ce qui vient d'être observé, le moyen suggéré pour accroître la flexibilité du critère SLC, c'est-à-dire garantir ou clarifier qu'il inclut une branche empêchement, accroîtrait probablement la sécurité juridique plutôt qu'il ne la réduirait, et ne semble pas créer de problèmes significatifs en soi.

En conclusion, si l'on examine la situation d'ensemble et prend note des effets salutaires qui découleraient, en vertu de l'un ou l'autre critère, de la publication de lignes directrices détaillées sur les fusions et d'un pourcentage important de décisions en matière de fusions, et, peut-être, de l'inclusion de critères d'évaluation dans le droit de la concurrence, il pourrait s'avérer qu'aucun critère de concurrence ne présente un net avantage sur l'autre en termes de sécurité juridique.

9. Remarques Finales

Nous avons soutenu qu'une fusion peut nuire aux consommateurs et être bloquée par un critère SLC, en dépit du fait qu'elle ne crée ni ne renforce pas une position dominante. Nous avons également soutenu qu'il peut exister des fusions renforçant plutôt que créant une position dominante, qui puisse être plus facilement bloquée en appliquant un critère de la position dominante qu'un critère SLC. En général, le critère SLC est susceptible d'être plus rigoureux en ce qui concerne les fusions anticoncurrentielles survenant sur des marchés où il n'existait aucune position dominante individuelle ou collective avant la fusion, tandis que l'inverse peut être vrai pour les fusions anticoncurrentielles qui renforcent une position dominante préexistante.

Une grande partie de l'écart de couverture pouvant favoriser le critère de la position dominante pourrait être réduite ou éliminée en ajoutant, ou simplement en rendant plus explicite une branche "empêchement" dans le critère SLC. Cela permettrait non seulement de combler largement cet écart, mais également de ce faire sans créer des problèmes significatifs en soi.

S'agissant des fusions anticoncurrentielles qui pourraient plus aisément être bloquées par le critère SLC, par comparaison avec le critère de la position dominante, ce document a identifié et critiqué six moyens de combler largement ou totalement cet écart. Ils sont énumérés à la fin de la précédente section du document. Nous avons vu que tous ces moyens impliquent des problèmes juridiques ou politiques significatifs. Pour commencer, il convient de noter que les tribunaux pourraient s'avérer très réticents à élargir le concept de position dominante collective pour bloquer des fusions, si l'interdépendance oligopolistique "non-coopérative" (c'est-à-dire un comportement qui n'implique explicitement ni tacitement aucune collusion) tend à entraîner une hausse des prix après la fusion. En outre, les tribunaux pourraient résister à dissocier les définitions de la position dominante individuelle et collective et, partiellement pour ce motif, résister également à abaisser les seuils de pouvoir de marché liés à une position dominante collective ou individuelle. Les tribunaux répugneront probablement à admettre que plusieurs entreprises de tailles différentes jouissent d'une position dominante individuelle sur une marché antitrust convenablement défini.

La dissociation de ces définitions pose une question beaucoup plus grave. Les tribunaux pourraient être peu disposés à dissocier les définitions de la position dominante, selon qu'il s'agit d'une affaire de contrôle des fusions ou d'abus de position dominante. En d'autres termes, les autorités de contrôle de la concurrence souhaiteront être très prudentes dans leurs tentatives pour abaisser le seuil de marché lié à la position dominante, en matière de contrôle des fusions. Elle redouteront de bousculer, ce faisant, l'équilibre incorporé dans les interdictions d'abus de position dominante. La position dominante est un élément vital de ces interdictions, car les pratiques qu'elles entendent stopper pourraient parfaitement être pro-concurrentielles si elles ont employés par des entreprises non dominantes. L'abaissement de la position dominante à un niveau de pouvoir de marché suffisant pour provoquer une hausse de prix au-dessus des niveaux concurrentiels, à la mesure de la SLC, éliminerait le criblage de la position dominante et aboutirait à prononcer des interdictions d'abus de position dominante d'une manière qui ferait plus de mal que de bien.

Toujours sur le thème de la dissociation des définitions, il convient de noter que l'affaiblissement du lien entre le pouvoir de marché et la position dominante pourrait avoir deux effets négatifs. Il pourrait perdre de vue l'objectif important de l'efficience économique, et peut-être réduire la sécurité juridique. Des effets négatifs sur la sécurité juridique pourraient également découler de quatre des cinq autres moyens cités d'élargir la portée du critère de la position dominante, appliqué en matière de contrôle des fusions. La seule exception est le dernier point mentionné, c'est-à-dire garantir que la position dominante collective permette d'appréhender à la fois un comportement coopératif et non-coopératif.

Ajouter une souplesse suffisante afin de garantir que les deux critères de concurrence soient également susceptibles de bloquer des fusions dommageables ne signifie pas que les critères auraient des effets économiques équivalents. Pour une équivalence complète, les deux critères doivent également avoir le même impact en termes d'encouragement de la sécurité juridique, évitant ainsi l'effet refroidissant qui découragerait des fusions bénéfiques.

Il est très difficile de choisir entre les critères lorsqu'il s'agit de sécurité juridique. Nous avons noté que le critère de la position dominante peut être intrinsèquement moins souple, et donc supérieur sur le plan de la sécurité juridique. Nous avons toutefois soutenu que cet avantage peut être réduit, voire même inversé en faveur du critère SLC, si l'on considère les effets des modifications exigées pour garantir que les deux critères aient un pouvoir égal de blocage de fusions dommageables. En toute hypothèse, il se peut parfaitement que si les juridictions publient des lignes directrices détaillées, décrivent leurs décisions en matière de contrôle des fusions (y compris, à tout le moins, certaines de celles qu'elles choisissent de ne pas contester ni modifier), et, éventuellement, fournissent des critères légaux pour leurs critères de concurrence, il y aura probablement peu de différence, voire aucune, entre les critères de concurrence en ce qui concerne la sécurité juridique.

Dans la comparaison de certains aspects des approches américaine et allemande du contrôle des fusions, nous avons noté que les différents seuils inhérents au critère SLC et au critère de la position dominante semblent être liés à des objectifs différents, ou, plus précisément peut-être, à des vues sous-jacentes différentes concernant la résilience des marchés. L'approche allemande, et le critère de la position dominante lui-même, pourraient être décrits comme un véritable laissez-faire pour des fusions sur des marchés où il n'existe aucune position dominante, que ce soit avant ou après la fusion, mais comme un barrage très rigoureux lorsqu'il existe une position dominante avant la fusion. Une philosophie similaire semble caractériser le contrôle des fusions par la Commission Européenne. Dans sa récente étude des décisions divergentes prises par les Etats-Unis et la Communauté Européenne dans la fusion General Electric/Honeywell, Götz Drauz, directeur de la Task Force « Contrôle des Opérations de Concentration entre Entreprises » de la Commission Européenne, a fait observer :

> Je pense que la plupart des lecteurs conviendront que l'objet du contrôle des concentrations est d'empêcher l' accumulation d'un pouvoir de marché excessif par une entreprise ou un petit nombre d'entreprises. En outre, le contrôle des fusions doit viser à la préservation de structures de marché concurrentielles, qui peuvent bénéficier au consommateur en maintenant la concurrence. Ce disant, j'espère que vous conviendrez également que si des concurrents sont écartés, marginalisés ou éliminés du marché, ils ne peuvent constituer aucune contrainte concurrentielle crédible pour les entreprises dominantes fusionnées. En d'autres termes, et sous réserve de cas exceptionnels comme des monopoles naturels, il ne peut y avoir aucune concurrence effective sans concurrents. C'est l'envers de l'adage si fréquemment entendu selon lequel la législation antitrust n'est pas près de protéger les concurrents.[90] (soulignage ajouté)

Considérons également trois extraits de ce que William Kovacic, General Counsel de la FTC américaine, a déclaré lors de l'examen des différences transatlantiques de traitement de la fusion Boeing/McDonnell Douglas :

> La volonté de se placer délibérément dans la perspective du client suggère la manière dont les fonctionnaires américains chargé du contrôle de la concurrence sont moins enclins à tirer des conclusions définitives sur la sensibilité d'un marché à l'exclusion post-fusion, à partir de la simple taille de l'entreprise issue de la fusion ou de la masse de ses ressources financières. La méthodologie de la Commission Européenne a rapidement inféré des risques concurrentiels de la combinaison des parts de marché et des ressources financières de Boeing-MDC, et n'a pas même abordé l'hypothèse de contre-stratégies efficaces de Airbus, des acheteurs d'avions ou des

> fournisseurs des constructeurs aéronautiques. Globalement, la politique américaine en matière de fusions donne plus de poids à la résilience et à l'adaptabilité des entreprises que l'entité issue de la fusion pourrait tenter d'opprimer.
>
> Comparées aux autorités américaines, les autorités européennes de contrôle des fusions doutent plus des efficiences et de l'adaptabilité des rivaux, clients et fournisseurs à compenser convenablement les risques concurrentiels liés à l'établissement ou au renforcement d'une position dominante.
>
> Comme l'était la politique américaine dans les années 1960 et au début des années 1970, la politique européenne en matière de fusion est actuellement sceptique sur les arguments d'efficience, et très circonspecte à propos des marchés concentrés. Il serait inexact de dire que ces perspectives de la politique communautaire traduisent une décision fondamentale de protéger les concurrents sans égard pour les intérêts des consommateurs. En revanche, il est exact que la politique communautaire continue de faire davantage confiance à des critères structurels, qu'elle considère comme des augures du futur bien-être des consommateurs.[91] (soulignage ajouté)

Dans la mesure où les citations ci-dessus de Drauz et Kovacic décrivent correctement la politique de la Commission Européenne, on pourrait en conclure que les seuils inhérents à un critère de la position dominante sont bien adaptés aux objectifs de la Commission, et à ses hypothèses de base sur la dynamique du marché. Et l'on peut simplement présumer que la dynamique des marchés, autres que ceux qui sont réellement internationaux de nature, est la même des deux côtés de l'Atlantique.

Bien qu'il puisse parfaitement y avoir des différences importantes entre le critère de la position dominante et le critère SLC, cela ne signifie pas que les réformateurs doivent exclusivement regarder dans cette direction. D'autres questions méritent de l'attention, qui sont d'ailleurs liées à la question des critères, et notamment : les objectifs du contrôle des fusions ; le poids donné aux effets concurrentiels par rapport aux autres facteurs rencontrés dans des critères liés à l'intérêt public ; la mesure dans laquelle le pouvoir de marché, par opposition à des considérations structurelles ou autres, est déterminant dans l'application d'un critère de concurrence ; le rôle joué par les efficiences ; la mesure dans laquelle le cadre d'évaluation général est adapté en cas de fusions concernant des entreprises en difficultés ; et le degré de pouvoir discrétionnaire dont dispose l'autorité de contrôle de la concurrence. Il est improbable que le type de critère de concurrence adopté élimine un grand nombre des questions de cette liste. En d'autres termes, la formulation particulière du critère de concurrence n'est probablement pas aussi importante que la manière dont il est appliqué.

Annexe

Revue des aspects des lignes directrices américaines et allemandes sur les fusions, relatifs à l'appréciation et à la comparaison de leurs critères de fond

Etats-Unis

Les Lignes Directrices des Etats-Unis en matière de Fusions Horizontales ("Lignes Directrices Américaines") présentent la politique d'application, par les autorités antitrust américaines, de l'article 7 du Clayton Act (Loi Clayton), de l'article 1 du Sherman Act (Loi Sherman) et de l'article 5 du Federal Trade Commission Act (Loi sur la Commission Fédérale du Commerce). L'article 7 du Clayton Act dispose :[92]

> Aucune personne engagée dans le commerce ou toute activité affectant le commerce ne doit acquérir, directement ou indirectement, la totalité ou une partie quelconque des actions ou autres titres de capital, et aucune personne soumise à la compétence de la Commission Fédérale du Commerce ne doit acquérir la totalité ou une partie quelconque des actifs d'une autre personne également engagée dans le commerce ou toute activité affectant le commerce dans un lieu quelconque du pays, si cette acquisition peut avoir pour effet de diminuer substantiellement la concurrence, ou de tendre à créer un monopole. (soulignage ajouté)

L'Article 1 du Sherman Act interdit les fusions si elles constituent un "contrat, un arrangement ou une conspiration pour restreindre le commerce";[93] et l'Article 5 du Federal Trade Commission Act fait de même pour les fusions constituant une "méthode déloyale de concurrence".

Les Lignes Directrices Américaines commencent par une déclaration liminaire définissant leur objectif général :

> Les Lignes Directrices sur les Fusions Horizontales adoptées en 1992 par le Département de la Justice et la Commission Fédérale du Commerce reposent sur un élément central : la reconnaissance qu'une bonne application de la législation sur les fusions constitue un composant essentiel de notre système de libre entreprise, qui bénéficie à la compétitivité des entreprises américaines et au bien-être des consommateurs américains. Cette bonne application doit empêcher des fusions anticoncurrentielles, tout en évitant d'exclure le vaste univers des fusions pro-concurrentielles ou des fusions neutres sur le plan concurrentiel.[94]
>
> Elles articulent ensuite un objectif plus précis :
>
> …il ne faut pas permettre que des fusions créent ou renforcent un pouvoir de marché ou facilitent son exercice. Le pouvoir de marché d'un vendeur est sa capacité à maintenir de manière profitable des prix au-dessus des niveaux concurrentiels pendant une période de temps significative. Dans ces circonstances, un vendeur unique (« monopoliste ») d'un produit n'ayant pas de bons substituts peut maintenir un prix de vente supérieur au niveau qui prévaudrait si le marché était concurrentiel. De la même manière, dans certaines circonstances, si seul un petit nombre d'entreprises concentrent la majorité des ventes d'un produit, ces entreprises peuvent exercer un pouvoir de marché, voire même peut-être approcher des performances d'un monopoliste, en coordonnant explicitement ou implicitement leurs actions. Des circonstances peuvent également permettre à une entreprise seule, qui n'est pas un monopoliste, d'exercer un pouvoir de marché par une conduite unilatérale ou non-coordonnée - conduite dont le succès ne dépend pas du concours d'autres entreprises sur le marché ou de réactions coordonnées émanant

de ces entreprises. En toute hypothèse, l'exercice du pouvoir de marché a pour résultat de transférer des richesses des acheteurs aux vendeurs ou d'opérer une mauvaise allocation de ressources.[95]

En bref, les Lignes Directrices Américaines appliquent un critère SLC qui est destiné à empêcher la création ou le renforcement d'un pouvoir de marché, que l'on peut grossièrement caractériser comme le fait d'augmenter les prix au-dessus, ou très au-dessus des niveaux concurrentiels. Etant donné que le prix pré-fusion n'est pas susceptible d'être inférieur au niveau concurrentiel, on résume fréquemment le critère appliqué par les Etats-Unis en matière de fusions en disant que les fusions qui sont susceptibles d'augmenter les prix d'un montant négligeable et pendant une période de temps significative seront interdites.

Les Lignes Directrices Américaines développent longuement la manière dont les marchés seront définis, les parts de marché assignées et les concentrations estimées. C'est parce que le niveau de concentration qui prévaut, et les changements qui le modifient, sont considérés comme un facteur important pour déterminer si une fusion tendra à accroître le pouvoir de marché. Trois niveaux de concentration, calculés en termes de HHI (Herfindahl-Hirschman Index ou Indice de Herfindahl-Hirschman)[96], sont présentés et certaines déductions générales sont faites à propos de chacun d'eux :

1. HHI post-fusion inférieur à 1 000 (niveau qui prévaudra si le marché est servi par dix concurrents de taille égale) : "L'Agence considère que les marchés de cette région ne sont pas concentrés. Il est improbable que les fusions résultant en marchés non concentrés aient des effets concurrentiels défavorables et ces fusions n'exigent généralement aucune analyse supplémentaire."

2. HHI post-fusion compris entre 1 000 et 1 800, c'est-à-dire modérément concentré. Les fusions intervenant dans cette fourchette et conduisant à une augmentation de moins de 100 points ne sont "…pas susceptibles d'avoir des conséquences concurrentielles défavorables et n'exigent généralement aucune analyse supplémentaire." Si la fusion produit au contraire une augmentation de plus de 100 points du HHI, elle peut "…potentiellement susciter des problèmes concurrentiels significatifs en fonction des facteurs énumérés dans [des sections subséquentes] des Lignes Directrices."

3. HHI post-fusion supérieur à 1 800 (2 000 correspondrait à cinq concurrents de même taille), c'est-à-dire hautement concentré. Les fusions produisant un accroissement du HHI inférieur à 50 points ne sont pas "…susceptibles d'avoir des conséquences défavorables et n'exigent généralement aucune analyse supplémentaire." Une hausse du HHI de plus de 50 points "…pose des problèmes significatifs, en fonction des facteurs énumérés dans [des sections subséquentes] des Lignes Directrices." Les fusions produisant une hausse du HHI de plus de 100 points seront présumées "…susceptibles de …créer ou renforcer le pouvoir de marché ou d'en faciliter l'exercice." Cette présomption peut être renversée en "…prouvant que des facteurs énumérés dans des [sections subséquentes] des Lignes Directrices rendent improbable que la fusion créera ou renforcera un pouvoir de marché ou en facilitera l'exercice…."[97]

A l'exception de la présomption renversable visée à la fin du point 3, ces seuils constituent fondamentalement des "ports sûrs » plutôt qu'ils n'articulent des présomptions qu'une fusion produira une SLC. Il convient de noter, toutefois, qu'une autre présomption approximativement équivalente est traitée dans le contexte de la discussion des "effets unilatéraux". Elle s'applique lorsque la fusion sort du cadre des « ports sûrs » précités, lorsque :

> …les entreprises fusionnant détiennent une part de marché combinée d'au moins trente-cinq pour cent, et lorsque les données sur les attributs du produit et l'attrait relatif du produit démontrent qu'une part significative des acheteurs du produit de l'une des entreprises fusionnant considère l'autre comme son second choix, les données sur les parts de marché pourront être prises en compte pour démontrer qu'une part significative des ventes sur le marché est imputable à des consommateurs qui seront défavorablement affectés par la fusion.[98]
>
> Conformément à la volonté générale d'éviter des présomptions fondées sur les parts de marché, les Lignes Directrices soulignent que :
>
> ...les données sur les parts de marché et la concentration du marché fournissent seulement le point de départ de l'analyse de l'impact concurrentiel d'une fusion. Avant de déterminer s'il convient de contester une fusion, l'Agence évaluera également les autres facteurs de marché qui ont sauvegardé des effets concurrentiels, ainsi que l'entrée, les efficiences et les défaillances.[99]

Les « Lignes Directrices sur les Fusions Non-Horizontales » des Etats-Unis (Département de la Justice), qui datent un peu mais sont toujours en vigueur, font un nombre considérablement supérieur de références aux données sur les parts de marché et la concentration du marché. Dans tous les cas sauf un, ces données servent à reconnaître l'existence d'un "port sûr » au-dessous d'un HHI de 1 800 (sur le marché de l'entreprise acquise) plutôt qu'à invoquer une présomption de SLC.[100]

Pour en revenir aux Lignes Directrices Américaines, leur texte décrit, à la suite des développements consacrés aux niveaux de concentration, deux manières principales dont une fusion pourrait créer ou renforcer le pouvoir de marché ou en faciliter l'exercice, à savoir une interaction coordonnée et des effets unilatéraux. Ils ont été amplement décrits dans l'introduction à ce document et ne seront donc pas développés ici.

Les Lignes Directrices Américaines finissent sur un panorama des efficiences et des questions spéciales qui se posent lorsque l'une des parties fusionnant est en danger de défaillance imminente. Dans les deux cas, la charge de la preuve est déplacée des autorités de contrôle de la concurrence vers les parties fusionnant. En ce sens, les deux peuvent être considérés comme des "arguments de défense" qui peut sauver une fusion qui serait autrement anticoncurrentielle. Aucun de ces arguments n'est pertinent à moins que la fusion, sans considérer les effets des efficiences alléguées ou de la défaillance imminente, ne soit susceptible de produire une SLC.

En termes généraux, les autorités américaines de contrôle de la concurrence considéreront si des efficiences "spécifiques à la fusion"[101] et "reconnaissables" sont ou non susceptibles d'être "…suffisantes pour annuler le dommage potentiel que la fusion peut causer aux consommateurs sur le marché pertinent, par ex. en empêchant des hausses de prix sur ce marché."[102] Pour que les efficiences soient "reconnaissables", il faut que les parties fusionnant "…les justifient de manière circonstanciée, de telle sorte que l'Agence puisse vérifier par des moyens raisonnables la probabilité et l'ampleur de chaque efficience alléguée, comment et quand chacune d'elles se produira (ainsi que tous les coûts en découlant), comment chacune d'elles accroîtra la capacité et l'incitation de l'entreprise fusionnée à être concurrentielle, et pourquoi chacune d'elles sera spécifique à la fusion." [103] N'était-ce ce renversement de la charge de la preuve, il n'y aurait probablement aucune nécessité de traiter des efficiences à la fin des Lignes Directrices. Celles-ci seraient alors probablement considérées en même temps et au même rang que tous autres éléments pris en compte pour déterminer si une fusion est susceptible de provoquer une hausse des prix.

Les développements consacrés à l'entreprise défaillante énumèrent ce que les parties doivent démontrer pour faire valoir cet argument de défense. Elles doivent essentiellement prouver que la

défaillance est réellement imminente, et qu'en cas de blocage de la fusion, les actifs appartenant à l'entreprise en difficultés sortiront probablement du marché. Cela suppose notamment de démontrer que l'entreprise défaillante "…a déployé de bonne foi des efforts inutiles pour obtenir des offres alternatives raisonnables d'acquisition de ses actifs, qui lui permettraient de conserver ses actifs corporels et incorporels sur le marché pertinent et impliqueraient un danger moins grave pour la concurrence que ne le fait la fusion proposée."[104]

Allemagne

Dans une récente description de son cadre analytique de contrôle des fusions ("Document Cadre Allemand sur les Fusions"), le Bundeskartellamt a fait observer ce qui suit:

> Aux termes de l'Article 36(1) de la Loi contre les Restrictions à la Concurrence [LRC], une fusion doit être interdite par le Bundeskartellamt "s'il est prévu qu'elle crée ou renforce une position dominante."[105]

Les « Principes d'Interprétation » du Bundeskartellamt (traduction officieuse), que nous viserons sous le terme de "Lignes Directrices Allemandes", décrivent leurs objectifs de contrôle des fusions dans les termes suivants :

> La tâche du contrôle des fusions est de contrer une concentration "excessive" d'entreprises. L'objectif est ici de maintenir des structures de marché concurrentielles et de garantir que le champ d'action des entreprises est suffisamment contrôlé et n'empiète pas sur la liberté substantielle d'action des autres entreprises et des consommateurs. Le contrôle des fusions doit donc combattre tout risque pour la concurrence qui pourrait naître d'un changement de la structure du marché résultant d'une concentration ("approche structurelle").[106]

La position dominante est manifestement un élément central de l'approche allemande, et inclut à la fois la "position dominante d'une seule entreprise" et "la position dominante oligopolistique". Le Document Cadre Allemand sur les Fusions commence par la position dominante individuelle, décrite de la manière suivante :

> Le concept de position dominante sur le marché est défini en termes concrets à l'Article 19(2) de la LRC, qui dispose qu'une entreprise est présumée détenir une position dominante lorsqu'elle n'a pas de concurrents (première option), n'est exposée à aucune concurrence substantielle (seconde option), ou détient une position prééminente sur le marché par rapport à ses concurrents (troisième option). La première variante n'a pas de grande signification pratique, car l'absence totale de concurrence ne peut être présumée que dans des cas très exceptionnels. Bien que les première et seconde variantes déterminent une certaine absence de concurrence (substantielle), la perspective que la restriction de la concurrence conduise très probablement à un arrêt de la concurrence dans la suite des événements suffit à déterminer une position prééminente sur le marché. La troisième variante est donc la plus significative en matière de contrôle des fusions.
>
> Une position prééminente sur le marché existe si le champ d'action d'une entreprise n'est pas suffisamment contrôlé par ses concurrents en raison de critères structurels liés au marché ou à l'entreprise. Une fusion renforce la position prééminente sur le marché si les conditions concurrentielles sur le marché affecté empirent encore en conséquence de la fusion.
>
> L'Article 19(2) phrase no. 1(2) de la LRC définit les facteurs principaux qui doivent être pris en compte lors de l'examen d'une position prééminente sur le marché. La part de marché forme

> toujours la base de l'évaluation du pouvoir de marché. Une position dominante est présumée exister au sens de l'Article 19(3) de la LRC si une entreprise détient une part de marché d'un tiers au moins. Indépendamment de la part de marché, la loi institue les critères d'évaluation suivants : puissance financière, accès aux marchés des fournisseurs ou des vendeurs, liens avec d'autres entreprises, barrière légales ou factuelles à l'entrée sur le marché par d'autres entreprises, concurrence réelle ou potentielle par des entreprises implantées dans le territoire d'application de la présente Loi ou à l'extérieur de ce territoire, aptitude à déplacer l'offre ou la demande vers d'autres produits ou services commerciaux, et capacité des antagonistes sur le marché à recourir à d'autres entreprises. Cette liste n'est pas exhaustive. Lorsqu'il examine une fusion, le Bundeskartellamt doit apprécier globalement tous les critères.[107]

Il est important de noter que la présomption de position dominante individuelle, au-delà d'une part de marché d'un tiers, est une présomption simple.[108] En outre, les Lignes Directrices Allemandes attirent l'attention sur une liste de facteurs à examiner pour déterminer l'existence d'une position dominante. Cette liste reflète l'opinion selon laquelle :

> …en principe, la position d'une entreprise sur le marché ne peut pas être appréciée exclusivement en examinant des critères structurels (par exemple part de marché, concurrence existante ou potentielle), mais uniquement en considérant tous les aspects pertinents d'un cas particulier. En conséquence, il se peut même que des concentrations impliquant de grandes parts de marché ne soient pas interdites car il est prévu que d'autres facteurs structurels, - par ex. une concurrence potentielle de l'étranger et une forte demande sur le marché -, garantissent que le champ d'action des parties fusionnant sera suffisamment contrôlé.[109]

Immédiatement après les développements consacrés aux parts de marché, les Lignes Directrices Allemandes abordent "l'évaluation des ressources, en particulier de la puissance financière". En termes de nombre de pages consacrées à cette question, seules les parts de marché et les barrières à l'entrée reçoivent une plus grande attention dans la section consacrée à la position dominante individuelle. La section sur les ressources est introduite dans les termes suivants :

> Une puissance financière supérieure peut fournir à une entreprise un champ d'action, en particulier en ce qui concerne l'utilisation de paramètres de concurrence, tels les prix, les investissements, la recherche et la publicité. La même remarque vaut, par exemple, d'un vaste programme de production ou éventail de produits, ou de ressources qui sont spécifiques à un secteur ou marché particulier, en particulier les ressources technologiques. Des ressources supérieures entraînent une position prééminente sur le marché si elles limitent les alternatives disponibles pour les acheteurs, et si elles produisent des effets décourageants et dissuasifs sur les concurrents. Dans certains cas, des profits peuvent être transférés et des pertes équilibrées d'un marché à l'autre. Ces effets se manifestent par le fait que les concurrents existants s'abstiennent de se livrer à une concurrence active et que les concurrents potentiels s'abstiennent d'entrer sur le marché.
>
> La présomption que des ressources supérieures sont effectivement utilisées doit être dûment établie. Ces ressources ne sont pas prises en compte dans les marchés où elles n'ont qu'une importance secondaire. A cet égard, la pratique des tribunaux se focalise sur la pertinence du marché et les objectifs commerciaux, par exemple des stratégies de diversification. L'allégation selon laquelle l'évaluation faite de la puissance financière d'une entreprise serait spéculative, telle qu'elle est effectuée dans le cadre du contrôle des fusions, peut être invalidée s'il existe une coïncidence entre les ressources potentielles, un fort intérêt à utiliser des ressources, la pertinence de ces ressources potentielles sur le marché et les possibilités limitées de réaction des concurrents existants et potentiels.[110]

Un point important se dégage des développements qui précèdent, à savoir la présomption implicite de position dominante individuelle ne peut s'attacher qu'à une seule entreprise opérant sur un marché antitrust bien défini. L'entreprise issue de la fusion semble devoir être comparée à tous ses concurrents, et non pas à certains seulement d'entre eux.

Après avoir traité de la position dominante individuelle, le Document Cadre Allemand sur les Fusions tourne son attention vers la position dominante oligopolistique décrite comme suit :

> Aux termes de l'Article 19(2) 2ème phrase de la LRC, deux entreprises ou plus détiennent une position dominante dans la mesure où elles satisfont conjointement aux conditions posées pour conclure à l'existence d'une position dominante sur le marché et où il n'existe aucune concurrence substantielle entre elles. En conséquence, l'évaluation d'une situation oligopolistique exige d'examiner d'abord si les conditions de concurrence interne favorisent une conduite parallèle anticoncurrentielle. Les seuils de présomption en matière de position dominante oligopolistique se situent à une part de marché combinée de 50 pour cent dans le cas d'un maximum de trois entreprises ou à deux tiers pour un maximum de cinq entreprises. Les avantages en termes de part de marché et de ressources, ainsi que les imbrications ou l'interdépendance économique entre les oligopolistes et les outsiders revêtent une importance particulière en ce qui concerne la concurrence externe. Plusieurs critères supplémentaires sont appliqués dans l'évaluation de la position dominante oligopolistique, y compris le niveau de transparence du marché, l'homogénéité des produits et l'activité concurrentielle effective sur le marché. L'appréciation de la position dominante collective exige en outre une évaluation complète et une prise en compte de toutes les conditions concurrentielles.[111]

Dans les Lignes Directrices Allemandes, la position dominante oligopolistique est introduite en considérant l'interdépendance oligopolistique générale qui, comme elles le notent, pourrait donner lieu aux résultats les plus divers, depuis une "concurrence oligopolistique" intense jusqu'à des oligopoles "non-concurrentiels ou concurrentiels pour partie seulement". Elles développent ce point dans les termes suivants :

> L'interdépendance oligopolistique peut par exemple conduire aux réductions de prix d'un oligopoliste poussant ses concurrents à réduire également leurs prix pour éviter de perdre des clients. Il en résulterait des prix plus bas et des profits plus faibles pour tous les fournisseurs. Si les fournisseurs ont conscience de ces interactions, ils essayeront d'éviter une situation de ce type, dans laquelle tous les fournisseurs essuieraient des pertes. Ils feront usage de leurs paramètres concurrentiels, conscients des réactions possibles de leurs concurrents. En l'absence même d'accords formels, cette prise en considération mutuelle pourra conduire les membres de l'oligopole à agir comme un monopole collectif. Les concepts élaborés à partir de théories de jeu, et la jurisprudence des autorités de contrôle de la concurrence, ont mis au jour une série de facteurs qui peuvent pousser les oligopolistes à suivre le code de conduite non écrit décrit ci-dessus. Ce code de conduite oligopolistique exige en particulier la possibilité d'actions de représailles afin d'empêcher les franc-tireurs de circonvenir ce code, dans le but, par exemple, d'exploiter l'écart entre le prix de l'oligopole et les coûts marginaux. La question de savoir si ces actions de représailles sont possibles dépend, en particulier, des conditions individuelles du marché.[112] (soulignage ajouté)

A la fin des développements consacrés à la description de la "définition de la position dominante oligopolistique dans le système allemand de contrôle des fusions", les Lignes Directrices Allemandes indiquent :

> Les facteurs les plus importants en ce qui concerne la création d'une position dominante oligopolistique – en ce comprises des situations où la position dominante individuelle est remplacée par une position dominante oligopolistique – sont les conditions de concurrence après la fusion. L'évaluation globale des conditions de concurrence après la fusion doit démontrer qu'il est probable que l'oligopole adoptera un parallélisme conscient à l'avenir. Il doit y avoir une forte probabilité que la concurrence substantielle qui s'est établie avant la fusion, ou qui était du moins présumée avant celle-ci, n'existera plus après la fusion. Plus les conditions du marché concerné seront modifiées en conséquence de la fusion, et moins l'indication qu'il existait une concurrence substantielle avant la fusion aura d'impact.
>
> En ce qui concerne le renforcement de la position dominante oligopolistique, il convient d'examiner si les conditions de concurrence sont susceptibles de se détériorer encore. Les preuves exigées pour établir que ce renforcement a eu lieu seront d'autant moindres que le degré de concentration sur le marché sera élevé (voir section consacrée à la position dominante individuelle).
>
> Il n'est pas nécessaire, pour établir la position dominante oligopolistique, de prouver que les membres de l'oligopole se sont livrés à une collusion active. Au contraire, le simple fait que les membres de l'oligopole adaptent leur comportement aux conditions du marché peut entraîner une conduite parallèle anticoncurrentielle, ayant pour conséquence de rendre l'oligopole dominant. Cette observation est compatible avec le fait que des marchés montrant des signes d'accords d'entente courent un risque particulièrement élevé de position dominante oligopolistique, et que des imbrications constituent un important critère d'examen de la position dominante oligopolistique.[113]

Les Lignes Directrices Allemandes contiennent des sections séparées traitant des critères d'examen en ce qui concerne la concurrence interne et externe. L'analyse de la concurrence interne se concentre fondamentalement sur l'évaluation de la probabilité qu'à supposer qu'il ne soit pas soumis à la pression d'entreprises extérieures, un groupe d'oligopolistes pourra remplacer la concurrence régnant entre eux par une certaine forme de coordination. Les facteurs essentiels examinés pour les besoins de cette évaluation sont les suivants : parts de marché ; "rapports de force au sein de l'oligopole" ; différentes "imbrications" entre les oligopolistes ; capacité des acheteurs à contrôler l'exercice du pouvoir de marché du vendeur, et phase de développement du marché. L'analyse de la concurrence externe est très similaire à celle qui est effectuée pour déterminer si une seule entreprise détient une position dominante, les oligopolistes étant considérés comme une seule entreprise.[114]

Les Lignes Directrices Allemandes traitent également la question de ce qui constitue un renforcement de la "position prééminente", c'est-à-dire la forme la plus commune de position dominante individuelle et la seule pour laquelle le renforcement semblerait particulièrement pertinent. Les Lignes Directrices indiquent :

> Une fusion renforce une position prééminente sur le marché si les conditions concurrentielles sur le marché concerné deviennent encore pires en conséquence de celle-ci. Outre la détermination de l'existence d'une position prééminente sur le marché, il convient ensuite d'examiner si le champ d'action non contrôlé existant est étendu, et si une concurrence efficiente deviendra ce faisant encore moins probable. Les mêmes facteurs servent à établir la création et le renforcement d'une position dominante.
>
> La position d'une entreprise est déjà renforcée si elle est mieux en mesure de parer à la concurrence consécutive après la fusion qu'avant, et peut en conséquence maintenir ou garantir sa position dominante sur le marché. Plus le marché concerné est déjà dominé, moins il sera

> nécessaire de prouver qu'une position dominante est renforcée. Même de petits changements dans les facteurs déterminant le pouvoir de marché suffiront pour établir l'effet de renforcement, s'il existe déjà une concentration élevée sur le marché. Il n'est absolument pas nécessaire dans ces cas que les parts de marché augmentent. Le renforcement de la position d'une entreprise peut également être due à d'autres accroissements des ressources. La Cour Suprême Fédérale a considéré, par exemple, que des changements structurels même faibles consécutifs à des fusions verticales dans le secteur de la fourniture d'énergie (par exemple en assurant la pérennité de contrats de fourniture d'énergie existants, au moyen du droit des sociétés), constituaient des éléments de renforcement suffisants en raison du degré élevé de concentration de ce secteur. Dans l'affaire "Kali+Salz/PCS", l'élimination d'un concurrent potentiel et le plus grand potentiel de l'entreprise dominante à se défendre contre l'entrée sur le marché de nouveaux concurrents, ont été des éléments décisifs pour reconnaître que sa position dominante était renforcée.
>
> Le fait d'avoir une plus grande influence sur une société cible, par exemple en passant d'un contrôle commun à un contrôle exclusif, peut également renforcer une position dominante dans la mesure où les ressources de la société dominante produisent des effets concurrentiels encore accrus. En revanche, une position dominante n'est pas renforcée si l'évaluation concurrentielle établit que la part de marché et le chiffre d'affaires de la société absorbée étaient déjà entièrement imputables à la société acquéreur avant la fusion, c'est-à-dire si aucun effet concurrentiel correspondant ne naîtra de l'acquisition par la société absorbante de droits ou ressources supplémentaires.[115]

Contrairement aux Lignes Directrices Américaines, les Lignes Directrices Allemandes ne contiennent rien à propos d'un moyen de défense ou d'une exception se rapportant aux efficiences. Cependant, elles contiennent un moyen de défense se rapportant au cas d'une "entreprise menacée de faillite". Ce moyen peut être invoqué dans le cas particulier où il n'existe aucun lien de causalité entre la fusion et la création ou le renforcement d'une position dominante. Pour pouvoir l'invoquer, les parties doivent rapporter la preuve que la défaillance/faillite est imminente, et que la société acquéreur obtiendra l'intégralité de la position sur le marché de la société acquise dans le cas d'une telle défaillance/faillite. Elles doivent également démontrer qu'il n'existe aucune autre "…partie désireuse d'acquérir l'entreprise, et que son plan de fusion, s'il réussit, conduira à moins d'entraves à la concurrence."[116]

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NOTES

1. La stabilité des prix, le développement régional et l'emploi, la loyauté envers les petites entreprises et une kyrielle d'autres objectifs politiques publics peuvent être intégrés dans une norme d'intérêt public. Il est éminemment douteux que le contrôle des fusions soit le meilleur instrument pour poursuivre ce fatras d'objectifs, d'autant qu'il est très difficile d'articuler des mécanismes de compensation appropriés entre eux, et entre chacun d'eux et l'objectif de promouvoir l'efficience économique par la concurrence. Le critère de l'intérêt public introduit également inévitablement une grande marge de jugement subjectif, et, dès lors, un degré supplémentaire d'incertitude et de retard dans le contrôle des fusions. Il pourrait en résulter que certaines fusions bénéfiques ne seraient jamais proposées, quand bien même pourraient-elles subir avec succès la série d'épreuves du critère.

2. En outre, le Royaume-Uni a récemment comparé les deux, comme substituts possibles de son actuel critère de l'intérêt public. Voir Royaume-Uni (2000).

3. Bundeskartellamt (2001).

4. Ibid. p. 35, en omettant la référence.

5. *Airtours plc c/. Commission des Communautés Européennes*, Affaire T-342/99, Tribunal de Première Instance des Communautés Européennes, 6 juin 2002.

6. Le Paragraphe 167 du Livre Vert de la Commission des Communautés Européennes (2001) indique notamment : "Pour conclure, l'expérience de l'application du critère de la position dominante n'a pas fait apparaître de lacunes importantes. Elle n'a pas non plus produit souvent de résultats différents de ceux qui découlent de l'application du critère SLC dans d'autres systèmes juridictionnels."

7. Cf. loc. cit.

8. Il est intéressant de noter que la contribution des Etats-Unis [voir Etats-Unis (2002)] à la discussion de l'International Competition Network du 28 septembre 2002 sur le critère de fond applicable en matière de contrôle des fusions s'en tient aux Lignes Directrices des Etats-Unis en matière de Fusions *Horizontales*. La contribution allemande [voir Bundeskartellamt (2002)] à la même discussion se concentre fortement sur des questions de fusions horizontales. La contribution australienne [voir Australie (2002)] à cette discussion est également muette sur les différences possibles entre les fusions horizontales, verticales et conglomérales et il en est de même de la contribution de l'Afrique du Sud [Lewis (2002)].

9. Voir Etats-Unis (1997c).

10. Voir, respectivement, Europe Economics (2001, 7) et Nouvelle-Zélande (2001). Le Canada établit également une distinction qui revient pratiquement au même – voir Directeur des Enquêtes et Recherches (1991).

11. Cf. Willig (1991, 292-293). Europe Economics (2001, 49) met également l'accent sur la crainte de réactions de rivaux dans les termes suivants :

> Les effets coordonnés sont ainsi dénommés parce que les entreprises, même si elles agissent indépendamment les unes des autres, comme en cas de collusion tacite, parviennent à un résultat 'coordonné'. L'entreprise issue de la fusion ne peut augmenter ses prix qu'à condition que ses rivaux s'alignent sur cette augmentation, et si chaque entreprise de l'oligopole craint le retour à des prix compétitifs et génère des profits si elle vend moins cher que ses rivaux.

Un ancien et un actuel fonctionnaires de la Commission Européenne travaillant pour la Task Force sur les Fusions opèrent à peu près la même distinction :

> En termes simples, les effets unilatéraux permettent à une société, en raison du changement de structure du marché résultant de l'absorption d'un concurrent, d'augmenter ses prix unilatéralement après une fusion, y compris si les sociétés restantes s'efforcent de lui faire concurrence. En revanche, les effets coordonnés se produisent lorsque la capacité d'une société à augmenter ses prix dépend des actions de ses concurrents. En d'autres termes, les effets coordonnés impliquent un certain degré d'adaptation de la part des concurrents, ce qui n'est pas le cas des effets unilatéraux. [Christensen et Rabassa (2001, 229)] (références omises).

12. Etats-Unis (1997c, section 2.2, page 15).

13. En se référant probablement à ces deux grandes catégories d'effets, comme en attestent les situations séparées décrites pour chacune d'elles, puisque les Lignes Directrices US indiquent :

> Etant donné qu'une fusion individuelle peut menacer de nuire à la concurrence par le jeu combiné de plusieurs de ces effets, les fusions seront analysées en considérant autant d'effets anticoncurrentiels potentiels qu'il sera approprié. [United States (1997c, section 2.0, page 13)]

14. Europe Economics (2001, 62-63, référence omise) souligne que :

> Des effets unilatéraux et coordonnés conduisent à des résultats différents en termes d'équilibre après une fusion et, bien que des effets unilatéraux risquent de se produire dans toutes les fusions horizontales, il est plus probable que des effets coordonnés se produisent dans certaines circonstances, lorsque les conditions du marché le permettent. Toutefois, ces deux types d'effets ne peuvent pas se produire dans le même temps. En d'autres termes, la fusion conduit soit à un autre équilibre de Cournot ou Bertrand soit à un équilibre collusoire, les deux premières situations représentant des effets unilatéraux et la dernière des effets coordonnés.
>
> Il peut se produire des situations dans lesquelles les deux types d'effets de la fusion semblent se produire simultanément. Par exemple, il est concrètement possible qu'une fusion n'ait initialement que des effets unilatéraux, de telle sorte que l'équilibre immédiat post-fusion ne soit pas collusoire, mais que la circulation ultérieure de l'information, etc., transforme cet équilibre en une collusion tacite. En principe, la fusion pourrait également conduire à une collusion tacite entre outsiders, quand bien même l'entreprise issue de la fusion continuerait-elle à fixer ses prix unilatéralement. Toutefois, la première situation pourrait être considérée comme une fusion produisant des effets coordonnés, bien que non réalisés immédiatement, tandis que la seconde possibilité serait peut-être trop irréaliste pour qu'on s'en inquiète.
>
> En conséquence, le fait de mélanger les effets unilatéraux et les effets coordonnés dans l'analyse d'une fusion, en attribuant le résultat d'une fusion partiellement à des effets unilatéraux et partiellement à des effets coordonnés, n'a aucun sens sur le plan économique.
>
> Néanmoins, le contrôle des fusions doit impliquer l'analyse de ces deux effets. L'analyse des effets unilatéraux démontrera la probabilité d'une hausse significative des prix, y compris sans aucune collusion. Si les effets unilatéraux sont négligeables, mais si la structure et d'autres caractéristiques du marché suggèrent la probabilité d'un comportement de collusion entre les entreprises restantes sur le marché après la fusion, l'analyse des effets coordonnés sera également appropriée. Une fusion peut donc être bloquée à un titre ou un autre.

15. Cf. Bundeskartellamt (2000).

16. Etats-Unis (1997c, 1).

17. Etats-Unis (1997c, section 0.1, p. 3).

18. Le document pour discussion indique ce qui suit :

> La puissance sur le marché est définie, quant à elle, comme la possibilité d'agir d'une manière différente de la manière qui serait prévisible dans des conditions de concurrence effective. Cela signifierait, cependant, que le critère SLC évalue précisément le "champ d'action qui n'est pas *suffisamment* contrôlé par la concurrence" qui sert généralement à définir la « position dominante » dans le cadre du contrôle européen des fusions et la « position prééminente sur le marché », variante particulière de la position dominante en vertu de la Loi allemande sur les Restrictions de Concurrence. [Bundeskartellamt (2001, 14) références omises et soulignage ajouté]

19. Ibid. p. 34.

20. Cette distinction peut aider à expliquer, par exemple, pourquoi la section décrivant les motifs pour lesquels la puissance des acheteurs doit être prise en considération dans l'analyse, est intitulée "Contrebalancer la puissance sur le marché".

21. Cela suppose implicitement que la qualité soit demeurée constante et qu'une réduction de l'innovation puisse être assimilée à une hausse des prix (ajustée en fonction de la qualité) supérieure à ce qu'elle aurait été si l'innovation n'avait pas été réduite.

22. Bundeskartellamt (2002, 13-14).

23. Ibid. p. 3.

24. Ibid. p. 4.

25. Ibid. p. 5.

26. . C'est ce qui ressort, par exemple, des développements sur la comparaison entre les ressources de l'entreprise issue de la fusion et celle de ses "concurrents", c'est-à-dire probablement tous ses concurrents. Cf. Bundeskartellamt (2000, 15).

27. *Airtours/First Choice, Affaire* IV/M.1524, Décision de la Commission du 22 septembre 1999, OJ [2000] L93/1.

28. Temple Lang (2002, 309).

29. Les affaires critiques ont été : *France c. Commission* (Kali & Salz), affaires C-68/94 et 30/95 [1998] ECR I-1375; et [1998] 4 CMLR 829; et *Gencor c. Lonrho,* affaire T-102/96 [1999] ECR II-753, [1999] 4 CMLR 971.

30. L'Australie (1991a et b) évoque plusieurs fusions que l'Australian Trade Practices Commission (Commission australienne des Pratiques Commerciales) (depuis intégrée dans l'Australian Competition & Consumer Commission (Commission australienne de la Concurrence et de la Consommation)) a suspectées d'être anticoncurrentielles, mais n'a pas pu bloquer en appliquant un critère de la position dominante limitée à la domination individuelle. L'autorité de contrôle de la concurrence de Nouvelle-Zélande a éprouvé des préoccupations similaires – cf. Nouvelle-Zélande (1999, 13-17).

31. Des effets coordonnés pourraient plutôt se manifester comme une réduction de la concurrence sur d'autres fronts que les prix. Pour simplifier l'exposé, nous partons de l'hypothèse qu'une telle réduction peut être assimilée à un certain niveau de hausse des prix.

32. *Gencor v. Lonrho*, affaire T-102/96, arrêt du Tribunal de Première Instance du 25 mars 1999, para. 276.

33. Cf. Bundeskartellamt (2000, II. B. 2, pp. 48-49).

34. Remplacer la concurrence par la coordination dans un groupe oligopolistique ne peut pas durer longtemps à moins que les entreprises se coordonnant ne puissent effectivement se dissuader d'être infidèles à leur accord anticoncurrentiel. Plus le prix est élevé, toutes choses étant égales par ailleurs, et plus l'incitation à être infidèle à l'accord sera vive, et plus la perte de débouchés imposée par le retour au niveau de prix non coopératif sera probablement importante. Bien que la tentation d'infidélité et le poids de la sanction puissent parfaitement augmenter tous deux proportionnellement à la hausse du prix "convenu", il n'existe aucune raison nécessaire de prévoir que la capacité à détecter des infidélités s'améliore plus le prix est élevé. Il est donc possible qu'un groupe d'entreprises oligopolistiques se coordonnant pourra hausser les prix, mais ne parviendra pas à augmenter et soutenir les prix au niveau auquel une entreprise exerçant une position dominante individuelle les fixerait.

35. Pour les besoins de l'Article 82 (article instituant l'interdiction des abus de position dominante dans le Traité sur l'Union Européenne) appliqué dans une affaire de position dominante individuelle, la Cour de Justice Européenne a posé le principe qu'une position dominante :

> …correspond à une position de force économique dont jouit une entreprise et qui lui permet d'empêcher le maintien d'une concurrence effective sur le marché en cause, en lui conférant le pouvoir de se comporter, dans une mesure appréciable, indépendamment de ses concurrents, de ses clients et, finalement, de ses consommateurs. [Telle que cette décision est citée dans Whish (2001, 152) – *United Brands c. Commission* affaire 27/76 [1978] ECR 207, [1978] 1 CMLR 429]

En fonction de la signification donnée au terme "appréciable", on pourrait soutenir que le pouvoir d'augmenter le prix à un niveau SLC peut être considéré comme la preuve qu'une entreprise, ou un groupe d'entreprises, a le pouvoir "…de se comporter, dans une mesure appréciable, indépendamment de ses[leurs] concurrents, de ses[leurs] clients et, finalement, de ses[leurs] consommateurs."

36. *Airtours plc/Commission des Communautés Européennes*, Affaire T-342/99, arrêt du Tribunal de Première Instance, 6 juin 2002, paragraphes 61 et 62.

37. Voir Starek & Stockum (1995, 803).

38. Etats-Unis (1997c, sections 2.21 et 2.212, pages 15-17), références et titres omis.

39. On peut en voir un exemple dans la fusion *Guinness/Grand Metropolitan*, Affaire No. IV/M.938, J0 [1998] L 288/24, [1997] 5 CMLR 760.

40. Voir Fingleton (2002, 7-8), pour une critique des effets de portefeuille liés à l'emploi de définitions de produits excessivement étroites.

41. Pour une discussion sur la question, voir Camesasca & Van den Bergh (2002, 153-155), et Werden & Froeb (1996). Voir également Shapiro (1996), qui estime que la définition du marché est moins importante en ce qui concerne les fusions sur des marchés de produits différenciés, mais qu'il est probablement impossible de s'en passer.

42. Pour de plus amples commentaires sur *Staples/Office Depot*, voir Baker (1998).

43. Voir Camesasca & Van den Bergh (2002), pour une discussion approfondie sur les difficultés particulières d'application du contrôle des fusions aux oligopoles de produits différenciés utilisant une approche structuraliste, c'est-à-dire se fondant très largement sur une analyse des parts de marché, approche qui semble plus proche du critère de la position dominante que du critère SLC.

44. Commission des Communautés Européennes (2001, para. 166).

45. Sur l'arrêt de la Cour d'Appel des Etats-Unis, Circuit du District de Columbia, prononçant une injonction provisoire bloquant la fusion, voir Federal Trade Commission v. Heinz, 246 F.3d 708, 345 U.S. App. D.C. 364.

46. Kolasky (2001, 82).

47. Leary (2002, 1).

48. Etats-Unis (1997c, section 2.22, p. 17).

49. Voir Scher (1999), ss. 125-126.

50. Voir Whish (2002, 153-156).

51. Nouvelle-Zélande (2001, 31).

52. Spector (2001) souligne qu'en appliquant le modèle unique de Cournot (c'est-à-dire : des marchés de produits homogènes, des entreprises se concurrençant sur les prix, et chaque oligopoliste fixant sa production en supposant que ses rivaux maintiendront leurs productions constantes), et en supposant des courbes de coûts marginaux plates ou en hausse, toute fusion profitable ne générant pas des synergies technologiques (économies de coûts autres qu'une réduction des coûts fixes) nuit immanquablement aux consommateurs en raison de hausses de prix, indépendamment des conditions d'entrée dans l'industrie. Il ajoute : "Ce n'est qu'à condition que des entrées à grande échelle puissent ramener les prix à des niveaux proches de ce qu'ils étaient avant la fusion qu'il sera légitime de ne pas contester la fusion. Dans le cas contraire, il convient d'étudier la probabilité et l'ampleur des synergies spécifiques à la fusion. Si cette étude révèle que ces synergies sont improbables ou très faibles, la fusion devra être empêchée, y compris si une certaine entrée sur le marché semble probable." (13)

53. Kloosterhuis (2001, 80-81).

54. Ibid. p. 87.

55. Deux paragraphes essentiels de la décision de la Commission méritent d'être cités in extenso :

> Dans sa Communication des Griefs, la Commission a identifié certaines caractéristiques de la structure et du fonctionnement du marché qui ont été identifiées comme rendant plus probables des résultats anticoncurrentiels, et, en particulier, une position dominante collective. Airtours considère en effet qu'aucun de ces indicateurs n'est présent et, qu'en outre, il serait impossible pour les principaux fournisseurs de pratiquer des 'représailles' si l'un d'eux essayait de conquérir une part de marché aux dépens des autres, en accroissant sa capacité et en offrant des prix plus bas. Toutefois, la Commission n'a pas suggéré, et ne considère pas que toutes les caractéristiques doivent être présentes et/ou aggravées par la fusion pour qu'une position dominante collective naisse dans un cas donné. Elle ne considère pas non plus qu'un *strict mécanisme de représailles*, tel que celui proposé par Airtours dans sa réponse à la Communication des Griefs, constitue une condition nécessaire de l'existence d'une position dominante collective en l'espèce ; s'il existe, comme en l'espèce, *de puissants stimulants pour réduire l'action concurrentielle, la coercition peut être inutile.* Toutefois, quoi qu'il en soit et comme indiqué ci-dessous, la Commission refuse d'admettre qu'il n'y ait aucune place pour des représailles sur ce marché. Au contraire, il existe une place considérable pour des représailles, qui ne feront qu'accroître les incitatifs à se comporter d'une manière anticoncurrentielle parallèle. [soulignage ajouté]

Etant donné qu'il n'exclut pas la nécessité d'un certain type de mécanisme de représailles, le paragraphe ci-dessus laisse planer un doute considérable sur la question de savoir si la Commission a voulu étendre la position dominante collective au-delà de la simple appréhension des fusions susceptibles d'entraîner une

interaction coordonnée. Le paragraphe suivant, souvent cité, est moins ambigu mais n'est cependant pas totalement clair sur ce point :

> 150. Ainsi qu'il est indiqué dans la section d'introduction, la Commission ne considère pas qu'il est nécessaire de démontrer que les acteurs sur le marché se comporteront, en conséquence de la fusion proposée, de la même manière que s'ils étaient un cartel, liés par un accord de cartel plus tacite qu'explicite….En particulier, il n'est pas nécessaire de démontrer qu'il existe un mécanisme *strict* de sanctions. En l'espèce, pour déterminer l'existence d'une position dominante collective, il importe de savoir si le degré d'interdépendance entre les oligopolistes est tel qu'il soit rationnel pour les *oligopolistes* de restreindre la production, et, ce faisant, de réduire la concurrence de manière à créer une position dominante collective. [soulignage ajouté]

On pourrait soutenir *qu'étant donné* que la Commission estime que l'interaction coordonnée implique uniquement une collusion explicite et tacite, elle entendait clairement étendre la position dominante collective afin de couvrir également certains cas d'effets unilatéraux. Contrairement à cet avis, il est remarquable que la Commission ne soutient pas qu'il n'est pas nécessaire de prouver l'existence d'un mécanisme de sanctions, mais uniquement qu'il n'est pas nécessaire de prouver l'existence d'un mécanisme *strict* de sanctions. En outre, la situation à laquelle pense la Commission est celle dans laquelle des oligoplistes restreindront la production. S'il n'existe que des effets unilatéraux, on peut s'attendre à ce que seules les parties fusionnant réduisent la production. Les autres oligopolistes vont soit augmenter la production soit, s'ils souffrent de contraintes limitant leur capacité, laisser la production inchangée.

Il est possible de déduire des paragraphes 55 et 150 que la Commission a simplement essayé d'alléger la charge de la preuve pesant sur elle, en ce qui concerne la preuve de l'existence d'un mécanisme de représailles approprié, ce qu'elle a apparemment eu des difficultés à faire dans le cadre de la fusion dont elle était saisie.

56. Ce paragraphe ne fait qu'effleurer la littérature consacrée à la théorie de l'oligopole, qui est complexe et évolutive.

Les économistes ont développé un éventail de modèles concernant les modes d'interaction des oligopolistes. Ces modèles diffèrent dans leurs hypothèses sous-jacentes sur les questions suivantes: existe-t-il une interaction isolée ou répétée entre fournisseurs, ce que connaît chaque entreprise et à quelle date sur ce que font ses rivaux, la capacité des entreprises à communiquer de manière crédible entre elles, et les structures de coûts des entreprises (c'est-à-dire les capacités, et les coûts constants, fixes et marginaux).

L'analyse des fusions repose sur une poignée de types de modèles. L'un d'eux se réfère à un jeu de Cournot portant sur une seule période, à savoir : les entreprises prennent des décisions sur la quantité, ne tirent aucun enseignement du passé et ne peuvent pas employer une stratégie qui dépend de la possibilité d'agir différemment en des périodes différentes. Les variantes du modèle de Cournot mono-période sont plus communément appliquées lorsque les produits sont homogènes. Il s'agit du type de modèle qui prévoit que quatre entreprises pratiqueront des prix plus élevés que cinq, et qu'un coût marginal plus élevé constitue un engagement crédible de réduction de la production. Le modèle de Cournot est sous-jacent à l'analyse standard des effets unilatéraux des fusions sur des marchés de produits homogènes.

Un autre type de modèle est construit sur un jeu de Bertrand mono-période, c'est-à-dire si les entreprises prennent des décisions sur le prix, ne tirent aucun enseignement du passé et ne peuvent pas employer une stratégie qui dépend de la possibilité d'agir différemment en des périodes différentes. Ce modèle est communément utilisé lorsque les produits sont hétérogènes. Il s'agit du type de modèle qui prévoit que plus les offres des parties fusionnant sont proches dans l'"espace produits", plus la fusion tendra à augmenter le prix. Le modèle de Bertrand fournit le cadre analytique habituellement utilisé pour explorer les effets unilatéraux de fusions sur des marchés de produits différenciés.

Un troisième type de modèle prévoit un type particulier de stratégie multi-périodes et multi-entreprises, c'est-à-dire permet à des entreprises d'agir de connivence entre elles (tacite ou explicite) et de se « punir »

si l'une d'elles fait une entorse à cette collusion. Ce type de modèle formule des hypothèses explicites sur ce que les entreprises savent de leurs 'rivaux', et sur le moment où elles le savent. En d'autres termes, il s'agit du modèle sous-jacent à la théorie des effets coordonnés appliquée dans le contrôle des fusions.

Ces modèles fondés sur des théories de jeu souffrent de limitations évidentes, lorsqu'il s'agit de prendre des décisions politiques réelles. Leur caractéristique la moins attrayante tient peut-être au fait que si les jeux de Cournot ou Bertrand sont étendus pour devenir des jeux répétés (c'est-à-dire si le jeu mono-période est répété inlassablement avec les mêmes entreprises), les entreprises peuvent employer des stratégies multi-périodes et le prix d'équilibre illustré par le modèle pourra alors se situer n'importe où entre les coûts marginaux et le prix de monopole.

57. Jenny (2002, 370).

58. Niels (2001, 172).

59. Fingleton (2002, 4-6).

60. Jenny (2002, 370). Jenny suppose implicitement que les deux éléments du critère de la position dominante, à savoir "créer" et "renforcer" doivent s'appliquer à la fois à la position dominante individuelle et à la position dominante collective. Il propose donc de reconnaître un renforcement de la position dominante collective si une fusion est susceptible de rapprocher le prix d'équilibre non-coopératif du niveau du prix de monopole.

L'idée que la branche « renforcement » du critère de la position dominante est vide de sens en ce qui concerne la position dominante collective, à moins qu'un comportement non-coopératif ne soit inclus, repose sur une autre hypothèse implicite (voir p. 369 de l'article de Jenny), selon laquelle un comportement coopératif produit toujours un niveau de prix de monopole. Si tel était le cas, une fusion qui améliore la coopération entre des oligopolistes ne renforcerait pas la position dominante collective en conduisant à un prix plus élevé. Nous avons déjà noté, toutefois, qu'un comportement coordonné avant la fusion peut ne pas réussir à augmenter les prix à un niveau de prix de monopole.

61. Ibid. p. 370.

62. Cette remarque est particulièrement pertinente en ce qui concerne les théories d'effets concurrentiels dommageables bâties sur un modèle de Cournot. Pour un commentaire sur certaines des lacunes apparentes du modèle de Cournot, par exemple le fait que ce soit un modèle mono-période, bien que deux périodes soient impliquées dans le fait que chaque fournisseur suppose que les productions de ses rivaux demeureront inchangées, voir Shapiro (1989). Shapiro n'est pas convaincu que cette difficulté puisse être surmontée sans recourir à des modèles dynamiques complets. Bien que ces modèles dynamiques puissent traiter les questions théoriques, ils laisseront aux autorités antitrust la charge plus complexe et plus difficile de prouver l'historique des effets dommageables pour la concurrence.

63. Leary (2002, 2).

64. Pour que cette différence soit significative, il est inutile que l'une des parties pré-fusionnant soit dominante avant la fusion. Une position dominante collective avant la fusion serait suffisante. Une fusion pourrait préserver le pouvoir de marché exercé par un groupe d'oligopolistes, tout comme elle pourrait préserver le pouvoir de marché d'une seule entreprise dominante.

65. Les Lignes Directrices allemandes l'expriment dans les termes suivants :

> La position d'une entreprise est déjà renforcée si elle est mieux à même de parer aux retombées concurrentielles après qu'avant la fusion, et peut maintenir ou assurer sa position dominante sur le marché en conséquence de la fusion. Plus le marché concerné est déjà dominé, moins il est nécessaire de prouver qu'une position dominante est renforcée. Même de petits changements des facteurs

> déterminant le pouvoir de marché suffisent à établir l'effet de renforcement, s'il existe déjà une forte concentration sur le marché. [Bundeskartellamt (2000, I. A. 2.2, pp. 8-9), référence omise]

66. Une juridiction au moins, la Nouvelle Zélande, spécifie explicitement qu'elle compare deux scénarios futurs pour évaluer la probabilité d'une SLC, c'est-à-dire avec ou sans la fusion – voir Nouvelle Zélande (2001, section 1.2). Une juridiction SLC est donc libre de se limiter à comparer la situation actuelle avec ce qui peut se produire si la fusion est autorisée. Une juridiction appliquant le critère de la position dominante pourrait néanmoins opérer un tel choix restrictif. Il n'est inhérent à aucun des deux critères.

67. *Loi sur la Concurrence*, R.S., 1985, c. C-34 (telle que modifiée), s. 92(1). Les Lignes Directrices canadiennes pour l'Application de la Loi sur les Fusionnements développent ce point dans les termes suivants :

> De la même manière, la concurrence peut être empêchée par une conduite unilatérale ou interdépendante. La concurrence peut être empêchée par un comportement unilatéral en vertu duquel un fusionnement permet à une seule entreprise de maintenir des prix plus élevés que ceux qui auraient vraisemblablement cours en l'absence du fusionnement, en freinant ou en empêchant le développement d'une concurrence accrue. [Directeur des Enquêtes et Recherches (Bureau de la Concurrence) (1991, sec. 2.3, page 4)]

Crampton (1990, 357) déclare : "Il est important de reconnaître qu'il existe des situations où la concurrence peut être "empêchée", mais non "diminuée", et *vice versa*." Il fait ensuite allusion à des fusions qui élimineraient un concurrent potentiel avant d'ajouter : "De la même manière, l'acquisition préventive d'un concurrent peu performant qui aurait autrement été acquis soit par un (vigoureux) concurrent tiers sur le marché, soit par un nouvel entrant, pourrait empêcher dans une mesure substantielle le développement de la concurrence future qui aurait été générée en l'absence de la fusion."

Le Canada n'est pas la seule des juridictions SLC à avoir introduit une branche "empêchement » dans son critère. En Australie, l'article 4G du Trade Practices Act, 1974, (Loi sur les Pratiques Commerciales de 1974) dispose : "Pour les besoins de la présente Loi, les références à la diminution de la concurrence doivent être interprétées comme incluant des références à l'empêchement de la concurrence ou à des entraves à la concurrence." En outre, selon une lettre adressée à l'auteur par un fonctionnaire travaillant au Service Réglementaire et de la Politique de Concurrence de Nouvele Zélande (Ministère du Développement Economique), l'article 3(2) de la Loi sur le Commerce néo-zélandaise "…dispose que les références faites à la diminution de la concurrence incluent des références à l'empêchement de la concurrence ou à des entraves à la concurrence."

68. Bundeskartellamt (2001, 22) références omises.

69. Pour de plus amples informations sur *Boeing/McDonnell Douglas*, voir Kovacic (2001). Pour une discussion sur des questions contentieuses similaires, voir les deux articles consacrés à la fusion *General Electric/Honeywell* par James (2001) et Monti (2001).

70. Whish (2002, 17) références omises. La référence à *Compagnie Maritime Belge* est "Affaires C- 95/96 et C-396/95…[2000] 4 CMLR 1076".

71. A propos du caractère préoccupant de l'élargissement de la portée des dispositions sur l'abus de position dominante, et pour des exemples de ses effets négatifs, voir Hampton (2002, 9).

72. Fingleton (2002, 9-10) brandit le spectre de démembrements forcés appliqués en vertu du droit de la concurrence de l'Union Européenne afin de remédier à une tarification non-coopérative supra-concurrentielle, sur un marché oligopolisé de produits homogènes. Il observe qu'il a été suggéré d'inclure des recours structurels dans le texte qui doit remplacer le Règlement de la Commission Européenne 17/62.

73. Affaire No IV/M.1221 OJ [1999] L 274/1, [2000] 5 CMLR 256.

74. Affaire No IV/M.1412.

75. Affaire No COMP/M.1684.

76. Ibid., paras 155-167.

77. Affaire No COMP/M.1630.

78. Affaire No COMP/M.1795.

79. Whish (2002, 15-16).

80. Case T-102/96 [1999] ECR II-743, [1999] 4 CMLR 971, para. 106, tel que cité in Which (2002, 11).

81. Whish (2002, 11-12).

82. Voir American Bar Association (1992, 413) pour une discussion sur l'élément "préjudice concurrentiel" d'une affaire sur le fondement de l'Article 2(a) de la Loi *Robinson-Patman*.

83. Voir *Loi sur la Concurrence*, R.S., 1985, c. C-34 (telle que modifiée), s. 79(1).

84. Voir Royaume-Uni (2000, paras. 2.17, 2.18 and 2.21) et Whish (2002, 12 & 17). Heimler (2002, 9) partage cette opinion, mais il ne faut pas en déduire qu'il préfère le critère SLC au critère de la position dominante.

85. En discutant de la contribution de la concurrence à l'efficience économique, John Vickers reconnaît que : "Bien que le concept de concurrence ait toujours été central dans la pensée économique … il a fait l'objet de nombreuses interprétations et significations, dont beaucoup sont vagues." [Vickers (1995, 3)]

86. Décrivant récemment l'évolution de la loi antitrust américaine, l'Assistant Attorney General Charles James écrit :

> Une chose semble claire après avoir revu cette liste de théories antitrust qui ont été adoptées puis écartées, à savoir la tendance constante au cours des trente dernières années à accroître la focalisation sur l'économie, l'efficience et l'intérêt des consommateurs. En demeurant suffisamment flexible pour intégrer la toute dernière pensée économique dans notre analyse, nous avons désormais affiné nos politiques d'exécution de la loi, au point que nous sommes mieux à même que jamais de cibler des transactions et pratiques que les lois antitrust sont censées viser. [James (2002a, 9)]

87. Commission Européenne (2001, paras. 163-165).

88. Whish (2002, 13-14). Les lois sur la concurrence de juridictions SLC, comme l'Australie, le Canada, la Nouvelle Zélande et l'Afrique du Sud contiennent des listes de ce que Whish a visé comme "les facteurs à prendre en compte dans l'analyse des cas…." Dans un document soumis à l'International Competition Network, l'Afrique du Sud a noté : "En incorporant une liste non-exhaustive de critères de contrôle dans la Loi, nous avons fait en sorte de combiner la souplesse d'un système de « diminution substantielle de la concurrence » avec le degré requis de sécurité juridique. Les critères énumérés dans la Loi seront inévitablement complétés par des lignes directrices lorsque le système aura acquis une plus vaste expérience du contrôle des fusions." [Lewis (2001, 11)]

89. Pour de plus amples informations sur ce point, voir n. 40 supra.

90. Drauz (2002, 904). Certains lecteurs pourront se demander si Drauz, dans la première phrase du passage cité ci-dessus, entend par "empêcher l'accumulation d'un pouvoir de marché excessif" la simple atteinte d'un certain niveau "excessif" de pouvoir de marché, ou s'il y inclut également le processus suivi pour

atteindre ce niveau. Cette phrase serait susceptible de recueillir un consensus plus large si elle faisait l'objet de la dernière plutôt que de la première interprétation.

91. Kovacic (2001, 861 & 862-863), références omises.

92. Article 18 du Titre 15 du Code des Etats-Unis (1988).

93. Article 1 du Titre 15 du Code des Etats-Unis (1988).

94. Etats-Unis (1997c, 1).

95. Ibid., section 0., page 3.

96. Herfindahl-Hirschman Index (Indice de Herfindahl-Hirschman), soit 10 000 fois la somme des carrés des parts de marché des entreprises opérant sur le marché.

97. Le texte cité dans ces trois points est extrait de Etats-Unis (1997c, section 1.51, pp. 11-12).

98. Ibid. section 2.211, page 16.

99. Ibid. section 2.0, page 13.

100. Etats-Unis (1984, sections 4.131, 4.134, 4.213, 4.221 et 4.222). L'exception figure à la section 4.134, qui peut prévaloir sur la section 4.131. La section 4.1 se rapporte aux fusions éliminant des entrants spécifiques potentiels. La section 4.134 dispose que : "Le Département est susceptible de contester toute fusion satisfaisant aux autres conditions, dans lesquelles l'entreprise acquise détient une part de marché de 20 pour cent ou davantage.

101. Voir Etats-Unis (1997c, section 4, p. 20).

102. Ibid., section 4, p.21.

103. Ibid.

104. Ibid. section 4 at p. 22.

105. Bundeskartellamt (2002, 2).

106. Bundeskartellamt (2000, I.A.1. , p.4).

107. Bundeskartellamt (2002, 2-3).

108. Ibid. section I.B.1.1.1, p. 11.

109. Ibid., section I.A.1, pp. 4-5, référence omise.

110. Ibid. section I.B.2, pp. 15-16, références omises.

111. Bundeskartellamt (2002, 3).

112. Bundeskartellamt (2000, II. A. 1, pp. 39-40) références omises.

113. Ibid. II. A. 2, pp. 41-42, références omises.

114. Voir Bundeskartellamt (2000, II. B. 2, pp. 48-49).

115. Ibid. I. A. 2.2, pp. 8-9, références omises.

116. Ibid. I.B.10, p. 38.

QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

(Suggested Issues and Questions for Consideration in Country Submissions)

1. Objectives

In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position, and public interest tests.

2. Nature of the substantive test

1. *Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a create or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test.*

2. *If your jurisdiction applies a public interest test to merger review:*

a. Does the test contain a competition element? If so, how much weight is that element given, and does it resemble more the SLC or the dominance test; and

b. How and by whom is the public interest test applied?

3. *If dominance is a central feature of your substantive test, does it include collective as well as single firm dominance? Please explain why that extension has been made, or not thought necessary. If collective dominance is part of your test, kindly elaborate on what constitutes such* dominance (one or more case illustrations would be particularly appropriate here).

4. *In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expected post-merger increases in quality adjusted market prices? What other factors, if any, are prominently featured in determining whether competition is likely to be harmed by a merger.*

5. *If you have recently changed your substantive test, please describe what motivated the change, and whether it appears to have achieved the desired effect.*

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers.

1. *Please explain why you do or do not believe, that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following*

hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind):

a. a series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors;

b. in the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level;

c. a merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links; and

d. although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors.

2. *Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed.*

3. *It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?*

4. *Might the choice of competition test influence the choice of remedy for or against a structural solution?*

3. Broader Policy Concerns

As with the previous sections, if possible please illustrate your responses with references to actual cases.

1. *Does the choice of competition tests (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?*

2. *More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?*

3. *Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?*

4. *What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the*

prohibition of anticompetitive agreements? Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i.e., that the effect is more than de minimis) also have implications for prohibitions on agreements that lessen competition?

5. *Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?*

QUESTIONNAIRE SOUMIS PAR LE SECRÉTARIAT

(Questions proposées et questions à examiner dans les contributions nationales)

1. Objectifs

En quoi, si la question est pertinente, les objectifs généraux de votre législation en matière de concurrence privilégient-ils particulièrement l'un des trois types de critères de fond habituellement utilisés dans l'examen des fusions, à savoir la réduction sensible de la concurrence, la création ou le renforcement d'une position dominante et les considérations relatives à l'intérêt public ?

2. Nature du critère de fond

1. *Veuillez décrire le critère de fond appliqué aux fusions dans votre pays, en indiquant s'il s'agit de la variante d'un critère de réduction sensible de la concurrence (réduction de la concurrence), d'un critère de création ou de renforcement d'une position dominante (domination), d'un mélange des deux ou d'un critère relatif à l'intérêt public.*

2. *Si votre pays applique, pour l'examen des fusions, un critère relatif à l'intérêt public :*

a. Ce critère contient-il un élément de concurrence ? Dans l'affirmative, quel est le poids donné à cet élément, et ressemble-t-il davantage au critère de réduction de la concurrence ou au critère de domination ?

b. Comment et par qui est appliqué le critère relatif à l'intérêt public ?

3. *Si la domination est un élément central de votre critère de fond, englobe-t-elle la domination collective et la domination par une seule entreprise ? Veuillez expliquer pourquoi cette extension a été faite ou n'a pas été jugée nécessaire. Si la domination collective entre en ligne de compte dans votre critère, veuillez préciser en quoi consiste cette domination (un ou plusieurs cas réels seraient particulièrement indiqués ici).*

4. *Pour déterminer si une fusion satisfait ou non à l'élément concurrence de votre critère de fond national, quel est le poids accordé aux hausses de prix attendues après la fusion sur le marché, en fonction de la qualité ? Quels sont les autres facteurs, s'il y en a, qui sont mis en avant pour déterminer si une fusion risque de nuire à la concurrence ?*

5. *Si vous avez récemment modifié votre critère de fond, veuillez indiquer quelles sont les raisons de cette modification et si elle semble avoir produit l'effet désiré ?*

3. En quoi le critère spécifique de concurrence, à savoir la domination (y compris la domination collective) ou la réduction de la concurrence, pourrait-il faire une différence dans des fusions particulières ?

1. *Veuillez expliquer pourquoi vous pensez ou vous ne pensez pas que le choix du critère de réduction de la concurrence ou de domination (y compris la domination collective) ferait une différence, lors de l'examen des fusions, dans chacune des hypothèses suivantes (veuillez donner des exemples réels illustrant la différence que vous envisagez) :*

   a. une série de petites fusions qui paraît conduire à la création d'une entreprise ayant un important pouvoir de marché, par exemple une série de petites fusions visant à former une chaîne de distributeurs ;

   b. avant la fusion, il y a peu de concurrence sur le marché pertinent -- par exemple, le marché est actuellement réglementé mais une libéralisation est prévue ; un petit nombre de vendeurs ont un excédent de capacité considérable et il y a d'importants obstacles à l'entrée ; il existe un oligopole strict caractérisé par un degré élevé de parallélisme conscient ; ou un autre facteur a pour effet de réduire la concurrence à un niveau très faible ;

   c. une fusion conduira probablement à une coordination anticoncurrentielle entre des entreprises qui n'ont pas de liens *structurels* entre elles ;

   d. même si l'entité fusionnée n'obtient pas une position dominante (ou quelque chose qui y ressemble fort), elle sera sans doute en mesure de relever ses prix et d'augmenter ses bénéfices après la fusion malgré un accroissement prévisible de la production de ses concurrents.

2. *Veuillez décrire toutes autres situations, de préférence à l'aide d'un ou plusieurs exemples réels, où le critère de concurrence, qu'il s'agisse de la réduction de la concurrence ou de la domination (élargie à la domination collective), ferait une différence importante pour l'évaluation de la fusion.*

3. *On dit parfois que le critère de réduction de la concurrence permet d'approuver une fusion qui, en l'absence d'éléments précis et tangibles prouvant son efficience, serait bloquée, alors qu'avec un critère de domination, cette « pondération » est beaucoup plus difficile du fait que les éléments d'efficience peuvent accroître le bien-être économique mais, en même temps, contribuer à créer un problème de domination. Etes-vous d'accord avec cette affirmation ?*

4. *Le choix du critère de concurrence pourrait-il influer sur le choix des mesures correctrices pour ou contre une solution structurelle ?*

4. Préoccupations plus générales

Comme pour les sections précédentes, veuillez, si possible, illustrer vos réponses en vous référant à des cas réels.

1. *Le choix des critères relatifs à la concurrence (réduction de la concurrence et domination, y compris la domination collective) fait-il une différence en ce qui concerne les rôles joués par la définition du marché et les données relatives à la concentration dans l'évaluation des fusions ?*

2. *D'une manière plus générale, les deux critères relatifs à la concurrence pourraient-ils conduire à donner plus ou moins de poids à l'analyse économique ou, au contraire, à l'étude des caractéristiques juridiques ?*

3. *Est-il probable qu'il y aura des différences dans la certitude juridique (c'est-à-dire la capacité des parties de prévoir le résultat de l'examen de la fusion dans une opération particulière) selon le critère de concurrence utilisé ?*

4. *Quels sont les liens jurisprudentiels qui existent entre un critère de domination utilisé dans l'examen d'une fusion et une interdiction de l'abus de position dominante ? Et entre un critère de réduction de la concurrence utilisé dans l'examen d'une fusion et des éléments de l'interdiction des accords anticoncurrentiels ? Ces liens jurisprudentiels influencent-ils votre choix du critère à utiliser pour l'examen d'une fusion ? Par exemple, que se passerait-il, pour l'application d'une interdiction d'abus de position dominante, si, dans l'examen d'une fusion, deux ou plusieurs entreprises étaient considérées comme ayant une position dominante individuelle sur le même marché ? L'élément "de fond" d'un critère de réduction de la concurrence (c'est-à-dire que l'effet est supérieur à l'effet de minimis) aurait-il aussi des conséquences pour l'interdiction des accords qui affaiblissent la concurrence ?*

5. *Est-il important, en particulier pour ce qui concerne les fusions touchant les marchés internationaux, que les autorités chargées de la concurrence envisagent sérieusement une convergence sur l'un des trois critères génériques utilisés pour l'examen des fusions (réduction de la concurrence, position domaine ou considérations relatives à l'intérêt public) ?*

AUSTRALIA

1. Objectives

1.1 In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position, and public interest tests

The objective of Australia's competition statute, the Trade Practices Act 1974 (TPA), is to enhance the welfare of Australians through the promotion of competition and fair-trading and provision for consumer protection. With this mandate, Australia's competition regulator – the Australian Competition and Consumer Commission (ACCC), focuses on the need to protect consumers and therefore, the community, in its administration and enforcement responsibilities.

2. Nature of the substantive test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition test, a create or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test?

Section 50 of the TPA states:

A corporation must not directly or indirectly:

- acquire shares in the capital of a body corporate; or
- acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

As above, the substantive test applied in Australia is whether the merger or acquisition would have the effect or likely effect of substantially lessening competition in a market. Subsection 50(6) defines 'market' as a substantial market for goods or services within Australia, or a State, Territory or region of Australia. Mergers or acquisitions which breach the substantial lessening of competition test are prohibited unless authorised by the ACCC under section 88 of the TPA.

2.2 If your jurisdiction applies a public interest test to merger review

- does the test contain a competition element? If so, how much weight is that element given, and does it resemble more the substantial lessening of competition or the dominance test?

- how and by who is the public interest test applied?

Parties to mergers at risk of breaching the TPA may apply to the ACCC for authorisation. Authorisation provides immunity from legal prosecution, on net public benefit grounds, for mergers and acquisitions which would or might otherwise contravene the merger provisions of the TPA (sections 50 and 50A). Authorisation may be granted conditionally and/or may be granted subject to statutory undertakings provided by the applicant. The onus is on the applicants to satisfy the ACCC of their case.

Under section 90(9) of the TPA, the ACCC will not grant authorisation:

Unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Section 90(9A) provides that in determining what amounts to a benefit to the public; the ACCC must have regard to:

- a significant increase in the real value of exports;

- significant import substitution; and

- other relevant matters that relate to the international competitiveness of any Australian industry.

The decision whether to grant authorisation is determined by the ACCC in the first instance. A decision by the ACCC not to grant authorisation is reviewable by the Australian Competition Tribunal under section 102(1)(a). The Tribunal will undertake a 'review on the merits', which means it will assess whether the decision is both correct in law and the most preferable according to the law.

People who claim to have an interest in an authorisation application have the opportunity to present their views to the ACCC. Any interested party may make a submission to the ACCC for its consideration in determining an application. Submissions become part of the public register. In addition, under section 90A, the ACCC is to afford an opportunity for interested persons to attend a conference with it before determining the application.

Since 1993, the ACCC has assessed thirteen applications for authorisation of mergers, acquisitions and joint ventures. Five were rejected, one was withdrawn and seven were approved. Three examples of successful authorisation applications appear below:

- Adelaide Brighton/Cockburn Cement. The ACCC granted authorisation for a merger which, in its view, reduced competition in the markets for cement and lime in certain areas of the State of Western Australia. The ACCC considered that public benefits including rationalisation benefits and increased competitiveness in all other markets in Australia were likely outcomes of the merger. The merging parties gave undertakings which included certain conditions to reduce the anticompetitive detriment of the merger.

- Davids/Composite Buyers Limited. This merger in the grocery-wholesaling sector of supermarket distribution resulted in 'monopoly' provision of services to independent supermarkets. Substantive efficiencies in production, a significant proportion of which were likely to be passed on to consumers, were accepted as being of sufficient public benefit to justify authorisation.

- DuPont/Ticor. This was a merger in the sodium cyanide market. The world market was highly concentrated with only three producers, two of which operated in Australia. Ninety percent of domestic demand, which was growing, was satisfied by the domestic producer, with DuPont the major importer. The ACCC authorised the merger because it was likely to increase domestic production and although it was unlikely to generate exports due to growing domestic demand it was likely to replace imports, the volume of which was likely to otherwise increase.

2.3 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expect post-merger increases in quality adjusted prices? What other factors, if any, are predominantly featured in determining whether competition is likely to be harmed by a merger

As a general guide, in its evaluation of possible contraventions of section 50 the ACCC assesses the ability of a firm or firms to profitably divert price, quality, variety, service, innovation or any other aspect of the competitive process or its performance outcomes from their competitive levels for a significant period of time.

Subsection 50(3) of the TPA lists a number of factors that must be taken into account in assessing whether a merger contravenes the prohibition and is, therefore, likely to harm competition through a substantial lessening of competition in the market. These are:

- the actual and potential level of import competition in the market;

- the height of barriers to entry to the market;

- the level of concentration in the market;

- the degree of countervailing power in the market;

- the likelihood that the merger would result in the merged entity being able to significantly and sustainably increase prices or profit margins;

- the extent to which substitutes are available, or are likely to be available, in the market;

- the dynamic characteristics of the market, including growth, innovation and product differentiation;

- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and

- the nature and extent of vertical integration in the market.

It is important to note that subsection 50(3) expressly permits other, non-specified matters to be taken into account in the merger assessment.

2.4 Assessment Process

The factors outlined in subsection 50(3) have been incorporated by the ACCC into a five-step merger assessment process to analyse the likely competitive outcome of a merger or acquisition. The five-step process is as follows:

(1) Market Definition: The scope of the relevant 'market' is defined by its product, geographic and time dimensions. An assessment can then be made as to whether the market is substantial. If the market is not substantial, the ACCC will terminate its inquiry at this stage.

The process of market definition can be viewed as establishing the smallest area of product, functional and geographic space within which a hypothetical current and future profit maximising monopolist would impose a small but significant and non-transitory increase in price (SSNIP) above the level absent of the merger. More generally, the market can be defined as the smallest area over which a hypothetical monopolist could exercise a significant degree of market power, with market power describing the capacity of the hypothetical monopolist to raise prices and/or offer a lower level of service and quality. If consumers switched their demand to close substitutes and/or firms would switch their production to supply the customers of the merged firm, it would not be profit maximising for the hypothetical monopolist to impose a SSNIP and the relevant market would need to include these sources of substitute products.

(2) Market Power: The ACCC will assess concentration levels within the defined market. The ACCC will determine whether the merged entity would either have a market share of more than 40 percent, suggesting the possibility of unilateral market power, or a share of more than 15 percent and the post-merger combined market share of the four largest firms would be greater than 75 percent, that would suggest the possibility of co-ordinated market power. The ACCC is normally unlikely to proceed further where concentration is below the thresholds as the merger would usually be unlikely to substantially lessen competition.

(3) Import Substitution: The ACCC will assess whether actual or potential imports would be likely to constrain the merged entity. If so, the merger is unlikely to be considered to substantially lessen competition.

(4) Barriers to entry: If the merger crosses either of the concentration thresholds and imports are not seen to be an effective constraint, the ACCC will examine whether there are significant barriers to the entry of new competitors.

(5) Other factors: In a concentrated market, unconstrained by imports and characterised by significant entry barriers, the ACCC will examine whether any other factor suggests that a substantial lessening of competition is likely. Such factors may include:

- the existence of countervailing bargaining power;
- the availability of substitute product from spare, expandable or convertible capacity;
- the existence of dynamic factors including growth, innovation or product differentiation in the market; and
- the elimination or creation of a vigorous and effective competitor.

If the result of the five-step assessment is that there are market characteristics that make substantial lessening of competition the likely result of the merger or acquisition, the ACCC will challenge the merger.

Australia does not have a pre-merger notification requirement, however, parties may voluntarily submit any proposal to the ACCC for an informal assessment.

2.5 Section 87B Undertakings

Section 87B of the TPA allows the ACCC to accept legally enforceable written undertakings in connection with matters where it has the power or function under the TPA. Undertakings provide a flexible alternative to simply opposing an acquisition where the ACCC believes the acquisition is likely to substantially lessen competition.

Where the ACCC believes a merger may breach the TPA, the parties might provide the ACCC with undertakings designed to address those concerns. In the case of merger undertakings, the ACCC favours those which attempt to address the market structure. Structural undertakings often involve the divestiture of identifiable assets of the merged businesses to a new entrant or an existing smaller player in a particular market. They are generally more effective in maintaining competition and are more easily monitored and enforced than undertakings that required merger parties to behave in particular ways.

2.6 If you have recently changed your substantive test, please describe what motivated the change, and whether it appears to have achieved the desired effect

Section 50 of the TPA originally prohibited any merger or acquisition likely to result in a substantial lessening of competition in a market for goods and services in Australia.

In July 1977 amendments were made to the mergers test whereby only mergers or acquisitions which would be likely to result in a corporation being able to dominate or control a substantial market for goods and services in Australia or in a State or Territory of Australia were proscribed. The rationale for these amendments was to enable and encourage mergers to proceed. The government of the day believed that it was necessary to allow more mergers to take place so that Australian firms could achieve economies of scale and improve international competitiveness.

The fundamental problem with this test was that some anticompetitive mergers were allowed because of the lower threshold test.

The TPA did not define ‘dominance’. However, the ACCC’s Merger Guidelines stated that the dominance threshold was unlikely to be breached where:

- two well matched competitors remain in the market; or
- there are a number of small independent competitors with the potential to develop further; or
- there is effective competition from imports.

The Guidelines suggested that the threshold for an investigation would be where the acquiring firm has 45 percent of the relevant market and is the largest competitor, or is the largest competitor and has a market share exceeding that of its nearest competitor by 15 percent or more.

Throughout the 1980s and into the 1990s there was considerable debate as to the appropriateness of the dominance test, particularly after a number of significant mergers led to high levels of concentration in major industries. For example, the acquisition of the Herald and Weekly Times newspaper group by News Ltd gave News Ltd around 70 percent of the newspaper circulation market.

There were also criticisms that the dominance test had failed to deliver the gains in efficiency and international competitiveness that would supposedly be achieved by allowing more mergers.

The substantial lessening of competition test allows the ACCC to deal explicitly with cases that raise issues regarding co-ordinated market power. In a concentrated market with only a few firms those firms will find it easier to lessen competition by colluding. It was recognised that this can be achieved without explicit agreement through subtle forms of tacit co-ordination, co-ordinated interaction or conscious parallelism.

Proponents of an SLC test also argued for change on the grounds of consistency between the merger test and the prohibition on anticompetitive agreements (in section 45, which is based on a substantial lessening of competition test). For example, conduct that may be in breach of the prohibition on anticompetitive agreements may be achievable through a merger approved under the dominance test which is a lesser standard.

The ACCC also expressed concern about markets that had either been recently de-regulated or were candidates for imminent deregulation where mergers short of dominance were likely to defeat the objectives of deregulation. This was likely to arise in sectors such as electricity, gas and telecommunications.

In small, open economies like Australia import competition is also an important element in assessing competitive outcomes. However, it is in areas not subject to the discipline of imports, such as those in deregulating industries and the broader non-traded goods sector that significant harm can occur to the economy if the higher levels of concentration seen under dominance are allowed to develop.

Anticompetitive behaviour in oligopolistic markets (a characteristic of the Australian economy) where those market participants supply competitive markets that are themselves subject to import competition, could seriously damage the competitiveness of those firms in industries subject to competitive discipline form imports.

In 1992 the Government decided to revert to the substantial lessening of competition test. According to the then Commonwealth Attorney-General the amendment would have a procompetitive effect because it would broaden the range of transactions which could be examined under section 50, and further stating that:

> In an Act which seeks to preserve competition it is appropriate that the merger test should focus on the effect on competition in a market rather than on the dominance of a particular firm.

3. Explore how the particular competition test, i.e. dominance (including collective dominance) versus substantial lessening of competition, might make a difference in specific mergers

3.1 Please explain why you do or do not believe, that the choice of substantial lessening of competition or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations

3.1.1 A series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors

In certain circumstances a series of small mergers or 'creeping acquisitions' can be difficult to address under the substantial lessening of competition test. This is because creeping acquisitions are only ever likely to increase the market power on an incremental basis and therefore it becomes difficult to observe and quantify which incremental acquisition resulted in the substantial lessening of competition.

Further, creeping acquisitions can pose difficulties under the TPA when a major chain seeks to acquire a business in a geographic market in which it is not already represented. Whilst the acquisition may potentially increase the market concentration of the major chain, the acquisition is unlikely to raise competition issues on a horizontal level. This is because the acquisition of a pre-existing business by the major chain merely represents a displacement and transfer of any residual market power from one operator to another. Only if the major chain is present in the same geographic market as the target independent will it possibly lead to an increase in market concentration and the accumulation of market power that may have the effect of substantially lessening competition.

3.1.2 In the pre-merger situation there is little in the way of competition in the pertinent market – e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level

Provided that the notion of collective dominance is included as part of a dominance test, then the potential co-ordinated market power effects described in this example should be adequately addressed under both a dominance and a substantial lessening of competition test.

3.1.3 A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links;

As above.

3.1.4 Although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors.

Because a dominant position has not been established in this particular example even though market power could be exercised through the charging of higher prices, it would appear that only a substantial lessening of competition test could adequately address this example.

3.2 Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the substantial lessening of competition or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

The dominance test applied in Australia between 1977 and 1992 was only a single firm form of dominance. Therefore, the ACCC has no experience in applying a dominance test that includes the notion of collective dominance.

However, the key lesson from Australia's experience with the dominance and substantial lessening of competition tests is that the substantial lessening of competition test is more stringent and, unlike the dominance test, prevents anticompetitive structural outcomes, such as co-ordination.

There are examples of major mergers considered by the ACCC where the outcome may have been substantially different depending on which test was applied. For example, the four largest Australian banks have sought to acquire regional banks. It is the ACCC's view that regional banks provide a distinctive contribution to the competitive landscape and it has therefore closely assessed any such proposals.

It is highly unlikely, given that there are already four major banks operating at the retail level, that under the dominance test the ACCC would have examined these mergers. Even mergers between two of the four major banks would not be subject to competition analysis under a dominance test.

Under the substantial lessening of competition test, the ACCC initially opposed a proposed merger between Caltex and Ampol, the fourth and fifth largest competitors in the petroleum and refining sector. This would have reduced the number of competitors from five to four. In the absence of import competition, the ACCC considered that the merger would be likely to substantially lessen competition. However, the parties offered conditions in undertakings to sell certain port terminals to make independent imports possible. The undertakings were considered sufficient to allay the ACCC's concerns and the merger was allowed to proceed.

Under a dominance test, the ACCC could not have opposed the Caltex-Ampol merger. Indeed, it could not have opposed mergers between the remaining four major competitors unless they resulted in single firm dominance. In fact, under the substantial lessening of competition test, the ACCC subsequently indicated its concern about a joint refining venture between Shell and Mobil followed almost immediately by another similar proposal between Caltex and BP. Both were carefully scrutinised by the ACCC before the parties abandoned them for commercial reasons.

In the food sector, a New Zealand entity, Rank, sought to acquire Foodland Associated Ltd, the largest grocery wholesaler in the State of Western Australia, which supplied various independent supermarkets operating under banner groups, and also controlled a number of large supermarkets itself. The proposed acquirer had entered into a collateral agreement with Coles-Myer, one of the two largest integrated wholesale/retail supermarket groups in the country, to subsequently transfer the entity to it. The ACCC successfully opposed acquisition; and it did not proceed. Under a dominance test, the ACCC would not have been able to examine it because Woolworths, a national, integrated supermarket chain, was a significant, remaining competitor.

The Wattyl/Taubmans paint manufacturer proposed merger was considered by the ACCC and opposed under the prevailing substantial lessening of competition test whereas, under a single firm dominance test, it would probably not have been scrutinised and, even if scrutinised, would almost certainly have been allowed.

The ACCC also considered a proposed merger between Optus/AAPT, the second and third largest players in fixed line telephony, which would have reduced the number of competitors in the market from three to two. Under a dominance test, it could not even have been examined however it was opposed under the substantial lessening of competition test.

During the period of the dominance test, a number of very prominent mergers had not been opposed and many argued that they had caused significant competitive harm. Those mergers would have been likely to have been scrutinised and perhaps opposed under a substantial lessening of competition test. The most prominent examples are:

- Coles-Myer. This was a merger between two of the three largest competitors in the department store and discount department store retailing sectors. A merger in the supermarket sector, shortly thereafter, between Woolworths and Safeways, combined two of the four largest integrated supermarket chains. The overall impact of these two mergers appeared to be a substantial increase in concentration in the retailing sector.

- In the newspaper market, two of the three national newspaper-publishing groups, News Ltd and Herald & Weekly Times had merged, leaving Fairfax as the only remaining significant competitor.

- In the national domestic aviation market, a merger between Ansett Airlines and East West Airlines reduced the number of interstate competitors from three (Qantas, Ansett and East-West) to two. While Qantas and Ansett were substantially larger than East West, it was a vigorous and effective competitor on the trunk routes with good prospects of growth.

3.3 It is sometimes said that the substantial lessening of competition test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

The achievement of operating efficiencies is often an important factor driving mergers. Merger policy is a continuing balance between potential efficiency gains for the firms involved and possible detriment associated with the exercise of increased market power for consumers. In regard to mergers the ACCC's guiding principle is that the TPA is concerned with the competition in the market, not the competitiveness of individual firms. However, the ACCC does take account of efficiency enhancing aspects of a merger where they may impact on the competitiveness of the market.

If a merger can be shown to enhance the efficiency of the merged entity, the effect may be to enhance the competitiveness of the market. This may occur through, for example, undermining of the conditions for co-ordinated conduct or enhancing the competitive constraint on unilateral conduct of other firms in the market.

However, if business wishes to argue efficiency enhancing claims that are firm specific in order to counter perceived anticompetitive effects it is more likely these need to be accounted for through the authorisation process. This enables a balancing of the detriments and benefits to be undertaken and allows a closer scrutiny of claimed efficiencies arising from the particular proposal.

It may well be that under the more stringent single firm dominance regime the balance may be more difficult to achieve, although it is not obvious from the Australian experience. It may be that the

closer one comes to a dominant position that the costs of concentration become greater therefore requiring much higher levels of efficiencies to offset the competitive detriment.

4. Broader Policy Concerns

4.1 Does the choice of competition tests make a difference in the roles played by market definition and concentration data in merger assessment?

Market definition and concentration data are likely to be integral to the competition assessment under either test. The ACCC's experience is that market identification remained as important under the dominance test as under the substantial lessening of competition test. It was certainly the experience in Australia when it moved from a dominance test to a substantial lessening of competition test in 1992.

4.2 More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?

There does not appear to be any reason for the two tests leading to different legal and/or economic emphases. It is true that under the dominance test that operated in Australia, economic analysis dealing with issues of co-ordinated market power were not addressed at all, which is certainly not the case with the substantial lessening of competition test. However, the experience of the ACCC, as with the market definition and concentration, is that the underlying economic and legal arguments are likely to be of similar import no matter the regime in place (subject, of course, to the comment above concerning the assessment of structural factors leading to the likelihood of co-ordinated conduct).

5. Additional concerns

In addition to the comments above, it is important to note that there are likely to be certain benefits achieved through having a common test. It could assist in facilitating a common and consistent approach to merger review right around the world. It could also make it easier for applicants of cross border mergers to deal with the same test. Transaction costs should be lower and certainty as between regimes improved, although there may always be differences in focus on the part of the various authorities.

BRAZIL[1]

1. Introduction

In Brazil, mergers are reviewed under the rule of reason criterion and are dealt with administratively, according to the Competition Law. The Secretariat for Economic Monitoring of the Ministry of Finance (SEAE-MF) and the Secretariat of Economic Law of the Ministry of Justice (SDE-MJ) prepare the case and are responsible for issuing non-binding opinions to the Administrative Council for Economic Defense (CADE), a federal autarchy linked to the Ministry of Justice, which finally decides it. The preparation of the case follows the analysis criteria as expounded in the Joint Merger Guidelines issued by SEAE and SDE[2], quite similar to the North-American Merger Guidelines.

Administrative penalties, whenever applicable, are imposed by CADE according to Title V (on infringements of economic order), Chapter III ("on penalties") of Article 23, Law no. 8884/94. The Judicial Branch is in charge of reviewing all CADE's decisions, thereby respecting not only the due process of law but also the full defense principle and the free access to the Judicial Branch, as seen in Sections LIV[3], LV[4] and XXXV[5], respectively, of Article 5 of the Federal Constitution of Brazil.

2. Nature of the Substantive Test

In accordance with Brazilian jurisdiction, competition status exerts strong influence in favour of the Substantial Lessening of Competition test (SLC), although Law no.8884/94 also contemplates the Dominance and the Public Interest tests.

The main section of article 54 (Law 8884/94) provides that "Any act that may limit or otherwise restrain open competition (e.g., SLC test), or that result in the control of relevant markets for certain products or services (e.g., dominance test) shall be submitted to CADE for review". Therefore, according to the Brazilian Competition Law, it seems that both tests could be applied whenever reviewing a merger: the dominance and the SLC tests.

The former takes into consideration the market share and the probability of the new firm to exercise its market power (by analysing entry conditions, for example). The latter is more rigorous in that it not only takes into account market share and probability, but also checks the merger's efficiency. It is likewise important to mention that variables such as "quality of the product offered by this new firm" could also be included in this part of the analysis.

Despite the fact that the main section of article 54 expresses the two interpretations, Clause 1 of article 54 (Law no. 8884/94) establishes the rule of reason principle when reviewing a merger.

This means that a merger may be blocked, approved with restriction or approved as it is, after balancing the costs – benefits of it from a consumer perspective. Therefore, an analysis of the merger's efficiency is done if the merger brings costs for the consumers (e.g. if there is a possibility and also a probability of the new entrepreneur exercise its market power), what suggests that a SLC test is carried out.

With regard to the public interest test, Clause 2 of article 54 (Law no.8884/94) states: "Any action under this article may be considered lawful if at least three of the requirements listed in the above items (which establishes the rule of reason principle) are met, whenever any such action is taken in the public interest (public interest test) or otherwise required to the benefit of the Brazilian economy, provided no damages are caused to consumers or users." This means that the public interest test could also be applied.

Even though this last test is included under Law no. 8884/94, SEAE and SDE have never reviewed a merger case based on the public interest test. However, one can say that CADE has approved merger cases based on such test, when imposing restrictions. That is, in some cases macroeconomic variables have been taken into consideration (such as "employment", "exportation" and "investment"). Therefore, in Brazil, we can not identify examples of the public interest test that have been used to assess a merger case by SEAE or SDE, but CADE has considered it sometimes when clearing a merger. Ambev´s (beer) case is an example, where CADE imposed some restrictions on employment.

Consequently, in practice, although the Law contemplates the three tests, the antitrust authorities review a merger using the SLC test. In fact, one can say that, as the dominance test is a part of the analysis of the SLC test, it is also considered in Brazil. On the other hand, once the public interest test was never used by the Secretariats and was never used solely to approve a merger by CADE, until now, one can say that this test is not really used in Brazil.

In addition, when reviewing a merger, the antitrust authorities are concerned about the possibility of collusion. Normally, SEAE uses three concentration measures to identify the strength of a collective dominant position. They are: Ci (i could be four, five, six or even eight), Herfildahl Hirshman Index (HHI) and the one used by "La Comisión Federal de Competencia de México", called the "dominance test" (which has no bearing on the dominance test so far mentioned in this article). The first two are commonly used in many jurisdictions, though not much can be said of them. The last one proposes a rivalry analysis. That is, in cases where the index is negative, the merger would be able to bring about a more competitive structural market because the newly formed enterprise would have grown to a size equal to other existing competitors on the market and, thus, would be able to compete on an equal footing. Furthermore, it would decrease the probability of collusion since after the merger there would be one more "large firm" to be included in the collusion assessment. On the other hand, if the index were positive, it would be an indication that a problem with respect to the competitive structure might arise.

The reason for analysing the possibility of a collusion is not exactly to block a merger (e.g., a merger has never been blocked because of a high probability of collusion), but to approve it with restrictions or to alert the other antitrust members that a problem could arise in a particular economic sector. Moreover, this analysis would serve to alert the antitrust authorities with respect to future problems in forthcoming mergers in this particular economic sector.

In summary, Brazilian jurisdiction does use the SLC test, is concerned with possible collusion regarding dominant position (although not to block a merger) and has never reviewed a merger solely under the public interest test, although has approved some cases with restrictions that considered non-competition variables.

3. Exploring how the particular competition test, i.e. dominance versus SLC, might make a difference in specific mergers

3.1. Please explain why you do or do not believe that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind)

- series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors.

3.1.1 Several cases in the ELEVATORS sector

Twenty-two mergers in the elevator's services sector, dealing with conservation, maintenance, repair and modernisation of elevators, have been presented to SBDC over the last few years. Thirteen of these operations have consisted of the acquisition of small companies by elevators producers companies, mainly for "Elevadores do Brasil Ltda.", a subsidiary of the Otis Elevator Company, belonging to the United Technologies Corporation group (UTC). The other seven cases consist of Otis' small acquisitions.

The definition of the relevant market for this segment was established as being within a radius of 100 km from the city headquarters of the company that was being acquired, as well as from the cities where the acquired company had a branch office or even a resident technician.

Once this area was demarcated, all service contracts inside the given area were verified and finally the market share of each service company in the area was calculated.

The region that presented the greatest number of cases was Salvador (three cases) and its surrounding area: one merger happened in December 2000, one in January 2002 and one in February 2002.

To show that the strategy of acquiring did not succeed, the market share of the top three companies in the period of 2000 – 2002 in the region of Salvador is presented below. As it can be seen, Otis was supposed to add 6 percent + 0.2 percent + 0.4 percent = 6.6 percent in the three acquisitions, but added only five percent. Therefore, even acquiring firms, Otis did not have a proportional increase in its market share.

Table 1 – Market Share of Salvador and Region

Companies	Market Share (Dec/2000)	Market Share (Feb/2002)
Atlas/Schindler	38.0 %	39.2 %
Otis	27.0 %	32.0 %
Thyssen/Sûr	12.0 %	16.2 %
Other	29.0 %	17.7 %
TOTAL	100.0 %	100.0 %

Source: Elevadores Brasil Ltda.

The explanation for the fact that Otis did not have a proportional increase in its market share can be that there is big rivalry among firms. As can be seen, Thyssen did not undergo an acquiring strategy and augmented its market share. Furthermore, especially in other cases, entry of small service companies was quite an easy matter and occurred frequently in the analysed markets.

We believe that the use of either the SLC or the dominance test would have made no difference in such cases. Either one would have resulted in the approval of the Acts since barriers to entry are sufficiently low in this market to guarantee the entry of new competitors.

- In the pre-merger situation there is little in the way of competition in the pertinent market – e.g. the market is currently regulated but is scheduled to be liberated.

3.1.2 Petrobras & Repsol-YPF

This operation involved Petróleo Brasileiro S.A. and Repsol YPF S/A and occurred in the oil and derivatives sector, involving exchange of assets between the petitioners in fuel distribution, oil refining and extraction. At that time, this market in Brazil was regulated.

Repsol, the owner of a refinery in the northeast of Argentina, called Bahia Blanca, would have a participation of 30 percent of a refinery in the south of Brazil, called REFAP. And Petrobas would own some fuel distribution in Argentina and *vice-versa*.

To define the Geographic Market (GM), three hypotheses relative to the future regulated market in January 2002 were considered: *1*) GM = south of Brazil & liberalisation of imports of derivatives with or without open access for ducts and terminals after January 2002; *2*) GM = south of Brazil + northeast of Argentina + Uruguai & liberalisation of imports of derivatives without open access; *3*) GM = south of Brazil + northeast of Argentina + Uruguai & liberalisation of imports of derivatives with open access.

In the first case, there was no concentration, so the operation could be accepted. In the second case, once neither before or after the operation there were no open access, Repsol was not a rival and was not going to be one. Therefore, after 2002 Repsol would still not be able to distribute oil in Brazil. Consequently, the operation could be accepted. In the last GM, if after other competitors could distribute oil in Brazil, Repsol would be one of others firms that could use the pipelines. Therefore, the operation could be accepted

Consequently, the conclusion SEAE reached was that in all considered scenarios, the elimination of a potential competitor would not be sustainable.

With regard to retailing, the analysis demonstrated that the operation did not evidence the existence of risks to the competition in the involved markets. So, the operation was approved by SBDC without restrictions.

In this case, as the analysis of the efficiencies was not necessary, we believe that the decision would have been the same, had the SLC or the dominance test been applied. The operation would have been approved once the possibility of elimination of a potential competitor had not been evidenced.

3.2. Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

3.2.1 Brahma & Antartica = AMBEV

This was a fusion between" Companhia Antarctica Paulista and Companhia Cervejaria Brahma", creating the "Companhia de Bebidas das Américas - AmBev" - in the drinks and malt sector.

Seven relevant markets of distinct products had to be defined: bottled water, beer, soda, tea, sports drink, juice and malt.

For the tea, sports drink and juice markets, the analysis did not substantiate any coincidence in operations between Brahma and Antarctica. They were seen to be quite complementary as there was no horizontal concentration in such markets.

In the specific case of malt, although the act would generate horizontal concentration, most of the companies' production would be directed to their own consumption, so the concern over the exercise of market power became irrelevant.

With respect to the other relevant markets, the conclusions were the following:

- bottled water market: SEAE concluded that there would be no damage to the competition since combined market shares only amounted to 1.08 percent;

- soda pop market: five distinct geographic markets were defined, in which the total sales of Ambev shares varied from 16.8 percent to 24.5 percent. The analysis evidenced that entrance of new competitors into this market would be easy and sufficient;

- beer market: five distinct Geographic Markets were defined, where Ambev´s shares after the merger would vary from 65.1 percent to 91.8 percent in total commercialised hectoliters.

Because of the high concentration verified in all five regions in the beer market, SEAE proceeded to the study of the market power exercise probability. Since the entrance would be neither easy nor sufficient and faced with the fact that rivals had not presented themselves as effective competitors capable of disciplining price formation in this market, the Secretariats analysed the efficiencies of the case and considered them too low. Therefore, the Secretariats suggested the merger could not be approved in the form it had been presented to SBDC, recommending, among others, the following alterations:

- the selling of total tangible and intangible assets corresponding to the entire beer business associated to the Skol brand, a property of Brahma;

- the selling of one of two plants located in Cuiabá: Cuiabana (Brahma) and Cuiabá Branch office (Antarctica);

- the selling of one of two plants located in Manaus: Miranda Corrêa (Brahma) and Manaus Branch office (Antarctica).

CADE's interpretation of the alleged efficiencies was quite different from the Secretariats' as the Council decided to approve the merger with lighter restrictions: the new firm had to sell the total tangible and intangible assets corresponding to the entire beer business associated to the Bavária brand to a

purchaser who could not already be the owner of more than five percent of the beer market; the selling of five plants (one in each geographic market); and the sharing in distribution net.

If the dominance test had been applied in the analysis of this Act, the operation would have probably been rejected or approved only under certain restrictions, for example, that of having to sell one of the three main brands involved in the operation, namely, Antarctica, Skol or Brahma, since the market participation of Ambev would then be very high in all of the defined relevant markets and this particular market had been characterised by high barriers to entry.

In the case of the SLC test, taking into consideration the analysis of efficiencies, the decision becomes rather subjective, depending on the interpretation each Agency of the SBDC sees fit to use. SEAE's and SDE's recommendation pointed to the selling of one of the three main brands whereas Cade's decision was less severe.

3.2.2 Merger of 5 firms - CROMA

The operation to form CROMA (American Metallic Cork Company) consisted of a commercial agreement among the top five metallic cork producing companies in the country: Amorim Pinto e Cia Ltda.; Aro S.A. Exportação, Importação e Comércio, Indústrias Reunidas Renda S/A; Metalúrgica Cearense S/A; Tapon Corona Metal Plástico Ltda. and Tapon Corona Industrial do Norte S/A. Once the agreement was approved, these five companies would own 98.75 percent of the nation's metallic cork market.

We believe that the choice of the SLC or the dominance test would have made no difference in this case, and that either one would result in blocking the Act. This would occur because the merger companies were unable to demonstrate that the agreement would generate reduction of production costs and to assure that the final consumer price would not be increased.

3.2.3 Praxair & Nicrom

With this operation, Nicrom Industrial Limitada would yield to Praxair Surface Technologies do Brasil Ltda. the surface and burnishing machinery used for laser engraved ceramic anilox rolls manufacturing. Also, through this acquisition, Nicrom would be forbidden to proceed over the next five years, directly or indirectly, in manufacturing anilox rolls engraved with equipment similar to the ones acquired (what we would call an anticompetitive clause).

The analysis was restricted to the laser engraved ceramic anilox rolls market. Praxair´s market share in the relevant market would be 100 percent with the Act. The absence of effective competitors, allied to the difficulties for entrance in the market, together with imports incapable of serving as an effective tool against the exercise of market power, led SEAE to the analysis of possible economic benefits in the operation. However, the fact that the analysis demonstrated that the liquid effect of the concentration – i.e., the comparison between the economic costs and potential benefits derived from the Act that could not be reached by any other form in less than two years, - was considered to be negative.

SEAE understood, though, that simply rejecting the operation would not automatically keep up competitive conditions in the relevant market, as the Praxair's entrance, in 1998 – before the operation – brought a new technology to the relevant market, which was driving down Nicrom's rivalry. Moreover, not only there were no other purchasers interested in buying it but also the dissolution of the acquisition would jeopardise the performance of Nicrom in other markets.

In this view, the Secretariat suggested that the Act should not be approved in the manner in which it had been presented to SBDC, recommending that certain alterations should be made. With an aim towards restricting the take over of the market and of re-establishing minimal conditions of competition, SEAE recommended the creation of a specific import tariff code for laser engraved ceramic anilox rolls and the setting up of an import aliquot of zero percent. Moreover, it also recommended the exclusion of the non-competition clause in the contract established between Nicrom and Praxair.

We believe that if the dominance test had been used in this case, the Act would have either been rejected, or that it would have been approved with the same restrictions. In the same way, the analysis for the SLC would not have been different, since the presented efficiencies would not have been enough to surpass economic costs generated by the operation.

3.2.4 Casil & Saint-Gobain Group

By this operation, Casil Indústria e Comércio S/A. (Casil) would be acquired by the Saint-Gobain Group (which is an owner of Norton). The operation would create horizontal concentration in the silicon carbide (SiC) market and two vertical integrations: SiC and refractories and Sic and abrasives.

The market share of the Saint-Gobain Group in the SiC sector did not bring on much concern because Saint-Gobain was not in Brazil. Also, the vertical integration between SiC and refractory did not damage the Brazilian market because Saint-Gobain had an old technology that was being substituted.

However, the vertical integration between the production of SiC and abrasives was a problem. Saint-Gobain Group had high participation in these two segments, coupled with the absence of effective competitors, with difficulties for entrance and with difficulties in imports led SEAE to analyse the possible economic benefits (efficiencies) that could be gained from such an acquisition.

The analysis, however, has demonstrated that the net effect of the operation, that is, the comparison between the economic costs and the potential benefits derived from the Act was negative.

Therefore, SEAE suggested that the operation could be approved with restrictions. To ensure that existing competitive conditions could be reestablished, SEAE has recommended the alienation of assets from the old Norton company related to the abrasives business.

We believe that if the dominance test had been used in this case the Act would either have been rejected outright, or it would have been approved under the same restrictions. Likewise, the analysis made by SLC would not have been different, since the alleged efficiencies would not have been enough to cover the economic costs generated by the operation.

4. Concluding Remarks

It seems Brazilian jurisdiction does use the SLC test, is concerned with possible collusion regarding dominant position (although not to block a merger) and has never reviewed a merger solely under the public interest test, although has approved some cases with restrictions that considered non-competition variables.

In the previously described cases, it is possible to notice that only in the Ambev case the application of the SLC test or the dominance test would probably lead to distinct conclusions. If the dominance test had been applied in the analysis of this merger, the operation would have probably been

rejected or approved with stronger restrictions (than an analysis made by the SLC test), once the market share of Ambev was high in the defined relevant market of beers, which was characterised by high barriers to entry. On the other hand, in the case of the SLC test, taking into consideration the analysis of efficiencies, the decision becomes lighter. SEAE's and SDE's recommendation pointed to the selling of one of the three main brands whereas Cade´s decision was less severe, making them to sell one weaker brand, called Bavaria. The difference in the solution could be explained because of the efficiencies analysis: the formers considered that there were not high efficiencies in the beer business, while the latter understood there were.

In a general way, in about 95 percent of the cases analysed by the SBDC, the analysis of efficiencies is not necessary, that is, the operations are approved in earlier stages. Therefore, it is reasonable to assume that, in these cases, the conclusion would be the same either with the application of the SLC test or with the dominance test, once that one of the main differences between the two is exactly the analysis of the efficiencies of the operation.

Even considering the other five percent cases, both analyses would lead to the same conclusion. Consequently, we can say that only in very few cases, maybe two percent, the analysis would have led to different results, weather making use of the SLC or the Dominance test, as we could see in the Ambev case.

NOTES

1. Paper prepared by Claudio Monteiro Considera, Secretary for Economic Monitoring of the Ministry of Finance, Cristiane Alkmin Junqueira Schmidt, Deputy-Secretary for Economic Monitoring, Claudia Vidal Monnerat do Valle, General Co-ordinator for Industrial Products, Kélvia Albuquerque, Competition Policy Advisor, Leandro Pinto Vilela, Co-ordinator for Durable Goods Industry and Marcelo Souza Azevedo, Co-ordinator for Process Industry, for the OECD Competition Committee Roundtable on Substantive Criteria Used for Merger Assessment, to be held in Paris, October 23-24, 2002.

2. Joint Directive Seae/SDE n.º 50/2001.

3. "[N]obody shall be deprived of his or her liberty, or of his or her assets without due legal process."

4. "[T]o the litigants, in a judicial or administrative process, and to the defendants in general, are assured the right to contradictory and full defense, with their inherent means and resources." Full defense = the right to produce proof, regardless of whether there has been a change or not. Contradictory = right to deny what the other party has stated, whether by producing proof or otherwise. Usually contradictory and full defense operate jointly, i.e., the individual produces proof to defend himself/herself from a charge.

5 . "[The] law shall not exclude a grievance or a threat from the right to appreciation by the Judicial Branch."

6. Schmidt, Cristiane and Lima, Marcos, Working Paper (*Documento de Trabalho)* no. 13 SEAE/ MF.

CHINESE TAIPEI

1. Objectives

1.1 In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position and public interest tests?

The general objectives of Chinese Taipei's Fair Trade Law are to maintain trading order, protect consumer interests, ensure fair competition and to promote economic stability and prosperity. The legislators designed the Law in an effort to pursue such multiple objectives rather than to solely protect and promote competition.

Accordingly, the general objectives defined in the Fair Trade Law are not particularly in favour of the SLC test or the dominance test for merger assessment. The Law applies a public interest test and requires that the Fair Trade Commission (the FTC) take these objectives into account when reviewing mergers.

2. Nature of the substantive test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a creation or strengthening of a dominant position (dominance) test, some mixture of the two or a public interest test?

Chinese Taipei applies the public interest test to mergers. Article 12 of the Fair Trade Law provides that the FTC "… shall not prohibit the notified merger if the overall economic benefits of the merger outweighs the disadvantages resulting from competition restraints".

Once the FTC believes the disadvantages resulting from competition restraints cannot be overcome by the economic benefits produced by the proposed merger, it is obliged to reject the proposal. On the other hand, the FTC is also empowered to set conditions or require undertakings in its decision to the notified merger if it is satisfied that the measure taken can produce enough economic benefits to outweigh the disadvantages resulting from competition restraints.

2.2 If your jurisdiction applies a public interest test to merger review

2.2.1 Does the test contain a competition element? If so, how much weight is that element given, and does it more closely resemble the SLC or the dominance test?

The public interest test Chinese Taipei uses does contain a competition element. When applying the aforementioned criteria, the FTC needs to consider the potential disadvantages that result from competition restraints. Competition is clearly one of the key elements in the test.

If the FTC is not fully satisfied that the proposed merger can indeed satisfy its overall economic benefits and outweigh the disadvantages from competition restraints, then the proposed merger fails the test. In other words, once the proposed merger harms competition in a way that cannot be overcome by its benefits to the overall economy, the merger will not be approved. Obviously, therefore, the element of competition plays a crucial role in processing the public interest test.

In considering the "competition restraints", Chinese Taipei normally gives the greatest weight to the anticipated entry barriers of the post-merger market . The "competition restraint" might, as a consequence, more closely resemble the dominance test. Once again, however, competition itself is not the only concern of the provisions, as stipulated in the general objectives of the Fair Trade Law. It is the overall economic benefits that the Law endeavors to pursue.

2.2.2 How and by who is the public interest test applied?

It is the Fair Trade Commission's responsibility to apply the public interest test to the proposed mergers. The FTC is a government agency at the ministerial level. According to the Fair Trade Law, the FTC is in charge of formulating the fair trade policy, in addition to enforcing the Fair Trade Law.

The decisions made by the FTC can be appealed to the administrative courts. Thus, the administrative courts also play a role in applying the public interest test.

Once having been notified by and having received sufficient materials from the merging parties, the FTC considers the overall economic benefits of the proposed merger as well as the disadvantages caused by any incurred competition restraints. After deciding the "net effect" of the proposed merger – is it positive or negative, the FTC then concludes whether the proposed merger should be approved or prohibited.

There is not much jurisprudential discussion on the "overall economic benefits", however. In practice, when reviewing different types of mergers, the FTC considers different factors in weighing the "overall economic benefits" and the "disadvantages brought about by competition restraints".

Horizontal mergers: the factors the FTC considers in terms of the "overall economic benefit" and the "disadvantages resulting from competition restraint" are the following:

- "overall economic benefits": economy of scale (in technology of production, management and finance); technology efficiency; and other factors, such as the possibility of changes in prices in post-merger markets and whether one of the merging parties is a failing company, among others;

- "disadvantages resulting from competition restraints": market power of the merged entity and entry barriers of the post-merger market; changes in the concentration ratio and the number of players in the relevant market; substitutability of the merging parties' production or distribution; past records with regard to merging parties in conducting illegal mergers, hard-core cartels or misuse of market power.

Vertical mergers:

- "overall economic benefits": economy of scale (in management and finance); vertical economy; and other factors, such as possible changes in prices in post-merger markets and whether one of the merging parties is a failing company; and so on

- "disadvantages resulting from competition restraints": entry barriers of the post-merger market; changes concerning the concentration ratio; past records of merging parties in conducting illegal mergers, hard-core cartels or and misuse of market power.

Conglomerate mergers:

- "overall economic benefit": economy of scale in technology of production; whether one of the merging parties is a failing company; and the economy of scope, etc.;

- "disadvantages resulting from competition restraints": market power of the merged entity in the post-merger market; changes *vis-a-vis* the concentration ratio; past records of merging parties with respect to conducting illegal mergers, hard-core cartels or misuse of market power.

2.3 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expected post-merger increases in quality adjusted market prices? What other factors, if any, are prominently featured in determining whether competition is likely to be harmed by a merger?

Price change is clearly a very crucial issue when Chinese Taipei reviews a merger proposal. If the merged entity can obtain a dominant position or if there is a risk that it may significantly and persistently raise prices without undertaking measures to solve this concern, then it is quite unlikely for the FTC to be satisfied when applying the public interest test to the proposed merger.

If the merged entity does not enjoy a dominant position or it obtains a dominant position without ability to affect price, then the FTC will put more weight on other factors, such as the possibility of lowering the quality of the commodity or services; the decreasing of upstream or downstream businesses' or consumers' choices; raising entry barriers; and whether the post-merger market structure will be prone to the collusion of market players.

3. Broader Policy Concerns

3.1 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?

In reviewing a cross-border merger, the choice of tests might not be so decisive to the rationale behind the decision-making. For competition officials, it is the market situation that really matters. Different markets have different competition concerns to address, and a universal standard for merger assessment can hardly guarantee a universal decision to cross-border mergers.

Merger review is deemed the most profound area in competition law enforcement. It is not as easy as dealing with hard-core cartels in obtaining consensus from the competition community. There might be still a long way to go. As the competition authorities share the goal of minimising possible friction arising from the discrepancy between different decisions on cross-border mergers and facilitating international trade and investment, further exchanges of views and experiences might still need to be encouraged.

CZECH REPUBLIC

The new Act No. 143/2001 Coll., on the Protection of Competition (hereinafter referred to as "the Competition Act") came into force on 1 July 2001 and brought some substantive changes concerning merger control. For example: the dominant position is derived from market power; notification thresholds on the basis of turnover have been introduced; the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as "the Office") may grant a position of a party to the proceeding also to third parties; decisive criterion for existence of a merger is „a concentration between two previously independent undertakings"; the Office shall issue a decision within 30 days of the initiation of proceedings if the concentration does not create or strengthen a dominant position, or within a five months, if the concentration raises serious doubts as to a significant distortion of competition. Under the new Competition Act, the creation of a new undertaking jointly controlled by more undertakings performing on a lasting basis all the functions of an autonomous economic entity (joint venture of a concentrative character) shall also constitute a concentration. Under the new Competition Act the undertaking may not determine or influence competitive behaviour of the controlled undertaking before the Office's final decision on the concentration approval. The Office may impose conditions and restrictions aimed at preservation of effective competition or condition the approval by the fulfilments of commitments that the parties have entered during the proceedings.

The submitted contribution of the Czech Republic includes the answers to questions related to the proposed issues for discussion, utilising in the Secretariat's questionnaire stated possibility to answer to some of the questions included. The Office also took advantage of describing in detail a specific case recently investigated by the Office, with relation to the discussed issues.

1. The Basic Substantive Criteria – The Substantive Test

The key provisions of the Competition Act relating to the so-called substantive test are the Articles 16 and 17. According to Article 16(2) of the Competition Act, the Office shall issue a decision approving the concentration within 30 days of the initiation of proceedings in cases, where the concentration does not create or strengthen a dominant position of the undertakings concerned or some of them, as a result of which competition would be significantly distorted. In the event that the Office finds that the concentration raises serious doubts as to a significant distortion of competition, the Office shall advise within the stipulated period the parties to the proceedings of this fact and of continuation of the proceedings into the second phase.

According to Article 17(2) of the Competition Act, the Office shall refuse the proposal on concentration approval if the concentration would significantly distort competition on the relevant market.

It follows from the abovementioned, that the basic precondition for any refusal of proposal on concentration approval is the fact, that the concentration would create or strengthen a dominant position, as a result of which competition on the relevant market would be significantly distorted. This means that it is not sufficient that the concentration would create or strengthen dominant position; this created or

strengthened dominant position must result in significant distortion of competition. This provision corresponds to the Article 2(3) of the Council Regulation No.4064/89 as amended.

The new legislation adopted with the aim to reach the maximal compatibility of Czech competition law with the EC competition law thus embodies the review of concentration of undertakings exclusively on the basis of competition criteria. This is the main difference from the previous legislation as stipulated in the former Act No. 63/1991 Coll., on the Protection of Competition, as amended, which enabled the assessment also of other then only competition criteria. According to the previous legislation, the Office should approve the concentration if the detriment that may result from distortion of competition was outweighed by benefits brought about by this concentration. The fact that the concentration distorts or may distort competition was considered to establish the distortion, e.g. the decrease of number of competing undertakings or the creation or strengthening of a dominant position. On the other hand, cost reductions, economies of scale, increase of production quality, improved balance between quality and price, improved export capacity and improved competitiveness of domestic undertakings in foreign markets could have been considered as economic benefits of a concentration. An important condition was to prove, that the benefits of the concentration would have had positive impact even for third parties (the competitors), who were not the parties of the concentration, for customers and the economy as a whole. For the assessment of the concentration by the Office, it was thus not decisive to prove benefits only for the parties of the concentration, but the most important was the participation of other undertakings, consumers and the economy as a whole in these benefits.

As concerns the legislation currently in force, the issue of creation or strengthening of a dominant position is decisive. The concept of dominant position is in the Competition Act defined in the Article 10(1) according to which one or more undertakings jointly are deemed to have a dominant position, if their market power enables them to behave to a significant extent independently of other undertakings or consumers.

The Competition Act further defines the concept of the market power, which is a multi-criterion category, that is assessed by the Office pursuant to the market share and other criteria, especially according to the economic and financial power of the undertakings, legal and other barriers to entry into market by other undertakings, vertical integration level of the undertakings, market structure and size of the market shares of immediate competitors. Thus, the market share is not a single criterion for the assessment of the market power. On the other hand it is true, that it is the primary and the most important criterion, which is reflected in the wording of the Competition Act that provides for so called refutable presumption, that unless proven contrary, an undertaking or undertakings shall be deemed not to be in a dominant position, if its/their market share achieved during examined period is below 40 percent.

It could be concluded, that the main criteria for assessment of a dominant position in the market are:

- market structure (market shares; period, in which market shares are held; market shares of the closest competitors; potential competition; stability of the market share of the leader during the time; mature vs. dynamic and high innovative markets; barriers to entry);

- firm’s structure (the technology leadership in comparison to its competitors; business advantages such as trademarks or distribution network; large production capacity; long-term secured supply in comparison with the investment opportunities available to other undertakings; access to the raw materials; vertical integration level; activities in other markets via subsidiaries; financial resources; the ability to diversify the risks between activities); and

- firm's behaviour (ability to set or control prices).

As mentioned above, after having found that the assessed concentration will lead to the creation or strengthening of a dominant position, the Office is further obliged to explore, whether the creation or strengthening of a dominant position will result in the substantial distortion of the competition on the relevant market. When deciding, the Office takes into account among others the necessity of preservation and further development of effective competition, the structure of all markets affected, the shares of the parties to the concentration on such markets, their economic and financial power, legal and other barriers to entry by other undertakings into the relevant markets, the alternatives available to suppliers and customers of the parties to the concentration, the development of supply and demand on the affected markets, the needs and interests of consumers and research and development provided that it is to consumer's advantage and does not form an obstacle to effective competition.

2. An Example of Using the Basic Substantive Criteria in Decisional Practice of the Office

In 2001, the Office conducted administrative proceeding on approval of concentration of KMV/Podebradka, two producers of mineral waters in the Czech market. The Office did not approve the concentration in particular on the basis of the following facts:

- Low degree of utilisation of the production capacities leading to the long-term security of supply from the mineral water sources (at present time there is only about 30 percent utilisation of the natural mineral springs. Also it may be pointed out that some of the other producers of mineral water have 40times lower production capacity).

- Commercial advantage in ownership of considerable number of well known trade marks (constituting an entry barrier on the mineral water markets).

- Financial resources (deep pocket) of the investor.

- Almost zero import (lack of significant market entry given by the particular characteristics of the product - every 300 km of transportation could increase the price of bottled mineral water by ten percent).

- Static nature of the market (no dynamic, rapidly changing market).

- Stable market with no appreciable deviations.

- The relative size of the market shares of the leading firms' nearest rivals (54 percent market share of the new subject, 28 percent, 22 percent and one-six percent market shares of the nearest competitors).

- The strength of the brand portfolio and rise of portfolio power consisting in possibility of spreading of risk over brands sold, including the possibility to sell non-competitive brands by tying (linking sales of those weaker brands to the purchase of strong brands. Increased scope for tying makes the threat to refuse to deal more likely. Consequently it could lead to the increase of the ability to secure promotional support for secondary brands. These concerns are similar to the so called *post* Chicago theories on vertical restrains, whereby firms with market power can use that power to foreclose market access and raise rivals' costs and dampen competition).

- Economy of scale, which could be reached by selling of huge volumes of mineral water. This is an advantage, which strengthens negotiation position *vis-à-vis* supermarkets, hypermarkets or other big purchasers.

3. An Example of Supporting Use of Quantitative Economic Analysis

In the decision concerning the KMV/Podebradka case (alike in other complicated cases), the Office used Herfindahl – Hirschman index (HHI) as an instrument for measuring the degree of concentration (monopolisation) on the markets of packaged natural mineral waters and packaged flavoured mineral waters. The increase of HHI index after the concentration on both abovementioned markets instigated serious competition concerns. The market of packaged natural mineral waters would face an increase by 310 points and the HHI index would reach a value of almost 3 500 points and therefore it would be a case of a strongly concentrated market. The market of packaged flavoured mineral waters after the concentration would face an increase by 862 points and the HHI index would thus reach the value of app. 1 800 points and it would also be a case of a concentrated market. These facts also confirmed the conclusions of the Office that the abovementioned concentration would significantly distort competition.

4. An Example of Supporting Use of Empirical Analysis

In the abovementioned case KMV/Podebradka the Office defined, in line with the practice of the European Commission, two separate relevant product markets for packaged natural mineral waters and packaged flavoured mineral waters. This definition was supported also by the empirical analysis conducted by the Office in this case.

One of the empirical tests consisted in comparison of development of consumers' consumption of soft drinks such as juices, coca-cola and flavoured waters (soft drinks demand in million litres) with development of consumer consumption of the bottled natural mineral water (natural mineral water demand in million litres). There had not been found any "shocks" in soft drinks demand or natural mineral water demand over the past three years. It is evidence that there is no switching of products based on the change of consumer preferences.

Other empirical test involved comparison of the price movements over time of the bottled natural mineral water with the price movements of other soft drinks such as juices, coca-cola, flavoured waters over the past three years. This analysis confirmed that the relative ratio between the price levels of these products is very high and stable. For example, the juices remain three times expensive than natural mineral water over time and twice more expensive than flavoured waters. Also coca-cola was still twice expensive than natural mineral water over past three years. The both empirical tests together with other assessed characteristics of the markets supported the Office's conclusion, that there are two separate relevant markets. Our experience, therefore, shows that empirical analysis plays an important role in assessments of the markets and could improve the objectivity of the final decision.

5. Conclusion

The experience of the Office shows that there are evident similarities between the dominance test and the substantial lessening of competition test as regards the assessed criteria, as a result of which the danger of achieving different results of assessment in using these tests is to a significant extent eliminated. Legal regulation implemented in the current Competition Act provides for a basic test, consisting in assessing whether the concentration would lead to creation or strengthening of a dominant position,

including the possibility of a collective dominance, that would lead to substantial distortion of competition (dominance test). This basic test is aimed exclusively at assessing the competition criteria and does not contain any elements of considering the public interest. In the opinion of the Office, the test anchored in the Competition Act, based on assessing establishment or strengthening of a dominant position defined on the basis of market power, enables effective evaluation and assessment of all kinds of concentrations of undertakings and their possible anticompetitive effects, with a possibility to take into account the efficiencies brought by a concentration.

FINLAND

1. Objectives

1.1 In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position, and public interest tests.

The general objective of the Act on Competition Restrictions (hereinafter the Competition Act) is to promote competition. Therefore, the general objective reflects the SLC test type of thinking. However, the Finnish Competition Authority (hereinafter the FCA) is provided with profound tools in merger control. The legislator has, therefore, specifically defined the scope of action of the FCA. The FCA thus applies the dominance test.

2. Nature of the substantive test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a create or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test

The FCA applies a dominance test similar to the EC Merger Regulation 4064/89 (hereinafter the ECMR). According to Article 11 d, the Market Court (previously Competition Council) may prohibit or order a concentration to be dissolved or attach conditions on the implementation of a concentration, if, as a result of it, a dominant position shall arise or be strengthened which significantly impedes competition in the Finnish markets or a substantial part thereof.

The competition test applied by the FCA is therefore a two-fold test consisting of the dominance and the significant impediment of competition.

Along with the general competitive test the Competition Act has a special provision on concentrations in the electricity market. The Market Court may, upon the proposal of the FCA also prohibit a concentration in the electricity market as a result of which the combined share of transmission operations of the parties to the concentration and the entities or facilities related to them (defined in the provisions of the Competition Act) of the amount electricity transmitted at 400 V in the transmission grid exceeds 25 percent on national level. The general objective of this provision is to prevent the integration between the producer and the distributor in the electricity market.

2.2 If your jurisdiction applies a public interest test to merger review

The FCA does not apply a public interest test.

2.3 If dominance is a central feature of your substantive test, does it include collective as well as single firm dominance? Please explain why that extension has been made, or not thought necessary. If collective dominance is part of your test, kindly elaborate on what constitutes such dominance (one or more case illustrations would be particularly appropriate here)

The above-mentioned Article 11 d does not make a distinction between single and joint dominance. Article 11 d does not, however, specifically mention the concept of joint dominance. In this sense the situation is similar to that of Article 2 of the ECMR. The legislative history, i.e. the Report of the Committee established by the Ministry of Trade and Industry, recognises joint dominance as well as the case law of the Competition Council. However, the Finnish Government's proposal for the amendments to the Competition Act, does mention joint dominance.

In determining whether collective dominance is present, the FCA assesses several factors which, taken separately, are not necessarily decisive. The assessment consists of a total appraisal of various factors.

For example, in the Fritidsresor Holding AB/Oy Finnmatkat-Finntours Ab case (Dno 1076/81/99), the factors appraised were divided into those forming the prerequisites of joint dominance and those increasing the likelihood of co-ordination. The relevant markets were package tours and the related markets. The most important factors to establish prerequisites consisted of the symmetry of market shares and cost structure, transparency of markets, entry barriers, stagnant demand, the possibility to monitor and punish the deviator. The most important factors to increase the likelihood of co-ordination consisted of the transparency of markets, stagnant demand, lacking buying power of customers and product homogeneity.

Collective dominance was also discussed in the Carlsberg AS/Orkla ASA's brewery business case (Dno 573/81/00) in which the relevant markets consisted of e.g. different types of beers, ciders and soft drinks. The factors that were considered to increase the likelihood of co-ordination consisted of high market shares of the members of oligopoly, symmetry of their market positions, market transparency, product homogeneity, regulations for alcoholic beverages, inelastic demand, demand growth, product capacity, symmetry of cost structures, multi-markets contacts, mature technology and the co-operation in the recycling of packages. The FCA also assessed the effects of the competitive pressure outside the oligopoly. The FCA stated that the competitive pressure is low. Among the factors assessed were regulations for alcoholic beverages, the low competitive pressure by small domestic producers, low import competition, low buying power of customers and low market entry.

2.4 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expected post-merger increases in quality adjusted market prices? What other factors, if any, are prominently featured in determining whether competition is likely to be harmed by a merger

A precondition in order to conclude that a dominant position is present is the company's ability to behave - to an appreciable extent - independently of its competitors, customers and ultimately of its consumers. This independent behaviour is assessed to reflect the way a company sets its output and/or prices.

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers

3.1 Please explain why you do or do not believe, that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind)

3.1.1 A series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors

Dominance test is applicable only to the extent that dominance is achieved. Therefore, a series of small mergers is covered by the dominance test only when the required level of dominance is achieved. The SLC test will cover series of small mergers in the earlier stages, i.e. when the market concentration is only in its incipiency. According to the FCA, there is a difference between the tests. An example of this situation is the merger between the number two and three in the market without them to became a number one. The dominance test does not cover this type of situation even if it could be argued that there is at least some level of lessening of competition in the market. The SLC test applies to this situation provided that the substantial lessening of competition can be stated.

In addition, it could be mentioned that the series of small mergers is covered in the Finnish merger control by the so-called two-year rule. According to Articles 11 b(4) and (5), where business operations are acquired through two or more successive transactions, the turnover of the target of the acquisition shall mean the combined turnover related to the business operations acquired from the same entity or foundation, and the turnovers of the entities or foundations acquired within the same industry in Finland during two years preceding.

3.1.2 In the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level

In those situations where there is little in the way of competition in the pertinent market, a one-fold dominance test could easily state that the dominance is to be strengthened. However, while applying a two-fold test, it would be difficult to state that the conditions established by the latter part of the test, i.e. the significant impediment of effective competition, are also fulfilled.

In the first example the market will become competitive as a result of a merger. Due to the liberalisation, a dominant position will, therefore, be lost in the foreseeable future. In this type of situation, despite of the test applied, it would be difficult to state the causality between the merger and the significant impediment of effective competition or the substantial lessening of competition.

3.1.3 A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural *links; and*

According to the FCA there are no significant differences between the tests in this aspect.

3.2 Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

One of the situations where the SLC test is probably more applicable than the dominance test is the one where competitive concerns result only in innovation markets. The effects of concentrations to innovation market have been assessed in the EC case law. However, it is not clear whether the dominance test would be a sufficient vehicle to intervene if the competitive concerns arose solely in the innovation market and the R&D activity did not consist a relevant product market. Contrary to that, the SLC test applies to the lessening of innovation competition similar to price competition.

Another situation in which the SLC test is probably a more flexible vehicle is a situation of oligopolistic market. The application of the dominance test requires dominance to be constructed. The SLC test can already be applied in the phase in which the likelihood of co-ordination is present.

3.3 It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

In the Finnish merger control, efficiency is one of the factors to be assessed in the merger review. The list of the factors that the FCA has to take into account while assessing the effects of the proposed merger is stated in the Finnish Government's proposal for the Competition Act. The list is similar to that of factors listed in Article 2 of the ECMR.

As regards the dominance test, efficiencies can be taken into account as one of the factors appraised. The limit up to which efficiencies can be taken into account is the creation or strengthening of a dominant position as a result of which effective competition is significantly impeded. As regards the SLC test, efficiencies are similarly taken into account as one of the factors assessed. The limit up to which efficiencies can be taken into account is the significant lessening of competition. In both cases the efficiencies do not consist an explicit defence against an otherwise illegal merger. However, it could be argued that due to the wider scope of the SLC test the existence of countervailing factors may be preferable.

4. Broader Policy Concerns

4.1 Does the choice of competition tests (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?

The FCA finds that the choice of competition tests does not make a difference in the roles played by market definition and concentration data in merger assessment. As regards both tests, the definition of relevant market is a precondition for the assessment of dominance as well as for calculating concentration data.

4.2 More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?

The general starting point of Finnish merger control is that the Competition Act reflects the findings of the economic theory of how the markets operate. The dominance test clearly emphasises the juridical level up to which the competition authority may intervene. The SLC test is more open leaving a wider discretionary power to the authority.

4.3 Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?

At first sight it might be stated that due to its flexibility and its wider scope the SLC test would provide the competition authority with a wider tool to intervene. However, in practice there does not seem to be any significant differences between the application of the dominance test and the SLC test.

4.4 What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements? Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i.e., that the effect is more than* de *minimis) also have implications for prohibitions on agreements that lessen competition?

The concept of dominance in Finnish merger control clearly differs from the concept of dominance established in Article 7 of the Competition Act prohibiting the abuse of the dominant position. The difference is similar to that of the ECMR and Article 82 of the EC Treaty. Dominance in merger control must therefore result in significant impediment to effective competition.

As regards abuse cases, the FCA finds that collective dominance may only arise if there also exists a structural link between the companies. Therefore, the FCA finds that collective dominance cannot arise on the basis of the tacit collusion theory alone. In merger cases, the FCA finds that collective dominance may arise not only on the basis of structural links but also tacit collusion.

4.5 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?

The FCA applies a merger control similar to that of EC merger control. The FCA considers that from the practical point of view it is important, specifically for the application of Articles 9 and 22 of the ECMR, to have a similar merger control to that applied by the European Commission. In this sense, it apparently would be appropriate to follow the future development of EC merger control.

FRANCE

Dans le cadre du contrôle des concentrations, les États-Unis et l'Union européenne utilisent des tests de marché différents pour évaluer l'effet d'une concentration sur la concurrence : alors que la Commission européenne sanctionne la création ou le renforcement de position dominante (MD), les instances américaines (FTC et DOJ) évaluent la « réduction substantielle de concurrence » (SLC). Le test français, quant à lui, fait explicitement référence aux deux types de tests.

Les modalités d'application de ce test sont explicitées et commentées dans les « Lignes directrices relatives à l'analyse des concentrations et aux procédures » qui seront très prochainement disponibles sur le site de la DGCCRF[1]. Cette note fait dans un premier temps une présentation très succincte de certains aspects du document ; dans un second temps, elle vise à éclairer quelques éléments du débat autour des divergences des tests de marché européen et américain.

1. La nature du critère de fond en droit français

Le test français fait référence à la fois à l'approche européenne et à l'approche américaine, puisqu'il cherche à évaluer « si la concentration est de nature à porter atteinte à la concurrence, notamment par création ou renforcement d'une position dominante»[2]. Comme pour le test américain, le texte implique l'évaluation de l'ensemble des conséquences à attendre d'une concentration, dont un aspect est l'impact sur la structure des marchés.

Le test français ne fait, en revanche, aucune référence au critère relatif à l'intérêt public. La jurisprudence ne tranche pas quant au périmètre du surplus dont la maximisation est *in fine* visée par la politique de concurrence.

Le critère spécifique de « position dominante » a été appliqué en France à la fois dans une acceptation de position dominante simple et de position dominante collective.

1.1 La Position Dominante Simple

La position dominante est le problème de concurrence le plus fréquemment généré par les concentrations. Celle-ci est simplement définie comme la capacité de se comporter indépendamment de ses concurrents, de ses clients et/ou de ses fournisseurs. Il n'existe aucun seuil mécanique de définition de la position dominante. Même en l'absence de toute addition de parts de marché, une opération peut notamment susciter des questions de concurrence si elle réunit dans une même entreprise des activités situées à des stades différents de la vie d'un même produit ou d'un même service (concentration verticale).

> Exemple *:* A titre d'exemple de concentration horizontale, dans le secteur des champignons (CHAMPI-JANDOU/ROYAL CHAMPIGNON), la nouvelle entité constituée par la concentration détenait plus de 75 percent du marché. Cependant l'opération a été autorisée en raison notamment de la forte contestabilité du marché (pression concurrentielle des importations, pas de politique tarifaire indépendante, puissance de négociation de la grande distribution).

1.2 La Position Dominante Collective

Il est de plus en plus fréquent de rencontrer des situations dans lesquelles il ne reste plus, sur certains marchés, qu'un nombre restreint de concurrents significatifs, sans qu'aucun ne se trouve en position dominante par rapport aux autres. Cette nouvelle structure de marché peut toutefois faire croître de façon importante le risque futur de collusion tacite. La position dominante collective n'est cependant pas mentionnée en tant que telle dans le droit positif, et c'est la pratique décisionnelle du ministre qui a contribué à développer l'analyse de cette notion en droit français. Les mécanismes de collusion tacite reposent sur l'existence de capacités de rétorsion envers un concurrent qui aurait pratiqué des prix jugés trop bas. Par conséquent, un équilibre de collusion tacite ne peut émerger que s'il existe au moins deux périodes : une période de prix collusif (ou de déviation) et une période de punition en cas de déviation.

Exemple *:* La décision BASF/TAKEDA précise le faisceau d'éléments à considérer[3] pour établir une PDC.

1.3 Les facteurs mis en avant dans le jugement d'une fusion

1.3.1 Les effets unilatéraux[4]

Les hausses de prix attendues après la fusion sur le marché sont prises en compte lors de l'examen des potentiels « effets unilatéraux » consécutifs à la fusion. Le test de marché français étant large, les effets d'une fusion qui risquent de nuire à la concurrence mais qui ne relèvent ni de la position dominante, ni de la coordination peuvent également justifier des remèdes appropriés. L'effet unilatéral d'une fusion n'a pas donné lieu à ce jour à des décisions négatives en droit national. Il a cependant été examiné de manière approfondie dans la décision M. BRICOLAGE/TABUR SA.

1.3.2 La caractérisation de la position dominante

Pour caractériser une position dominante, les autorités de concurrence s'appuient sur un ensemble de facteurs, souvent nommé « faisceau d'indices », dont aucun n'est en général suffisant à lui seul, mais dont l'accumulation emporte la conviction. Ces facteurs sont notamment, outre la part de marché de l'entité constituée à l'occasion de la concentration, les parts de marché des autres offreurs ainsi que diverses variables telles que, par exemple, la possibilité technique des importations à concurrencer les produits domestiques lorsque le marché est de dimension nationale, les difficultés d'approvisionnement en matières premières ou en facteurs spécialisés de production, l'importance des économies d'échelles et l'intensité capitalistique du secteur considéré, l'ampleur de l'investissement publicitaire nécessaire pour pénétrer ou se maintenir sur le marché, l'existence éventuelle de brevets protégeant les entreprises parties à l'opération, les conditions de la concurrence antérieure entre les divers offreurs.

2. Les différences potentielles entre position dominante (MD) et réduction substantielle de concurrence (SLC)

Les deux approches (MD et SLC) tendent à mettre en évidence le renforcement ou la création d'un pouvoir de marché. Grossièrement, leurs formulations opposent les risques liés à la structure de marché post-concentration aux conséquences immédiates de la concentration.

Dans son appréciation des effets d'une concentration, la Commission européenne retient un critère de création ou de renforcement de position dominante. Le test porte sur la structure de marché pré et

post-concentration, notamment son degré de concentration et les obstacles qu'il oppose à l'entrée de nouveaux compétiteurs. Il en infère l'effet strictement concurrentiel.

Les instances américaines tentent d'évaluer la réduction substantielle de concurrence consécutive à une concentration ; il s'agit par conséquent d'une appréciation portée sur le fonctionnement effectif des marchés. L'impact est évalué sur tous les aspects du fonctionnement du marché (prix, surplus, progrès, effets anticipés de la concurrence sur la structure de marché, etc.).

Il nous semble que c'est surtout dans la mise en œuvre pratique des tests que l'on peut envisager des risques de divergence.

Lorsque l'on observe l'application pratique des tests de marché, deux types de divergences apparaissent : une divergence de champ d'évaluation des conséquences de la concentration et une divergence d'horizon temporel. L'application du test américain recouvre un champ plus vaste d'effets anticoncurrentiels : à court terme, il recherche un équilibre de marché à la différence du test de position dominante simple statique de la Commission européenne ; il apparaît en revanche moins prospectif et moins dynamique que le test européen dans l'étude des positions dominantes collectives. L'angle «structure de marché» du test européen amène la Commission à protéger les marchés contre les risques non encore avérés ; au contraire, les autorités américaines portent plus d'attention aux bénéfices immédiats pour les consommateurs.

2.1 Une étape supplémentaire dans le test américain : l'estimation quantitative des effets immédiats de la concentration et la prise en considération de l'équilibre après réactions unilatérales

L'approche américaine de la « réduction substantielle de concurrence » s'appuie sur une estimation quantitative des conséquences à attendre d'une concentration. Pour l'instant, la Commission ne s'appuie que relativement peu sur des estimations quantitatives immédiates d'une concentration. Sa démonstration de position dominante simple est plus statique que la démonstration américaine, car elle ne cherche pas à prouver l'existence d'un équilibre de marché de court terme.

La structure de marché (nombre d'intervenants …) résumée à travers les parts de marché est un élément important du jugement concurrentiel de part et d'autre de l'Atlantique. Mais alors que la Commission observe un « niveau de parts de marché » cumulées après concentration, les agences américaines tiennent compte à la fois de l'estimation quantitative des parts de marché et de leur évolution grâce au critère HHI.[5].

Dans ce cadre quantitatif et de court terme, les « effets unilatéraux »[6] sont très fortement privilégiés par l'approche américaine et systématiquement mis en avant dans les affaires récentes, à la différence de la Commission européenne qui n'y fait jamais référence. Le texte du règlement ne semble pas l'y autoriser, même si ce point est sujet à débat, ce qui expliquerait son absence d'utilisation en pratique. Dans l'approche américaine, les gains d'efficacité attendus de la concentration peuvent être pris en compte dès cette première estimation des effets potentiels de la concentration. Une modélisation simple montre que les pertes de surplus, toutes choses égales par ailleurs, sont moindres qu'en cas de collusion, mais ne sont pas nulles.

Une seconde étape très importante est alors de tester la stabilité du nouvel équilibre ainsi décrit, c'est-à-dire l'évolution de la structure du marché (possibilité d'entrées, de collusion, etc.). Cette étape est moins facile à mener et ne revêt pas un degré empirique comparable à celui de la première étape. Elle est indispensable pour prouver l'existence de l'équilibre de marché de court terme.

2.2 La prise en compte des gains de productivité de l'opération est moindre en Europe

L'approche américaine tient fortement compte des gains d'efficacité (hausse de la productivité globale des facteurs de production) liés à la concentration étudiée, c'est-à-dire aux chocs sur le côté « offre ». A l'extrême, le test américain peut autoriser la convergence de deux technologies qui entraîne une amélioration de l'offre, en dépit d'un risque pour la concurrence, plutôt que d'exclure *a priori* une amélioration du niveau de vie de la population, même si la fraction de la population qui bénéficiera de cette amélioration est celle qui accepte un prix intégrant une prime d'oligopole. Il n'existe pas d'exemple où la Commission européenne aurait pris en compte les gains du côté de l'offre résultant de l'opération. La démarche européenne s'interroge pratiquement exclusivement sur les chocs du côté « demande », et donc se concentre sur la structure de la population qui bénéficiera du choc d'offre potentielle.

Il convient toutefois de rappeler que le calcul des gains d'efficacité est particulièrement délicat à mener, notamment pour les gains attendus à long terme, et que les études existantes sont très décevantes quant à la réalisation effective des gains d'efficacité attendus des concentrations. Dans ce cadre, la divergence soulignée doit être minimisée.

2.3 La question du choix du surplus maximisé n'est pas entièrement tranchée en Europe

Dans le cadre du bilan économique et social[7], un second aspect de l'appréciation des conséquences économiques générales de la concentration est encore plus problématique : il s'agit de l'objectif *in fine* du contrôle de concentration, c'est-à-dire du choix de l'objectif de bien-être poursuivi : quel « surplus » est maximisé par la politique de la concurrence ? S'agit-il du surplus global, du surplus du producteur ou de celui du consommateur ? Plus précisément, peut-on intégrer des considérations d'équité dans l'objectif économique et social poursuivi ?

L'approche américaine donne la priorité à l'évolution favorable du surplus total des consommateurs. En Europe, les décisions font peu référence aux évolutions de surplus. Cette question du choix du surplus à privilégier n'est pas négligeable. Il est possible d'envisager une concentration qui entraîne une hausse du surplus global, quoique accompagnée d'une réduction du surplus des consommateurs : le Canada dans l'affaire « Superior Propane»[8] a autorisé l'an passé une concentration s'inscrivant dans ce schéma.

Il semble indispensable de préciser l'objectif poursuivi par la politique de la concurrence en terme de maximisation du bien être : le surplus des consommateurs est-il la cible privilégiée en Europe ?

Autre question : peut-on renforcer cet objectif par un critère social de type : l'ensemble des consommateurs bénéficie de la hausse du surplus et, plus particulièrement, les consommateurs les moins aisés ne sont pas exclus suite aux gains technologiques potentiels de la concentration ?

2.4 Une divergence d'horizon temporel : la Commission européenne a une approche plus prospective du pouvoir de marché

Les « faisceaux de preuves » permettant d'évaluer le risque de position dominante collective ou de réactions coordonnées sont assez proches de part et d'autre de l'Atlantique. Toutefois, une divergence apparaît, en pratique, dans l'horizon temporel d'évaluation du risque. Même si un des objectifs de la politique de concurrence américaine demeure la prévention de ces phénomènes, la mise en œuvre de cet objectif se heurte à la démonstration irréfutable du risque plus élevé de comportement coordonné suite à la concentration. Pour que les agences américaines allèguent de comportements coordonnés, il faut soit que

des comportements coordonnés aient déjà été observés dans le passé, soit que la concentration porte de trois à deux le nombre d'intervenants ; sinon ce sont les effets unilatéraux qui sont systématiquement explorés.

La démarche européenne en matière de position dominante collective est forcément plus prospective (alors qu'elle l'est généralement moins pour la position dominante simple). Afin d'argumenter le risque de PDC, elle s'appuie sur un faisceau de preuves. Le principe même de la PDC ne lui donne pas de possibilité de quantification du risque à horizon moins lointain, puisqu'il faut se placer à l'équilibre « final » du marché après réactions répétées de chaque intervenant[9]. C'est le raisonnement suivi dans « Gencor Lonrho ».

3. Quelques éléments de conclusion

En pratique, les différences entre test de position dominante et test de restriction de concurrence apparaissent limitées dans leur portée, puisqu'elles ont très rarement donné lieu à des divergences d'appréciation dans les évaluations des effets d'une concentration dans le passé. Les éléments factuels qui permettraient de mieux évaluer les lacunes éventuelles d'un test, les risques de divergence, font aujourd'hui cruellement défaut.

Certains aspects mineurs d'application pratique des tests de marché européen et américain peuvent donner lieu à quelques remarques finales :

- Toutes les autorités de la concurrence doivent poursuivre leur effort de développement d'analyse économique des effets attendus d'une fusion en tant qu'arguments à l'appui des décisions.

- Que ce soit pour les démonstrations d'effets unilatéraux, de position dominante simple ou de position domination collective, la démonstration devrait toujours viser à prouver la stabilité de l'équilibre de marché décrit. Les approches « statiques » qui ne tiennent pas compte de l'évolution potentielle du marché devraient être proscrites.

- Enfin, une divergence d'horizon temporel semble apparaître entre les applications des tests américain et européen.

NOTES

1. http://www.concentrations.minefi.gouv.fr

2. Code du commerce, Livre IV, Titre III, article L.430-6.

3. Le marché présente, « en raison de sa structure oligopolistique, de nombreuses caractéristiques propres à favoriser la constitution d'une position dominante collective, ce qui pourrait se traduire par des comportements qui, sans être nécessairement illicites, conduiraient à restreindre la concurrence : produits homogènes (« *commodities* ») et faciles à stocker ; techniques de fabrication maîtrisées par tous les grands groupes chimiques ou pharmaceutiques (brevets dans le domaine public) ; rôle mineur de la recherche et de l'innovation dans le développement des produits et de leurs applications ; industrie à forte intensité capitalistique (proportion des coûts fixes élevés) se traduisant par des économies d'échelle importantes ; capacités de production excédentaires ; cotation internationale des produits (notamment à Hambourg) facilement accessible pour les intermédiaires ou les utilisateurs, qui accroît la transparence des prix ; part faible ou très faible du coût des vitamines dans les coûts totaux des utilisateurs, d'où une faible élasticité de la demande; participation de Roche, Basf et Takeda à l'organisation d'un cartel dont le rôle a été, depuis le début des années 1990, de fixer le prix de différentes vitamines à un niveau élevé, démontrant que les structures du marché avant même la concentration sont compatibles avec une collusion soutenue ; entrée peu vraisemblable sur le marché de nouveaux opérateurs. »

4. L'ensemble des pertes de bien-être résultant d'une concentration, consécutives aux mouvements de prix et de quantités de la part des firmes agissant indépendamment de la concurrence.

5. Le critère HHI peut être directement utilisé dans une approche à la Cournot pour estimer la réduction « mécanique » de concurrence et son impact sur les prix et les quantités.

6. Les « effets unilatéraux » englobent ainsi l'ensemble des pertes de bien être d'une concentration consécutives aux mouvements de prix et de quantités de la part des firmes agissant indépendamment des concurrents.

7. Dans le test français, la contribution au progrès économique et social de l'opération est susceptible de compenser les atteintes à la concurrence pouvant en résulter.

8. Case « *Superior Propane* » : le « Competition Tribunal » a privilégié un test prenant en compte le surplus total ; ce faisant, il peut autoriser une concentration entraînant une hausse de prix dans le cas où les réductions de coûts sont supérieures au « poids mort » généré par la réduction de production et l'effet négatif sur les consommateurs pauvres.

9. La PDC décrit l'équilibre final obtenu après un jeu dynamique de Nash « infini ».

GERMANY

1. Nature of the substantive test

Under Section 36(1) of the ARC, a merger is to be prohibited by the Bundeskartellamt "if it is expected to create or strengthen a dominant position." The concept of market dominance is put into concrete terms in Section 19(2) of the ARC, where an undertaking, which either has no competitors (first option) or is not exposed to any substantial competition (second option) or has a paramount market position in relation to its competitors (third option), is presumed to be dominant. The first variant is of practically no great significance because the complete absence of competition can only be presumed in the most exceptional cases. Whilst the first and second variants determine the certain absence of (substantial) competition, the expectation that the restraint of competition will most probably lead to a standstill in competition in the further course of developments is enough to determine a paramount market position.[1] The third variant is thus the most significant in merger control.

1.1 Single-firm dominance

A paramount market position exists if an undertaking's scope of action is not sufficiently controlled by its competitors due to market or company-related structural criteria. Company mergers strengthen a paramount market position if the competitive conditions on the affected market become even worse as a result.

Section 19(2) sentence no. 1(2) of the ARC stipulates the major factors which should be taken into account when examining a paramount market position. The market share always forms the basis for assessing market power. A dominant position is presumed to exist within the meaning of Section 19(3) of the ARC if one undertaking has a market share of at least one third. Apart from market share the law stipulates the following assessment criteria: financial power, access to supply or sales markets, links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the area of application of this Act, the ability to shift supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings. This list is not conclusive. In examining a merger the Bundeskartellamt has to make an overall appraisal of all the criteria.

1.1.1 Market share

A high absolute market share suggests that the ability of the opposite side of the market to switch to other undertakings is limited and that the enterprise concerned has an increased scope of action. As a general rule a product's market share in value terms is expressed by turnover. Other methods of calculation can be a more appropriate indication in certain circumstances, e.g. volumes of orders in the construction industry and armaments sector, the number of passengers in air traffic. The threshold from which dominance can be presumed is when a market share of one third is reached.

Market share difference and the distribution of market shares are indicative of the competitors' ability to offer the other side of the market alternative choices. The greater the difference between an enterprise's market share and that of its largest competitor and the more fragmented the market shares of its other competitors, the greater the likelihood is that the market (share) leader has a scope for restrictive action. However the law gives no indication of the measures of concentration (e.g. Hirschman Herfindahl Index, HHI) and presumption thresholds applicable in this respect.

The development of market shares over time can also be indicative of the presence or absence of a paramount market position. A permanently high market share is indicative of an uncontrolled scope of action. The Bundeskartellamt therefore generally analyses the development of the market shares in the relevant market over a period of several years.

1.1.2 Resources, in particular financial strength

Superior financial strength may provide a firm with a scope of action, in particular as regards the use of parameters of competition such as price, investment, research and advertising. The same applies for example to a comprehensive production programme or range of products, or resources that are specific to a particular sector or market, in particular technological resources. Superior resources result in a paramount market position if they limit the alternatives available to buyers and if they have discouraging and deterrent effects on competitors.

In order to assess the financial strength of an enterprise, the Bundeskartellamt applies numerous criteria such as turnover, cash flow, profits, liquid funds, annual surplus or access to national and international capital markets. The financial strength of an enterprise can be of particular importance in markets that are subject to strong cyclical fluctuations, or require high research expenses. However, it is not the increase in financial strength as such that leads to the deterioration of market structures. The likelihood of an anticompetitive impact should be examined, i.e. whether resources are likely to be of relevance for predatory and disciplinary strategies or as barriers to market entry.

A similar examination is conducted to establish any other possible resource advantages. These gain in significance in conjunction with an existing market dominance which is further strengthened by product range extensions and technological improvements.

1.1.3 Access to supply or sales markets

A firm's easier access to the supply or sales markets in relation to its competitors may give it a paramount market position. This is particularly so if a powerful firm (in terms of its market share) can make access to such markets difficult or even impossible for its rivals on account of its own excellent access to the supply or sales markets (raising the barriers to entry).

A market foreclosure effect can, for example, be of relevance in the case of vertical integration, when a company can supply a full line of products or complete systems, or in the case of other resource-based competitive advantages (e.g. superior distribution system). Such offers often involve efficiency advantages. However, the supply of full product ranges or complete systems can contribute to the creation or strengthening of a dominant market position if it results in advantages relating to sales market access that cannot be matched by competitors and predatory strategies to the disadvantage of less diversified firms. Furthermore, having to offer a complete system or full range of products can deter potential rivals from entering the market.

1.1.4 Interlocks

The interlocking arrangements of a firm, in particular with its competitors, customers or suppliers, may be contributing factors to a paramount market position, but cannot in themselves lead to its creation. Interlocks can be of a social, personal, economic or legal nature (e.g. reciprocal patent licensing agreements, (exclusive) supply contracts). Such interlocking arrangements may in principle strengthen a firm's dominant position if it gains resources or influence as a result. Interlocks with current or potential competitors as well as with suppliers of imperfect substitutes are particularly significant here, as competition among those competitors is usually restrained as a result.

1.1.5 Barriers to market entry / potential competition

Just as market share gives an indication of the relationship between the firms involved in a merger and their current competitors, the barriers to entry provide information on the significance of potential competitors for competition on the market concerned. As long as a powerful firm cannot quote excessive prices as otherwise potential competitors would be likely to enter the market, it is unlikely to have an unlimited scope of action. However, if barriers to entry are high, this may be an important indication that a dominant firm has a paramount market position as it is able to secure its market position against new entrants. In evaluating a potential competitor, it should be examined whether an effective entry which is of relevance to competition is possible and probable. It must also be possible to express in sufficiently concrete terms.

Barriers to entry can be roughly divided into three categories:

- statutory barriers to entry are those set up in the context of the state's monopoly on power in the form of laws, regulations and administrative practice (for example national individual procedures for the clearance of medicaments or protection of patents);

- structural barriers to market entry usually arise from certain technological or demand-related market characteristics, but may also lie in the resource-based strength of a company. They are not generally created intentionally to prevent entry. These include, for example: deterrent potential of large resources of the market leader, transport costs, economies of scale, high sunk costs, economies of scope, technical barriers to entry;

- strategic barriers to entry are intentionally set up by incumbents in a market in order to deter potential suppliers from entry. These can include for example long-term supply contracts, exclusive contracts, industrial standards and technical access systems.

1.1.6 Counterbalancing market power

A high level of concentration of firms on the buyer side of the market is not in itself sufficient evidence to disprove the market dominance of a supplier, since any buying power initially affects all suppliers to an equal extent.

Instead of this, a prerequisite for counterbalancing market power is that a powerful buyer awards its contracts according to market-strategic considerations, so as not to become dependent on (dominant) suppliers. In order to do this he must have high cost transparency and the competence to develop the products concerned. Here the question arises of whether the factors contributing to effective competition –

for example effective price and cost limitation or the incentive to make technical progress – can be equivalently replaced by buyer power and strategic purchasing behaviour in individual cases.

1.1.7 Market phase

On markets which are just beginning to develop and where the speed of innovation is high, a large market share or even a sole position is not necessarily to be seen as a dominant position. In such a situation conditions of competition are exposed to rapid change. There is no danger of paramount positions being cemented in the long term. If, however, it is likely that the market concerned will be sealed off permanently as a result of the concentration already at the time when the firm is set up, the concentration concerned is to be prohibited (examples: digital television services, Internet platforms).

In markets in which the technology is in an advanced stage and turnover volumes are declining or stagnating, competitive impulses through innovation and market entry tend to be rare. As a consequence high market shares are less likely to decrease in later than in earlier market phases.

1.1.8 Public interest issues

In examining mergers the Bundeskartellamt applies solely competitive criteria. After a merger has been prohibited by the Bundeskartellamt any considerations of public interest in it can only be made by the Federal Minister of Economics in the form of a ministerial authorisation. If in individual cases restraints of competition are outweighed by advantages to the economy as a whole, or are justified by an overriding public interest, they can be given exceptional approval by the Federal Ministry of Economics and Technology. This possibility also exists for special cartels. Grounds for giving ministerial authorisation can be e.g. rationalisation advantages, the wish to preserve jobs or secure the supply of energy or raw materials. In doing so the market economy system of the economy as a whole may not be jeopardised.

1.1.9 Efficiency gains

The evaluation of efficiency is reflected in the overall appraisal. The Bundeskartellamt, however, is of the opinion that, at least in cases of clear market dominance, mergers cannot be cleared solely on the basis of efficiency gains. However like that of public interest, this criterion is applied as a competition-unrelated criterion in the ministerial authorisation.

Based on the conviction that in the long term free competition also increases welfare, the emphasis in merger control lies in protecting this competition. Its objective is to combat any risks to competition arising from dominant positions.[2] The aim here is to maintain competitive market structures and ensure that the scope of action of companies is sufficiently controlled and does not impinge on the substantive freedom of action of other firms and consumers. Merger control should therefore combat any risk to competition that may arise from a change in market structure resulting from a concentration. It is essential because a code of conduct and abuse control are not considered as effective substitutes for competition.[3]

The emergence of a dominant position can indeed lead ad hoc to increases in efficiency. However, in the case of market dominance the freedom of action of other market participants is excessively and probably permanently restricted with the result that competition loses its effect as a steering and control mechanism. Without this consumers would not be able to simply switch to another supplier in the event of a change of their preferences or of deterioration in services. The sanction

mechanism, which ensures selection and thus progress, would ultimately be affected. Moreover as a result of the appreciable restraint on competition increasing inefficiencies on the part of the merged company would be likely in the long term as the competitive pressure on improving services would be lacking.

1.1.10 Other specific issues

The Bundeskartellamt can clear a merger which fulfils the prohibition requirements if the companies can prove that the merger – in another market – will improve the conditions of competition and that these improvements will outweigh "the disadvantages of dominance" (balancing clause of Section 36(1) of the ARC). Again, only competitive criteria are taken into consideration in such an examination.

1.2 Oligopolistic dominance

According to Section 19(2) sentence 2 of the ARC, two or more undertakings are dominant insofar as they jointly satisfy the conditions of market dominance and no substantial competition exists between them. Therefore, in assessing an oligopolistic situation it is first examined whether the conditions of internal competition favour anticompetitive parallel conduct. The presumption thresholds for oligopolistic dominance lie at a combined market share of 50 percent in the case of a maximum of three companies or two-thirds for a maximum of five companies. Advantages in market share and resources as well as interlocks or economic interdependence between the oligopolists and outsiders are of particular significance as regards external competition. Additional criteria applied in the assessment of oligopolistic dominance include the level of market transparency, the homogeneity of the products and actual competitive activity in the market. A comprehensive appraisal of all the significant conditions of competition should also be made and considered in assessing collective dominance.

1.2.1 Internal competition

In the examination of internal competition market transparency, homogeneity of products and the actual market process are particularly relevant criteria. Furthermore the characteristics familiar from the examination of single-firm dominance will be referred to. The examination of domestic competition mainly focuses on the symmetry of oligopoly members rather than on the paramount market position. The latter will only become relevant in the assessment of external competition. The basic assumption is that with increasing symmetry of oligopolists there will be a greater likelihood for parallel behaviour without competition. In situations of strong symmetry competitive action is equally perceptible to all firms, easily detectable due to the transparency of the products, and not likely to have a very promising outcome because all the firms would have a similar retaliatory potential.

1.2.1.1 Market transparency

If there is a high level of market transparency suppliers can obtain information on the competitive behaviour of their competitors and thus facilitate concerted action. Relevant are not only factors that allow explicit concerted action but also market conditions that allow enterprises to signal to each other their competitive strategies.

1.2.1.2 Homogeneity of products

Markets where product differentiations play an important part are generally rather unfavourable for parallel behaviour within the oligopoly. In the case of homogeneous products there can be no or only very limited competition in terms of quality. In addition, it is not possible in the majority of cases to determine with reasonable certainty whether there is price competition. Thus, in such markets all forms of residual competition (such as competition in services, terms, quality and the provision of advice to customers) decide whether competition is still substantial.

1.2.1.3 Actual market processes

If substantial competition exists between the market leaders before the concentration and if these enterprises have made substantial investments in long-term growth strategies in a cross-border market, the absence of internal competition will become less likely if an outsider firm is acquired. The same applies if there was a dramatic drop in prices in the past, in particular if it was associated with substantial market share losses on the part of the oligopolists in favour of outsiders and if new firms have, or are expected to, enter the market.

1.2.1.4 Market share

The tighter the oligopoly and the fewer the outsiders, the more likely is the elimination of substantial competition. As mentioned above the presumption thresholds for oligopolistic dominance lie at a combined market share of 50 percent in the case of a maximum of three companies or two-thirds for a maximum of five companies. Particularly the analysis of the development of market shares in the relevant market over several years may provide useful information on the competitive process taking place in the oligopoly. An indication that an oligopoly lacks competition is given when the oligopolists' market shares or the differences between their market shares are largely stable.

1.2.1.5 Interlocks

Interlocking directorates or capital links among the enterprises belonging to an oligopoly will increase the likelihood of anticompetitive parallel conduct. This applies both to interlocks in the market affected by the concentration and to interlocks in third markets, particularly to upstream or downstream markets.

1.2.1.6 Counterbalancing market power

In a highly-concentrated market, the more fragmented the opposite side of the market is, the more likely it is that there will be oligopolistic dominance. However, enterprises on the opposite side of the market that have great purchasing power may impede anticompetitive parallel conduct by suppliers.

1.2.2 External competition

When, in addition to the oligopoly, there are other firms operating in a market affected by a concentration, oligopolistic market dominance may only be assumed if substantial competition is lacking or if the oligopoly has a paramount position in relation to the outsiders. The examination of whether the

oligopoly has a paramount position is similar to the assessment of single-firm dominance. Instead of one single firm the whole group of oligopoly members is subjected to a collective evaluation.

1.2.3 Case illustration

In the Bundeskartellamt's view, the merger of RWE and VEW in 1999 threatened to create a narrow oligopoly consisting of RWE/VEW on the one hand and Veba/Viag (now E.ON) on the other in the electricity markets concerned.[4] The main arguments for presuming a lack of domestic competition in this case were the high combined market shares (between 55 and 85 percent in the various product markets), similar vertical integration and resources, multiple interlocks, the homogeneity of the product electricity, high cost and price transparency as well as the stagnating and inelastic demand. Like the Veba/Viag merger examined by the European Commission, the project could only be cleared subject to far-reaching obligations which concerned particularly the dissolution of interlocks between the two new entities and the sale of shares in other electricity providers.[5]

2. Dominance versus SLC

From the Bundeskartellamt's point of view there are no substantial differences between the actual application of the market dominance test and the actual application of the SLC criterion in terms of the rigour, flexibility or effectiveness of the competitive assessment of problematic mergers. In 2001 the Bundeskartellamt already dealt with this question in a detailed comparative study.[6] In particular no evidence can be found of problematic company mergers which under the SLC test would have to be prohibited, but would not lead to the creation or strengthening of a dominant position. This can be shown by means of the following case constellation which often is invoked as an example by those who object to the dominance test.

Three companies are active in the relevant market. Two of these three companies merge. Although the two remaining market participants do not co-ordinate their conduct, competition in the market is less intensive than before.

Those who criticise the dominance test unjustly doubt that such a merger could be prohibited under the dominance test. Both under the dominance and the SLC test it must be examined whether there is still substantial competition between the companies after the merger. Under the market dominance test, oligopolistic market dominance exists in the case described above if it is found that there is no longer any substantial competition between the oligopolists. In this context it is not required to prove an active co-ordination of conduct. It is sufficient to establish the existence of anticompetitive parallel conduct as an adaptation to the market conditions. A reduction of an oligopoly can thus be caught correctly under the dominance test as well, even if there is no co-operation between the companies. Therefore, in this case, too, a prohibition under the dominance test is possible.

The SLC test does not offer any advantages in the mentioned case. To prohibit the merger under this test one would have to prove that competition is substantially lessened as a result of the merger. This result cannot be more easily established than the result of insufficient competition between the oligopolists.

Overall the Bundeskartellamt´s study has shown that in practice the specific restraints of competition caused by horizontal, vertical or conglomerate mergers can be effectively covered by applying either the SLC or the market dominance test and can be assessed in a flexible way by taking into account the overall situation of the individual case. In particular, this can be attributed to the fact that the essential substantive evaluation criteria such as market shares, market structure, barriers to entry, market phase,

countervailing power etc. are taken into account regardless whether the SLC or the market dominance criterion is the starting point of merger control in the respective legal system. However, differences in the interpretations of the substantive evaluation criteria underlying the respective test and in the importance attached to them in the individual case may result in different international assessments of the same market processes regardless whether the underlying tests (SLC or market dominance test) diverge or the same test applies internationally.

The theoretical basis of the two tests does not provide any secure indications as to which approach is stricter than the other. Ultimately this depends on the concrete criteria applied by the different national legal systems in order to define the test itself and to establish the examination criteria which are to be applied in the market analysis.

The Bundeskartellamt has applied the dominance test since merger control was introduced in 1973. Since then more than 30 000 merger projects have been examined on the basis of this test. The Bundeskartellamt always has been able to make a decision in the interest of competition. Theoretical considerations as well as practical experience show that competition can be ensured by means of the dominance test. Furthermore, as already mentioned, both tests apply the same evaluation criteria. But even if the same test in merger control is applied world-wide, this will not ensure uniform results in the examination of merger projects by different authorities because of differences in interpretation and weighting. What seems more important than converging the tests is to intensify co-operation between competition authorities in areas such as the notification procedure or the time limits, thus contributing to greater cost-efficiency?

NOTES

1. Cf. Mestmäcker/Veelken in Immenga/Mestmäcker, GWB Kommentar zum Kartellrecht, 3rd ed., § 36, marginal note 137.

2. Cf. Mestmäcker in Immenga/Mestmäcker, GWB Kommentar zum Kartellrecht, 3rd ed., preliminary note on Section 35 (*Vor § 35*), marginal note 27.

3. Cf. Mestmäcker in Immenga/Mestmäcker, GWB Kommentar zum Kartellrecht, 3rd ed., preliminary note on Section 35 (*Vor § 35*), marginal note 27.

4. BKartA decision of 3 July 2000, WuW/E DE-V 301 ff. - "RWE/VEW". See also BkartA (2001), p.1 and p. 132 ff.

5. This paved the way for the creation of a fourth, financially-strong, vertically-integrated and independent power besides RWE/VEW, Veba/Viag and the third-largest company, EnBW, and thus for the development of a market structure that is able to create sufficient external competition at all market levels; for a critical view, see Möschel (2001), p. 131 ff.

6. Discussion paper of the working group on competition law, “Prohibition Criteria in Merger Control – Dominant Position versus Substantial Lessening of Competition?” (available at http://www.bundeskartellamt.de/diskussionsbeitrage.html).

HUNGARY

Under the Hungarian Competition Act[1] (HCA or the Act) concentrations are investigated and assessed by the Gazdasági Versenyhivatal (Office of Economic Competition – GVH). Decisions of the GVH are made by the Competition Council, which is a separate decision-making body within the GVH. As a part of the harmonisation of its competition law to the EC norms, Hungary adopted the concept of dominant position and the dominance test from the EU legislation into its competition law of 1990 and these concepts have been applied in merger control since 1996.

1. Objectives

The clear intention of the Hungarian competition law is to forbid any behaviour of undertakings, which might have anticompetitive effect and thereby would be against the public interest. The preamble of the HCA provides that *"… it is necessary to adopt competition rules … preventing concentrations of undertakings which are disadvantageous to competition ..."* This means, that the basic aim is to prevent the formation of a market structure which could harm future competition. The wording of the preamble does not really exert clear influence in favour of any of the three possible types of substantive criteria to be used for the assessment of mergers. Moreover as preambles are not valid source of law in the Hungarian legal system the general objective would not have in any case effect on the applicable methodologies.

2. Nature of the substantive test

2.1 General observations

There are thorough discussions on different forums, like the OECD and ICN about the pros and cons of the two main merger assessment criteria. It seems to be obvious, that in addition to other advantages the use of worldwide similar criteria could serve both the legal certainty of undertakings and the co-operation among competition authorities. It is also argued, that the same criterion used by the leading competition regimes may result in similar assessments, i.e. conflicts between an authorising decision by one jurisdiction and a blocking decision of another jurisdiction would not happen. In this respect the key decisions brought by both the US and the European authorities in the Boeing/McDonnell Douglas and in the GE/Honeywell cases can be referred to. (Interestingly, these cases raised more concerns in the EC, where the "less rigorous" dominance test is applied.) This situation raises the question that a very important aspect of the issue seems to disappear in the discussions. Namely, conflicting decisions can be brought even if the same test is applied by both (all) authorities investigating the transaction, since national markets can be effected differently to a great extent depending on the overall pre-merger competitive environment and the actual effects of the transaction evaluated by either test.

In outlining our view on the question of SLC versus dominance test we think that in a substantive sense there is no difference between the two tests. There have been no cases identified either in the US or in the EU history of merger control *in* which applying different tests would have resulted in different outcomes. The difference in the outcome of Boeing/McDonnell Douglas and that of GE/Honeywell can be

attributed to the difference in the economic circumstances rather than to the difference in the tests applied. It follows then that a convergence to the SLC test or vice versa is not necessary because it would not actually achieve different outcomes.

We share the idea of experts[2] who think that the issue in hand is rather a procedural than a substantive one. The basic difference between the two tests can be summarised – as we see it – in the use of the two terms of "dominant position" and "collective dominance". Identifying a single or a collective dominant position as the result of a proposed merger is an important legal step in the dominance test but is not a necessary step in the SLC test. During the SLC test these two terms are substituted by the terms of unilateral and co-ordinated effects. Under the dominance test the evaluation of a proposed merger can be divided into two steps: first, the creation or strengthening of a single or a collective dominance has to be identified and then, in the second step a further analysis is required in order to decide whether the parties would probably abuse their dominant position and thereby significantly impede competition or not. The SLC test procedure may seem to be simpler because it requires only one step: to decide whether a merger increases the market power of the parties and it has any unilateral or co-ordinated effects which substantially lessens competition or not.

Arguments for and against of replacing dominance test by the SLC test have raised several important procedural aspects of the merger control. It could be argued that SLC test has not only a common-sense resonance but can also be rooted in economics easier because it uses the concept of market power rather than that of the dominant position. It can also be argued that in some cases the definition of collective dominance is not clear enough and therefore it could be misleading. These are strong arguments and we certainly have had cases in Hungary in which the definition of collective dominance was problematic. On the other hand, strong arguments can be brought against the replacement as well. There is a long history of using the concept of dominant position and because of that, a considerable body of jurisprudence and substantial case law experience has been generated. That experience refers to the concept of dominant position which therefore provides a legal strongpoint to the businesses in order to self-evaluate the affected parties' legal position in the merger control procedure. Abandoning this well-established strongpoint can generate a great disturbance in those jurisdictions, which have been applying the dominance test for a long time. It can also be said that the concept of collective dominance has not been clearly specified yet but replacing it by the terms of co-ordinated effects may not solve the substantive problem either: how to identify those effects of a merger which could arise from a mutual understanding or a tacit collusion or any other kind of co-ordination between the parties of the proposed merger and their competitors. As a summary of Hungary's position in the issue in hand we think that there is no compelling reason in the very nature of the merger control either in substantive or in procedural sense as a consequence of which replacing the dominance test by the SLC test would be a must.

There is another aspect, however which should be considered and that is the case of international mergers. International transactions are normally reviewed by numerous competition authorities. There could be a real benefit of applying the same standards and/or similar procedures to the same transactions regardless of the country in which these standards and procedures applied.

2.2 Country specifics

The substantive test applied to mergers by the Hungarian legislation and practice is basically the dominance test. According to Article 30 Section (2) of the HCA: *"The Office of Economic Competition may not refuse to grant authorisation for a concentration, where with a view of Section (1) the concentration does not create or strengthen a dominant position, which would impede the formation, development or continuation of effective competition on the relevant market or on a substantial part of it."* In respect of concentrations, which do not meet the requirement of the dominance test, Article 30

Section (1) makes it possible for the competition authority to give authorisation, supposed, that the balance of gains and losses of the transaction is still favourable.

The determination of dominant position in merger cases has particular importance. The law enforcement practice of the Competition Council applies a dynamic approach, which offers a more comprehensive consideration of the possible effects of the transactions.

The dominance test applied by the Hungarian legislation covers both single firm and collective dominance. The involvement of collective dominance to the assessment of mergers creates the harmony with the dominance definition[3] of the HCA. As it has been clearly stated in one of the recent merger cases[4], that was about the existence of collective dominance held by a group of undertakings, the question is to be answered with a view to the definition given for dominant position under the abusive chapter of the HCA. Furthermore, the application of collective dominance approach makes it possible to capture concerns regarding possible post-merger co-ordinated actions.

> In the Südzucker case as a result of the acquisition of Financière Franklin Roosevelt S.A.S. by Raffinerie Tirlemontoise S.A., Südzucker – having controlling rights over the latter – would have acquired a 50 percent ownership also over Eastern Sugar BV. (99.7 percent owner of the Hungarian sugar factory Kabai Cukorgyár Rt). However, Südzucker had already indirect control over another Hungarian sugar firm, Magyar Cukor Rt. (Béghin Say was a third market participant on the Hungarian sugar market, controlling three sugar plants – it was not affected by the planned deal.) In its decision the Competition Council found, that the Hungarian sugar industry had a tight oligopoly situation already before the planned transaction. It was stated, that the transaction would have created even tighter structural relationship between Magyar Cukor Rt. and Kabai Cukor Rt, i.e. between two of the three Hungarian market participants. Consequently, the strengthening of joint dominance between the two remaining market participants is to be envisaged – the possibility of the duopoly being created would increase the risk of their using their market position by harming the consumers' interest, e.g. by increasing or by maintaining the high level of their prices. So, the Competition Council imposed condition to its authorisation: it was ordered that Südzucker had to sell Eastern Sugar BV to its other 50 percent owner, to Tate & Lyle Plc.

In predicting whether or not a merger is likely to fail the competitive element of the HCA's substantive test, a significant weight is given to the expected post-merger increases in quality-adjusted market prices, but sometimes possible future price increases are not specifically detailed in the decision. The dominance test serves as the basis for the assessment. If it can be stated that the transaction resulted in the creation of a dominant position, or, in the strengthening of an existing dominant position, it is held, that this could imply the possibility of the post-merger undertaking abusing this dominance, among others by the means of its pricing policy.

> As regards the role of other factors considering the dominance in merger cases, the increased role of potential competition can be underlined. A particular case can be mentioned in this respect, from the practice of the late '90-ies, where this aspect arose in a peculiar way. In the Matáv/Jásztel case the Competition Council blocked the planned acquisition of Jásztel (a small local telecom service provider) by Matáv (the national champion in telecommunications). At the time of the decision-making both undertakings were in a monopoly situation, since – due to an earlier sector-specific regulation – both had exclusive rights to operate on their respective territory. The transaction would have changed the operator on Jásztel's territory, but would not have changed the market situation in real terms. Nevertheless, with regard to the approaching market opening from the year of 2002, which would create the possibility for them to compete on

the liberalised market, the Competition Council did not give its authorisation to the transaction in 1998.

During its history from entering into force on 1 January 1991 the Hungarian competition law has shown a clear development towards the dominance test. This development has been made in three steps.

- At the outset, the first generation competition law of Hungary (the "1990 Competition Act") stipulated that *"no merger could be authorised which hindered the creation, the existence or the development of economic competition"*. In addition to this criterion, the law left a quite substantial room for the GVH to consider public interest type aspects as well: even if a merger "hindered the creation, the existence or the development of competition", the authorisation was still possible, if in its impacts on competition benefits prevailed over losses[5], the transaction did not exclude competition for an overwhelming part of relevant products and it helped to improve export performance and this had positive impacts on the national economy.

- In 1996 a new Competition Act was enacted, basically in the spirit of approximating the basic norms of the national competition law to those of the EC. According to the 1996 merger assessment criterion the competition authority could grant or deny the authorisation of a merger depending on whether it created dominance or strengthened an already existing dominant position or not. This was nevertheless subject to the condition that the merger could not prevent the establishment, continuation or development of effective competition on the relevant market. In this way the law of 1996 put the dominance test into the focus of the evaluation process. The former escape clause was maintained, namely, authorisation could not be denied from concentrations not complying with the dominance test, supposed that the positive impacts of the merger exceeded the negative ones. The law gave an exhaustive list of factors to be considered while assessing positive and negative impacts – this list differs to a large extent from the previous one, by giving greater weight to competition policy oriented aspects[6].

- The third generation Hungarian competition law entered into force in February 2001 as a result of a substantial amendment[7] of the 1996 Act. The substantive criterion was further amended. According to the "fine-tuning" of the assessment test, the authorisation cannot be denied, where the merger does not create or strengthen a dominant position, which would impede the formation, development or continuation of effective competition. The emphasis is put on the word of "which" and the change in the wording of the law is aimed at further increasing the role of competition policy related factors in the assessment. This helped to push other, primarily industrial policy related considerations to the background (e.g. the criterion of international competitiveness in the conditions to be considered according to the law of 1990).

In the enforcement practice of the Hungarian competition authority the assessment of dominance itself is made by considering a broad variety of factors. E.g. in the Südzucker case referred to earlier, it was stated, that a joint dominance, which is based on oligopolistic interdependence has basically two prerequisites: (*1*) factors, which are necessary for the undertakings to act as a single unit, (*2*) factors, which make it possible for the undertakings to pursue their business activities to a large extent independently of other market participants (e.g. to raise their prices without the need to take into account the market reactions of their customers). Putting it in another way, the market can be simultaneously characterised by the lack of competition among the members of the oligopoly and the lack of potential competition by undertakings, which are not members of the oligopoly, and this can stimulate the undertakings "to act as a single unit".

Assessing the situation the Competition Council analysed factors as follows:

- concentration of supply: the joint market share, market share of possible competitors, the differences in and the stability of these market shares;
- market barriers, the role of potential competition;
- market transparency (mainly from the point of view of output and prices);
- "homogeneity" of producers (more precisely, similarity of their business interests, the similarity of their market shares, degree of capacity utilisation, their cost structures);
- homogeneity of products, technology, R&D, role of innovation;
- price elasticity of demand;
- counterbalance of buyer power;
- life cycle of the industry.

Possible vertical effects of the merger and also portfolio effects are reviewed in cases where theses aspects can be relevant. In the case of conglomerate mergers the evaluation of financial strength of the post-merger entity has particular importance in the assessment.

As it follows form the specifics of the Hungarian merger control detailed above we have applied all the important substantive aspects of a merger control procedure incorporated in both the dominance and the SLC test.

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers

As it has been explained above, the Hungarian competition law applies the dominance test. From 1 January 1991 up to now, the number of M&A cases, which were decided by the Competition Council is 389 and there are rather positive experiences in connection with the application of this type of tests. At the same time, the Hungarian competition authority does not have any lesson about the "operation" of the SLC test in practice. Consequently, lacking the necessary experience in this respect, the assessment, whether the choice of SLC or dominance test would make a difference in reviewing the hypothetical situations listed in the questionnaire, could be made only based on estimates.

Point III/1/a/ of the questionnaire mentions a case, where a series of small mergers appears to be leading to the creation of a firm having significant market power. Under the Hungarian competition law this situation raises a notification-related peculiarity: the turnover thresholds can also be met in subsequent acquisitions from anywhere within a two-year period. From assessment point of view according to the GVH, in such a situation once the merger wave puts the acquiring group into an economic position where it can act to a large extent independently on the market, the transaction should be blocked.

Point III/1/c/ describes a merger with expected anticompetitive co-ordination among firms among whom there are no structural links. In the GVH's view the existence of structural links among firms is not a necessary precondition to the establishment of a collective dominant position.

4. Broader Policy Concerns

As regards the application of a gains-and-losses analysis, there was really exceptional during the 12 years' practice of the GVH. Even in these rare cases of the early years (first years of the '90-ies) the Competition Council concentrated rather more on competition policy-type considerations than on public interest type ones. Employment policy-oriented concerns have never been taken into consideration in these cases.

There have been a few instances in the history of the Hungarian merger control practice in which the need for broader policy concerns were clearly identified but could not be applied because of the lack of an institution executing them.

> The case of the acquisition of one of the leading Hungarian chemical company, BorsodChem in 2001 by an Austrian holding company is certainly a good example. During the investigation several links were identified between the acquirer company and one of the Russian giant gas companies. The Hungarian petroleum and chemical industries are significantly relying upon the supply of crude oil and that of the refined products from Russia and from the Ukraine. The government expressed its concern regarding the merger stating that it might strengthen Hungary's strategic dependence and be against the public interest. The Competition Council was not empowered by the Hungarian Competition Act to bring this type of considerations into its decision and the merger was allowed because no anticompetitive effects were identified.

NOTES

1. Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices as substantially amended by Act LXXXIII of 2000.

2. Of which Professor Richard Whish can expressly be mentioned.

3. According to Article 22 of the HCA, dominant position means the ability of undertakings to pursue their business activities to a large extent independently of other market participants, substantially without the need to take into account the market reactions of business partners when deciding their market conducts. The HCA enumerates all the factors to be considered in assessing the existence of a dominant position (like, among others, the entry conditions, financial strength and profitability of undertakings, the structure of the relevant market, etc.) The Act defines also the notion of joint dominant position, by providing, that a dominant position may be held by individual undertakings or jointly by more than one undertaking.

4. Case No. Vj-127/2001, Raffinerie Tirlemontoise S.A./Financière Franklin Roosevelt S.A.S (in the followings: Südzucker case).

5. Gains included favourable price developments, quality improvement, improvements in contract terms (e.g. delivery deadlines), shorter sales routes, rationalisations in organisation of procurements and sales, improvements in the terms of offer, in the environmental situation or the competitiveness of exports. An evident case of loss was produced if the participants of the merger reached a higher than 30 percent combined market share.

6. Among others: market structure, potential competition, possibilities of market entry and exit, the economic and financial capacity, business conduct, competitiveness of the undertakings concerned, and the effect of the transaction on suppliers, intermediate and final consumers were to be taken into consideration in the process of the assessment.

7. This modification was made by “Act No. CXXXVIII of 2000 on the Amendment of Act No. LVII. on the Prohibition of Unfair and Restrictive Market Practices”.

IRELAND

1. Merger Test and Determination

Ireland is currently moving from a public interest test to a test based on the substantial lessening of competition test. The principle differences between the two approaches are summarised below.

	Until January 2002	**From 2003**
Legislation	Merger, Monopoly and Takeover Act 1978 Competition Act 1991 Competition (Amendment) Act 1996	Competition Act 2002
Final decision	Minister	Competition Authority Minister has a role in media mergers
Process	Authority must be consulted before negative decisions (i.e., like Phase II), 4-6 weeks to report	1 month phase I 3 month phase II
Test	Whether the merger is in the public good In the Authority's phase II report, there is a list of 10 public interest factors given	Substantial lessening of competition
Judicial review	Yes, but no cases	Yes
Appeal	Unclear	Yes, to High Court on procedure and substantive decision

2. Arguments about the test during the legislative process

An expert report to the Minister in 2000 (The Competition and Mergers Review Group) recommended the following:

- the Authority would apply a dominance test with a Phase I initial examination and a Phase II detailed investigation and report its findings to the Minister;

- the Minister would apply a public interest test at Phase III and take the final decision.

During the process of drawing up the legislation, it was decided to adopt the SLC test rather than the combined dominance/public interest test and that the Authority would be the final decision making body (except for media mergers which are discussed below).

The decision as between SLC and dominance was less controversial and the reasons for moving to the SLC test are set out in the second part of this document. Fundamentally, it was considered that the SLC test was closer to the underlying economics of market power.

There was greater debate on the public interest vs. competition test, with business interests arguing for the retention of a public interest test and the continued involvement of the minister as final decision maker. Although these arguments were not accepted, it may be useful to summarise them here.

Interestingly, the central argument was not that anticompetitive mergers might need to be allowed in a small economy for national champion or industrial policy reasons. Instead, it was argued that a competition test would fail to prevent mergers that were against the public interest more generally.

The Authority's view on the first (i.e., national champion) argument was that: (*a*) market definition would resolve many of the issues; (*b*) domestic firms are better equipped to compete abroad if they face rivalry in the domestic market; (*c*) efficient capital markets are a better judge of sound investment than monopoly profit; (*d*) monopoly profit generally is wasted in rent-seeking and x-inefficiency so that it may not yield the benefits claimed for it; (*e*) the cost of the monopoly to domestic consumers was greater than the benefit to the economy of those profits being available for foreign expansion; (*f*) there is an inconsistency if domestic cartels are not allowed for industrial policy reasons; and (*g*) the government has myriad other industrial policy instruments that are more effective and efficient at addressing concerns.

The second argument was countered on the basis that (*a*) it was inappropriate to use competition policy to prevent foreign takeover of domestic companies; (*b*) such an approach would artificially constrain the market for domestic companies and thereby reduce the shareholder value of domestic companies; (*c*) having a public interest test in addition to a competition test reduces predictability of the process, raising the costs of merging generally; (*d*) if there were clear non-competition public interest reasons for blocking certain mergers, then these should be set out explicitly.

3. Media Mergers

It was decided that a public interest test should be retained for media mergers. The argument was made, and the Authority accepted, that wider issues arise in this sector relating to plurality and diversity.

The approach taken is as follows. The Authority applies the SLC test to the media merger in the usual way, with the exception that the Minister may request a Phase II investigation if the Authority has decided to close at Phase I.

At the end of its Phase II investigation, if the Authority blocks the merger on SLC grounds, there is no role for the minister and the decision is final subject to court review. If the Authority determines to allow the merger, with or without conditions, the process moves to Phase III. Here the minister determines whether the merger affects:

- the strength and competitiveness of media business indigenous to the State;

- the extent to which ownership or control of media businesses in the State is spread amongst individuals and other undertakings;

- the extent to which ownership and control of particular types of media business in the State is spread amongst individuals and other undertakings;

- the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the State;

- the share in the market in the State of one of more of the types of business activity falling within the definition of "media business" in this subsection that is held by any of the undertakings involved in the media merger concerned, or by any individual or other undertaking who or which has an interest in such an undertaking.

This asymmetric approach has the advantage that decisions of the Authority are not over-ruled by the Minister. In other words, the Minister's role is parallel rather than hierarchical. Further views on the treatment of public interest tests are set on in the Annex to this document.

4. Application of the SLC test

In July 2002, the Authority published draft substantive guidelines for merger control. It is currently completing a consultative process, which will lead to their revision, and the publication of a final version is anticipated before December. Copies of both can be obtained from www.tca.ie/mergers.html.

The Authority has adopted a conventional approach. The guidelines set out the following elements:

- market definition;

- use of the Herfindahl-Hirschman Index (HHI) as an indicator of horizontal concentration;

- analysis of immediate competitive effects;

- analysis of barriers to entry;

- efficiency defined in terms of net price. Although the Act makes no reference to efficiency, the Authority proposes to take the view that SLC is equivalent to an increase in the net price (i.e., a consumer welfare standard). Thus a reduction in rivalry that could be compensated by a reduction in cost would not be considered to lessen competition provided such cost reductions were passed on to consumers. The burden is on the parties in relation to establishing efficiencies.

5. Part Two: SLC versus Dominance and Broader Policy Concerns

5.1 General Comments on SLC vs Dominance

In outlining our view that the SLC test is superior to the dominance test. The arguments would apply equally to any test based on whether price would rise and/or output fall following a merger. We have included, as an annex, recent speaking notes by the Chairperson of the Authority, setting out some of these arguments in greater detail. We would also note that we are referring to dominance as defined in the EU as that is where the concept has primarily being developed.

Mergers may affect competition for one of three reasons, and it is useful to classify these into boxes as follows:

Box 1	Create or strengthen a monopoly or dominant position. Possibilities include duopoly to monopoly or the purchase by an already dominant firm of a smaller rival. In both cases, the merged firm does not face a rival.
Box 2	Collusion is likely after the merger. Here there are several potential rivals left in the market and, after the merger, they behave in co-operative fashion. In other words, they do not maximise individual profits, but chose their price/output to maximise the joint profit of the group. This is called co-ordinated effects in the US. It is clearly covered by the term collective dominance in EU law.
Box 3	Reduction of competition in an oligopoly where firms behave non-co-operatively. Here the elimination of one player changes the non-co-operative market equilibrium such that price is higher and output is lower. The term unilateral effects is used in the US, but this may not fully describe this case because it is not just the market power of the merging firms that is relevant, but also the equilibrium responses of rivals.

There is no difference between SLC and dominance in Box 1. Similarly, there is no difference in relation to Box 2: the term collective dominance has clearly been interpreted by the European courts to include Box 2, most recently and clearly in the Airtours judgement of the CFI. There is, however, some debate regarding Box 3 as summarised below.

5.2 Problem 1: Box 3 may not be covered by the dominance standard

There is considerable doubt about this. While the EU courts have made clear that collective dominance covers tacit collusion (box 2), there are no decisions supporting the extension to situations where the firms continue to behave non-co-operatively. At the same time, there are no decisions explicitly ruling it out. It does seem, however, that the term "collective" would need to be stretched considerably to describe a situation in which firms were behaving non-co-operatively.

The "dominance" component may not be the central one, although it does predispose the test to being structural. For example, Box 3 might be captured more clearly under the term "oligopolistic dominance". However, it is unclear if the ECJ would extend the concept of dominance in this way. If it did, then there is a danger of the approach becoming overly structural and coming down too hard on all concentrated markets, even when there are no competition concerns.

Overall therefore there is considerable uncertainty as to whether Box 3 can be covered and, even if it were feasible, it may not be desirable.

5.3 Problem 2: Certain anticompetitive mergers cannot be blocked under the dominance test

An example of a box 3 case may illustrate this point. Suppose two firms with 15 percent of the market merge. The only other firm has 70 percent share, there is pre-merger rivalry between the two merging firms, and there is little likelihood of collusion (because the good is heterogeneous and customised).

This case cannot be captured under Box 1 without defining the market narrowly to exclude the larger rival. The problem with doing this is that first it may impede the blocking of any subsequent merger between the 70 percent firm and one of the 15 percent firms (as they could claim they are in different

markets and second that it creates a legacy of overly narrow market definition that may have undesirable repercussions. It cannot be captured honestly under Box 2 because this is not a case of tacit collusion. As a result, cases like this will be omitted.

The problem of omitted cases is then proportionate to how large Box 3 is. If we think Box 3 is a large set, then omission is a big problem.

5.4 Problem 3: Box 3 cases are characterised incorrectly

Cases that properly belong in Box 3 may get pushed into Box 2. Almost all Box 3 mergers (recall that it excludes mergers that create single firm dominance) are likely to make the market more concentrated and more symmetric at the same time. In other words, the changed market structure will generally support a characterisation of Box 2, even if this is incorrect.

If this approach fails, then a larger set of cases will be omitted (Problem 2). The Airtours decision may have raised the standard of proof, so that it may be more difficult to characterise cases incorrectly.

If the approach succeeds, there are other problems. One is that because the case succeeds incorrectly, it raises the possibility cases that do not lessen competition but with similar observable data may be blocked. Another is that remedies may be focussed incorrectly.

5.5 Problem 4: Cases get characterised inefficiently

Some cases may genuinely fit in either box 2 or box 3. For many of these cases, characterisation as Box 3 may be more efficient. This is because box 3 involves only a change in a non-co-operative equilibrium, whereas box 2 involves a change from non-co-operative to co-operative equilibrium.

Using Box 3 is generally more plausible because we are not arguing that the entire nature of interaction is changing but more simply that a competitive element has been reduced. Also, economic theory has much more to offer on the comparative statics (i.e., examining how the market equilibrium changes) of non-co-operative equilibrium. In other words, there are many non-co-operative models in which we can estimate the effect on price and output of the removal of one firm, but we know relatively little about how the removal of a firm affects the switch from competition to collusion.

In cases where competition is a genuine concern, therefore, Box 3 is likely to be preferable in terms of plausibility, economic coherence and legal predictability. Classification as Box 2 is second best, and risks the concerns described under problem 3.

Another problem with the dominance test, not related to the Box 2/3 issue and possibly not a common one, relates to a situation in which a dominant firm buys another firm but does not increase its market power. A competition-based test might allow such a merger whereas there might be greater difficulty with a dominance standard.

Ultimately, what is important is that the legal language of a test permits a full and clear analysis of market power. Dominance may be capable of doing this but requires some broadening. SLC is a broader idea, and may require some narrowing of its interpretation in order to focus on the market power. Guidelines are of particular importance in this regard, although helpful in all situations. A third type of

wording, somewhere between the two, could be "significant increase in market power", provided this was interpreted in terms of market price and output.

6. Responses to Hypothetical situations

a) A series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors;

Response: We see no difference unless the Box 2/3 issue arises.

b) In the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level;

Response: There may be a difference. An SLC test would not prohibit a merger if existing competition were so low that the merger would not reduce it further. However, the dominance test might do this, although it is not clear that the merger should be blocked if there is no increase in market power. Clear guidelines could reduce any differences between the tests.

c) A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links

Response: This appears to be Box 2 above. The SLC test clearly captures tacit collusion, as seen in Australia, Canada and other jurisdictions. The EU courts have clarified, most recently the CFI in Airtours, that collective dominance covers this situation. So there is no difference.

d) Nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors.

Response: This may be an example of a change in the non-co-operative equilibrium (i.e., there is no tacit collusion). If so, then there is a significant difference between the tests as outlined above.

2. Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed.

Response: This is undertaken in the discussion above.

3. It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

Response: The statement may have some element of truth to it in practice, but this perception may partly arise from some jurisdictions (such as the US) who have the SLC test,

applying efficiencies defences, whereas ones with the dominance test (such as the EU) not applying them. Theoretically, the argument is not that strong but an SLC test, enabling a more flexible approach to market power, may be superior in terms of assessing the net effect of the merger, including efficiencies, on competition.

4. *Might the choice of competition test influence the choice of remedy for or against a structural solution?*

   Response: Yes; if the dominance test is used to force an inappropriate characterisation of a merger; e.g. a merger that is harmful to competition, but does not easily fall under the dominance rubric, then any remedies may be inappropriate too.

6.1 Broader Policy Concerns

1. *Does the choice of competition tests (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?*

   Response: The SLC test (or indeed a market power test) is more behavioural. It relies less on measures of horizontal concentration and is capable of being assessed directly without defining the market. In contrast, the dominance test relies more on structure, and on market definition.

2. *More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?*

   Response: The SLC test seems to fit more directly into economic analysis, insomuch as the concept of dominance is extremely rare in industrial organisation theory, whereas the overall degree of competition is much more commonly discussed and understood.

3. *Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?*

   Response: Yes, because a broader test like SLC permits more accurate and efficient legal characterisation that accords more closely with the underlying economics and thus offers the possibility of greater transparency, clarity and legal predictability. The use o Guidelines to the application of the SLC test can be used to limit any possible fears over the degree of discretion granted to the relevant deciding Authority.

4. *What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements? Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i.e., that the effect is more than de minimis) also have implications for prohibitions on agreements that lessen competition?*

   Response: No views.

5. *Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?*

Response: Legal wording of a test may not matter as much as its practical implementation so that substantial convergence may be possible. This is illustrated (*a*) by the fact that tacit collusion (Box 2) is treated identically by the dominance test in the EU and the SLC test in the US and (*b*) by the fact that many countries with a public interest test have tended to focus on the competition elements within that wider test.

The question of a public interest test vs. a competition test raises questions of different values, and forcing convergence on a single standard may undermine wider public support for competition policy. This may be particularly the case in certain sectors (e.g., media, defence) and/or in developing countries. Where public interest tests are used, questions about the hierarchy of decision-making and the interplay between competition and public interest tests may be central to ensuring efficiency (see Annex).

The choice of which competition test ultimately concerns the most efficient way to review mergers given that everybody agrees on the value or competition standard. It thus has the potential to achieve convergence.

ANNEX

Notes to Accompany Presentation at IBA Conference
Fiesole, September 20th 2002
John Fingleton

1. Slide 1: Merger Tests

The initial dichotomy appears to lie between competition tests and public interest tests. There is also more than one competition test and this second dichotomy is equally, if not more, interesting.

1.1 Public Interest Tests

Many developed countries and most developing countries apply public interest tests that are broader than a competition standard. These may relate to:

- Fairness/non-exclusion, small firms. Fairness/non-exclusion and preoccupation with small firms might be the same as structuralism, by which I mean a concern with having an unconcentrated market structure. This can be linked to having as an objective the protection of the competitive process, a feature of EU law and of US law enforcement prior to 1980.

- Industrial and Employment policy. The impact on jobs from an increase in competition is less often an issue than is claimed because the overall effect on aggregate employment is generally positively correlated with the effect on competition, and hence can usually be covered by the competition test. The effect of mergers on employment can be a more problematic issue if the distribution of the changes crosses jurisdictional boundaries so that some of the positive (or negative) effects of the merger are not internalised. Employment impacts may also be an issue if unions are given a role in assessing national or public interest impacts from mergers, as unions generally focus on the effects on existing workers (insiders) rather than on the effect on employment as a whole (including outsiders who enter employment).

- National ownership as strategic policy. This criterion may be important if governments seek to use their "influence", or explicitly regulate, to achieve policy objectives. Historically, ensuring national ownership, particularly in utilities has been an important objective, as evidenced by the state monopolies created in many countries. The national champion argument is also often used, especially in smaller economies, even though in many cases the relevant market is international so that the size of the company relative to the domestic market is not so relevant.

- Income distribution, regional policy, minority policy. A good recent example of the regional policy issue is given by Horn and Stennek[1]. A good example of minority policy is the example given by David Lewis in his 2001 Fordham paper.[2]

Within competition tests, we have two general standards: dominance (as used in EU, Germany, and other EU states), and the substantial lessening of competition test (SLC) (as used in US, Canada, Australia, Ireland, and other countries).

2. Slide 2: ICN Tests and Convergence

The first dichotomy is that between the competition and broader public interest tests. In general, there is convergence around the competition standard, for two reasons:

- Many countries have non-competition elements in their merger law, but public enforcement bodies apply de facto a standard that is closer to a competition standard. For example, the current Irish law has a long list of criteria[3] but a competition standard predominates. A similar point applies in the UK. A competition test could also come into effect via the courts, as in the way that the US Supreme Court has interpreted away the unfairness element in Section 5 of the FTC Act.

- There is an observable trend that countries reforming their competition laws tend to restrict rather than open up public interest objectives (and an increasing number appear to be reforming law increasingly often). This is often a codification of existing enforcement practice, thus being lead by the first factor. For example, Ireland has moved to an SLC-only standard for all but media mergers, and the UK will do so for all but media and defence mergers. A competition test is generally applied by the richer developed countries that have considerable leverage over other countries for many reasons (e.g., EU in the case of applicants, US in the case of trading parties in the Americas, economies because of trade, aid and related issues, multinationals, usually based in US/EU put pressure on to have common standard etc.) Meetings between competition officials (at OECD, ICN) strengthen this process, especially where merger enforcement is undertaken by competition experts. There are other questions and issues concerning public interest tests.

- Who applies them? Public interest tests are applied either by competition authorities or other bodies (e.g. Ministers, sector specific bodies). For example, a media regulator might apply diversity/plurality criteria to media mergers; or a central bank might apply prudential safety criteria to banking mergers. In the US, for mergers in telecommunications and transport (and more?) and in Italy for banking, the sector specific body applies the competition test. In Ireland the Minister applies the media criteria. David Lewis (again in his Fordham paper) argues that competition authorities should apply the non-competition criteria, but that they should be obliged to do this as a part of a transparent two-stage process in which the outcomes of both competition and public interest tests are clearly distinguished (like Model 1 below).

- In terms of hierarchy, there are two models. Model 1 is sequential in nature and (usually applies where there is a Minister rather than a sector body). Under Model 1 the expert competition body applies a competition test in a first phase and the Minister then applies a public interest test after seeing the first review. This process has the merit of transparency, but will allow anticompetitive mergers to be approved, and mergers that raise no competition concerns to be prohibited, in the public interest. In practice the public interest test takes precedence over the competition test because it is applied second. Hence the public interest test has a veto, but the competition test does not.

Model 2 is the case where each test has an equal veto, as where the competition and public interest criteria are applies independently and the merger proceeds only if both tests are passed. In this case, an anticompetitive merger cannot be allowed on public interest grounds. This approach has the merit that competition concerns cannot be trumped by wider public interest concerns; instead they have equal status. Model 2 is a more restrictive regime in terms of preventing mergers, but puts a higher weight on competition. Usually Model 2 is implemented by having separate bodies apply separate criteria in parallel (this is currently envisaged for banking in Ireland), i.e., a horizontal structure, but it can operate in the vertical or successive structure if the Minister has the asymmetric power to prohibit a merger cleared on competition grounds, but not to clear one prohibited on competition grounds (as is the case for media mergers in Ireland).

- In many cases, other policy instruments than merger control are more effective in achieving public policy goals. Often there is scare-mongering by vested interests, whereby anticompetitive effects are dressed up as having a positive effect on some other policy objective that may not subsequently occur. Even in the case of the Swedish paper that suggests a bias against small economies in merger control[4], policies that encourage head office functions to be based in smaller economies could counteract this bias.

A second dichotomy occurs within the set of competition tests, between SLC and Dominance. If we are converging towards a competition test, this begs the question of whether there is a single target towards which convergence is occurring. Many argue that SLC and Dominance tests are extremely similar. While this is true generally, there are important differences between them, and our appreciation of these differences may be increasing rather than decreasing, in which case it is important to clarify and understand these differences, so as to establish a clear and unambiguous (although not necessary single) competition standard.

3. Slide 3: Harm to Competition

In looking at the question of SLC vs. dominance, it is useful to examine the underlying economics. There is general agreement about mergers to monopoly/dominance and there appears to be no appreciable difference in the application of either test in this area. Comparisons of SLC and dominance should instead focus on situations of where the post-merger market is an oligopoly.

A merger in an oligopoly market reduces the number of firms (usually by 1). It will also affect the symmetry of the market. There are two general ways in which competition can be harmed.

3.1 Tacit collusion

Tacit collusion is captured under the rubric of co-ordinated effects in the US and collective dominance in the EU. As a result of the merger, firms that previously behaved non-co-operatively will change to behaving co-operatively. That is, instead of choosing price (or output, or other variable) to maximise their own profit (and needing to make assumptions about the actions of their rivals), they will set prices to maximise, or at least increase, the joint profit of all firms.

The type of equilibrium changes from non-co-operative to co-operative. To elaborate, in economic theory, we move from static one-shot models of competition to models in which future behaviour (and threats and promises) influence current behaviour. Because of the change in the type of equilibrium and the type of interaction, I refer to this as a paradigm shift within the market.

3.2 Change in the competitive market equilibrium

This type of change is captured under the rubric of unilateral effects in the US. (The term "unilateral" may be slightly misleading in that it suggests that only the merging parties change behaviour, whereas in fact rivals may also change.) In this case the non-co-operative equilibrium changes. The merged firm, still maximising its own profit, changes its price (or output or other variable), relative to the level set by the two pre-merger entities. This induces rivals to change their levels of output (or other variables).

While the market equilibrium changes in terms of the level of output and price in the market, there is no change in the type of behaviour or type of equilibrium. Firms still behave non-co-operatively (i.e., they compete), but the fact that there is one competitor less may result in a less competition.

In several mainstream oligopoly theories (Cournot, differentiated Bertrand), the non-co-operative equilibrium is more competitive the more firms that there are. [Not all models have this feature, and there are some in which the level of rivalry in the market does not fall as the number of firms falls.] In those cases where there is a negative effect on competition, it does not arise because firms collude, but rather because there are fewer of them competing. The reduction in competition has nothing to do with collusion.

3.3 Comment on interdependence

In both the co-operative and non-co-operative cases, there is oligopolistic interdependence, a defining feature of oligopoly. The nature of that interdependence is totally different. In one, the firms adopt a common policy towards the market that is not individually rational for each of them unless the others also adopt that policy. In the other, firms are behaving in an individually rational (selfish, profit maximising) manner, but taking account of the competitive reactions of their rivals.

4. Slide 4: Dominance does not catch all cases

The big question is whether unilateral effects (i.e., changes in the non-co-operative equilibrium) can be captured properly by the dominance test. There are two possibilities: single firm dominance and collective dominance.

4.1 Single firm dominance

This involves defining the market sufficiently narrowly so as to include only the merging firms or to get their market share above an acceptable threshold. There are several problems with this approach:

- It takes the "correct" answer and then squeezes it into a set of boxes, with the problem that other cases that can be fitted into these boxes may also be captured even though they are not "correct". This problem arises because the market definition is not being chosen as it would in other cases, but rather with the express intention of massaging up market shares to meet a quantitative threshold (that may have little theoretical justification).

- It distorts market definition, with possible repercussions later. These could be inculpatory (in cases of abuse of dominance) or exculpatory (because narrow market definition may define a true competitor to be in a different market). A different standard for dominance in

mergers would put a strain on the relationship between the word dominance in the merger area and that in Article 82.

- It also ignores the reactions of rivals, which would give biased answers. For example, in the case of Cournot (quantity setting), the reduction in output by the merging parties is partly offset by increases in output of other parties. This is considered under the SLC test. (It could be captured under the dominance test, if properly considered at the market definition stage.)

4.2 Collective dominance

The second approach is to capture unilateral effects under collective dominance.

The first question here is whether this is legally possible. In Airtours, the CFI makes clear that collective dominance covers tacit collusion, i.e., the first case mentioned above. Airtours does not completely close off the possibility of another interpretation, although it would not inspire enormous confidence on the question.

Even if it were legally possible, it would raise problems not unlike those in the single-firm dominance, especially relating to the interaction with Article 82. More seriously, it is not clear that the term "collective dominance" is capable of being used to describe every oligopoly, including those that are highly rivalrous. There is an advantage in terms of legal clarity for having a clear meaning to terms, especially when those terms also get used in Article 82, and reserving the term collective dominance to situations of collusion is very appealing.

It is difficult to avoid the conclusion that there is a set of cases with unilateral anticompetitive effects that may not be captured under the dominance heading. There is some debate about how large this set is. My view is that it may be small, but that it is not zero. The reason it is a small set leads me on to the second main reason why the dominance test is of concern.

5. Slide 5: Dominance forces incorrect and inferior characterisation

It may be possible to characterise the effects of many oligopoly mergers as either as unilateral or co-ordinated. The fact that dual characterisation is possible explains why the set of mergers that cannot be described in terms of dominance is small (see end of previous slide).

The set of relevant mergers for which dual characterisation is possible is large for two reasons. All mergers reduce the number of players, which in turn may both lessen competition in a non-co-operative equilibrium and increase the risk of collusion. Second, mergers that make the market more symmetric also have the potential for dual characterisation. Because mergers that increase asymmetry are more likely to be caught under single firm dominance, the set of oligopoly mergers remaining is more likely to increase symmetry. Indeed, many (if not most) mergers from 3 to 2 (that are not monopoly mergers) and mergers not involving the market leader are likely to make the market more symmetric.

To elaborate further, there are two different characterisation problems that arise with the dominance approach.

5.1 Problem 1: Incorrect characterisation

There will be some mergers where the true underlying story is one of change in the non-co-operative equilibrium. Think for example of a merger that takes the market from three firms (50 percent, 30 percent, 20 percent) to two firms (50 percent, 50 percent), and where there is little question of ex post collusion, but a big question about the level of rivalry ex post because a competitor has been eliminated.

A collective dominance approach forces the competition authority to characterise this as tacit collusion. Although the reality is that the merger would reduce competition, the enforcement body must argue a story that is not in fact true to get the correct answer.

One problem is arguing such a case may fail, and the decision of the CFI in Airtours suggests that the application of the theory of tacit collusion to the facts of the market must be increasingly rigorous. This would imply that enforcement bodies could fail to block truly anticompetitive mergers because the way in which competition is lessened is not the same as the legally secure route. This will increase the possibility of Type II error (i.e., failure to restrict anticompetitive mergers).

Alternatively where the enforcement body succeeds, there may be a problem in that the method of success is not the correct one. Some might say, "so what?" I think the accuracy of the case presented matters, not just for the system to have integrity and enjoy legitimacy, but also because there is a real danger of increasing Type I error (i.e., that deals that do not lessen competition would be prohibited) as an indirect reaction. This could happen if a competition agency (or a court) was presented with a case where competition was clearly lessened but there was no evidence of tacit collusion. Blocking this deal (which is the right outcome) could involve resorting to arguments (e.g., around linkages or interdependence or market structure) that happen to be present in that case but that in other cases would not be relevant. In this way, the standard for tacit collusion under collective dominance could be blurred.[5]

A second serious concern relates to remedies. It is not obvious that the remedies to a deal that creates a serious risk of tacit collusion are the same as those where competition is lessened due to a change in the non-co-operative equilibrium. Again, this could either result in Type I/II errors, or simply inefficient/unnecessary remedies.

Overall, therefore, examples of this kind raise serious issues about clarity, transparency and legal certainty. The fact that mis-characterisation could possibly affect analysis of a large set of mergers constitutes a potentially more serious problem than the problem of cases not covered by dominance.

5.2 Problem 2: Inferior Characterisation

There will be other cases where both theories may be generally and genuinely plausible. The example of the market structure given above could also apply. In such cases, where the enforcement body has a real choice between two characterisations (it may not even have to choose), there are several reasons for sticking to (or putting greater emphasis on) the unilateral characterisation.

- First, it simply requires arguing that the non-competitive equilibrium changes. This is a more straightforward theory to test with the market facts. Hence, it would enjoy greater legal certainty and predictability. In contrast, the tacit collusion story is akin to arguing for "the straw that breaks the camel's back" because we must be convinced that this one change in market structure is the key factor in pushing the market from rivalry to collusion.

- The ex post analysis of cartel cases does not inspire confidence in ex ante prediction. Many cartels have been discovered occur in markets with large numbers of players, asymmetric market structures and with differentiated products, all features that economic theory suggests make cartel formation unstable or unattractive.

- The set of co-operative outcomes is potentially very large, so that we have much less predictive power in terms of the anticompetitive impact or ability to test outcomes ex post.

Two recent cases may help to illustrate. In Europe, Airtours was characterised as tacit collusion. Suppose instead (or in addition) it was argued in terms of a Cournot market where the number of firms went from 4 to 3, in which the output restriction by the merged firm would not have been offset by the reactions of competitor.[6] I believe that it would have been easier and less speculative for the Commission (and the CFI) to determine if the market facts matched such a story. In contrast to this, in the US Babyfoods case, the argument relied on a change in the market equilibrium, and the FTC succeeded in this in the courts. If, however, the FTC had been required to rely only on a theory of tacit collusion ex post, it is less clear that it would have prevailed.

5.3 Summary

Dual characterisation affects a high proportion of mergers in oligopolistic markets that do create single firm dominance. For this reason it is potentially a big problem. It may result in a higher error rate in merger decisions, and may create serious confusion in the legal standard. In the longer term, it may damage the integrity and credibility of the system.

6. Conclusion

The dichotomy between competition and public interest tests is a central theme of the ICN agenda. If part of the ICN agenda is to support and encourage the idea of soft harmonisation towards a single test, then it is critical that we clarify what we mean by a "competition" test, as this is possibly the leading candidate for the convergence standard.

In this context, differences between SLC and dominance tests are critical. My own view is that the dominance test is flawed, because it will omit cases of harm to competition and especially because it leads to incorrect and inefficient characterisation. As a result, there may be unnecessarily high Type II error (failure to restrict anticompetitive mergers) and possibly also Type I error (prohibition of mergers that do not harm competition) either directly or as a reaction to the high Type II. The failure of a competition test to capture all mergers that harm competition could undermine confidence in the competition-based approach. It would be unfortunate if, at ICN level, this were to strengthen the case for public interest tests in mergers.

NOTES

1. H. Horn and J. Stennek, EU merger control and small member state interests, in The Pros and Cons of Merger Control, Swedish Competition Authority (2002).

2. D. Lewis, The Political Economy of Antitrust, paper presented to the Fordham Corporate Law Institute Annual Conference on International Antitrust Law and Policy (2001).

3. The Statute, which expires on December 31st, lists effects on 10 factors: continuity of supplies or services, level of employment, regional development, rationalisation of operations in the interests of greater efficiency, research and development, increased production, access to markets, shareholders and partners, employees, and consumers.

4. H. Horn and J. Stennek, op. cit.

5. A dominance test will also catch cases of reinforcement of dominant position where market shares have increased even if market power of the merging parties have not changed or that market power of all the players in the market has gone down.

6. Cases where firms compete in quantities in a repeated Cournot game appear to be relatively rare, but there is a plausible argument that the Airtours case was one such example. In such cases, intense price rivalry in the second phase is not relevant, as the level of competition is determined fundamentally in the choice of outputs.

ITALY

1. Objectives

The Italian Competition Act (Law No 287, of October 10, 1990 – hereinafter, the Law) does not set out explicit and clear-cut general objectives from which specific indications could be drawn as regards the interpretation of the substantive test in mergers analysis. Article 1 only states that the Law implements Article 41 of the Italian Constitution, which recognises and safeguards the freedom of private entrepreneurial activity as one of the fundamental principles of the national legal system in the domain of economic relationships.

2. Nature of the substantive test

The authority's assessment and determinations are exclusively based on competition considerations. Article 25 of the Law provides that the competition authority may, under exceptional circumstances and on the basis of general criteria to be laid down by the Council of Ministers, authorise otherwise anticompetitive mergers when major general interests of the national economy are involved in the context of the European integration process[1]. However, the government has never set out any such general criteria, and thus the aforementioned provision has never been applied.

Article 25 also provides that the Prime Minister may, for reasons of national economic interest and within 30 days of the notification, prohibit mergers involving firms from countries that apply discriminatory provisions or impose clauses having similar effects in relation to acquisitions of foreign firms by Italian undertakings. Alike the former, this provision has so far never been made use of in order to block proposed acquisitions by foreign undertakings.

Mergers are assessed on the basis of a dominance test. According to Article 6 of the Law, the competition authority has to ascertain whether notified mergers create or strengthen a dominant position on the domestic market so as to eliminate or significantly and durably restrict competition. In such a case, after completing the investigation the competition authority can either prohibit the merger or authorise it, laying down the necessary measures to prevent or remedy the identified anticompetitive effects otherwise arising from the proposed transaction.

Based on Community case law, the substantive test has been interpreted so as to include both single firm and collective dominance. This was made possible by the fact that the Italian competition law is largely modelled on EU legislation and that Article 1(4) of the Law explicitly provides that its substantive domestic provisions on agreements, abuse of dominance and mergers, have to be interpreted in accordance with the principles of EU competition law.

To date, collective dominance has only been used once to prohibit a proposed merger in a regional market for fresh milk (a summary of the case is provided further below), and since the parties did not appeal the authority's decision, administrative courts have had no chance yet to formally consider the extension of the substantive test. In principle, however, and especially after the recent CFI judgment in the

Airtours/First Choice merger, the concept of collective dominance seems to be applicable to all cases where, by virtue of specific market conditions, a proposed merger would likely create or increase the opportunities for existing operators (or a limited group thereof) to anticipate each other's market behaviour and to tacitly co-ordinate and adjust their business conduct so as to successfully achieve and maintain a non-competitive equilibrium.

As a result, the elements which are seen as being most relevant in a collective dominance context are largely the same as those that are commonly deemed to facilitate cartel arrangements, namely high levels of market concentration and product homogeneity, inelastic and static demand, significant barriers to entry, high market transparency, little product and technical innovation, symmetry of firms' cost structures, structural links or multi-market contacts between players. Furthermore, as much as in cartel cases, a finding of collective dominance would require evidence that market characteristics and dynamics are such as to make firms fully realise that any deviation from the common, tacitly agreed policy would likely be detected, would credibly trigger a timely competitive response by the other (collectively dominant) players, and would thus turn out to be unprofitable.

As with agreements and unilateral business conduct by dominant firms, the substantive assessment of mergers is strongly consumer-oriented and the expected impact of a proposed concentration on quality adjusted market prices is a key element of the screening process. However, the dominance test sets some legal constraints on the scope of the authority's decision-making power. Since a prohibition decision always has to rely on sufficient evidence that a dominant position would be created or strengthened as a result of the merger, a predicted post-merger increase in prices would still not be enough to block transactions falling below the dominance threshold. Moreover, where the threshold is met, it also has to be shown that the merger would result in competition being significantly and durably restricted. This implies, on the one hand, that an expected small or transitory price increase would not, by itself, provide sufficient grounding for a prohibition; and, on the other hand, that, absent any predictable price increase, a merger could still fail the substantive test if it were found to have a significant and durable adverse effect on other relevant factors of the competitive process, such as incentives to product or technical innovation and market entry conditions.

3. Dominance vs. SLC

The extension of the substantive test to collective dominance makes it possible to address *ex ante* the problem of collusive outcomes potentially arising from tacit co-ordination among market players in a tight oligopoly setting, where rules on agreements and concerted practices would otherwise be hardly applicable[2]. In such a context, structural links may be a relevant feature, but not a necessary – let alone sufficient – condition, since what matters is primarily the existence of certain market characteristics that allow oligopoly members, without the need of any explicit agreement, to identify some common policy (or focal point) and to individually realise that it is more profitable for them to abide by some implicit "rules of the game" rather than actively competing against each other.

On the other hand, as mentioned above, the dominance test does not permit to challenge proposed mergers falling short of the (single or collective) dominance threshold (e.g. a series of small mergers which might restrict access to distribution facilities by potential entrants, or mergers between firms supplying close substitutes in a differentiated products market and enabling the non-dominant merged entity to unilaterally raise prices). After admitting the existence of an "empty box", however, it remains to be seen how large the "box" is likely to be, before any final conclusion may be drawn as to the possible merits of a change in the substantive test.

The issue of efficiency gains first has to do with the relevant legal framework more than the nature of the substantive test itself. In Italy, there is no statutory consideration of merger specific efficiencies as a possible defence for otherwise anticompetitive concentrations, which must be prohibited whenever they create or strengthen a dominant position on the domestic market as a result of which competition would be either eliminated or significantly and durably restricted. A different and more complex issue is to establish whether and how efficiency gains may nonetheless be incorporated in the overall assessment of a proposed merger. In principle, the consideration of easily verifiable and merger specific efficiencies is not to be excluded given that the legal test provides for two logically distinct steps, respectively focusing on the creation or strengthening of a dominant position and on the expected effects of the merger on competition. Merger specific efficiencies may therefore be taken into account to the extent that the parties are able to provide clear and convincing evidence that the nature and dimension of these gains are such as to unequivocally support a finding that the merger will result in net benefits for consumers. In this respect, however, a general scepticism still seems to be largely warranted, for efficiency claims are much easier to make than to test and their alleged positive impact on consumer welfare is often deferred to some longer and not precisely defined time horizon. That's why such claims are usually subjected to a stringent scrutiny and mergers are more often prohibited where medium to long term efficiencies are to be weighed against the evidence of immediate and tangible anticompetitive effects.

The assessment becomes far more complex where mergers involving immediate and uncontested benefits for consumers at the same time raise concerns in view of the prospective adverse effects on competition that the competitive advantage gained by the merged entity over its rivals may possibly generate over a longer time period. It is precisely in this context that efficiency and competition considerations seem more prominently to clash and give rise to open disagreement between jurisdictions. In such instances, what considerations should govern the trade-off? How long can the time horizon be, taking also into account that the longer the horizon the lower the likelihood of any future competitive scenario, including any prediction as regards the competitors' alleged inability to replicate the efficiency-enhancing strategy?

These questions would greatly benefit from a more convergent approach across jurisdictions as regards not so much the nature of the substantive test being used for reviewing mergers, as rather the appropriate time horizon within which competition authorities carry out their assessment as to whether or not a merger is likely to adversely affect competition in the first place. This would provide some useful guidance on the way efficiency evidence is taken into account (irrespective of whether it is embodied in the substantive analysis or is considered as a countervailing justification for otherwise anticompetitive mergers). It would also help reduce some perceived asymmetries (or inconsistencies) in the treatment of efficiency claims, for the overall analysis would certainly look more balanced if a consistent approach (and standard of proof) were used to assess both the anti- and procompetitive/efficiency-enhancing long-term effects potentially arising from a proposed merger. Last but not least, specifying the time horizon would help clarify the burden of proof on competition authorities and enhance the overall transparency of the screening process, including at judicial level.

4. Case Example - Granarolo-Centrale del latte di Vicenza

In May 2001, on the basis of a finding of collective dominance, the competition authority prohibited the proposed acquisition by Granarolo, the second largest domestic producer of milk and dairy products, of Centrale del latte di Vicenza (CLV), a municipally-owned dairy company operating in the Veneto region.

At national level, the structure of the market for fresh milk is characterised, from the supply side, by the existence of two major players, Granarolo and Parmalat, both holding market shares of about

28 percent, and of a large number of local dairy companies, each operating a very limited number of production facilities in small geographic areas, with market shares ranging between one percent and four percent.

In the Veneto region, identified as the relevant geographic market, Parmalat was the first operator, with a market share of between 30 percent and 33 percent, followed by Granarolo with a share of between 15 percent and 18 percent. CLV was the fourth largest producer of fresh milk, with a market share of between nine percent and 12 percent, whereas the remaining supply came from a small number of local dairy companies, most of them serving only part of the relevant market. The three largest local companies held market shares ranging from 11 percent-14 percent to five percent-eight percent. Overall, the market was characterised by a certain degree of concentration, with a CR4 index of about 72 percent, and a Herfindal-Hirshmann index of 1 780.

Demand for fresh milk in the region was found to be extremely stable and production costs were significantly uniform among the various dairy companies. The relevant market was also characterised by barriers to entry in terms of transport costs, distribution networks and, more importantly, the investments required to build up a sufficiently strong brand image to alter firmly entrenched consumer habits. The market was also found to show a high degree of price and quantity transparency since specialist companies prepare weekly data on the value and volume of each dairy company's sales of fresh milk, desegregated by region and brand name. This allows operators to closely monitor, on a weekly basis, the sales performance and prices of rivals' products.

The analysis of the competitive dynamics in the relevant market showed that both Granarolo and Parmalat had sought to maintain their market shares without adopting aggressive strategies either between themselves or vis-à-vis local dairy companies. Furthermore, even though the established brand names of local dairy companies represent an alternative source of supply, such companies did not appear to provide a significant competitive constraint on Granarolo and Parmalat and were rather found to adjust to the latter's pricing policies.

In view of the foregoing, the authority deemed that the relevant market was already characterised by significant oligopoly features, that actual competition was already weak, although not totally absent, and that the same was true for potential competition due to the absence of significant market entries over recent years. Drawing from the criteria developed in the relevant Community case law, the authority thus considered that the proposed merger, by raising the combined share held by Parmalat and Granarolo up to some 60 percent of overall sales, would have led to the creation of a collective dominant position of the two leading nation-wide operators, which would have significantly and durably lessened competition in the Veneto regional market for fresh milk.

In coming to its determination the authority first considered that the proposed merger would have increased the Herfindal-Hirshmann index by 326 points, from 1,780 to 2,106. This increase was deemed to be significant for the other main structural and behavioural features of the market (stagnant demand, product homogeneity, little product and technological innovation, barriers to entry, symmetry of cost structures, market transparency and limited past competition) were seen as factors already facilitating the convergence of pricing policies and the alignment of conditions of sale among the existing competitors.

In this context the authority also noted that the concentration would have brought Granarolo's market share closer into line with Parmalat's and that this increased symmetry, together with the other characteristics of the market, would have enhanced the risk of tacit co-ordination between the two companies and the potential for a parallel price rise to the detriment of consumers. Moreover, since a reduction in the prices charged by one of the two national dairy companies would have been easily detected and would have likely triggered a similar reduction by the other, with an ultimate adverse impact

on the profits of both operators, it could be reasonably expected that Granarolo and Parmalat would have eventually adjusted to a tacitly agreed common policy of higher prices and refrained from actively competing against each other.

This scenario was deemed to be even more likely due to the existence of multiple contacts between the two leading players in a number of other local distinct markets. These contacts were seen as discouraging the adoption of reciprocally aggressive competitive strategies, since any steps taken by one of the companies to win market shares in a given local market could trigger retaliatory action in one or more other markets.

NOTES

1. In any event, the same provision states that competition cannot be eliminated from the market or restricted to an extent that is not strictly justified by the aforementioned general interests and that the competition authority must prescribe the measures to be adopted in order for competition to be fully restored within a specific deadline.

2. And also ineffective, for the unilateral optimising conduct by individual oligopolists could not be expected to change in the future.

KOREA

1. Introduction

Recently, there has been a great deal of discussion in international fora regarding mergers. This can be attributed to a more globalised economy than perhaps a decade ago. A merger that is approved in one jurisdiction may not be approved in another jurisdiction. GE/Honeywell is an example. There are claims that the different outcome was brought about by different merger analysis methods.

Although there are about a hundred jurisdictions that enforce competition law, no competition law is identical in analysing the potential anticompetitiveness of a merger. Each jurisdiction has different merger guideline which has evolved after long experience of competition law enforcement or which is best suited to the respective economy or administrative culture.

Efforts are being made at the international organisations such as OECD to reach convergence in the area of merger analysis. It is expected that such effort for convergence will enable better co-operation among competition authorities and more reliable result of merger review.

The fact that there are about 100 countries with competition law should not discourage convergence efforts. Although merger review regulations are not identical, most of them fall into two broad categories. One is SLC (Substantially Lessening of Competition) test, used by the US, Canada and Australia and the other is Dominance test, used by most of other jurisdictions. There are views that the two different tests can bring about different outcome in merger review but there are also claims that the result of merger review should be same regardless of the criteria used. This paper will compare SLC and Dominance tests and explore how merger review is conducted in Korea.

2. Comparison of SLC and Dominance Tests

2.1 Definitions

In the US, where SLC test is used, a merger is not approved if it may substantially lessen competition. In EU or Germany, where Dominance test is used, a concentration which is expected to create or strengthen dominant position cannot be approved. Both SLC test and Dominance test share same objective of determining anticompetitiveness of a merger. Moreover, two competition authorities using two different tests will be involved with same set of issues. Both regimes will be defining the relevant market for the merger concerned. Also, the competition authorities will also consider the possible anticompetitive effects after the merger, including collective action by the competitors in the market.

2.2 Single firm Dominance and Multi-firm Dominance

The proponents of SLC test argue that Dominance test will catch fewer anticompetitive mergers than SLC test. This statement may be true if only single firm dominance was used for the Dominance test.

In the US, where SLC test is used, a market with HHI (Herfindahl-Hirschman Index) of over 1800 is assumed to be highly concentrated and if the merger concerned raises the HHI by 100, it is presumed to substantially lessen competition. HHI is derived by adding the square of each suppliers market share.

Let us assume a market composed of six suppliers. Two largest suppliers have 30 percent market share each, and the remaining suppliers have ten percent each. The HHI of this given market will be 2 200, which is deemed to be highly concentrated, as it is over 1 800. If two of four smaller suppliers merge, the combined market share will be 20 percent. 20 percent is a market share which is not considered to create dominance in the market. However, in terms of HHI, the merger will result in HHI of 2 400, which is an increase by 200. Therefore, the merger is presumed to substantially lessen competition, unless consumers can find other source of supply.

In the case given above, SLC test can catch an anticompetitive merger which could not be prevented by a Dominance test. However, this does not imply that SLC test is superior to Dominance test. Dominance test can be supplemented by other complementary measures. Rather than using a single firm dominance criteria, multi-firm dominance criteria can be used.

In Korea, “The Notification on M&A Guidelines” (1999) stipulates that “competition may be substantially restricted if the combined market share of the Acquiring Party and others and the Acquired Party is 50 percent or more” or “among the top three and the combined market share of the top three companies is 70 percent or more.” If we are to consider our case, the newly merged parties will have 20 percent market share, which will now be the No. 3 company in the market. If only single firm dominance criteria is to be used, the market share of the No. 1 firm will fall short of 50 percent threshold and will not be subject of prohibition. However, this will not be the case in Korea. The combined market share of top three firms will be 80 percent. Therefore, the merger will be deemed to substantially lessen competition in Korea.

There are other ways to complement Dominance test. If a competition authority with single firm dominance criteria wants to catch anticompetitive merger, it can impose a more strict threshold. Then the merger review will bear same outcome as an SLC test.

2.3 SLC test and Dominance test against Unilateral and Collective Effects of Merger

Market power brought about by a competition-restrictive merger can be abused unilaterally or collectively with other suppliers. In case of a market where products are differentiated, a unilateral exercise of market power can occur. For example, a merged company may raise price of its product (Product A) above the premerger level. Increased price will result in fall in demand for the product concerned. However, sales loss can be diverted to increased sales for the product of the merged partner (Product B). In some cases, raising the price of a product might actually be more profitable. This is more so when customer regards “Product A” as a first choice and “Product B” as a second choice.

Korea's MRFTA does not specifically mention unilateral exercise of market power. Nevertheless, the case mentioned above would have still have been caught by the KFTC if the No. 1 supplier had market share of or above 50 percent. However, they would not have been caught for exercising unilateral market

power. Perhaps in order to catch more anticompetitive mergers with unilateral effects, a threshold of less than 50 percent might be necessary.

A merger might result in a market situation where it might be easier to engage in collusion among market players. Market players may increase the price of their products or reduce output. Korea's M&A Review Guidelines provide for expected co-ordinated action among competitors. The M&A Guidelines prescribes that "A merger is likely to substantially restrict competition if the decrease in the number of competitors as a result of the merger creates a situation conducive to explicit or implicit collusion on price, output or terms of trade."

Possibility of collusion will be assessed by examining the followings: (*1*) whether the price of the products sold in the relevant product market has been markedly higher than the average price of similar products not included in the relevant market, (*2*) whether enterprises in competing relations have maintained a stable market share for the past several years in the market where the demand for the product transacted in the relevant area of trade is inelastic, (*3*) whether there is high homogeneity among products supplied by enterprises in competing relations and whether the terms of production and sale of competitors are similar, (*4*) whether the information on the business activities of competitors is easily accessible, (*5*) whether there have been cases of undue concerted acts in the past.

2.4 Merger Specific Efficiencies

Sometimes, mergers, including anticompetitive mergers may result in efficiency gains. Efficiency gains can be great enough to offset the adverse effects of reduction in competition. Many jurisdictions have provisions which oblige competition authorities to take merger specific efficiencies into account. If the merger specific efficiencies outweigh the anticompetitive effects of a merger, the merger concerned will be permitted to consummate. Merger specific efficiencies include economies of scale and reduced production costs resulting from joint use of facilities.

Korea's merger regulations also provides for merger specific efficiencies. Article 7, Paragraph 2, Sub-paragraph 1 prescribes that merger specific efficiency gains shall be taken into account when reviewing a merger. The "Notification on M&A Review Guidelines" describes different types of merger specific efficiencies in detail. There are two broad categories of merger specific efficiencies that are accounted for in the M&A Review Guidelines. First category is efficiency gains in production, marketing, research and development. Second category is somewhat unique to Korea. It is on efficiency gains to national economy.

The effect of enhancing efficiency in the areas of production, sales and R&D shall be assessed by taking the following into consideration. (*1*) whether the production cost can be cut through the economy of scales, integration of production facilities, rationalisation of production process, etc. (*2*) whether the sales cost can be lowered or sales or exports can be boosted by integrating or sharing sales network. (*3*) whether sales or exports can be boosted by sharing market information. (*4*) whether logistics cost can be cut by sharing transpiration and storage facilities. (*5*) whether production-related technology and research abilities can be improved by complementing each other's technology, or sharing or effectively utilising skillful workforce, organisation and capital. (*6*) whether other expenses can be significantly reduced.

The second broad category of merger specific efficiency is related to the national economy. The Notification on M&A Review Guidelines states that "the effect of enhancing efficiency on the national economy as a whole shall be assessed by taking the followings into consideration": (*1*) whether it makes a significant contribution to job creation. (*2*) whether it makes a significant contribution to the development of regional economies. (*3*) whether it makes a significant contribution to the development of forward and

backward-related markets. (*4*) whether it makes a significant contribution to the stabilisation of the nation's economy by means of a stable supply of energy, etc. (*5*) whether it makes a significant contribution to the improvement of environmental pollution.

The Article 7, Paragraph 2, Sub-paragraph 1 stipulates that merger specific efficiencies should take place in the near future. M&A Review Guidelines also prescribe that "The effect of enhancing efficiency must be difficult to achieve using methods other than the said business combination." Following criteria are considered to determine whether it is not possible to achieve efficiency without the merger concerned. They are: (*1*) It shall be difficult to attain enhanced efficiency through the expansion of facilities, development of technology or methods other than business combination (*2*) Cost reduction shall not be realised by using competition-restrictive methods including the decrease in production volume, lowered quality of service, etc.

In order to grant exemptions in business combination, the effect of enhanced efficiency must be greater than the competition-restrictive effects of the business combination. Also, the burden of proving the merger specific efficiencies is on the merging parties. However, the guideline does not provide for a tool which can be used to compare the adverse effects of competition-restrictive merger and merger specific efficiency gains. Although it is not mentioned in Korea's M&A Review Guidelines, a reasonable method of comparing effects of reduced competition and merger specific efficiency might be to examine changes to consumer surplus from premerger level to postmerger level.

2.5 Failing Firm Defence

Many jurisdictions recognise failing firm defence as an exemption of merger prohibition. Competition authorities assess whether either party to the merger transaction would be likely to fail if merger does not take place. The rationale behind clearing a potentially anticompetitive merger is that it is more beneficial to the market to allow merger than to let the production facilities of the failing firm to exit the market.

Korea is no exception, and Korea Fair Trade Commission has a detailed explanation on assessment of a failing firm in its M&A Review Guidelines. A failing firm is described as "a company which is insolvent or expected to be insolvent in the near future due to the deterioration of its financial condition."

The following factors are considered to determine whether the acquired firm is a failing firm: (*1*) The company's total capital is less than its paid-in-capital on the balance sheet for a considerable period of time. (*2*) For a considerable period of time, the company's operating profit has been less than the interest payable by the company. (*3*) There has been an application for the commencement of a procedure of an insolvency.

To be granted an exemption, the following conditions must be met, even if a merging party is proved to be a failing firm. (*1*) It is difficult to use the company's production facilities, etc. on a continuous basis in the concerned market by no other means than business combination. (*2*) It is hard to come by a business combination that is less likely to restrict competition than the concerned business combination.

3. Merger Cases Reviewed by the Korea Fair Trade Commission

Article 7, Paragraph 1 of the MRFTA stipulates that "No person shall engage in a merger which substantially reduces competition in given area of trade." The provision is somewhat close to the provision

criteria seen in the US (No person shall acquire ... where ... the effect of such acquisition may substantially lessen competition) or Australia.(A corporation must not acquire ... if the acquisition would have the effect, or be likely have the effect of substantially lessening competition in the market)

By examining Article 7 of MRFTA, one might conclude that KFTC uses SLC test for the substantive analysis of mergers. However, the examples of Korea given in this paper suggested that KFTC's analysis was closer to Dominance test. Following cases will explain how merger analysis were conducted by the KFTC.

3.1 Case where Anticompetitive Effect of Merger was Presumed

In 1995, Nongshim-Kellogg and Purina Korea were engaged in a merger activity. Nongshim Kellogg was second in the cereal market with market share of 37.9 percent and Purina Korea was second with market share of 23.6 percent. The proposed merger will make the merged company number one in the market with market share of 61.5 percent. This market share is over the market dominance threshold and can be presumed to be competition-restrictive. Moreover, the number of players in the market will be reduced from three to two, increasing market concentration. As a result, the merger was not cleared.

3.2 Case Where Merger Specific Efficiency was Recognised

There has been one case where a potentially anticompetitive merger was allowed on the grounds of merger specific efficiency. It was a proposed exchange of businesses between Hanhwa Petrochemical Co. and Daelim Industry Co.(1999) This business combination was expected increase market concentration of LDPE, which is a type of plastic. After the merger, the suppliers of LDPE would be reduced to four from five. It was expected that abuse of market dominant power would be facilitated and the market share of top three firms were above market dominance threshold.

However, it was believed by the KFTC that production cost would be reduced as the result of rationalisation of production process and integration of production facilities. Other merger specific efficiencies such as reduction of marketing costs and increase in exports were anticipated. Most importantly, such efficiency gains would not have been obtainable without the merger in question.

3.3 Case where Failing Firm Defence was Used

In 1999, Daewoo Heavy Industries, Hyundai Heavy Precision Industries, and Hanjin Heavy Industries were to combine their rollingstock businesses and jointly establish a rollingstock company. This would reduce suppliers of rollingstock from three to one. There is no doubt that the proposed merger is anticompetitive.

However, rollingstock business of the three companies were all failing businesses. If the merger had not been allowed, the production facilities of the three rolling stock businesses would have been withdrawn from the market. The significance of this case is that it was not just a failing firm defence. It can also be seen as a case where "failing business division defence" was used.

4. Conclusion

Although different competition authorities have different substantive criteria for merger review, it was seen that the facts that they examine are mostly the same. Many issues including market shares, barriers to entry, potential imports are examined in both tests. Therefore, the outcome of merger review would be same regardless of whether SLC test or Dominance test is used.

MRFTA obliges KFTC to use both SLC and Dominance tests. First single firm market share and dominance of three top market players are used as the threshold of possible competition restrictiveness of a merger. If the market share is above the threshold, KFTC presumes that competition is restricted and it must determine whether a merger substantially lessens competition. Dominance test which looks at the market share of merging parties and main market players is an excellent instrument for determining whether a merger would be anticompetitive.

There are claims that Dominance test may fail to catch anticompetitive mergers caught by SLC test. However, if Dominance test is given flexibility, such problems can be resolved. Perhaps a lower threshold might allow competition authorities to catch more anticompetitive mergers.

KFTC sees the need to prevent confusion resulting from differing outcome of merger review among competition authorities. However, different outcome of merger review would not be the result of different test used, because the two tests basically examine the same facts. An outcome of merger review will be determined not because by the different tests used, but how the tests are used. Nevertheless, KFTC welcomes further discussion on this issue to bring international convergence on merger review process.

LITHUANIA

1. General objectives of the law on competition

The main objective of the Law on Competition of the Republic of Lithuania is "to protect freedom of fair competition in the Republic of Lithuania", however, aforementioned law does not provide the definition of what constitutes competition. While competition is often understood as a situation in a market in which sellers of a product or service independently strive for the patronage of buyers in order to achieve a particular business objective, for example, profits, sales and/or market share, it is well known from the mainstream economic theory that such process results in a situation characterised by the absence of market power. Therefore the law does not preclude the Competition Council of the Republic of Lithuania to rely on the mainstream economic theory which equates competition with the absence of market power. Furthermore, the main objective of the law creates a strong predisposition to use such test for merger review purposes that would allow the detection of a substantial increase of market power.

2. Nature of the substantive test

Lithuanian Competition law further establishes that the Competition Council is entrusted with merger review powers in the territory of the Republic of Lithuania. According to the law, the substantive test in merger review is creation or strengthening of a dominant position. The Competition Council either allows a merger to go through if it does not raise competition concerns or it takes a decision "to refuse to grant a permission to implement concentration <…> in order to prevent creation or strengthening of a dominant position." On the other hand, the Competition Council can "permit the implementation of concentration attaching to its decision conditions and obligations for the participating undertakings or controlling persons in order to prevent creation or strengthening of a dominant position." According to the definition of the law:

> Dominant position means the position of one or more undertakings in the relevant market directly facing no competition or enabling it to make unilateral decisive influence in such relevant market by effectively restricting competition. Unless proved otherwise, the undertaking with the market share of not less than 40 percent shall be considered to have a dominant position in the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings with the largest shares of the relevant market, jointly holding 70 percent or more of the relevant market shall be considered to enjoy a dominant position

The presence of a unilateral decisive influence implies insufficient competition. The latter implies the existence of a substantial market power. Therefore, the creation of dominance implies substantial increase in market power which is equivalent to substantial decrease of competition. The Competition Council takes a view that it could interpret both dominance test and substantial lessening of competition test as being equivalent under most circumstances. The widespread belief about alleged differences of the tests most likely stems from the difference in methods that various competition authorities rely on in their predictions of post-merger changes. It is worth emphasising that the definition of a dominant position provided in the Lithuanian law does include collective dominance. However,

market share test creates nothing more than strong presumptions that can be disputed even by the competition authority itself.

3. Possibility for a particular test to make a difference in specific merger reviews

The possibility for a particular test to make a difference in specific merger reviews will be discussed with the help of the following examples.

3.1 Hypothetical situation of a series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors

In this case particular firm would gain significant market power. Such market power being not only significant but also substantial should not be able to escape detection by either dominance test or SLC. However, a problem could arise with the practical application of any test if any small merger would be analysed in isolation and treated as neither being a substantial lessening of competition nor a creation or strengthening of a dominant position.

3.2 In the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level

3.3 A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links

Both pre-merger situations seem to be known under a variety of names among them are collective dominance, oligopolistic dominance, and co-ordinated interaction. Both the dominance test (augmented by the notion of collective dominance) and the SLC test (with due attention to co-ordinated effects) should be suitable for addressing aforementioned problem. In most conceivable cases a merger in such a market should strengthen oligopolistic dominance and substantially lessen competition either because of enhancing ability to act unilaterally or facilitating collusion.

3.4 Although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors

Economic theory suggests that profitable price increase could be executed either by a single firm that has enough unilateral market power or by a group of firms that have enough market power collectively and are able to sustain collusive equilibrium in the market. The presented example does not seem to fit any of those situations. Nevertheless, in a market of differentiated products it is easy to make a mistake by including into relevant market too many substitutes. A thoroughly investigated by the FTC and subsequently blocked merger of office superstores in the USA in 1997 serves as perfect example of how an antitrust agency can avoid such a mistake. Despite office superstore's sales accounting for only six percent of the total office supply sales only office superstores were included into a relevant antitrust market after rigorous econometric studies.

Sometimes a case is made in favor of the SLC test as being efficiency friendly in contrast to dominance test which is allegedly hostile towards efficiencies. In our view, analysis of merger specific efficiencies should not be influenced by the choice of the test. Merger specific efficiencies that result in marginal cost reduction should be taken into account when it is possible to predict with enough confidence their impact on future prices. Merger specific efficiencies should not raise objections on the grounds of creating or strengthening dominant position when market power is actually decreasing (at least when measured with respect to pre-merger marginal costs) and consumers' surplus increases. Nevertheless, the real issue remains whether producer surplus increase should be compared with deadweight loss when it is absolutely clear that a merger will result in a profitable price increase despite merger specific efficiencies.

4. Broader policy concerns

In our opinion, none of the tests make a difference in the roles played by market definition and concentration data in merger assessment. For both tests SSNIP is an acceptable method to define a relevant market. However, danger arises to misapply market definition or market concentration data when it is not possible to make a rigorous test and products are differentiated. If too many distant substitutes are mistakenly included into a relevant market then both tests will be based on false market shares or concentration indices.

Both tests are capable of creating legal certainty only when being consistently applied by practitioners. On the other hand, a better explanation of the methods and criteria used in predicting unilateral and co-ordinated increases of market power should help to enhance legal certainty concerning any particular test.

MEXICO

1. Substantial lessening of competition, market dominance and public interest[1]

Pursuant to the Federal Law of Economic Competition (FLEC) concentrations are defined as transactions allowing an economic agent to acquire assets or stock from other economic agent (article 16 FLEC).

Article 16 of the FLEC empowers the Federal Competition Commission (FCC) to challenge and impose sanctions on concentrations which have as object or effect to lessen, impair or deter competition.

Pursuant to section I, Article 17 of the FLEC, the FCC shall consider as indicia for blocking a concentration whenever the transaction grants or may grant to merging parties the power to unilaterally set prices or substantially restrain supply in the relevant market.

Nevertheless the aforementioned, Article 17 of the FLEC also contains two other sections indicating that a merger shall be blocked by the FCC if as a result of it the "new" economic agent acquires the power to unduly displace competitors or hinder entry; or the new agent gets or strengthens its power to exercise monopolistic practices as referred to in Chapter II of FLEC, namely, absolute (article 9) or monopolistic (article 10) practices[2].

In addition, article 18 of the FLEC and article 15, section I of Code of Regulations, prescribes that the review of mergers by the FCC must take into account the trade-off between achievement of market power by merging parties and efficiency gains, in a very similar way to a SCL test[3].

Thus Mexican competition law can be regarded as including a mixture of substantial lessening of competition and dominance tests. The Mexican antitrust legislation does not establish a public interest test to merger review[4].

Most cases presented in this Note are mergers either blocked or conditioned by the FCC in an effort to illustrate the criteria used by FCC in merger assessment.

So far the FCC has enforced the FLEC applying most frequently the SLC test although the Market Dominance test has prevailed in some other cases.[5]

The dominance test in merger review has been applied by the FCC in industries where some enterprises acquired a dominant position before the Federal Law on Economic Competition came into force (22nd of June 1993); a clear example are telephonic services (thru Telefonos de México, Telmex).

- In 1997 Telmex was declared agent with market power in five relevant markets by FCC: local telephony, access, national and international long distance, and interurban transport. The declaration of market power was established in the Telecommunications Act in order to empower the Federal Telecommunications Commission to impose specific regulations upon the firm.

Telmex, the former government owned company privatised in 1991 has participation in Empresas Cablevision pay TV firm which proposed to acquire Telecable del Estado de México, a local pay TV firm.

According to the FCC's merger analysis, the acquisition of Telecable del Estado de Mexico, by Empresas Cablevision, would reinforce the dominant position of Telmex in those related markets because the physical network owned by Telecable del Estado de Mexico could be used to hinder other telephony companies entry. For this reason the proposed merger was denied.

- In the Coca-Cola/Cadbury Schweppes merger, the FCC took into account that Coca-Cola could use their already dominant position in the market of non-alcoholic carbonated beverages, having the power of tying sales of other mineral waters and carbonated beverages.

2. Market Power

A standard for blocking mergers is the possibility to achieve or strengthen market power by merging parties as a result of the proposed transaction (article 18, section II, in conjunction with article 13 of FLEC)

The analysis conducted by the FCC takes into account, among others, the following facts:

- Market share and ability for unilateral price setting or to restrain supply.
- Existence of barriers to entry.
- Existence of competitors.
- Access to input by merging parties and other competitors.
- Recent behaviour of merging parties.

2.1 Concentration indexes

The FCC applies the Herfindahl Hirschman Index (HHI) to measure the level of concentration in a relevant market (article 13 of the FLEC, articles 10 and 13 of Code off Regulations). In addition the FCC has developed a new concentration index: the dominance index (ID)[6].

The ID is used complementarily with the HHI. A peculiar characteristic of the former is that it diminishes when the merging parties are minor competitors in the market so that presumably competition is enhanced by a "new stronger" agent. The ID increases when the sum of relative sizes of the merging parties is bigger than the rest of the competitors and thus competition is lessened.

An increase in the ID does not imply the achievement of dominant position by the merging parties, in any case the level and its change is taken as a presumption of the "new" agent to achieve or strengthen market power.

The application criteria and calculating method of both HHI and ID were published (07.24.1998) in the Official Gazette as it is instructed by article 13 of CR.

According to the criteria for concentration indexes, a concentration having low possibilities to hinder competition arises when any of the following conditions are met:

- Increase in HHI is lower than 75 points ($\Delta HHI < 75$).
- HHI is lower than 2000 points ($HHI < 2000$).
- Decrease in ID ($\Delta ID < 0$).
- ID is lower than 2500 points ($ID < 2500$).

In any case the FCC also takes into account whether:

- The parties had participated in previous concentrations in the same market.
- Merging parties have privileged access to inputs or important advantages in distribution.
- Participants in a concentration can achieve market power in related markets.
- Any other conditions that can increase market power by the merging parties and can be not v revealed by changes in the indexes.

Market shares underlying the calculation of concentration indexes should be based on the value of sales, or number of customers, or productive capacity or any other factor regarded important by the FCC (cf. section I, article 13 of the FLEC and article 10 of CR).

The most common variable applied for market shares calculation is the value of sales, although figures of production capacity are also used as well[7].

- In Monsanto Company/Asgrow Company/Cargill de México, the HHI increase would have been of 1204 points (from 2798 to 4002 points), and the ID would have increased from 6 438 to 8 080 points, in the market of sorghum hybrid seeds. The increasing corn hybrid seed market also would have exceeded the thresholds for considering a concentration innocuous for competition.
- According to the resulting figures of both HHI and ID, The Coca-Cola/Cadbury Schweppes merger in market of carbonated beverages seemed to impair the competition process:

Index	Before concentration	After concentration	Increase
HHI	4533	5090	557
ID	8532	8750	218

- In Compañía Industrial de Parras/Textiles Kamel Nacif, the concentration was approved by the FCC although the merging parties would achieve 100 percent of domestic production, in that case the barriers to entry were low and access to imports would impede the exercise market power by the merging parties.

Although in seven of twelve merger reviewed, concentration indexes were important for determining the potential anticompetitive impact of mergers, it is worth insisting upon the fact that the mere increase in concentration indexes is not a definitive argument to block a transaction, other important elements, such as entry barriers are also considered.

2.2 Barriers to entry

To find out whether a firm can acquire market power after a merger transaction, the FCC has to evaluate entry barriers (article 13, section II of FLEC).

Outstanding barriers found in merger cases have been:

- Limited access to distribution channels by competitors of merging parties (section I, article 11 of CR), three cases[8].

- Brand recognition by consumers (section IV, article 11 of CR), five cases[9]

- Governmental concessions or permits required for participating in the relevant market (section III, article 11, of CR), three cases[10].

- Restrictions due to common business practices by incumbent firms (section VI, article 11 of CR), one case[11]

- Sunk costs (section II, article 11 of CR), two cases[12]

2.3 Presence of competitors

The total lack of competitors to merging parties has been a situation rarely detected by FCC in the analysis of mergers. Only in one case, namely Autobuses Estrella Blanca and Transportes Chihuahuenses, the merging parties were the only suppliers in some routes of federal passenger road transport services.

2.4 Access by merging parties and competitors to inputs

Control of key inputs by merging parties due to vertical integration was an important issue, among others, leading to the decision to block some proposed mergers. The latter were related to production of tequila[13], distribution of pay-tv (cable television[14]) and pension funds management services[15].

2.5 Recent behaviour

In one transaction, the recent behaviour of the merging parties was an additional element for blocking a merger. The engagement in monopolistic practices by one of the merging parties was considered an indication of possible risk for competition if the merger had been approved by FCC[16].

3. Merger effects

According to Chapter II of the FLEC, monopolistic practices can be absolute (article 9) or relative (article 10). Absolute practices turn out to be price-fixing, agreements to restrain supply, market division and bid rigging; whereas relative practices are exclusive distribution, resale price maintenance, tying sale, refusal to deal, boycott, and all the actions that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services (article 7 of CR) such as predatory pricing, unjustified fidelity rebates, cross subsidies, price discrimination and raising rival costs.

Absolute monopolistic practices refer to collusive behaviour among competitors and they are deemed illegal *per se* by the FLEC. In contrast, relative monopolistic practices are analysed under a rule of reason approach and turn out illegal when the engaged firm has market power.

3.1 Co-ordinated effects

So far the FCC has blocked only one transaction[17] due to the possibility of collusion between competitors derived from to consanguineous relationships between the would be acquirer of the target firm and one of the main competitors. Nevertheless the FLEC can be applied to mergers with high possibilities to enhance monopolistic interaction (absolute monopolistic practices) without structural links among merging parties.

In the CINTRA case[18], the FCC approved a transaction between the two major airlines in the country in order to create a holding as "non-permanent financial vehicle" that would enable banking institutions to capitalise the liabilities of the aviation companies. The FCC imposed a variety of conditions to avoid collusive behaviour by the two enterprises. Later on, the FCC instructed that when sold, each aviation firm would have to be assigned to separate independent investor groups.

3.2 Unilateral effects

This emphasis in the merger unilateral effects is taken into account in the Code of Regulations when analysing the possible efficiency gains derived from the proposed transaction (articles 15, section I, and 6, CR). A non-exhaustive list of efficiency gains includes economies of scale, economies of scope and network economies.

Only the efficiency gains whose effect is favourable to the competition will be considered by the FCC. The efficiency gains must be proven by the merging parties (article 6, CR). So far only in a single case of a blocked merger[19], merging parties alleged some efficiency gains, but they did not provide measurable figures. For this reasons the FCC did not recognise the efficiency gains claimed by the merging parties.

3.2.1 A series of small mergers which appears to be leading to the creation of a firm having a significant market power, e. g. a series of small mergers used to build a chain of distributors

Notifications of concentrations are compulsory when they surpass the thresholds established (cf. article 20, FLEC). The compulsory notification empowers the FCC to investigate all concentrations with probability to create a firm with significant market power. According to the FLEC a merger can be

accomplished by a succession of acts (small mergers, for instance); therefore a series of mergers can be blocked before they derived in an economic agent with substantial market power.

- In Ingenio Nueva Esperanza Pujiltic/Ingenio Pujiltic, the first firm was owned by Consorcio Industrial Escorpion, who previously acquired through a related enterprise (Consorcio Integral de Empresas) other firm, Grupo Xafra; this latter being the owner of nine mills producers of refined sugar.

  After analysing the transaction, the FCC determined that the relevant market was that of refined sugar produced and sold in the country. It also evaluated Consorcio Integral's power over that market could be offset by various factors, such as the conversion of standard sugar into a refined product and the possible substitution of corn syrup for the latter product at the industrial level.

  Nevertheless, because of the time and costs involved in such conversion adjustments, the FCC considered that the aforementioned factors did not effectively offset the market power derived from the proposed concentration, thus the merging parties were required to give notice of all future plans to purchase companies or assets related to sugar production and/or distribution even when the amount of such operations would be below the notification thresholds.

  Later on Ingenio Nueva Esperanza Pujiltic proposed to acquire Ingenio Pujiltic, producer of refined sugar, at that moment the FCC concluded that such concentration could grant market power to Consorcio Industrial Escorpion, given the authorised previous merger.

  The FCC denied its authorisation based on the lessening of competition that would have resulted from the power of the "new" agent to exercise anticompetitive practices.

3.2.2 In the pre-merger situation there is little in the way of competition in the pertinent market-e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess of capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has effect of reducing competition to a very low level

So far this type of case has not been evaluated by the FCC.

3.2.3 A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links

So far the FCC has not detected mergers with potential effects of increasing firm's incentives to collude with other competitors lacking structural links.

3.2.4 Although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors

- In the Sigma Alimentos/Zwanenberg de Mexico/Quesos La Caperucita/Arosa case the biggest producer of processed meats (wide variety of hams, sausages, aged meats, salamis and other specialities) proposed to acquire the third firm in the market.

  Although Kir, the second competitor in the market, had certain capacity and ability to counteract the strategy to increase prices of Sigma-Zwanenberg, the latter have access to important chains of distribution and its products had wide brand recognition.

  Differentiation of products through brand recognition avoided the use of Dominant Market test because the merged entity could not be regarded dominant in any specific kind of processed meats, nevertheless Sigma-Zwanenberg could raise prices without taking losses due to strong consumer's fidelity to its brands. For this reason, FCC blocked the merger between Sigma and Zwanenberg.

3.3 Please describe any other situations, preferably using one or more actual examples where the competition test, i. e. either SCL or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

- In Bancomer/Aetna International/Ixe Banco/Afore XXI/Siefore XXI, the merging parties had reached a market share of 13.3 percent in 1999. Regulation imposes a market share cap of 20 percent for any individual afore, thus if the proposed merger had been approved they would have obtained a joint cap of 40 percent.

  This post-merger market share would have allowed them to get potentially a privileged position in pension funds, such situation could have been reinforced as the acquirer could have had preferential access to data bases concerning workers affiliated to the Instituto Mexicano del Seguro Social (a partner to Afore XXI).

  In this case, the SCL test was deemed the right approach to be applied.

3.4 It is sometimes said that SCL test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to dominance problem. Do you agree with this statement?

- In Kimberly Clark-Compañía Industrial San Cristobal, the merging parties could have created a firm with a dominant position in the market of tissue paper, if the FCC had used the Market Dominance Test, FCC had blocked merger. However, using a SCL approach, certain partial divestitures of physical assets and brand names were a feasible remedy to avoid potential restraints to competition without impeding the ability of companies to enter into partnerships that would allow them to fortify their competitive positions[20].

3.5 Might the choice of competition test influence the choice of remedy for or against a structural solution?

The stress of a SCL test on firm behaviour and market competitive dynamics can suggest that structural remedies (divestiture or licensing) are not always the best option for preventing the negative effects on competition resulting from a merger. However taking into account difficulties for monitoring behavioural remedies, a structural remedy becomes a feasible solution under a Market Dominance approach.

4. Broader Policy Concerns

4.1 Does the choice of competition tests (i. e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?

Market definition and concentration data are essentially the same for both tests. The difference between them can be founded in the last stages of the merger assessment, that is the effects of the merger on competition and possible remedies.

4.2 More generally, could the two competition test lead to different emphases on economic analysis as opposed to legal characterisation?

At first sight SCL seems to be more consistent with economic theory and MD would have a more legalistic approach for the assessment of mergers, however, the practical application by the competition authorities and/or tribunals can have only slight differences.

4.3 Are there likely to be differences in legal certainty (i. e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?

The SCL approach places greater emphasis on firm behaviour and market competitive dynamics, the final resolution can embody more uncertainty when the practitioner has low training in economics, however, as some analysts have recommended, the issuance of guidelines and consistency of resolutions can reduce uncertainty significantly.

The Market Dominance Test can have more predictable outcomes and low uncertainty, however it has the risk to lead to blocking a merger with substantial efficiency gains and it can lead to the approval of mergers that potentially hinder competition without creating or strengthening a dominant position.

4.4 What are the jurisprudential links between dominance test in merger review and prohibition of abuse of dominance? And between the SCL test used in merger review and elements of the prohibition of anticompetitive agreements? Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominant if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i. e. that the effect is more than* de minimis*) also have implications for prohibitions that lessen competition?

As has been mentioned before, a flexible approach for merger review is provided by the FLEC, a given it mixture between of elements SLC and MD tests. In practice, the choice by the FCC of one or another test varies according to the specific case.[21]

4.5 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of three generic merger tests (i. e. SLC, dominance or public benefit)?

As pointed out, The FLEC allows a flexible approach to evaluate mergers, so that elements of both tests are used within the analysis conducted by the FCC. In Practice such flexibility has proven to be quite useful to protect the competition process while minimising the possibilities to deny transactions which may be efficiency enhancing.

The FCC does not endorse a "public interest" approach since it will most likely lead to or involve policy measures more akin to industrial or trade policy, activities which beyond a competition law. In any case, at least for the Mexican case, the Constitution singles out activities which are deemed strategic and thus only conducted by the State, these activities are no subject to the FLEC[22].

NOTES

1. It is worth, as starting point, to quote the provisions of the Federal Law on Economic Competition (FLEC) as corresponding to the definition of concentrations and the elements that should be taken into account to challenge a proposed transaction:

> ARTICLE 16.- For the purposes of this Law, concentration is understood to be the merger, acquiring the control or any other action through which corporations, associations, stocks, equity interest, trusts and assets in general are concentrated among competitors, suppliers, customers or any other economic agents. The Commission shall challenge and sanction those concentrations whose objective or effect is to diminish, damage or deter competition and free access to equal, similar or substantially related goods and services.
>
> ARTICLE 17.- Upon investigating concentrations. The Commission shall consider as signs of the assumptions mentioned in the article hereinabove, that the act or attempt:
>
> I. Grants or may grant to the mergerer, the acquirer or economic agent resulting from the concentration, the power to unilaterally set prices or substantially restrict supply in the relevant market, without the competing agents being able to actually or potentially, counteract that potential;
> II. Intends or may intend to unduly displace the other economic agents or hinder their access to the relevant market; and
> III. Intends or pretends to substantially allow the participants in that act or tentative the exercise of monopolistic practices referred to in chapter two of this Law.

2. Articles 9 and 10 follow:

> ARTICLE 9.- Absolute monopolistic practices are contracts, agreements, arrangements, or combinations among competitive economic agents, whose aim or effect is any of the following:
> I. To fix, raise, to agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect;
> II. To establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;
> III. To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or
> IV. To establish, agree upon or co-ordinate bids or to abstain from bids, tenders, public auctions or bidding.
>
> The acts mentioned in this article will not have any legal effects and the economic agents engaged in such acts will be subject to the penalties established under this law, notwithstanding any criminal liability that may ensue.
>
> ARTICLE 10.- Subject to verification of articles 11, 12 and.13 of this Law, relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals, in the following cases:
> I. Some of the economic agents that do not compete among themselves are: to set, impose or establish the exclusive distribution of goods and services, by means of the subject, geographical location, or specific periods of time, including the division, distribution or assignment of customers and suppliers; and also the obligation to not manufacture or distribute goods or services for a specific period of time or that may be specified;
> II. To set the prices or other conditions that a distributor or supplier has to abide by when marketing or distributing goods or providing services;
> III. The conditioned sale or transaction when buying, acquiring, marketing or providing other goods or additional services, normally different or that can be differentiated, or on the basis of reciprocity;

IV. The sale or transaction subject to the condition of not using or acquiring, marketing or providing goods or services produced, processed or distributed or sold by a third party;
V. The unilateral action based on refusing to sell or provide to specific individuals, goods or services available and normally offered to third parties;
VI. The agreement reached among several economic agents or the invitation extended them to exert pressure against customers or suppliers, in order to discourage them from specific behaviors, to apply retaliations or force them to act in a specific manner; or
VII. In general, all the actions that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services.

Note 1. Article 11 establishes as a prerequisite for considering such practices illegal, to be done by an economic agent with actual market power. Articles 12 and 13 establish how to evaluate the relevant market and to find out if the agent's market position has market power.

Note 2. The full text of the FLEC can be consulted at: http://www.cfc.gob.mx

The provisions concerning only to concentrations can be consulted at:

http://www.cfc.gob.mx/cfc99i/concentrations.asp

3. Article 18 of FLEC.

The Commission shall take into consideration the following elements, in order to determine if the concentration has to be challenged or sanctioned pursuant to this Law:

I. The relevant market, pursuant to Article 12 of this Law;

II. The identification of the economic agents that supply the corresponding market, the analysis of the power it has in its relevant market pursuant to Article 13 of this Law, and the degree of concentration in that market;

III. All other analytical criteria and instruments prescribed by the regulation of this Law.

Article 15 of Code of Regulations

In order to determine whether a merger or concentration is to be objected to and sanctioned in accordance with Article 18, section III, of the Law, in addition the following criteria shall be considered:

I. The evaluation in the relevant market of the gains in efficiency which, in the terms of Article 6 of this Code of Regulations, may derive from the concentration, which gains must be accredited by the economic agents carrying out the said concentration;

Article 6 of Code of Regulations

Economic agents may accredit before the Commission whether the gains in efficiency deriving from a relative monopoly practice have a favorable influence on the process of competition and free participation in the market, which must be taken into consideration in the evaluation of the conduct referred to in Article 10 of the Law.

Such gains in efficiency are deemed to include the following, among others:

I. The obtaining of savings in resources which permit the accused /alleged violator, on a permanent basis, to produce the same quantity of the good at a lower cost, or a greater quantity at the same cost;

II. The obtaining of lower costs if two or more goods or services are produced jointly than when separately;

III. The significant reduction of administrative costs; IV. Transfer of production technology, or knowledge of the market, and V. Lowering of production or marketing costs derived from the expansion of an infrastructure or distribution network.

4. Caring for the "public interest".

5. Gas Natural México, SA de CV/ Compañía Mexicana de Gas, SA de CV/ Gas Regiomontano, SA de CV, Coca-Cola/Cadbury Schweppes and Telecable del Estado de Mexico/Cablevision.

6. Let $q_i = \left(\frac{Q_i}{Q} \right) \times 100$ be the market share of firm i

$$IHH = \sum_i q_i^2$$

$$h_i = \frac{100 \times qi^2}{H}$$

$$ID = \sum_i h_i^2$$

7. Other figures may be used too. For instance, in a case related to pension funds, Administradora de Fondos para el Retiro Bancomer, Aetna Internacional, Ixe Banco y Afore XXI, the number of social security affiliates was the key variable for analysing the proposed merger. Concentration indexes analysis in such a proposed transaction was complemented taking into account that the regulatory law imposes market share caps upon every single institution.

8. The Coca Cola Company - Cadbury Schweppes (market of carbonated beverages); Sigma Alimentos (processed meats); and Assa Abbloy Cerraduras y Candados Phillips, Cerramex, Grupo Industrial Orly.

9. The Coca Cola Company - Cadbury Schweppes; Bestfoods de México, Bestfoods Productos de Maíz and Corporativo Kraft (concentrated chicken broth); Romo Hermanas, Corporación de Servicos Herradura, Tequila Herradura, Destilados de Agave (market of tequila); and Assa Abbloy, Cerraduras y Candados Phillips, Cerramex, Grupo Industrial Orly (market of locks).

10. Empresas Cablevision, Telecable del Estado de México (pay TV); Autobuses Estrella Blanca and Transportes Chihuahenses (passenger bus transport market); Gas Natural México, Enserch de México, Gas Natural Internacional SDG, Hidroeléctrica del Cantábrico (natural gas distribution).

11. Sigma Alimentos.

12. Gas Natural México, Enserch de México, Gas Natural Internacional SDG, Hidroeléctrica del Cantábrico; and Empresas Cablevision, Telecable del Estado de México.

13. Romo Hermanas, Corporación de Servicios Herradura, Tequila Herradura, Destilados de Agave, merging parties would have taken control of a significant share of agave plants (main input of tequila).

14. Megapo Comunicaciones de México; one of merging parties was the main provider of programming.

15. Administradora de Fondos para el Retiro Bancomer, Aetna Internacional y Compañía, Ixe Banco y Afore XXI, the acquirer could have preferential access to data bases concerning workers.

16. Infraestructura y Transportes México (market of railroad).

17. Romo Hermanas, Corporación de Servicios Herradura, Tequila Herradura and Destilados de Agave.

18. Before the Federal Law on Economic Competition (FLEC) entered into force, the federal government authorised Aeroméxico, experiencing a better apparent financial situation, to acquire stock control over Mexicana, until then the former's main rival in the market. In this operation, prior to the LFCE, the Ministry of Communications and Transportation (SCT) imposed a set of conditions aimed at maintaining market competition.

19. The Coca Cola Company – Cadbury Schweppes (market of carbonated beverages).

20. Furthermore the FCC agrees with the view that a Market Dominance test can be difficult to apply in markets where knowledge, intellectual property and innovation are the driving forces.

21. The recent implementation of Competition Law (The Federal Law on Economic Competition was enacted on the 24th of December 1992 and came into force on the 22nd of June 1993) has not yielded enough material to establish corresponding jurisprudential criteria by Mexican tribunals.

22. All economic agents and activities are subject to merger review and antitrust enforcement except those strategic activities reserved to the State, strategic activities are defined by article 28 of the Mexican Constitution:

a) Postal services, b) Telegraph and radiotelegraph, c) Oil and other hydrocarbons, d) Basic petrochemical, e) Electricity, f) Radioactive minerals and generation of nuclear energy, g) Minting and issue of banknotes.

NETHERLANDS

1 Objectives

1.1 In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position, and public interest tests

The general objectives of the Netherlands Competition Act[1] (hereinafter: the Act) does not exert a strong influence in favour of either the substantial lessening of competition test or the creation or strengthening of a dominant position test. Although the objectives of the legislation are not given in the statute itself, it is evident from the parliamentary motivation thereof that the central theme is the promotion of well functioning and competitive markets in the Netherlands' economy. On the other hand, the parliamentary motivation is equally clear in its endorsement of a competition policy that follows EU competition policy, including, *inter alia*, the current EU substantive test "create or strengthen a dominant position".

It is clear that the law points into the direction of a competition test and not that of a public interest test. Only in exceptional circumstances does a public interest test come into play where the Minister of Economic Affairs is requested to reconsider, on general interest grounds, the decision of the director-general of the Netherlands Competition Authority to prohibit a concentration (also see section II, point 3 below).

2. Nature of the substantive test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a create or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test

The Netherlands Competition Authority applies a dominance test. Article 42, sub 2, of the Act states: "A licence shall be refused if a dominant position that significantly restricts actual competition in the Dutch market or a part thereof could be created or strengthened as a result of the proposed concentration".

2.2 If your jurisdiction applies a public interest test to merger review

- does the test contain a competition element? If so, how much weight is that element given, and does it resemble more the SLC or the dominance test; and

- how and by who is the public interest test applied?

The Netherlands Competition Authority, in general circumstances, does not apply a public interest test to merger review. The Act contains only one public interest provision that the authority itself must consider in merger review. This provision is applicable in very specific circumstances. Article 41, sub 3, of the Act stipulates that if at least one of the undertakings involved in a concentration is entrusted with the operation of services of general economic interest, by law or by an administrative agency, a licence may be refused only if such refusal does not obstruct the performance of the task entrusted to the undertaking or undertakings in question. This provision clearly echoes Article 86.2 of the EC Treaty.

As already mentioned above, the Minister of Economic Affairs may, upon request, grant a concentration licence if the director-general has refused one (cf. the German "Ministererlaub"). He can do so if, in his opinion, serious reasons of a general interest nature outweigh the expected restriction of competition.[2] Such a request may be made up to four weeks after the director general's decision to refuse a specific licence.[3] Since the introduction of the Act such a request has only been made to the Minister once. In that case, the Minister refused the request, since no sufficiently serious reasons of a general interest nature were found.

2.3 If dominance is a central feature of your substantive test, does it include collective as well as single firm dominance? Please explain why that extension has been made, or not thought necessary. If collective dominance is part of your test, kindly elaborate on what constitutes such dominance (one or more case illustrations would be particularly appropriate here)

The substantive test applied by the Netherlands Competition Authority comprises single firm dominance as well as collective dominance. However, no distinction is made in the Act between single firm and collective dominance as the Act contains no specific provisions for assessing duopolies or oligopolies (see the above quotation of Article 42, sub 2, of the Act.) A dominant position is defined in Article 1 of the Act as "a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users." The Act stipulates no quantitative presumption thresholds for a dominant position. It should also be noted that the Act makes no provision for the consideration of efficiencies in merger assessment.

The Netherlands Competition Authority has in its past decisions considered a number of factors in the evaluation of the likelihood of collective dominance of undertakings. According to these decisions the factors that could facilitate and be conducive to collective dominance, *inter alia*, are: (*i*) a high degree of concentration in the relevant market, (*ii*) a high degree of transparency of the market, (*iii*) the homogeneity of the services/products in question, (*iv*) symmetry between the players/oligopolists in terms of both market position (market shares) and cost structures, (*v*) high barriers to entry, (*vi*) market maturity, (*vii*) a lack of innovation, (*viii*) the existence of close structural and/or contractual links between the players/oligopolists (for example interlocking directorships and close co-operation within economic associations) and (*ix*) economic dependence of the players/oligopolists in question. The above-mentioned factors should not be regarded as an exhaustive checklist. Nor should any one factor be seen as a prerequisite (those listed in *ii* to *ix*) or the decisive issue for a potential situation of collective dominance.

The point of departure in the evaluation of situations of collective dominance has always been that the mere fact that a very small number of players are active in any particular relevant market does not *per se* give reason to assume that a dominant position that significantly restricts actual competition could be created or strengthened as a result of any proposed concentration.[4] In the evaluation of whether or not any proposed deal is likely to lead to the creation or strengthening of collective dominance, a

comprehensive appraisal is thus required of the characteristics of the relevant market, the competitive pressure from existing and potential competitors, the past behaviour of firms in the relevant market and the incentives of the firms for parallel conduct (i.e. incentives to "cheat" on other members of the oligopoly).[5] Decisions are based on the balance of evidence, within the context of conditions prevailing on the relevant market. As has become even more evident from recent jurisprudence, the burden of proof on the competition authority is substantial in cases of collective dominance (also see section IV, answer 3 below in this regard).

The Netherlands Competition Authority has not to date challenged a concentration on the grounds of the creation or strengthening of a collective dominance position. In the next section a short description will de given of two of the authority's decisions dealing with this subject matter. The first case[6] that would be referred to is a recent decision involving the lotteries market in the proposed transaction between Stichting Nationale Postcode Loterij ("SNP") and Stichting Uitvoeringsorgaan Financiële Akties ("SUFA"). The second case[7] quoted here involves the market for bulk gasses and involved Air Products Holdings ("Air Products") and AGA Transfer ("AGA").

2.3.1 SNP/SUFA

In this case certain conditions existed that could facilitate the creation or strengthening of collective dominance of the two largest players in the lotteries market in the Netherlands. These indications were a high degree of concentration of the relevant market as a result of the limited number of players, a highly regulated environment making for transparent market conditions, similarities in the cost structures of the players and a structural relationship between the players in question. Despite these findings the authority, however, approved the case on the grounds of a number of mitigating factors that made the likelihood of the creation or strengthening of collective dominance less plausible.

The authority, in the first instance, examined whether before the proposed deal a situation of duopolistic dominance already existed and, in the second instance, assessed whether the competition conditions prevailing would significantly alter as a result of the proposed deal. The investigation of the Netherlands Competition Authority revealed that the players, despite the tempering effect of the regulatory environment on the opportunities for rigorous competition, competed regarding diverse competition parameters within the scope that the regulation provided. Experts testified that competition in the market has in recent years in fact intensified through, for example, product development, marketing strategies and other actions, such as "legal battles" between the players. The Netherlands Competition Authority, furthermore, found that the market shares of the relevant parties were asymmetrical, that a certain degree of heterogeneity existed between the products of the various players and that the relevant market could not by any means de regarded as declining or stagnating. On the contrary, the investigation revealed that the average amount spent on lotteries and similar games in the Netherlands is still relatively low in comparison with other European countries and many interested parties confirmed the prospects for growth of the lotteries market. It was, furthermore, evident that the existing players could in the past gain market share through the introduction of new or revised product concepts. It could thus not be ruled out that the market would grow if a "new" type of game were introduced. Moreover, government made its intentions known to stimulate competition in the lotteries market by, for example, allowing a number of additional player access thereto. Although the exact time frames for these planned initiatives was not known at the time of the decision, the intentions of government to take measures in order to create more competition in the market was made very clear. The proposed transaction was consequently approved.

2.3.2 Air Products/AGA

In the above case the Netherlands Competition Authority found that the proposed acquisition of AGAT by Air Products would, despite highly concentrated markets for the bulk gasses oxygen and argon in the Netherlands, not lead to the creation or strengthening of a position of collective dominance. The proposed deal would however have increased the symmetry in the market shares of the three largest players. The authority's analysis of market share information in the period 1996 to 2000 also revealed significant fluctuations in the market shares over time; no one player consistently held the first position in terms of market share in this period. Post acquisition the three largest suppliers of these gasses would collectively have supplied some three-quarters of the market. Four smaller players, with product ranges comparable to that of the three larger players, were however also competing in the market. These competitors were expected to exert meaningful competitive pressure on the oligopolists in the event of them raising prices above competitive levels. One of these competitors was a recent entrant in the bulk supply of argon in the Netherlands. The majority of customers confirmed that they would shift to the smaller players in the event of a post acquisition price increase of five to ten percent. The authority also found that strong countervailing power existed from the large buyers. These buyers were able to demand large discounts and thus lower prices. The investigation further showed that the prices of each of the two gasses changed significantly in this four-year period, but these fluctuations in the prices of the various players did not indicate the same development over time. The authority also found that the relevant markets could not be regarded as transparent, whilst further evidence showed that these were growing markets. Based on these findings the proposed transaction was cleared.

2.4 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expected post-merger increases in quality adjusted market prices? What other factors, if any, are prominently featured in determining whether competition is likely to be harmed by a merger

No particular emphasis is placed on expected post-merger increases in quality adjusted market prices in the assessment of concentrations. The factors that feature prominently in the Netherlands Competition Authority's assessment of concentrations, *inter alia*, are: (*i*) structural issues, i.e. market shares and the level and trends in market concentration, (*ii*) the ease of entry into the market, for example legal or other barriers to entry, (*iii*) competition from abroad/imports, (*iv*) the characteristics of and developments in the relevant market, including market phase, innovation and trends in supply and demand, (*v*) the nature and extent of vertical integration, (*vi*) the existence and degree of countervailing power and (*vii*) potential competition. The list of factors is non-exhaustive. The final assessment is based on the consideration of all relevant factors.

2.5 If you have recently changed your substantive test, please describe what motivated the change, and whether it appears to have achieved the desired effect

The Netherlands Competition Authority has not changed its substantive test (i.e. dominance test) since the introduction of the Act in 1997. Prior to 1997 the Netherlands had no legislation regarding merger control. The 1997 Act is based on and closely linked to European competition law. The Act makes provision for a system of preventive concentration control, which is very similar to the EC Merger Regulation.

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers

3.1 Please explain why you do or do not believe, that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind)

3.1.1 A series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors

In such a scenario of "creeping" acquisition there seems to be little difference between the ultimate outcome of applying a SLC test or a dominance test given the similarities in these two competitive assessments. In such a hypothetical situation the specific market structure and conditions and the freedom of interpretation of the antitrust authority may be more influential than the question of which test is applied.

3.1.2 In the pre-merger situation there is little in the way of competition in the pertinent market – e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by the high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level

No difference is assumed in the two approaches as both provide the possibility of assessing the competition implications of a proposed deal for future competition. The consideration of future developments, such as the liberalisation of a market, expected entry and new product innovation, is common in both approaches.

3.1.3 A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links; and

The choice of either of the substantial tests in our view would make no difference. The structure of the market has been accepted as a *de facto* connecting factor, which could give rise to a position of collective behaviour. The 1999 judgement of European Court of First Instance in the Gencor/Lonrho transaction confirms that the existence of structural or contractual links between the players is no prerequisite for oligopolistic market dominance.[8] The Court of First Instance concluded that links based on the relationship of interdependence existing between the parties to a tight oligopoly can be considered as meeting the notion of economic links where the undertakings are strongly encouraged to align their conduct in the market. Strict economic links therefore are not necessary for a finding of collective dominance, nor in fact is the presence of such links conclusive evidence of collective dominance.

3.1.4 Although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors

Market power is generally assumed when an undertaking is able to raise prices consistently and profitably above competitive levels. This scenario raises questions as to whether the relevant market has

been defined correctly and if the ability to increase prices could be maintained given the excess capacity in the market. It seems that either choice of substantive test would raise the same questions.

3.2 Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

The Netherlands Competition Authority has no specific examples of cases that would have been assessed significantly differently under a SLC test as opposed to a dominance test.

3.3 It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

As stated above, the Netherlands competition legislation makes no provision for an efficiency defence. A balancing of the loss of competition on the one hand and the potential gains in economic welfare on the other hand has thus never been required.

3.4 Might the choice of competition test influence the choice of remedy for or against a structural solution?

The choice of competition test would in our view not influence the choice of remedy for or against a structural solution. The remedies most sought in situations of possible duopolistic or oligopolistic market power, i.e. the elimination of existing interlocks between the relevant players and the sale of shares held in each other, do not seem to be strongly influenced by the choice of substantive test.

4. Broader policy concerns

As with the previous sections, if possible illustrate your responses with references to actual cases.

4.1 Does the choice of competition test (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?

The choice of a SLC or a dominance test in our view has no bearing on market definition and/or concentration data. The level of concentration is always dependent on the specific relevant market definition and market definition in the evaluation process precedes the assessment of other competition criteria and other possible mitigating factors.

4.2 More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?

The choice between one of the two stated substantive tests in our view would not lead to a significant different emphasis on economic analysis vis-à-vis legal characterisation.

4.3 Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?

Some may argue that a substantial lessening of competition test provides more legal certainty to parties in cases of oligopolistic market conditions. The Netherlands Competition Authority has to date assessed a number of transactions dealing specifically with collective dominance, i.e. either duopolistic or oligopolistic market conditions. These decisions describe the characteristics, which if found to be present in the relevant market could be indicative of collective dominance. This together with the past and recent decisions of the European Commission and judgements of the various European courts regarding collective dominance certainly increases the ability of parties to predict the possible outcome of a merger evaluation. Moreover, it has been made clear by the courts that in these cases evidence of the lack of effective competition between the undertakings in question must be very convincing. Evidence of the weakness of competitive pressure for existing and potential competitors must also be clearly demonstrated.[9]

4.4 What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i.e., that the effect is more than de minimis) also have implications for prohibitions on agreements that lessen competition?

No obvious jurisprudential links come to mind.

4.5 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?

Although the ultimate results achieved with the two mainstream approaches to merger assessment may in the majority of cases be the same, the convergence on one single test would no doubt ease the task of parties involved in international transaction when filing these within different jurisdictions. However, although the two approaches certainly both leave room for interpretation, the many similarities in the two approaches are also evident. The major differences between the jurisdictions are not so much found in the type of substantive test, but in the instruments at their disposal, for example the possibility for deconcentration in the USA. Better co-operation and an intensified exchange of information on either a bilateral or international basis between the different competition jurisdictions do not seem to be appreciably hampered by the existing differences in the substantive test applied.

NOTES

1. Act of 22 May 1997.

2. Article 47, sub 1, of the Act.

3. Article 47, sub 2, of the Act.

4. See, for example, the decision of the Netherlands Competition Authority of 15 Augustus 2002 in case 3040/*NPL - SUFA*, paragraphs 120 to 133. For other jurisprudence see, for example, the judgement of the Court of Justice of 31 March 1998 in *SCPA/Kali und Salz/MdK/Treuhand* (the joint cases 68/94 and 30/95) and the decision of the European Commission of 20 May 1998 in case IV/M.1016 - *Price Waterhouse/Coopers & Lybrand*, paragraph 105.

5. Of particular importance is the oligopolists' ability to timely detect possible deviations from the combined strategy and to effectively penalise the culprit.

6. Decision of 15 August 2002 in case 3040/*NPL – SUFA*.

7. Decision of 6 August 2001 in case 2184/*Air Products – AGA Transfer*.

8. Gencor Ltd v. Commission, European Court of First Instance decision, 25 March 1999, T-102/96.

9. A number of decisions of the Netherlands Competition Authority have already been quoted. For decisions of the European Commission see for example the cases: IV/M.619 – *Gencor/Lonrho*, IV/M.1016 – *Price Waterhouse/Coopers & Lybrand* and IV/M.1524 – *Airtours/First Choice*. Also see the judgement in the joint cases C-68/94 and C-30/95, *France v. Commission* and *SCPA and EMC v. Commission*, concerning *the Kali und Salz/MdK/Treuhand*, EC case IV/M.308. The more recent judgement by the Court of First Instance in the *Airtours/First Choice* matter certainly reconfirms the large burden of proof on the competition authority in cases where collective dominance is at issue.

NEW ZEALAND

1. Objectives

1.1 In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position, and public interest tests.

New Zealand's competition statute is the Commerce Act 1986 (the Commerce Act).

Prior to May 2001, the Commerce Act applied a dominance test to mergers and acquisitions. The general objective of the Commerce Act was to promote competition in markets in New Zealand. Dominance became to be interpreted in a restrictive manner as meaning a high degree of market control. The Government determined that the threshold required to be modified.

In May 2001 the Commerce Act was amended and the merger review test was changed from dominance to substantial lessening of competition (SLC). The amendment also introduced a new purpose test. The Act now states that its purpose is "to promote competition in markets for the long-term benefit of consumers within New Zealand". This clarifies that competition is not an end in itself, but a means to promote the long-term welfare of consumers and New Zealand as a whole. The SLC threshold is consistent with this purpose.

2. Nature of the substantive test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a create or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test

New Zealand applies a SLC test to proposed mergers. Section 47 (Certain acquisitions prohibited) of the Commerce Act provides:

> "A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market."

The Commission has published a practice note outlining its approach to the SLC threshold. A copy is available on its website at: www.comcom.govt.nz.

If your jurisdiction applies a public interest test to merger review:

- does the test contain a competition element? If so, how much weight is that element given, and does it resemble more the SLC or the dominance test; and

- how and by who is the public interest test applied?

There is no public interest test in New Zealand of the sort that used to apply in the UK before the recent reforms.

There is provision in the Commerce Act for the Commerce Commission to grant an authorisation for a merger to proceed if, upon application, the Commission is satisfied that although the merger would have, or would be likely to have, the effect of substantially lessening competition in a market, "the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted" (Section 67(3)).

The Commission and the courts have interpreted this section to mean that a public cost-benefit-type analysis is required, where the detriments flowing from the substantial lessening of competition have to be weighed against the wider benefits from the merger, with both being assessed in economic efficiency terms.

2.2 If dominance is a central feature of your substantive test, does it include collective as well as single firm dominance? Please explain why that extension has been made, or not thought necessary. If collective dominance is part of your test, kindly elaborate on what constitutes such dominance (one or more case illustrations would be particularly appropriate here)

Until May 2001 New Zealand had a dominance threshold for mergers. The definition of dominance under former s 3(8) of the Commerce Act meant that dominance was restricted to single firm dominance, and could not be extended to include collective dominance. A key reason for the change to SLC was to allow the Commerce Commission to consider issues of co-ordinated market conduct.

2.3 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expect post-merger increases in quality-adjusted market prices? What other factors, if any, are prominently featured in determining whether competition is likely to be harmed by a merger

An increase in quality-adjusted market price is the primary factor considered in declining to give clearance or authorisation to a merger. This has to be judged against a counterfactual of what might happen in the absence of the merger. For example, a merger might be declined even if prices were unlikely to rise if, under the counterfactual, quality adjusted prices were expected to fall. It is also possible that a merger could be blocked because of an expected adverse effect on innovation in a dynamic industry.

2.4 If you have recently changed your substantive test, please describe what motivated the change, and whether it appears to have achieved the desired effect

In May 2001, New Zealand changed from having a merger threshold of dominance to one of substantially lessening competition (SLC).

First, this meant that New Zealand's competition statute was aligned more closely with that of Australia (Trade Practices Act 1974) with whom New Zealand has a close economic relationship. This

allows the benefits of lower transaction costs and serves to facilitate Trans-Tasman business activities and investment.

Second, the New Zealand courts had determined that dominance meant a high degree of market control. In light of that, there was concern that the interpretation of dominance by the courts had led to too high a threshold under the dominance test, and corresponding concern about the level of scrutiny that significant and potentially anticompetitive mergers were receiving.

Thirdly, it was evident to Government that the Commerce Commission needed the ability to assess the concerns of co-ordinated market power, as well as single-firm dominance. In particular, the competition legislation did not allow for consideration of tacit collusion, a particular concern of oligopoly industries. The dominance test focussed on market share of the merged entity rather than whole market structure.

This issue was highlighted in the electricity sector with the Commerce Commission decision to allow TransAlta to acquire a 40 percent stake in Contact Energy in early 1999. Although this acquisition never took place, it would have reduced the number of market players from five to four, and raised significant competition issues in terms of increased market power in the electricity sector and the risk of collusion.

The change of threshold has achieved a greater level of alignment of New Zealand competition law with Australian competition law and that of other overseas jurisdictions (given the US and Canada also have a SLC test).

The level of merger scrutiny in terms of collective-dominance has also increased, as evidenced by the Commerce Commission's new approach to their competition analysis. The Commerce Commission's Business Acquisitions guidelines (Practice Note 4, referred to above) indicates significant changes, in particular that the Commission has interpreted the SLC test as applying to co-ordinated market behaviour as well as unilateral behaviour. Their assessment of co-ordinated market behaviour involves looking at the whole market structure and behavioural characteristics of the relevant industry to assess the potential for "collusion" and "discipline" – characteristics determined to give rise to co-ordinated market power. The Commerce Commission also has regard to such matters as the potential market power arising from the differentiated nature of the market and the elimination of a particularly vigorous or effective competitor.

In terms of whether or not anticompetitive mergers have been prevented due to the change, it is too early to satisfactorily evaluate. There has been little more than a year's experience with the new threshold, and no appeal to the courts against any of the Commission's decisions under the new threshold. The supermarkets case - to be outlined below - does however indicate that the SLC threshold captures some mergers that would not have been caught under the dominance test.

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers

3.1 Please explain why you do or do not believe, that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind)

3.1.1 A series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors

In general, the SLC test is regarded as setting a lower threshold than the dominance test, and hence may be expected to have a real effect at an earlier point than the dominance test. With a series of small mergers there may be little difference between the tests. A central difficulty remains one of knowing at what point to intervene, that is to say at what point is the SLC threshold triggered.

3.1.2 In the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level

Arguably, the dominance threshold has more of a structural focus, whereas the SLC test puts more weight on market behaviour. Mergers in non-competitive markets may not cause concern under the dominance threshold until dominance is reached, whereas under SLC it is possible that concern may arise earlier, if it can be shown that a merger would lessen competition.

The SLC test may allow a merger to be blocked where it would lead to the acquisition of a small but vigorous competitor, which would not be blocked under the dominance threshold.

When the Commerce Act had the dominance threshold, there was a provision to allow mergers involving the bare transfer of monopoly power (as arises with mergers of companies involved in electricity distribution). When the Act changed to the SLC test, this provision was removed. However, in applying the SLC test, the Commission's reasoning has been that bare transfers of monopoly power do not constitute an increase in market power – in other words there is no loss of competition. Consequently, even with the new threshold, the Commission has continued to allow these mergers.

3.1.3 A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links

The SLC threshold would take into consideration this anticompetitive co-ordination whereas the dominance test was limited to the exertion of unilateral market power by the single firm. As previously noted, this limitation was a key reason for the change in merger threshold of 2001. The business acquisitions provisions did not consider issues of co-ordinated conduct and the competition legislation on restrictive trade practices lacks clarity with regard to tacit collusion. The Government's view is generally that it is easier and better to prevent market structures from forming where it is considered tacit collusion is likely, rather than trying to prove *ex-post* that tacit collusion occurred. Tacit collusion is very hard to prove without evidence of explicit collusion. For this reason no one has attempted to take a case under section 27

(Contracts, arrangements, or understandings substantially lessening competition in a market) alleging conscious parallelism by oligopolists solely based on analysis of past price and output decisions. In any case, such evidence would have to be accrued over a number of years.

An important part of the Commerce Commission's new approach to assessing proposed mergers is their consideration of the potential for co-ordinated market power arising from the merger. The Commission assesses this potential by looking at two factors considered important to this outcome – collusion, and discipline. This requires the assessment of probable post-merger structural and behavioural characteristics of the determined market.

Collusion involves firms in a market reaching a mutually profitable expectation or agreement over co-ordination. The Commission acknowledges that in order for collusion to work as markets become more concentrated, deviations from co-ordination must be detectable and punishable by other firms' participant in the collusion. In other words, the market must have discipline in order to eliminate short-term profit gains that would be realised by deviating.

The Commission has developed checklists of characteristics that they consider conducive to collusion and discipline. These are summarised in the table below:

Conducive to Collusive Behaviour	**Enhancing Discipline**
High Seller Concentration	High Seller Concentration
Undifferentiated Product	Nature of Sales (small & frequent)
Speed of New Entry	Lack of Vertical Integration
Lack of Fringe Competitors	Growth in Demand Mature
Price Inelastic Demand	Cost Similarities between Firms
Industry's Competition Record	Price Transparency (facilitates discovery)
Excess Capacity	
Presence of Industry Associations	

The dominance test did not consider these aspects in this context. A key point is that co-ordinated market power is easier to sustain when firms are of similar sizes and market shares. For this reason, the Commission is paying close attention to the effect of a reduction in the number of market participants in oligopolistic industries.

An example that illustrates the difference between the two tests in this regard is the Commerce Commission decisions regarding the acquisition of Woolworths (New Zealand) Limited by Progressive Enterprises Limited in the New Zealand supermarket market. This case is interesting in that the acquisition was decided under both threshold tests, for various legal reasons, with clearance being provided under the dominance test but declined under the new SLC test. (The acquisition went ahead following a Privy Council decision in favour of Progressive Enterprises Limited).

The key difference in applying the two tests was the consideration of co-ordinated market conduct in the SLC test. The Commerce Commission was concerned that the merger would enhance the scope for co-ordinated market power given that the merger would eliminate a key competitor in the market (Woolworths) increasing market concentration. Reducing the number of firms in the supermarkets market from three to two, in combination with other market characteristics of the aforementioned lists (for example, the high level of price transparency and resulting more-evenly balanced market shares), was seen to facilitate collusion and discipline. This was further supported by their conclusions that the industry is subject to high barriers to entry.

Under the dominance test, the merger was approved because the remaining chain ("Foodstuffs") was equal in size to the merged entity, so the merger did not create a dominant position.

3.1.4 Although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors

This scenario is not sufficiently defined to provide comment. It is unclear on what basis the merged entity would be able to raise prices if there are low barriers to expansion by competitors.

3.2 Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

In general the Commerce Commission considers the threshold for merger control under SLC is tighter than under dominance. (See supermarkets example above).

Under the former dominance test, a merged entity could not be dominant if it faced a substantial rival (and collusion was ruled out, as it would breach the anti-collusion provisions of the Commerce Act). The implication then was that the market remained sufficiently competitive until dominance was achieved, at which point it would flip to a largely non-competitive state. In contrast, under the SLC threshold there appears to be greater willingness to accept that competition has the potential to reduce progressively as mergers proceed and seller concentration increases. This is evidenced by the consideration by the Commerce Commission of Bertrand oligopoly models to estimate post-merger price changes.

3.3 It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

The Commission will, in limited circumstances, consider efficiency claims in the SLC test. Where the applicant can make a sound and credible case that efficiencies will be realised, that they cannot be realised without the acquisition, and that they will enhance competition in the market, the Commission will include them in the broader analysis to consider the net effect on competition.

The authorisation provisions of the Commerce Act referred to earlier continue to apply under the new SLC threshold, as they did under the former dominance test. As indicated, this involves a social cost-benefit-type analysis that weighs the expected benefits of a merger against the detriments flowing from reduced competition. Wealth transfers stemming from higher prices are not included in the assessment. Although the analysis is difficult, there seems to be no reason in principle why it cannot be applied equally well under both thresholds.

3.4 Might the choice of competition test influence the choice of remedy for or against a structural solution?

Under both the dominance and SLC tests, merging parties are able to propose structural divestments in order to make the merger acceptable. Alternatively, where court enforcement proceedings are taken, a court can order divestment. To date, there does not appear to be any difference between the thresholds in this regard, although conceivably it might be easier to devise acceptable structural solutions under the dominance threshold.

4. Broader Policy Concerns

4.1 Does the choice of competition tests (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?

Market definition is central under both tests – it was "dominance in a market" and is now "SLC in a market". Concentration and market share data provide an important starting point for the analysis under both tests, but - with both tests – other factors are then brought into play.

Nonetheless, oligopoly structures give rise to definitional issues in markets comprising differentiated products, a problem that tends to be less important under dominance where there may be few alternatives to the merged dominant entity. Differentiated products make it difficult to determine market boundaries, and hence market definition (and the consequent assessment of market shares) becomes a less useful step in the competition analysis.

4.2 More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?

The application of both tests relies significantly on economic analysis. The sophistication of the analysis has increased greatly with the use of oligopoly models under the SLC test. The extent of legal characterisation depends on each particular transaction. The SLC test has greater legal sophistication as well as economic sophistication.

4.3 Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?

The simple safe harbour tests for dominance may have improved business certainty for mergers not resulting in high market share.

Legal uncertainty can also arise when a new threshold is first introduced. Once the SLC test has been applied over a period of time and tested in the courts, legal uncertainty is likely to be lessened.

4.4 What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements?

4.4.1 Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i.e., that the effect is more than de minimis) also have implications for prohibitions on agreements that lessen competition?

When New Zealand had a dominance threshold for merger review, its prohibition on abuse of market power also was based on dominance. But the collusion provisions were based on SLC. This led some to say that firms prevented from colluding might be able to merge instead and achieve a similar market outcome without breaching the merger threshold.

With the change in the Commerce Act for merger review, the abuse of market power provisions also changed to "taking advantage of substantial degree of power in a market". The changes enable a potential focus on some oligopolistic behaviour, whereas the dominance thresholds only allowed action with respect to single firm behaviour.

The changes have now aligned the prohibitions on anticompetitive merger and collusive arrangements. Concerns were expressed prior to the change in threshold that the use of the SLC test for mergers might have the undesirable effect of raising the threshold applied to collusive arrangements. Those concerns have yet to be demonstrated.

4.5 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?

Convergence of merger tests at a regional level or with major trading partners can lower transaction costs of cross-border business activities and investment.

Convergence raises important conceptual issues about international welfare versus national welfare. Also, the market situations in different countries will be different. Therefore, a multinational merger may not raise competition concerns in one country but could do so in another. Different market situations of themselves will lead to different outcomes.

For the benefits of convergence to be fully realised it needs to occur at three levels:

- aligning of tests;
- convergence of approach or interpretation of the tests; and
- alignment of procedures used by the competition authorities.

NORWAY

1. Objectives

The objective of the Norwegian Competition Act, as set out in section 1-1, is to achieve efficient utilisation of society's resources by providing the necessary conditions for effective competition. The objective is economic efficiency and the means is competition.

Thus, the objective of the Competition Act clearly points towards a substantial lessening of competition test (SLC), as reflected in the merger control rule in section 3-11.

2. Nature of the substantive test

- According to section 3-11 of the Norwegian Competition Act the Competition Authority may intervene in mergers and acquisitions of enterprises where the Authority finds that the acquisition in question will create or strengthen a significant restriction of competition contrary to the objective of Section 1-1.

  Thus, a SLC test is applied.

- The only objective of the Competition Act is economic efficiency, which of course can be seen as a public interest test. The Act makes no reference to other public interests besides economic efficiency. However, section 3-11 does not prohibit mergers that significantly restricts competition in contravention of economic efficiency, it only states that the Competition Authority may intervene in the merger. If certain political non-competition objectives are at stake, for instance regional work places, the Authority may in principle conclude that it shall not intervene even if the intervention criterion is fulfilled. In practise, however, the Authority will as a rule intervene in such situations, but it will also carefully analyse the effects on other public interests. Then it is for the appellate body - the Ministry of Labour and Government Administration - to consider the trade-off between economic efficiency and other political goals.

- The Competition Act makes no reference to dominance as part of the substantive test, but of course the strengthening of dominance can be seen as an essential part of the SLC test. Collective dominance is of importance when analysing whether a merger will create or enhance the ability of the actors in the market to collude explicitly or implicitly.

- If a partial analysis under the assumption that the merger will not create any synergies indicates that prices will rise as a result of the merger, i.e. that there is a causal relation between the merger and subsequent price increases, the merger will probably create or strengthen a significant restriction of competition. However, this competition test must also be in contravention of the Acts objective of economic efficiency. The next issue is to

consider whether costs will decrease as a result of the merger. The intervention criterion will only be fulfilled if the total effect of the merger is a decrease in economic efficiency.

- The substantive test of Norwegian merger review has remained largely unchanged since merger control was introduced into the former Price Act in 1988. Originally, the test was whether competition would be significantly restricted in contravention of public interests. In 1994 the Price Act was substituted by the new Competition Act, in which the objective was narrowed down to economic efficiency only. As a result thereof the substantive test was slightly amended to whether competition would be significantly restricted in contravention of economic efficiency. One possible effect of this amendment of the substantive test is that the Competition Authority is less likely to accept an otherwise anticompetitive merger because of other public interests than economic efficiency.

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers

3.1 A series of small mergers appears to be leading to the creation of a firm having significant market power

One might wonder whether it is possible to stop the creation of market power in the incipiency, i.e. before the firm has reached the level of significant market power. The obvious interpretation of the Norwegian SLC test is that the Competition Authority may intervene in mergers that creates or strengthens significant market power. Thus, if the firm does not already possess significant market power one has to wait until that particular merger which creates significant market power before the Authority may intervene. It is not possible to stop a "wave of mergers" in its incipiency.

This was the case in the market for electricity, where the Competition Authority until recently had considered that competition, although it was restricted, was not significantly restricted. The major producer in the market – Statkraft – had clearly announced it intention of acquiring a significant portion of its Norwegian competitors. However, it was not until after the last acquisition (of Agder Energi) that the Authority considered that Statkraft had reached the level of significant market power. Therefore, the last acquisition was prohibited.

An intervention under section 3-11 can only be directed against that merger in the series of mergers, which would create a situation of significant market power. It is not possible under current competition law to intervene in mergers that have already come through.

It does not seem to make any difference if the substantive test had been that of a dominant firm instead of the SLC test.

3.2 There are little in the way of competition in the pertinent market

Under the SLC test the Norwegian Competition Authority will take into account all factors that influence competition. A large market concentration is normally seen as a necessary, although not sufficient condition for competition to be significantly impeded. If competition is considered to be vigorous and unaffected, even if market concentration is large and increasing because of the merger, the merger will not be prohibited under the SLC test. (And, as explained above, even if the merger is

considered to create or strengthen a significant restriction of competition, it may be approved if there are considerable synergies arising from it).

Whether the dominance test will lead to other results, seems to depend on the definition of dominance. If dominance (single or collective) is defined solely in terms of market shares, then erroneous decisions clearly may occur.

If the dominance test only applies when the result of the merger will be a significant restriction of competition, the two tests would seem to be quite similar. Of course, it cannot be ruled out that the dominance test compared to the SLC test would put more emphasis on large market shares as a prima facie indication of anticompetitive effects. But if effects on competition must also be considered it is not very likely that the two tests will produce different outcomes when the same case is analysed.

3.3 A merger will lead to anticompetitive co-ordination among firms

Anticompetitive co-ordination among firms is considered under the Norwegian SLC test. There are no absolute threshold level of market concentration that must be reached for this effect to be considered, although high market concentration is generally considered to be necessary for anticompetitive co-ordination to succeed.

The dominance test may be handled in a way that fail to consider anticompetitive effects of a merger, or fail to take into account other factors that makes collusion unlikely. Handled in a proper way, however, the dominance test does not in itself seem to be a hindrance for prohibiting mergers that lead to anticompetitive co-ordination among firms.

3.4 The merged entity will not have a dominant position

Other factors may lead to a situation of a significantly restricted competition even when the degree of market concentration is fairly low. For instance, if the remaining competitors face capacity constraint they will not be able to respond aggressively to any quantity reductions by the merging parties, even if the merging parties' market shares are lower than what is generally considered necessary to be market dominant. In fact, if capacity constraints are absolute, the merging parties will be able to act as a monopoly towards its residual demand. Another example is that of consumer switching costs. If such costs are large and widespread the firms will face inelastic demand and a merger that otherwise would be neutral with respect to consumer welfare may have anticompetitive effects. A third example is that of localised competition. If firms are differentiated with respect to localisation and localisation matters for consumers' choice, then competition will typically be stronger between two firms that are situated close to each other compared to firms that are situated further apart. The same reasoning applies for firms that are differentiated across a product space. When market shares are calculated and the increase in market concentration observed, the figures will tend to under estimate the anticompetitive effects of a merger between two close competitors and overestimate the effects of a merger between two firms that are situated further apart.

Since the SLC test considers competition as such, it will apply even if the merged entity does not have a dominant market position. It might be argued that the dominance test will fail to forbid anticompetitive mergers between non-dominant firms. However, this problem may also be handled within the dominance test by means of a narrow delineation of the relevant market, reflecting the idea that the relevant market is the smallest group of products and geographical area where it is possible to exercise significant market power if the market is monopolised. In practise it may be more effective to delineate a

relatively broad market and then consider effects on competition taking all aspects of competition into consideration. This methodology will not represent a problem when a SLC test is applied. It is probably more problematic under a dominance test because one has to argue that the merging parties will be dominant even without having high market shares.

3.5 Other examples of where the test might make a difference

We have no other examples.

3.6 Relation between competition tests and efficiencies

Under section 3-11 of the Norwegian Competition Act it is required that the merger contravenes the Act's objective of efficient use of society's resources. Thus, an "efficiency defence" is recognised under Norwegian merger review. It is not clear under the dominance test what will be the outcome of the merger assessment if the merger creates both large efficiencies and a dominant position. As an extreme example, consider a merger, which creates a monopoly but also large efficiencies. It may be that these efficiencies more than outweigh the anticompetitive effects, gaining both consumers and producers. It seems that such a merger might nevertheless be prohibited under a dominance test. If taken to the extreme the dominance test may be seen to favour an efficiency accusation. The reason is that a merger creating large efficiencies may bolster the dominant position of the merging parties.

We think an efficiency defence should in principle be acknowledge in merger analysis, although we strongly emphasise that competition is the most effective means to achieve efficiency and consumer benefits. The more likely it is that the merger will substantially restrict competition, the larger merger specific efficiencies should be proved.

3.7 Relation between competition tests and remedies

Under its SLC test the Norwegian Competition Authority favours, as a guiding principle, structural remedies as the preferable solution. The ideal is to make a one-time "surgery" intervention in order for the market to function properly without any further regulations.

4. Broader Policy concerns

4.1 Relation between competition test chosen and roles played by market definition and concentration data in merger assessment

There might be a tendency under a dominance test for more narrow market delineation, confer our response to question III 1 d).

4.2 Relation between competition test chosen and emphasis on economic analysis as opposed to legal characterisation

As explained above, the dominance test may lead to a preoccupation with market concentration as such, although of course this depends on the interpretation of the test.

4.3 Relation between competition test chosen and level of legal certainty

The more discretion is applied in the merger review process, the more likely it is that the outcome of the case will be correct, but also the more likely it is that legal certainty will be lower. The cost of decreased legal certainty is that resources are wasted in the process of planning mergers that will not be accepted by the competition authority, or that procompetitive mergers never becomes reality. An efficient merger review process must balance these two effects.

4.4 Jurisprudential links between competition test chosen elements of competition law including abuse of dominance

Both the SLC test and the dominance test seem to be applicable under the current Norwegian Competition Act as well as under an EU harmonised competition law.

4.5 Effects of choice of substantive test on international convergence

We do not think that there is a very strong tendency for the two substantive tests to produce different outcomes, and the two tests in themselves would likely be no serious obstacle to a desired harmonisation of merger control practises. When that is said, we do think that the SLC test is more in line with what competition authorities around the world try to accomplish. Thus, if harmonisation of the two tests is considered necessary, the tests should converge towards a SLC test.

SPAIN

1. Introduction

There are basically three types of substantive tests employed to decide whether a merger should be blocked, conditioned or approved. They involve assessing whether a merger will: create or strengthen a dominant position (dominance test); produce a substantial lessening of competition (SLC test); or have a net negative effect on the public interest. The public interest test typically incorporates one of the preceding two competition tests and adds a number of non-competition criteria such as effects on employment or regional development.

The October roundtable will focus on the two competition tests and will help to determine whether there are mergers that would be decided differently depending on which is applied. Discussion of that issue should facilitate considering some more fundamental questions such as the role played in merger review by concentration data and merger specific efficiency gains. Another such question is how judicial interpretation of the dominance and SLC tests might impinge on enforcement of prohibitions on abuse of dominance or anticompetitive agreements, respectively.

2. Nature of the Substantive Test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a creation or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test.

Under the Spanish Competition Act, mergers are assessed taking into account whether the transaction may hinder the maintenance of effective competition in the market. That means that the Spanish Competition Authorities analysis is not solely based on whether a dominant position is created or reinforced, but rather considers a wide range of elements in order to assess if the merger will lead to a substantial lessening of competition, and can therefore be assessed as closer to a SLC test.

Therefore, mergers assessment takes into account not only the post-merger position of the undertakings involved in the affected markets, but also the competitive structure of these markets, analysing elements such as existing competition, potential competition, barriers to entry and demand (or supply) countervailing power.

2.2 If your jurisdiction applies a public interest test to merger review

- does the test contain a competition element? If so, how much weight is that element given, and does it resemble more the SLC or the dominance test; and

- how and by who is the public interest test applied?

2.3 If dominance is a central feature of your substantive test, does it include collective as well as single firm dominance? Please explain why that extension has been made, or not thought necessary. If collective dominance is part of your test, kindly elaborate on what constitutes such dominance (one or more case illustrations would be particularly appropriate here)

As it has been stated before, the Spanish system is closer to the SLC test than to the dominance test. Therefore the concept of collective dominance is not legally defined though the possible damage on effective competition within an oligopolistic structure is considered.

The criteria used to analyse these risks are very similar to those of the Commission when assessing collective dominance. It is a market structure where a small number of interdependent undertakings enjoy a significant market power which allows them to co-ordinate their behaviour, in order to set higher than competitive prices, and behave independently from other undertakings active in the markets, their clients and final consumers.

These three mergers are Heineken/Cruzcampo, Unión FENOSA/Hidroeléctrica del Cantábrico and Endesa/Iberdrola.

In 1999, the TDC recommended not to authorise the merger between two brewers, Heineken and Cruzcampo, because it would create a collective dominant position in the market of beer sales in hotels, restaurants, bars and other premises. The decision was founded in the market share of the new undertaking (above 73 percent), high entry barriers, excess capacity, difference in market power between the three leaders and the other firms active in the market, low demand growth, mature technology and lack of demand countervailing power. In this context, the optimal strategy would be co-operation to geographically split the market.

In 2000, the TDC recommended not to authorise the acquisition of Hidroeléctrica del Cantábrico by Unión Eléctrica FENOSA (two power generators and distributors), due to the creation of collective dominance. The elements highlighted by the Court were the nature of electricity as a commodity, the high degree of transparency, the concentration of electricity distribution, the strong vertical integration, the important structural links between the leaders in the market and the high entry barriers.

2.4 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expect post-merger increases in quality-adjusted market prices? What other factors, if any are prominently featured in determining whether competition is likely to be harmed by a merger

The Spanish Competition Authorities do not focus the analysis on the expected price increase caused by the merger. Their analysis takes into account the market position of the undertakings involved in the merger, the existing degree of competition, the potential competition, the entry barriers and the demand's countervailing power. All these criteria are needed to assess the market power of the undertakings.

Undoubtedly, one of the main elements is an entry barrier in order to evaluate market contestability.

3. Exploring how the particular Competition Test, i.e. Dominance (including collective dominance) versus SLC, might make a difference in specific Mergers

3.1 Please explain why you do or do not believe, that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind)

a) a series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors;

b) in the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level;

c) a merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links; and

d) although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors.

The differences between SLC and Dominance tests are much more difficult to state than their common features. They both drink from the same economic theoretical sources. Considering their enforcement, the frontier between them is becoming increasingly blurred as they fine-tune their procedures as a reaction to the dynamic nature of markets.

These models include heterogeneous criteria with many common aspects which are ultimately based in economic analysis and which lead to the same results in the vast majority of cases. Nevertheless, SLC seems to fit more with economic analysis and would allow for more flexibility, especially when analysing case a) and d).

3.2 It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

The use of a DT or a SLC test does not make a difference when taking efficiencies into account. The weight attached to these gains in order to authorise a merger depends more on the practice of a given jurisdiction than on the kind of test used.

4. Broader Policy Concerns

As with the previous sections, if possible please illustrate your responses with references to actual cases.

4.1 Does the choice of competition tests (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?

No. The weight attached to these elements in merger analysis depends more on the practice of each jurisdiction than on the kind of test used. Comparing the practice of jurisdictions with SLC tests to those with dominance ones, it is relatively easy to appreciate the similarities between both tests. For example in the US (SLC tests), market share and concentration ratios thresholds base the presumption of adverse competitive effects and SLC. The same applies to Germany, where the presumption of single dominance rests on a market share threshold.

With regard to market definition, it is equally relevant for both tests. The relevant market constitutes the reference market where the merger is going to be assessed. The definition of the relevant market does not depend on the particular test used.

In any case, any dominance test should be flexible enough to take into account a wide range of elements, not only the market share.

4.2 More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?

A very stringent application of the dominance test, i.e., based mainly on the market share, would lead to a weaker emphasis on economic analyses than SLC tests. But generally, the dominance test includes a wider range of variables in order to assess market power other than just the market share of the undertakings involved.

4.3 Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?

Legal certainty depends more on the consistency of implementation of competition legislation than on the particular test used in a jurisdiction. Legal certainty depends on the competition authorities following criteria in a coherent manner.

Legal certainty cannot be assured if the process of adapting competition policy to the new challenges in the international arena results in keeping the same words but applying them in a “flexible” and unpredictable manner.

4.4 What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements? Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the "substantial" element of an SLC test (i.e., that the effect is more than de minimis) also have implications for prohibitions on agreements that lessen competition?

The relationship between merger control based on dominance and abuse of dominance cases is that they must be based on the same basic economic analysis and share common concepts. There must a parallelism between both analyses.

Competition legislation prohibits the abuse of a dominant position (the anticompetitive behaviour of a dominant undertaking). That requires defining the relevant market, to determine that the undertaking or undertakings concerned have a dominant position in the relevant market and to prove that their conduct is an abuse of their dominant position.

That analysis does not preclude other undertakings from being in dominant position in the market.

In merger control, the analysis is ex ante and its objective is to prevent the structural change caused by the transaction from creating a substantial lessening of competition. Therefore, the results of both approaches might differ.

In the particular case of Spain, competition legislation in issues of abuse of dominance is similar to the EC legislation (art. 82 of the Treaty). The legislation on conducts has not exerted an influence on the particular test used in merger control.

There could be a relation between abuse of dominance cases and merger control as to case law and the decisions of the Competition Authority, in the sense that concepts defined in resolutions may be used in both kinds of cases.

4.5 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?

It is important to stress that, even if jurisdictions share the same kind of merger test, the assessment of any given merger would be different. The cause is that there are many elements involved which are weighted differently in every country and economic structure also varies from one market to another.

ANNEX

NOTICE ON KEY ELEMENTS FOR THE ASSESSMENT OF ECONOMIC CONCENTRATIONS BY THE SPANISH SERVICIO DE DEFENSA DE LA COMPETENCIA
(non official translation)

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1. Introduction

Control of business concentrations is a key element of competition policy systems such as the Spanish one, which combine prohibition and prosecution of anticompetitive practices with preventive action in view of market changes which may favour the existence of those practices.

The ultimate goal when analysing concentrations is not to block corporate decisions which may entail an increase in size of economic agents or a change in control structure in response to market changes, but to adopt the necessary measures to ensure that no negative effects arise from such concentrations for effective competition, for bussiness competitiveness, for consumer wefare and ultimately for public interest.

Such is the sense of the Spanish legislation focused on Chapter II of Act 16/1989, July 17 – Competition Act– further developed by the Spanish Royal Decree 1443/2001, December 21. At present, this model is based on a system of prior (before putting concentrations into effect) and compulsory notification of mergers which exceed the turnover or market share thresholds established in the Spanish Competition Act.

In line with most European countries, the proceedings are conducted in two phases. In the first phase, the Servicio de Defensa de la Competencia analyses the operation in view of its foreseeable impact on effective competition in the affected market and submits a report to the Minister of Economy who will resolve on whether to refer the operation to the Tribunal de Defensa de la Competencia. In the last case, the second phase starts with an in-depth study of the operation and a non-binding report issued by the Tribunal de Defensa de la Competencia, and concludes with a Decision of the Council of Ministers resolving either to clear the operation, to forbid it or else authorise it subject to compliance with certain conditions.

In practice, the Spanish authorities have hardly prohibited any concentration, since the system was launched in 1989, and most cases do not even reach the second phase and therefore they are authorised within the period of one month after the notification to the Servicio de Defensa de la Competencia[1].

Within the framework of the new Royal Decree 1443/2001, and in view of the increasing complexity and relevance of mergers, it seems advisable to set out the key elements considered by the Servicio de Defensa de la Competencia when assessing concentrations in view of the experience gathered since the system was launched in 1989, and in particular, since the requirement of compulsory notification was established in 1999.

This Notice is an important effort to foster transparency in the proceedings and to reinforce legal certainty for economic operators minimising their uncertainty as well as the risk of future anticompetitive practices arising from mergers.

Notwithstanding, stress must be made of the necessarily limited scope of this project. On the one hand, because it does not exhaust the elements considered when analysing concentrations, as it only

provides general criteria which are applied in a flexible manner by the competent bodies depending on the nature of the case examined. On the other hand, because this effort is based on the analysis conducted by the Servicio de Defensa de la Competencia and therefore does not refer to the reports issued by the Tribunal de Defensa de la Competencia nor obviously on the criteria followed by the Council of Ministers when deciding in this field.

2. Substantive Analysis

Merger control in Spain is of preventive nature, it is applied on a case by case basis and does not attempt to limit the business concentration process linked to a market economy and its increasing globalisation, but purports to avoid that mergers may hinder the maintenance of effective competition in the market and foster certain practices which in the short or medium term may diminish consumer welfare, the competitiveness of the Spanish economy and finally damage public interest.

Therefore, an assessment has to be made on whether a given operation alters the market structure so that it may hinder effective competition in the market. This assessment does not automatically depend on a certain degree of concentration or a specific market share of the companies active in a relevant market but requires a detailed analysis of different elements.

3. Definition of Concentration

Within the framework of merger control, the Servicio de Defensa de la Competencia first verifies if the operation notified qualifies as a concentration to the purposes of Act 16/1989, and determines the assessment of its possible co-operative elements.

3.1 Definition of concentration

The key element to consider whether a concentration exists is a permanent change of the control structure of an undertaking when two or more previously independent undertakings merge, one person acquires sole control of all or part of a company or companies, or two or more undertakings acquire joint control over an independent company of a concentrative nature.

For the purposes of the Servicio de Defensa de la Competencia, control is not solely based on quantitative criteria as those set out in other merchant regulations, but also on qualitative elements, which have to be analysed case by case. In particular, control is understood as *de facto* or *de iure* possibility of exercising a decisive influence on the activities of a company, which will depend on the nature of the operation and in particular, on the identity of the parties, the moment when the merger takes place, the affected markets, the provisions included in the Rulings of the Company, the shareholders' agreements and other external factors as the applicable regulations.

3.2 Treatment of joint ventures

Mergers consisting in the creation of joint ventures usually include concentrative and co-operative elements. It is esencial to assess which of these prevail, in order to determine their treatment within the scope of the Competition Act.

Section 14 of the foregoing Act provides that economic concentrations are deemed to be those operations which lead to the creation of a joint company and, in general, when they lead to joint control of

a company, when the latter exercises the functions of an independent economic entity in a permanent manner and its main purpose or effect is not the co-ordination of the competitive activities of companies which remain independent.

Therefore, in order to determine which companies are subject to merger control, three elements must be taken into account. In the first place, to what extent the company is under joint control in view of who has the possibility of exercising a decisive influence on the activity of the company and how such possibility is implemented. Joint control will exist when the parent companies must reach an agreement on the key decisions related to the joint venture.

In second place, an analysis is conducted on whether the company has "full functions" and may perform in a permanent manner the usual activities carried out by the rest of the companies acting in the same market independently from its parent companies. Therefore the corporate purpose and the permanence of the company are examined, and the extent to which it will have its own management bodies and resources to conduct its business activity in a permanent manner. Additionally, it is necessary to assess the importance of purchases and sales to and from the parent companies within the activities of the joint venture and the extent to which the latter merely plays an accessory role with regard to the parent companies.

In third place, the extent to which the main goal of the company is the co-ordination of the parent companies activities is also examined, and it is important to evaluate the presence of the parent companies in the same product market and in upstream or downstream markets with regard to the joint venture, as well as the existing links between these companies. In general, permanence of the parent companies in the same market as the joint venture may indicate the co-operative nature of the operation.

This third element is essential as "concentrative" operations are subject to merger control whereas those whose main object is the co-ordination of the competitive activities of the parent companies fall under the provisions on restrictive agreements and their individual authorisation in Act 16/1989.[2]

Considering that in many cases, it is difficult to determine the main purpose or effect of a joint venture and that this requires a detailed examination of the case, the Spanish Competition Act foresees that when an operation notified pursuant to the merger control requirements does not meet the thresholds for compulsory notification (among others, its "concentrative" nature), the Director of the Servicio will resolve on whether it is to be considered as an agreement between companies subject, in that case, to the proceedings for individual authorisation.

If it is considered that the case is not a concentration, proceedings will be dismissed with regard to merger control and the tacit authorisation following the lapse of the legal period of one month will not be applicable.

3.3 Treatment of ancilliary restrictions in mergers

The principle of differentiated treatment for concentrative and co-operative operations has an exception in the case of those restrictive practices which are merely accessory to the main operation. In this field, Act 16/1989 establishes that certain accessory restrictions to competition may be considered as part of a merger when they are directly linked to that operation and are required to carry it out.

These restrictions may refer to non-competition, non-solicitation or confidentiality clauses, licence agreements, or certain purchase or procurement obligations which must be assessed considering not only that they are fully tied-up to the merger, but also taking into account their term, content and geographic scope.

In particular, with regard to non-competition agreements, the Tribunal de Defensa de la Competencia in its report issued on March 2nd, 1993 [3], assumed the criteria set forth by the European Commission, considering that the existence of certain clauses is tied up to certain legal transactions involving the acquisition of commercial activities, wherefore it is not possible to separate them from the treatment provided to concentrations. However, such clauses should not include more restrictions than those which are objectively required to ensure the successful conveyance of the commercial enterprise, nor may they be detrimental to third parties.

Concerning the acceptable term for non-competition clauses, the Tribunal de Defensa de la Competencia in its report issued on March 25, 1998[4] considered that there is no absolute rule on this matter and it depends on the product affected by the clause and the circumstances surrounding each case. In general, the Spanish competition authorities have followed the criteria of the European Commission Notice of 1990 on this issue[5], which has recently been amended by a new Notice[6] which reduces the maximum period generally acceptable for non-competition clauses.

In view of the increasing dynamism of the markets, the potentially restrictive nature of these clauses which are justified due to the transfer of the company goodwill or know-how, it seems adequate to follow the standard provided by the Commission in its new Notice and thus consider that the just mentioned non-competition clauses should not exceed the term of three years from the date on which the company goodwill and know-how were conveyed, and limited to two years in the event that only the good-will is transferred.

Accessory restrictions that imply non-soliciting of personnel, customers or suppliers between the parties, licensing agreements and confidentiality clauses will be evaluated according to the same criteria as those used for non-competition clauses, although, in principle, a longer period than three years seems acceptable for these agreements considering the need of preserving trade secrets.

With regard to purchase, supply or distribution agreements, they may arise from the need of guaranteeing the on-going activity of a company when its internal ties arising from a former integration of its activities within the economic unit of the vendor no longer exist. In line with the foregoing Commission Notice, the accepted term for supply and distribution agreements must be limited to the necessary period that allows a change from a dependency situation to an independent position in the market, and therefore will depend on the circumstances of each case and the undertakings involved. In general, exclusivity agreements may be considered necessary under exceptional circumstances, taking into consideration, for example, the absence of a market or the specificity of the products.

In any event, evaluation of accessory restrictions will be made case by case in view of the parties involved, the affected market, the geographic scope, the object, the underlying reasons and their term. Insofar as these agreements are ancilliary to the concentration and do not introduce additional competition restrictions other than those strictly required to complete the merger, their provisions will be considered as part of the transaction and will be authorised together with it. Otherwise, they will not be considered included in the analysis of the operation and will be subject to the general legal provisions on restrictive agreements and individual authorisation.

4. Relevant Market

Once the existence of a concentration subject to merger control has been determined, the *Servicio* will focus its analysis on those markets whose competitive conditions are liable to be affected by the operation. This entails that competitors must be identified considering the product sold by them (product market) and the geographic scope of their activities (geographic market).

In order to define the relevant markets, the Servicio de Defensa de la Competencia considers all the available information, taking into account the information provided by the parties in the Notification and likewise considering, among other sources, the reports issued by the Tribunal de Defensa de la Competencia and the Decisions of the European Commission.

In this area, it must be highlighted that when assessing the impact of mergers on effective competition not only the simultaneous presence of the parties in the same market is considered, but also the effects arising from their presence in upstream or downstream markets or related markets. Therefore, the analysis will not be limited exclusively to the most stringent definition of the market, but will also assess mergers in the framework of alternative, wider or narrower, market definitions.

4.1 Product market

The main criterion to determine the relevant product or group of products which in light of their characteristics are part of the same market, is their demand substitutability. This concept is analysed in light of practical or qualitative criteria which are in particular, the physical characteristics of the product, its intended use, its price, the demand structure and consumers [7] preferences.

Apart from demand substitutability, the definition of the affected product market must also take into account supply substitutability, considering those undertakings which may be capable of offering a certain product or service in the market in response to a significant price increase.

4.2 Geographic market

The definition of the geographic market intends to limit the area which is potentially affected by the concentration and where the different companies which are active in the same product market compete between each other. In order to define the geographic affected market qualitative elements are considered, such as the area where the affected companies operate, the nature and characteristics of the products and services offered by them, legal, administrative or technical barriers, the scope of administrative authorisations or public tenders, consumer preferences, the distribution of market shares between the parties and their competitors, price differences between different areas, foreign trade, transport costs, distribution structures, language and other culture factors.

In any event, pursuant to the competences of the Spanish authorities, merger analysis is limited to the effects within the domestic market.

4.3 Other affected markets

In some cases, it may be necessary to assess the foreseeable impact of an operation in markets other than those where the parties directly operate. In particular, the analysis must include to what extent the undertakings become shareholders of competitors active in the same market as a result of the merger; and therefore the operation could lead to co-ordinated practices. This analysis is relevant, in particular, when dealing with markets under a deregulatory process in which the development of competition requires greater monitoring on the part of public authorities.

5. Analysis of the Markets

Once the context of the merger has been defined the Servicio de Defensa de la Competencia analyses the competitive structure of the relevant markets. Among other elements, this analysis considers the general characteristics, past development and future prospects of the affected market, the price setting process and other commercial conditions, potential competition and barriers to entry.

6. Assessment of the Concentration

It must be highlighted that the practice of the Spanish Competition Authorities is not solely based on considering whether a dominant position is created or reinforced, but also takes into account as a material criterion if effective competition may be hindered as a result of a transaction.

Therefore, the assessment of the concentration contemplates not only the position of the company resulting from the merger in the affected markets, but also other elements such as existing competition, potential competition and entry barriers to the market, as well as demand (or supply) countervailing power.

These elements are assessed in the context of recent development and market forecast, considering, short-term market growth, technological maturity and the role-played by more innovative alternative products. This case is particularly relevant in technology intensive markets, best described by the importance of knowledge and innovation, with high sunk and fixed costs and slightly relevant marginal costs once production has been launched. These characteristics make it more difficult to define product markets, because the competitive structure is highly unstable, so that the analysis must be focused on entry barriers rather than on existing competition.

6.1 Effects on the market position of the undertakings as a result of the merger

The first issue to be considered is whether the undertakings involved in the transaction will reinforce their position in the markets where they are active. This position is assessed generally by a dynamic analysis of the market where the undertakings concerned are active. Additionally, it must be borne in mind that a high market share is not sufficient to consider that effective competition is hindered, since in competitive markets it may arise from greater efficiency of the undertaking concerned which may lose its position as a consequence of greater aggressiveness of established competitors or the entry of new agents.

In any event, the assessment of market shares must be dynamic and consider at least the last three financial years. The importance of a high market share is reduced if it has fluctuated significantly or has decreased progressively in benefit of competitors during the last years. In general, the market size and its maturity, contracting procedures and the importance of innovation are elements which determine the stability of market shares.

Together with the market share analysis, the competitive position of the entity derived from a concentration must be assessed considering other elements such as production capacity of the undertakings, its use, access to financial resources, raw materials and other necessary inputs, possible synergies and economies of scale, vertical integration and existing links with other competitors, the importance of product differentiation, the role of trademarks, demand access conditions, the market's maturity, market growth perspectives and the role of innovation.

Once the position of the undertaking in the different markets where it is active has been defined, concentrations are assessed taking into account other issues, such as their horizontal, vertical and conglomerate effects.

Horizontal effects arise from the addition of market shares of the companies which merge and are based on an overlapping or the simultaneous presence of the undertakings in the same relevant market. In this area, it must be taken into consideration the extent to which the concentration implies the disappearance of an economic agent with financial capacity to remain as a competitor in the market.

In second place, the effects on competition derived from the merger may be vertical, when the undertakings are active in upstream and downstream product markets. In particular, the competition degree in the different production phases, access to essential facilities on the part of the undertakings concerned or the extent to which their vertical integration may raise entry barriers in any of the vertically related markets must be considered.

In third place, the analysis of the concentration must consider the possible conglomerate or "portfolio" effects arising from an extension of the scope of action of a company either by means of its expansion in different but close market products or by increasing the number of trademarks in markets characterised by product differentiation. In this case, the concentration may hinder effective competition when, for example, one of the undertakings concerned is capable of offering must-stock, or obtains a product range without comparison to that of its competitors, with the subsequent benefits in terms of an advantageous position in the market, higher price flexibility, economies of scale or synergies because of development of common activities.

Additionally, the analysis may include other aspects such as network externalities associated to the fact that a product has greater value for the consumer when the number of users increases, and which are specially important in certain economic sectors.

6.2 Market competitive assesment - Collusion

The competitive assessment in the relevant markets aims to determine the extent to what active undertakings are capable of exercising sufficient competitive pressure, which limits the behaviour of the company arising from the concentration and counterbalances its possible damaging effects on competition. In particular, the analysis must consider the position of competitors, the supply concentration degree and the competitive dynamics of the market.

In this field, it is important to analyse the impact of the concentration on the probability of collusive practices on the part of the undertakings that are present in the relevant markets. Ultimately it must be considered to what extent a certain number of companies have incentives and may act jointly in a co-ordinated manner regardless of their competitors, clients and suppliers. This possibility basically depends on the structural characteristics and the competitive dynamics of the affected market and, in particular, on the number of companies active in the market and their competitive practices in the past, their possible structural interdependence or behaviour, the symmetry of their businesses or productive structures, the existing price setting procedures, market transparency, entry barriers, product standardisation, the degree of technological development and the role of innovation.

6.3 Potential competition – Entry Barriers

The possibility of new competitors accessing the relevant market and their ability to discipline the behaviour of the incumbents are two of the main aspects taken into account when assessing the risk of hindering effective competition. The threat of entry may effectively limit the behaviour of the incumbents, if it is probable, it may take place in the short term and has significant impact on competition.

In general, the analysis of potential competition takes into account the companies with greater probability of entering the market, those active in product or geographic markets which are close to the affected one, or those who are capable of adapting quickly and cheaply their production methods and have enough financial sources and access to the necessary production or technological resources. Recent development of successful entries that have taken place in the market and their evolution is especially useful to determine the probability and sufficiency of future entries.

In any event, entry of new competitors will depend substantially on the assessment of entry barriers to the market; the obstacles which potential competitor face and which may influence their decision to enter the market to the extent of eliminating the discipline they may exercise on the incumbents. Among entry barriers which must be considered in each specific case, there are legal and economic ones.

Legal barriers may arise from current legislation (i.e.: tariffs), sector regulations (i.e. market access conditions or assignment of essential facilities), or technical regulations which are mandatory in certain economic sectors or may arise from regulatory risk.

Economic barriers include, among others, the investments required to access and act in the market, the technology required to produce, the minimum efficient scale or the research and development or advertising requirements, since incumbents do not have to face these costs which may be of such scale that may deter any future entry.

In second place, access to raw materials, other inputs and essential facilities, either of tangible or intangible nature may also be considered as entry barriers. In this context, special attention must be given to intellectual property rights.

In third place, foreseeable access restrictions to demand arising from the distribution structure must also be considered, i.e., the existence of long-term contracts under exclusivity agreements, the need of having own wide distribution networks, imperfect information about demand available in the market or the importance of the physical location of demand.

Other possible economic barriers arise from sunk costs, i.e., those which may not be recovered when exiting the market. These costs may be generated, for instance, if in order to enter the market it is necessary to acquire certain tangible or intangible assets whose value may not be recovered when they are sold back in the event of exiting the market. Investments in machinery specially adapted to the production of certain type of goods, advertising expenses required to launch a new trademark or a differentiated product in the market, discount and promotion policies, set-up expenses or R&D costs constitute some examples of sunk costs.

6.4 Demand countervailing power

The possible impact of a given concentration on the supply structure of the affected market may be counterbalanced by demand negotiating power capable of preventing the appearance of anticompetitive practices. Countervailing power depends on the relative strength of demand when setting the price and other contractual conditions and is basically determined by the nature of clients, their concentration degree, demand-price elasticity, the importance of brand loyalty, the distribution characteristics, the negotiating procedure to determine the contractual conditions and the foreseeable evolution of demand.

This analysis will refer to the countervailing power of supply when the concentration basically affects the demand of goods and services.

7. Completion of the First Phase of the Proceedings

The above mentioned elements represent the framework used to asses the extent to which a concentration may hinder existing competition in the affected markets and must therefore be referred to the Tribunal de Defensa de la Competencia for an in-depth analysis.

Once the merger has been cleared during the first phase or the proceedings is submitted to the Tribunal de Defensa de la Competencia, the Servicio de Defensa de la Competencia shall publish the report submitted to the Minister of Economy on this issue after having resolved, when applicable, on the confidential information contained in the just mentioned report.

The Competition Act foresees that in the event that the proceedings is referred to the Tribunal de Defensa de la Competencia, the Minister of Economy may lift the suspension on the operation, considering the damage arising from such suspension and the foreseeable impact on effective competition if the merger takes place before the Council of Ministers adopts its decision on the case, which may be authorised subject to compliance of certain commitments.

Finally, the Spanish Competition Act contemplates the possibility of concluding the proceedings by mutual agreement in the case of concentrations which hinder competition when competition obstacles may be easily removed. Such conclusion shall be based on the commitments or modifications suggested by the notifying parties in order to eliminate or counterbalance the restrictive effects identified.

NOTES

1. At the end of year 2001, only 18 percent of the 378 operations examined have been submitted to the *Tribunal de Defensa de la Competencia* for their analysis. Of those submitted to the *Tribunal*, only 4 (six percent) have been banned by the Cabinet, whereas 33 (48 percent) have been authorised and in 29 cases (43 percent) their authorisation has been subject to certain conditions. Additionally, the parties have withdrawn from 2 operations after the proceedings were submitted to the *Tribunal de Defensa de la Competencia*.

2. This differentiated treatment is subject to an exception with regard to certain co-operative aspects of chiefly operations, which in view of their accessory nature, are considered as restrictions ancillary to the main operation and are dealt with in Section 3.3. of this Notice.

3. Proceedings N-036 Finaf/Arbora Holding/Ausonia Higiene/Lab. Ausonia and Others.

4. Proceedings N-126 Sara Lee/Reckitt & Colman.

5. Commission Notice on accessory restrictions in concentration operations (1990/C203/05).

6. Commission Notice on restrictions directly related and necessary for concentration operations. (2001/C188/03).

7. Economic theory provides a mechanism which is not always possible to assess on an empirical basis in order to determine the extent to which two products belong to the same market or not: crossed elasticity-price. This term refers to the changes in the demand of a product when the price of the other product varies, and will be positive for substitute products, negative for complementary products and zero for independent products.

UNITED KINGDOM

1. Objectives

The general objective of the United Kingdom merger control regime is to ensure that mergers do not affect market structure so that markets work less well for consumers. Firms should compete for customers through lower prices, innovation and improvement of customer choice. A merger will weaken rivalry for this custom where it reduces the competitive constraints on the merging parties such that they are no longer incentivised to deliver the same level of benefits to customers.

At present, the Fair Trading Act 1973 (FTA) sets out a two stage merger regulation process, which is statutorily based on the 'public interest' test. First, the Secretary of State for the Department of Trade and Industry ("SoS"), upon the recommendation of the Director General of Fair Trading (DGFT), decides whether to refer a qualifying merger to the Competition Commission ("CC") for more detailed investigation; second, if the CC finds that the merger is likely to operate against the public interest, the SoS, with advice from the DGFT, can prohibit the merger or accept measures to remedy the adverse effects identified by the CC.

This, however, is not to say that merger references are predominantly made on grounds of 'public interest', and in practice our competition statute does not exert a strong influence in favour of the public interest test. In fact, most references are made on the basis of a possible detriment to competition.[1] Former SoS Norman Tebbit stated this in the House of Commons in 1984. In 1997 the then SoS Margaret Beckett restated that competition was the primary ground for referring mergers. Most recently, in October 2000, the then SoS Stephen Byers made a restatement of competition being the primary ground for referring mergers, where he said that he confirmed that he would continue to refer cases to the CC primarily on competition grounds.[2]

The new Enterprise Bill will reflect the focus on competition by introducing a Substantial Lessening of Competition (SLC) test. The OFT's focus on consumer welfare is underscored by the fact that the SLC test will be complemented by a customer benefits clause.

2. Nature of the substantive test

2.1 Substantive test applied in UK

As noted above, the current UK merger control regime is based on a broad public interest test. However, the substantive test applied to mergers in the UK is in practice more closely related to the SLC test than to the public interest test. There is still scope for the authorities to take account of other non-competition related public interest issues such as employment, regional development, national security and defence etc., even while decision-making focuses mainly on the competition aspects of a proposed merger.

Under the new Enterprise Bill, the OFT will have a duty to refer a merger to the CC if it believes that it is or may be the case that a merger has resulted or may be expected to result, in a "substantial lessening of competition." The OFT may exercise a discretion not to refer in certain limited circumstances, including where the merger delivers countervailing customer benefits that outweigh the expected substantial lessening of competition.[3]

The CC has a duty in most cases to decide if the merger situation has resulted, or may be expected to result in an SLC. A public interest element will be retained under the Enterprise Act but will only apply in very exceptional circumstances where the SoS decides that there is a national security, public security or defence interest issue.

Where a merger is found to result in a substantial lessening of competition but where it is believed to bring overall benefits to UK consumers affected by it, the OFT and CC may take those benefits into account in determining what remedies (if any) are required to address the identified SLC. Such consumer benefits must be expected to materialise within a reasonable period and to arise solely from the merger.

2.2 Public interest test

In a merger investigation, section 69 of the FTA requires the CC to consider whether the merger "operates, or may be expected to operate, against the public interest". Section 84 of the FTA provides that, in making this assessment:

> "the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regards to the desirability (*a*) of maintaining and promoting effective competition between persons supplying goods and services in the UK; (*b*) of promoting the interests of consumers, purchasers and other users of goods and services in the UK in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied; (*c*) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets; (*d*) of maintaining and promoting the balanced distribution of industry and employment in the UK; (*e*) of maintaining and promoting effective competitive activity in markets outside the UK on the part of producers of goods, and suppliers of goods and services, in the UK".

As a matter of law therefore, it is currently possible for the CC to take into account non-competition matters such as public security, regulatory concerns or environmental considerations. However, in practice, the Competition Commission in the UK is almost entirely concerned, in its investigation, with competition effects of a merger. The competition element therefore carries substantial weight in practice.

Under the Enterprise Bill, a public interest element will be retained in the substantive test for use in exceptional circumstances such as matters of national security. In such cases, the Department for Trade and Industry ("DTI") can intervene and take the final decision, balancing the views of OFT/CC on competition issues with the public interest issues. In newspaper cases, the current Fair Trading Act arrangements and procedures will continue to apply for the time being whereby the CC undertakes a public interest assessment and OFT has no role to play.

The public interest test is applied by the CC in assessing whether a merger fulfils the criteria set out in section 84 of the FTA. When the CC has completed its investigation of a merger, it submits its

recommendation to the SoS, copied to the DGFT. The SoS then decides whether to accept the CC's recommendation. The public interest test is also applied by the OFT in deciding whether to recommend reference to the CC, but the main aim of the OFT's evaluation of a merger is to establish its potential effect on competition. While drawing attention to any non-competition public interest issues in the advice he gives to the SoS, the DGFT may choose not to advise whether these non-competition issues themselves constitute grounds for reference to the CC. In general, the judgement on whether to refer is whether the merger may be expected to lessen competition to the extent that the merged company would be able to raise prices, reduce output or quality to the detriment of its customers, or operate in some other way that could be against the public interest.

2.3 Factors in determining whether competition is likely to be harmed by a merger

The key concept of SLC involves comparing the prospects for competition with and without the merger. This involves an examination of the process of rivalry between firms seeking to win customers' business and, in particular, a consideration of whether the merger so weakens that rivalry that competition no longer functions as effectively.

The likely change in prices as a result of the merger is therefore clearly of central importance to such an analysis. This is because price effects are often the outcome of reductions in different types of rivalry, including reductions in innovation or customer choice. Within the new regime in the UK, the OFT may believe that a merger may be expected to lessen competition substantially, but may decide not to refer the merger to the CC on the grounds that merger-specific customer benefits are judged likely to outweigh any reduction in rivalry. Though likely to be rare, such cases would involve a combination of reduced rivalry and price reductions/quality improvements/increase choice.

But price is by no means the only factor considered. For example, we might also consider the impact of a merger on innovation in the longer term and whether its procompetitive effects outweigh a short-run price increase. Thus, post-merger prices are not always the prime consideration in merger assessment. Also, there may be exceptionally rare cases in which post-merger short-run prices are expected to fall (for example, where the merged firm is able to internalise a pricing externality between complementary goods or benefits from technical bundling and synergies), but in the longer term may rise again as firms that cannot compete with the lower prices exit the market.

In contrast, a merger analysis might indicate that prices would increase post-merger without any SLC. This may occur, for example, if the assessment indicated that one of the merging firms is genuinely failing: the counterfactual to the merger in such a case would be one where its assets would be lost to the relevant industry. In this case, one might conclude that a loss of the failing firm would result in a price increase in any event, so the merger would not be the cause of the price increase: hence, it should be cleared. In reality, such genuinely failing firms are rare.

2.4 Changes to substantive test

As stated above, the Enterprise Bill[4] will reform the UK merger regime: (*i*) mergers will be expressly assessed on the basis of the SLC test and (*ii*) with some minimal exceptions, the influence of the Secretary of State (SoS) on merger decision-making will be formally removed.

Under the current public interest regime, while in-depth examination of mergers is conducted by the CC, the final decision whether to clear or prohibit a proposed merger, and indeed whether to initiate an in-depth investigation in the first place, is taken by the SoS. Although in practice the SoS follows the

advice of the OFT and the CC, there remains at least a possibility of political interference. This risk can lead to uncertainty and means that the parties to a transaction can never be absolutely sure what impact, if any, political factors will have on the decision on their merger in practice. Cases in which SoS has overruled the OFT/CC have been very exceptional. The reform proposals will essentially remove ministerial discretion from the merger process. The OFT will be responsible for the decision on whether to refer the merger to the CC, and will do so on purely competition grounds. The CC's findings as to whether to clear or prohibit or conditionally clear a merger will be determinative in the vast majority of cases. Only in a small minority of mergers raising defined public interest issues (national security, defence interests and other public security concerns) will the SoS be able to deviate from the decisions of the OFT or the CC.

As the new regime has not been officially enacted, it cannot be said whether the change of test has achieved its desired effects. However, in the vast majority of cases, the final assessment in merger cases to date has been reached in the light of competition criteria and taking into account the effect of the merger upon customers. Consequently, the OFT does not consider that the change to a competition-based test will itself result in a different number of merger references being made. In addition, the existing CC reports and the growing body of published advice from the OFT to the SoS as to whether to make a reference will continue to be relevant to those contemplating mergers under the new regime.

3. Effects of the application of SLC rather than dominance

3.1 Differences in reviewing mergers as a result of choosing SLC or dominance test

3.1.1 Series of small mergers

In small merger scenarios, the two tests are likely to yield the same outcomes. Where one of a series of mergers leads to an immaterial increase in market power then this is unlikely to be viewed as reinforcing or creating a dominant position or as a SLC. On the other hand, where such a small merger led to a material increase in market power, by definition, it is both a reinforcement or creation of a dominant position and a SLC.

3.1.2 Little in the way of competition in the pertinent market

The concept of SLC covers the situation where a merger may increase the market power of the merged firm and some of its remaining competitors, allowing each of them to increase prices unilaterally in the face of reduced competition. In this case, the conduct of the firms is not co-ordinated; they are simply competing less vigorously with one another. In a market that is initially concentrated and where the pre-existing level of competition is weak it is all the more important to preserve what competition does exists. A merger in such a market can substantially lessen competition other than through individual market power or tacit co-ordination[5], simply by blunting competition among the remaining competitors in the market.

In the same situation where there is no single firm dominance, to capture the reduction in competition, a dominance test must rely on collective dominance in order to prohibit a concentration. Whilst "market conditions favourable to tacit co-ordination" is a clear basis for a finding of collective dominance, there has been some uncertainty as to whether tacit co-ordination is the minimum condition necessary for finding collective dominance. If - as the Airtours merger case states - it is a necessary

condition, this implies that the dominance test cannot capture certain mergers that substantially lessen competition through the unilateral effect theory above (i.e. without tacit co-ordination).

In July 2001, the proposed UK merger between Lloyds TSB Group plc and Abbey National plc was prohibited by the SoS on the recommendation of the CC on grounds of a reduction in competition in the personal current account markets and the adverse consequences for consumers could be expected to result.[6] The combined share was around 27 percent with an increment of five percent. It would have not met a single firm dominance test. However, the CC noted that the four leading banks would have had a combined market share of 77 percent following the merger, and that the merger would have removed one of the main sources of competition to them. The CC did not consider the issue of collective dominance. Given the existing high level of concentration and lack of competition in the market, it was felt that the disappearance of a small, reasonably aggressive competitor represented a substantial lessening of competition.

3.1.3 Merger expected to lead to anticompetitive co-ordination among firms with no structural links

An SLC test could clearly capture the above concerns on anticompetitive co-ordination. If the assessed market conditions are such that the co-ordination would take the form of clear, transparent and sustainable tacit co-ordination, a finding of collective dominance is possible; and there would be little difference in the scope of the SLC and dominance tests, despite the absence of explicit structural links. It is not necessary to establish direct economic linkages between firms to demonstrate the likelihood of tacit co-ordination, but the CFI's Airtours judgement appears to require exacting market conditions to establish the latter.

In July 2001, the CC published its report on the merger between Interbrew SA and Bass PLC concluding that the merger would lead to substantial lessening of competition. In this report the creation of an effective duopoly position and the associated risks of tacit collusion were explicitly considered as part of the analysis of the competitive situation in the market.

3.1.4 Merged entity will not have dominant position but will be able profitably to raise price post merger

Such a scenario may occur where, post-merger in a Cournot setting with homogenous products and competition on capacity, the merged entity is able to raise prices profitably despite an expected increase in output by competitors (a unilateral effect of the merger). Although the merged firm must, by definition, have substantial market presence, the SLC test appears to be more suitable to capture the unilateral effects of this merger, as the merged entity need not have a dominant position in the above scenario.

For example, the proposed merger between Cendant Corporation, which owns Green Flag and RAC Motoring Services Limited (RACMS) raised concerns regarding the supply of insured breakdown services for light vehicles. Within this market the AA is the main player with a 48 percent market share, so the proposed merger would not have created a dominant position as RACMS holds 29 percent and Green Flag 12 percent. The CC however believed that post-merger, in the medium to long term, prices would potentially rise in certain segments, because of unilateral effects. The reduction in the number of competitors was likely to allow the remaining firms to settle at a level price which is higher than before the merger even if they do not collude with each other. Therefore the CC recommended that before Cendant acquired RACMS it should be required to divest Green Flag.

3.2 Other situations where competition test would make a significant difference

There are no further UK examples though, as a theoretical matter, we consider that there may be some difference in the context of vertical or conglomerate mergers.

3.3. Whether SLC test may permit a merger that in the absence of merger-specific efficiencies would be blocked, whereas dominance test may find such "balancing" more difficult to apply

It is worth distinguishing two possibilities here. The first is that efficiency gains can change the intensity of post-merger competition such that a merger does not substantially lessen competition. For example, the third and fourth firms in a market may become a stronger competitive force against the leading firms through efficiency gains. Secondly, the SLC test also has the scope to take into account that, whilst efficiencies may reduce prices in the short term, this may be more than offset over a longer time frame through an overall reduction in rivalry. It is more difficult to frame an efficiency defence around the legal concept of dominance since the dominance test is not directly linked to the economic effect of a merger. Thus, any assessment of efficiencies, which in it turns on the economic effect of the transaction is hard when that assessment has not been carried out.

The UK Neopost/Ascom merger (postal franking machines) is an example of where the CC recognised that the merger would strengthen rivalry. The market leader, Pitney Bowes had a share of supply of 56 percent. The merging parties were number 2 and 3 in the market, with market shares of 26 percent and ten percent respectively. In their analysis of the merger, the CC concluded that there was likely to be some short-run lessening of competition. However, in the medium to longer term, the CC reasoned that Ascom would be "a declining force unless it merged". By merging the parties would be able to benefit from combining their R&D spend, and pooling their patents, both of which would allow them to produce more innovative products and, more generally, to provide more effective competition to Pitney Bowes. The CC concluded that the efficiency gains generated from the merger had a positive effect on the intensity of competition in the market which more than outweighed any detriments from the increase in concentration.

The merger between Prosper de Mulder Ltd and Croda International plc in 1991 involved animal rendering plants where Prosper de Mulder, which had a market share in England and Wales of 60 percent acquired Croda which had a market share of five percent. Such a merger would create concerns under a dominance test. Indeed, applying a competition test, the CC concluded that there were likely to be adverse effects on competition from the merger but also found that the adverse effects were marginal and were likely to be outweighed by efficiency gains that would be realised by the merger. The merger was permitted.

3.4 Choice of competition test and choice of remedy for or against a structural solution

Remedies to address potential adverse effects of mergers should be consistent with both the jurisdictional underpinning of the merger regime and the substantive test. A key issue is whether the "maximum" remedy that can be required in a merger case is the restoration of the position before the merger, or a reduction of the share to the level of the jurisdictional threshold. Where remedies fall short of restoring the level of competition to the pre-merger world, this can require defining the precise point at which dominance is created or a lessening of competition becomes substantial. Applying this principle is not obviously easier in either the SLC or dominance tests.

Arguably, if a company is found to be dominant, it might be more straightforward to roll back to the point where adverse effects become insignificant due to the legal definition of dominance. Therefore, structural remedies such as divestiture could possibly be more easily identified and defined under the dominance test. Behavioural remedies which for example, reduce barriers to entry, could also be used to avoid a strengthening or creation of a dominant position.

When adopting SLC, it may be more difficult to pinpoint where adverse effects should be remedied and which remedy would achieve its end, as was the case in Interbrew/Bass. One clear limitation arises in which the SLC concern is unilateral effects. In such cases, a behavioural remedy could not be constructed or used effectively.

In Interbrew/Bass, the CC considered nine behavioural and structural remedies and concluded that the behavioural remedies would not address the adverse public interest effects, nor would most of the structural remedies. The CC concluded that Interbrew was to divest the UK business of Bass Brewers, which was successfully appealed. Whether this indicates that under SLC it is more difficult to justify structural remedies is a moot point. With regard to CC decisions recommending structural and behavioural remedies between 1991 and 2002, the CC recommended that a merger could be allowed to go ahead on condition of structural remedies given in 9 cases, and on condition of behavioural remedies, in a further ten cases. Therefore, the choice of competition test may not necessarily influence the choice of remedy.

4. Broader policy concerns

4.1 Choice of competition test and the roles played by market definition and concentration data

The choice of competition test may make a difference in the roles played by market definition and concentration data in merger assessment. Because the SLC test is focused on the assessment and analysis of rivalry from first principles economics, market definition may play a comparatively less important role in the SLC test than it does in dominance, where the identification of a dominant position on a defined market is a cornerstone of the legal concept. In merger analysis in the UK (which is SLC-oriented), market definition is used as an analytical tool to identify a frame of reference within which the immediate competitive constraints on the parties can be considered. This approach is helpful in organising the analysis of competitive constraints, in particular because it does not run the risk of excluding competitive constraints that lie outside the boundaries of a defined market.

4.2 Likelihood of different emphases on economic analysis as opposed to legal characterisation?

It is generally clear that the expression ‘dominant position’ is not a term of economics: although the Community Courts and the Commission have tried to give this expression an economic meaning, it is not one to be found in economic literature. The term ‘dominant position’ is a legal construct. The SLC test is a test that is fundamentally rooted in economics and, in that it can be used from first principles (see question one above), it is therefore better adapted to merger control. Its aim is to assess directly the impact of a merger on competition in a way that the concept of dominance does not always have the scope to do.

4.3 Differences in legal certainty

The OFT does not believe that there should be material difference in legal certainty between the tests. However, in practical terms, there may be some differences when a jurisdiction introduces a new test

(which will not happen in the UK because we already apply a test materially similar to SLC) or when there is doubt as to the precise meaning and contours of the test (as there presently is with dominance in Europe).

4.4 Jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance, and between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements

Within the ECMR, there are strong links between merger review and Article 82. The definition of a dominant position was set out by the ECJ in the context of Art 82 EC in United Brands Company and United Brands Continental BV v Commission of the European Communities. The tests for dominance used for each regime is the same although merger review is *ex ante* review of a merger, compared to *ex post* review of dominance cases. Also, because a finding of dominance in merger review has a direct impact on a firm's "special obligations" under Article 82 EC, a finding of collective dominance against a company that was not party to the merger is potentially problematic. In particular, it may have implications for a firm's rights of defence. Further, it also appears problematic to blur the distinction between the tests for *ex ante* and *ex post* intervention by using the same test.

4.5 Converging on one of the three generic merger tests

The OFT believes that convergence is desirable, particularly in cases where it is not possible to apply remedies effectively on just a national level. Different tests are not, of course, the only reason for divergences between regimes. A change to SLC would, though, bring the ECMR into line with other important international merger control regimes, including that of the USA - but at the same time, out of line with those EU member states with the dominance test.

NOTES

1. See R. Whish 2001: p. 815.

2. See http://www.nds.coi.gov.uk/coi/coipress.nsf/4eb388ccc4bff3e880256bf4003360fb/477cf9a119f7ec8b8025698400539c20?OpenDocument

3. The Bill will require the OFT to publish guidance on the substantive test. This draft guidance will be published for consultation shortly.

4. http://www.dti.gov.uk/enterprisebill/

5. There is tacit co-ordination when firms adopt a common policy – on prices, say – without entering into an express agreement to do so because they know that it is in their mutual best interests to do so.

6. CC report on Lloyds TSB Group plc and Abbey National plc, July 2001.

UNITED STATES

The United States uses a “substantial lessening of competition” test for merger analysis. Mergers are prohibited if their effect may be “substantially to lessen competition, or to tend to create a monopoly ” “in any line of commerce… in any section of the country.” Clayton Act §7, 15 U.S.C. § 18. Mergers may also be challenged under the Sherman Act, 15 U.S.C. § 1 or the Federal Trade Commission Act, 15 U.S.C. § 45; the analytical framework would be the same.

The DOJ and FTC analyse mergers using the analytical framework contained in the HORIZONTAL MERGER GUIDELINES issued by the agencies.[1] The Guidelines reflect the analytical framework of analysis of horizontal mergers under United States merger law.[2] The ensuing discussion primarily uses the language of the Guidelines to explain the substantive test employed in United States merger law.

The goal of the antitrust laws is to protect competition, not competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Such a “lessening of competition” would lead to reduce output and higher prices, the evils at which the law is directed.

1. Market Power

Market power for a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly co-ordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-co-ordinate conduct - conduct the success of which does not rely on the concurrence of other firms in the market or on co-ordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers and a misallocation of resources.

2. Competitive Effects of a Merger

In the United States, the agencies take an economically driven, consumer welfare approach to merger review whereby the agencies evaluate the likely net effect of a transaction on price and output. The analytical approach to merger review recognises consumer benefits by pursuing merger enforcement only against mergers likely to be harmful, while otherwise relying on market forces to operate (including through lawful mergers) to benefit consumers.

While challenging competitively harmful mergers, the agencies seek to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral. In implementing this objective, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

The agencies assess whether the merger, in light of market concentration and other factors that characterise the market, raises concern about potential adverse competitive effects. A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in co-ordinated interaction that harms consumers. Lessening of competition through co-ordinated interaction is discussed in section 2.1 of the Guidelines and below. A merger may diminish competition even if it does not lead to increase likelihood of successful co-ordinated interaction, because merging firms may find it profitable to alter their behaviour unilaterally following the merger by elevating price and suppressing output. Lessening of competition through unilateral effects is discussed in section 2.2 of the Guidelines and below.

3. Efficiencies

First, the law takes account of efficiency gains by employing a standard under which mergers do not need formal approval of the government - rather; all mergers are lawful unless they violate the statute. Thus, "[w]hile challenging competitively harmful mergers, the Agenc[ies] seek[] to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral." GUIDELINES 0.1

Second, as the Guidelines describe, the agencies undertake a specific analysis of efficiency issues. In 1997, the Department of justice and the Federal Trade Commission revised a portion of their joint Horizontal Merger Guidelines to clarify how the agencies analyse claims that a merger is likely to lower costs, improve product quality, or otherwise achieve efficiencies. The revisions make clear that the agencies will take efficiencies into account as part of their analysis of the competitive effects of the merger. The revisions also provide explicit guidance on issues such as: how the agencies determine if the claimed efficiencies are properly attributable to the merger; what the parties must do to substantiate their efficiencies claims; the circumstances, as a practical matter, in which the agencies are likely to find efficiencies claims persuasive; and the circumstances under which consideration will be given to out-of-market efficiencies and to in-market efficiencies that are not expected to have short-term, direct effects on prices. Efficiencies are discussed in section 4 of the Guidelines and below.

4. Failing firms

The agencies assess whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. The theory is that "[a] merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances, post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market." GUIDELINES 5.0 See below for a description of the analytical steps in applying this principle.

5. Application of the Substantive Standard

Before discussing in more detail the application of the Guidelines, this paper will discuss how the agencies would likely apply the substantial lessening of competition test to the four hypothetical mergers described in section III.1 (a-d) of the "Suggested Issues and Questions for Consideration in Country Submissions."

5.1 "A series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors"

The US agencies typically evaluate each individual transaction independently on its own merits, asking whether the transaction at issue, in and of itself, will lead directly to anticompetitive effects (e.g., price increases or output reductions). Generally, concentration trends alone "are irrelevant except insofar as they might suggest that somewhat more severe antimerger rules be applied when an industry reaches or approaches a particular level or concentration or once a number of sellers has reached a critical point. In that event it is the present market structure that is critical, and not the history of its getting there." Areeda, Solow & Hovenkamp, IV Antitrust Law ¶916a (1998). "There is some reason to believe that, starting with monopoly, the competitive gains from increasing the number of sellers decline steadily and substantially. That is, there is a greater gain in competitive pricing from increasing the number of sellers from one to two than from two to three, and so on. At the same time, there is every reason to suppose that there is a critical threshold, that as one moves from monopoly to an increasing number of sellers, each seller at some point will begin to ignore its own influence on price. The question is what that critical threshold is." *Id.* at ¶927b.

The rapid consolidation of radio stations following the liberalisation of that industry in the 1996 Telecommunications Act is an example of this scenario. Prior to the Act, the amount of radio consolidation that was allowed by statute was so small that the antitrust laws never really came into play. The primary reason for the huge radio merger wave after passage of the Act - over a thousand mergers, of which about 50 were investigated by the DOJ in the first year - was the pent-up demand that resulted from the previous statutory limitations on radio ownership. The DOJ brought three cases in the first year, based on unilateral effects theories, where in particular geographic markets the merged entities would have held post-merger market shares of advertising dollars of 53 percent, 63 percent, and over 40 percent; in each case, consent decrees resulted in divestitures of particular stations and reductions of these market shares.

5.2 "In the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level"

Although §7 of the Clayton Act refers to mergers that may "lessen" competition, the statute has been interpreted to prohibit mergers that worsen the competitive health of markets that already exhibit weak competition and mergers that, while preserving the status quo, forestall future competition. Analogous language in §2 of the Sherman Act, which makes it unlawful to monopolise or attempt to monopolise, has been read to prohibit efforts to maintain a monopoly. See *id.* at ¶907. "Clearly the term 'lessen competition' also encompasses the merger that promises to make a bad situation even worse." Id. at ¶916c. It is important to note, however, that the agencies are enforcement bodies, not regulators. Once a violation of the Clayton Act is established, the goal is not to review the market and decide how it would best operate or to resolve problems that were not caused by the transaction. Instead, the goal is to remedy the violation by maintaining competition at its pre-merger level.

5.3 "A merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links"

This hypothetical presents the standard co-ordinated effect scenario. The presence of "structural links" has never been an element of US merger law as it applies to these cases. The approach of the

agencies to co-ordinated effects cases, described in greater detail below, is based on the premise that in order for firms to co-ordinate their business practices, they must be able to do three things: *1*) reach terms of co-ordination that are profitable to the firms involved, *2*) detect deviations that would undermine co-ordination, and *3*) punish any such cheating that occurs. There are many different market conditions that can facilitate co-ordinated interaction. In the context of merger review, a fundamental issue is how one or more market conditions could interact with a change in market structure to increase the likelihood and success of post-merger co-ordinated interaction.

A good example of a litigated co-ordinated effects case is Federal Trade Commission v. Cardinal Health, 12 F.Supp.2d 34 (D.D.C. 1998). In this case two pairs of drug wholesalers proposed to merge. Cardinal Health sought to merge with Bergen-Brunswick Corp. and McKesson Corp. sought to merge with AmeriSource Health. The FTC brought two separate actions and the District Court consolidated the cases. The Court granted a motion for preliminary injunction. Despite finding that the defendants presented credible evidence to rebut the *prima facie* case, the court held the government's competitive effects arguments and evidence to be more persuasive. The court highlighted three bodies of evidence. First, documents showed that the defendants sought to merge in order to achieve "rational" pricing in a market that was plagued with excess capacity. Second, the government produced evidence showing that prices fell after an earlier proposed merger between two of the defendants was challenged and withdrawn. Third, the government showed evidence of present co-ordinated pricing arising from the inclusion of most-favoured-nation clauses in customer contracts.

5.3.1 Prima Facie Case

The court noted that the proposed mergers would reduce the number of national wholesalers from four to two, giving them control of 80 percent of the wholesale market. "Given the projected increases in the HHI, the Court must presume that the proposed mergers pose a risk to competition."

Market shares		**HHI**	
McKesson	24.9 %	Pre-mergers	1648
Bergen-Brunswick	22.4 %	Post-both mergers	3079
Cardinal	17.5 %	Change (both mergers)	+ 1648
AmeriSource	12.3 %		

6. Co-ordinated Effects Analysis

- History of co-ordination: Contracts between three of the defendants and customers included most-favoured-nation clauses. One of the contracts between a hospital purchasing group and three of the four defendants set a floor on prices that the defendants would offer to other hospitals and guaranteed that the purchasing group would receive the same price from each of the defendants. There was evidence that when the defendants believed that one of them had offered lower prices, they would report that to the buying group who got the outlaw to bring prices back to the agreed upon pricing matrix. Because of these agreements, the court believed that three of the four defendants engaged in a "subtle form of price stabilisation" that could assist the merging firms to tacitly collude.

- Entry impediments: The court stated that "[a] court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's *prima facie*

case of anticompetitiveness." However, the court concluded that the record developed at trial was not strong enough to find that entry could rebut the government's *prima facie* case.

- Small buyers: The court recognised that the sophistication and bargaining power of buyers is a significant factor in assessing the effects of a merger. While the evidence at trial showed that some large buyers and buyer co-operatives monitored prices, the court concluded that the size and sophistication of the buyers could not rebut the government's *prima facie* case. The court found that the market as a whole was fragmented, consisting of numerous independent pharmacies and smaller hospitals. Because of the large number of customers and the interchangeability of contracts, it was not clear how important each individual customer - and particularly a small or medium-sized customer - was to the defendants.

6.1 "Although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors"

This hypothetical presents a unilateral effect scenario, as described in greater detail below. An example of a unilateral effect case is the DOJ's June 2000 suit to block WorldCom's acquisition of Sprint. In several of the markets of concern in that case, WorldCom and Sprint were the second and third largest firms after AT&T, which even after the merger would have retained the largest market share. In the residential long distance US telephone market, for example, WorldCom had a 19 percent share, Sprint had eight percent, and the "Big 3" (WorldCom, Sprint, and AT&T) had 80 percent. Similar market shares were present in the market for international private line services between the US and more than 60 foreign countries, the market for data network services to large business customers in the US, and for international long distance services between the US and more than 50 foreign countries.

7. The Guidelines' Analytical Framework

The analytical framework is forward-looking. The agencies employ a five-step analytical process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure as a tool that allows them to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or to facilitate its exercise. Moreover, as noted below, the analytical framework entails explicit consideration of "changing market conditions" because "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance." Thus, the agencies "consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data." GUIDELINES 1.521

The Guidelines describe a five-step analytical process that is employed in determining whether to challenge a horizontal merger.

- First, the agencies assess whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured.

- Second, the agencies assess whether the merger, in light of market concentration and other factors that characterise the market, raises concern about potential adverse competitive effects.

- Third, the agencies assess whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern.

- Fourth, the agencies assess any efficiency gains that reasonably cannot be achieved by the parties through other means.

- Finally, the agencies assess whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market.

7.1 Definition of Markets and Assessment of Concentration

"First, the agencies assess whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured."

A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.

The analytic process described here ensures that the agencies evaluate the likely competitive impact of a merger within the context of economically meaningful markets - i.e., markets that could be subject to the exercise of market power. Accordingly, for each product or service (hereafter "product") of each merging firm, the agencies seek to define a market in which firms could effectively exercise market power if they were able to co-ordinate their actions.

Market definition focuses solely on demand substitution factors - i.e., possible consumer responses. Supply substitution factors - i.e., possible production responses - are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry. If the process of market definition and market measurement identifies one or more relevant markets in which the merging firms are both participants, then the merger is considered to be horizontal.

After market participants have been identified and market shares measured, then market concentration is assessed. Market concentration is a function of the number of firms in a market and their respective market shares. As an aid to the interpretation of market data, the agencies use the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the participants. Unlike the four firms concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the four firms. It also gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions.

The agencies divide the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterised as unconcentrated (HHI below 1 000), moderately concentrated (HHI between 1 000 and 1 800), and highly concentrated (HHI above 1 800). Although the resulting regions provide a useful framework for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information. In addition, as discussed below, market share concentration is only the starting point for analysis - concentration in and of itself is insufficient to justify an enforcement action.

General Standards. In evaluating horizontal mergers, the agencies consider both the post-merger market concentration and the increase in concentration resulting from the merger. Market concentration is

a useful indicator of the likely potential competitive effect of a merger. The general standards for horizontal mergers are as follows:

- Post-Merger HHI Below 1 000. The agencies regard markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.

- Post-Merger HHI Between 1 000 and 1 800. The agencies regard markets in this region to be moderately concentrated. Mergers producing an increase in the HHI of less than 100 points in moderately concentrated markets post-merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending on the factors set forth in the competitive effects analysis of the Guidelines.

- Post-Merger HHI Above 1 800. The agencies regard markets in this region to be highly concentrated. Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth in the competitive effects analysis of the Guidelines. Where the post-merger HHI exceeds 1 800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in the competitive effects analysis of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

Factors affecting the Significance of Market Shares and Concentration. The post-merger level of market concentration and the change in concentration resulting from a merger affect the degree to which a merger raises competitive concerns. However, in some situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger. The following are examples of such situations.

- Changing Market Conditions. Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the agencies may conclude that the historical market share of that firm overstates its future competitive significance. The agencies will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.

- Degree of Difference between the Products and Locations in the Market and Substitutes outside the Market. All else equals, the magnitude of potential competitive harm from a merger is greater if a hypothetical monopolist would raise price within the relevant market by substantially more than a "small but significant and nontransitory" amount. This may occur when the demand substitutes outside the relevant market, as a group, are not close substitutes for the products and locations within the relevant market. There thus may be a wide gap in the chain of demand substitutes at the edge of the product and geographic market. Under

such circumstances, more market power is at stake in the relevant market than in a market in which a hypothetical monopolist would raise price by exactly five percent.

7.2 Evaluation of Potential Adverse Competitive Effects

"Second, the agencies assess whether the merger, in light of market concentration and other factors that characterise the market, raises concern about potential adverse competitive effects."

Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. If collective action is necessary for the exercise of market power, as the number of firms necessary to control a given percentage of total supply decreases, the difficulties and costs of reaching and enforcing an understanding with respect to the control of that supply might be reduced. However, market share and concentration data provide only the starting point for analysing the competitive impact of a merger. Before determining whether to challenge a merger, the agencies also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.

7.2.1 Lessening of Competition through Co-ordinated Interaction

A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in co-ordinated interaction that harms consumers. Co-ordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion, and may or may not be lawful in and of itself.

Successful co-ordinated interaction entails reaching terms of co-ordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the co-ordinated interaction. Detection and punishment of deviations ensure that co-ordinating firms will find it more profitable to adhere to the terms of co-ordination than to pursue short-term profits from deviating, given the costs of reprisal. In this phase of the analysis, the agencies will examine the extent to which post-merger market conditions are conducive to reaching terms of co-ordination, detecting deviations from those terms, and punishing such deviations. Depending upon the circumstances, the following market factors, among others, may be relevant: the availability of key information concerning market conditions, transactions and individual competitors; the extent of firm and product heterogeneity; pricing or marketing practices typically employed by firms in the market; the characteristics of buyers and sellers; and the characteristics of typical transactions.

Certain market conditions that are conducive to reaching terms of co-ordination also may be conducive to detecting or punishing deviations from those terms. For example, the extent of information available to firms in the market, or the extent of homogeneity, may be relevant to both the ability to reach terms of co-ordination and to detect or punish deviations from those terms. The extent to which any specific market condition will be relevant to one or more of the conditions necessary to co-ordinated interaction will depend on the circumstances of the particular case.

It is likely that market conditions are conducive to co-ordinated interaction when the firms in the market previously have engaged in express collusion and when the salient characteristics of the market have not changed appreciably since the most recent such incident. Previous express collusion in another

geographic market will have the same weight when the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market.

In analysing the effect of a particular merger on co-ordinated interaction, the agencies are mindful of the difficulties of predicting likely future behaviour based on the types of incomplete and sometimes contradictory information typically generated in merger investigations. Whether a merger is likely to diminish competition by enabling firms more likely, more successfully or more completely to engage in co-ordinated interaction depends on whether market conditions, on the whole, are conducive to reaching terms of co-ordination and detecting and punishing deviations from those terms. In some circumstances, for example, co-ordinated interaction can be effectively prevented or limited by maverick firms - firms that have a greater economic incentive to deviate from the terms of co-ordination than do most of their rivals (e.g., firms that are unusually disruptive and competitive influences in the market).

7.2.2 Lessening of Competition through Unilateral Effects

A merger may diminish competition even if it does not lead to increase likelihood of successful co-ordinated interaction, because the merging firms may find it profitable to alter their behaviour unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.

a) Firms Distinguished Primarily by Differentiated Products. In some markets the products are differentiated, so that products sold by different participants in the market are not perfect substitutes for one another. Moreover, different products in the market may vary in the degree of their substitutability for one another. In this setting, competition may be non-uniform (i.e., localised), so that individual sellers compete more directly with those rivals selling closer substitutes.

A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales loss due to the price rise merely will be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable premerger. Substantial unilateral price elevation in a market for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their first and second choices, and that repositioning of the non-parties' product lines to replace the localised competition lost through the merger be unlikely. The price rise will be greater the closer substitutes are the products of the merging firms, i.e., the more the buyers of one product consider the other product to be their next choice.

b) Firms Distinguished Primarily by Their Capacities. Where products are relatively undifferentiated and capacity primarily distinguishes firms and shapes the nature of their competition, the merged firm may find it profitable unilaterally to raise price and suppress output. The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.

This unilateral effect is unlikely unless a sufficiently large number of the merged firm's customers would not be able to find economical alternative sources of supply, i.e., competitors of the merged firm likely would not respond to the price increase and output reduction by the merged firm with increases in their own outputs sufficient in the aggregate to make the unilateral action of the merged firm unprofitable. Such non-party expansion is unlikely if those firms face binding capacity constraints that could not be economically relaxed within two years or if existing excess capacity is significantly more costly to operate than capacity currently in use.

7.3 Entry Analysis

> "Third, the agencies assess whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern."

A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.

Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis.

The committed entry treated here is defined as new competition that requires expenditure of significant sunk costs of entry and exit. The agencies employ a three step methodology to assess whether committed entry would deter or counteract a competitive effect of concern.

The first step assesses whether entry can achieve significant market impact within a timely period. If significant market impact would require a longer period, entry will not deter or counteract the competitive effect of concern.

The second step assesses whether committed entry would be a profitable and, hence, a likely response to a merger having competitive effects of concern. Firms considering entry that requires significant sunk costs must evaluate the profitability of the entry on the basis of long term participation in the market, because the underlying assets will be committed to the market until they are economically depreciated. Entry that is sufficient to counteract the competitive effects of concern will cause prices to fall to their premerger levels or lower. Thus, the profitability of such committed entry must be determined on the basis of premerger market prices over the long-term.

A merger having anticompetitive effects can attract committed entry, profitable at premerger prices, that would not have occurred premerger at these same prices. But following the merger, the reduction in industry output and increase in prices associated with the competitive effect of concern may allow the same entry to occur without driving market prices below premerger levels. After a merger that results in decreased output and increased prices, the likely sales opportunities available to entrants at premerger prices will be larger than they were premerger, larger by the output reduction caused by the merger. If entry could be profitable at premerger prices without exceeding the likely sales opportunities - opportunities that include pre-existing pertinent factors as well as the merger-induced output reduction - then such entry is likely in response to the merger.

The third step assesses whether timely and likely entry would be sufficient to return market prices to their premerger levels. This end may be accomplished either through multiple entry or individual entry at a sufficient scale. Entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry profitably to achieve the necessary level of sales. Also, the character and scope of entrants' products might not be fully responsive to the localised sales opportunities created by the removal of direct competition among sellers of differentiated products. In assessing whether entry will be timely, likely, and sufficient, the agencies recognise that precise and detailed information may be difficult or impossible to obtain. In such instances, the agencies will rely on all available evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

7.4 Efficiencies Analysis

> "Fourth, the agencies assess any efficiency gains that reasonably cannot be achieved by the parties through other means."

The analytical steps involved in efficiency analysis are described as follows:

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, mergers have the potential to generate significant efficiencies by permitting a better utilisation of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.

Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective (e.g., high cost) competitors to become one effective (e.g., lower cost) competitor. In a co-ordinated interaction context, marginal cost reductions may make co-ordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. In a unilateral effect context, marginal cost reductions may reduce the merged firm's incentive to elevate price. Efficiencies also may result in benefits in the form of new or improved products, and efficiencies may result in benefits even when price is not immediately and directly affected. Even when efficiencies generated through merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive.

The agencies will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies. Only alternatives that are practical in the business situation faced by the merging firms will be considered in making this determination; the agencies will not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realised. Therefore, the merging firms must substantiate efficiency claims so that the agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be

merger-specific. Efficiency claims will not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

Cognisable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognisable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The agencies will not challenge a merger if cognisable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the agencies consider whether cognisable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market. In conducting this analysis, the agencies will not simply compare the magnitude of the cognisable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger - as indicated by the increase in the HHI and post-merger HHI, the analysis of potential adverse competitive effects, and the timeliness, likelihood, and sufficiency of entry - the greater must be cognisable efficiencies in order for the agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognisable efficiencies would be necessary to prevent the merger from being anticompetitive.

In the agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near - monopoly.

The agencies have found that certain types of efficiencies are more likely to be cognisable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger - specific, and substantial, and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost are less likely to be merger - specific or substantial, or may not be cognisable for other reasons.

7.5 Failing Firm Analysis

> "Finally the agencies assess whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market."

The analytical steps involved in failing firm analysis are described as follows:

A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met:

a) the allegedly failing firm would be unable to meet its financial obligations in the near future;

b) it would not be able to reorganise successfully under Chapter 11 of the Bankruptcy Act;

c) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible

assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and

d) absent the acquisition, the assets of the failing firm would exit the relevant market.

8. Other Public Interest Considerations in Merger Review

The United States antitrust agencies do not employ a "public interest" test in analysing mergers. "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise… While challenging competitively harmful mergers, the Agenc[ies] seek[] to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral." GUIDELINES 0.1

For many years, a United States regulatory agency for the airline industry applied a public interest test in the specific case of mergers in the airline industry. After forty years of experience with that test, it was generally not viewed as useful or necessary, and the separate test was eliminated when the airline industry was deregulated. Since 1989, mergers in the industry have been governed by the ordinary application of the antitrust laws. See Civil Aeronautics Board Sunset Act, 49 U.S.C. § 1551(a)(7).

Certain regulatory agencies still employ a public interest test in reviewing mergers under other non-antitrust statutes. The Federal Communications Commission (FCC), for example, reviews mergers in the telecommunications industry through its power to approve transfers of licenses, an employs a statutory public interest standard. In reviewing mergers involving the former Bell Operating Companies, for example, the FCC in its 1997 ruling in the SBC/Pacific Telesis merger applied a competition standard requiring that "no foreseeable adverse consequences [to competition] will result." Later that year, however, in the Bell Atlantic/NYNEX merger, the FCC, noting that its decision was "informed by antitrust principles" but "not limited by the antitrust laws," applied a standard requiring that the merger "on balance will enhance and promote, rather than eliminate and retard, competition."

In the case of railroads, jurisdiction over mergers resides solely in the Surface Transportation Board (STB), which applies a "public interest" standard that takes into account such factors as public benefits, labour conditions, environmental issues, and effects on competition. The DOJ provides non-binding advice to the STB, which must consider, but need not heed, the DOJ's recommendations. In the 1996 Union Pacific/Southern Pacific merger, which involved the combination of two of only three major railroads in the Western United States, the DOJ recommended denying the merger application. The DOJ concluded that the transaction would significantly reduce competition in numerous markets where the number of carriers dropped from two to one or from three to two, and that the remedy proposed by the carriers (granting trackage rights to the third western railroad) was unworkable and insufficient. The DOJ also found that the efficiencies claimed did not outweigh the competitive harms. The STB did not accept DOJ's recommendation, instead giving great weight to the benefits claimed by the carriers. The STP found that trackage rights were sufficient to replace direct competition where the number of carriers fell from two to one, and that a reduction from three competitors to two was not of concern. Following implementation of the merger, there was a massive service breakdown in the West, resulting in billions of dollars in losses to shippers. In addition, there were numerous complaints that the trackage rights have been ineffective in replacing competition lost because of the merger.

In 2001 the STB established new procedures for review of major rail consolidations that stated the agency would look to antitrust standards in reviewing the competitive effects of mergers and would "take a more skeptical 'show me' attitude toward claims of merger benefits and toward claims that no

transitional service problems would occur." Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No. 1)(June 11, 2001).

9. Conclusion

Over the last half century, United States merger analysis has become increasingly well grounded in economics and it has become more clearly focused solely on protection of consumer welfare. Older views have been rejected as misguided: e.g., seeking protection of competitors, rather than competition; any assumption that there is something inherently undesirable about large firms, including conglomerate firms; restriction of even small increases in market concentration in the absence of evidence of anticompetitive harm; "populist" attempts to preserve a large number of firms merely for the sake of numbers, even though such preservation was unnecessary for effective and efficient competition. Today, United States merger analysis is focused squarely on "whether the merger is likely to create or enhance market power or to facilitate its exercise." GUIDELINES 0.2

NOTES

1. U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (1992, revised 1997), hereinafter, "GUIDELINES."

2. Non-horizontal mergers are analysed under the framework of the NON-HORIZONTAL MERGER GUIDELINES, originally issued as Section 4 of the "U.S. Department of Justice Merger Guidelines," June 14, 1984 (All other sections of the 1984 Merger Guidelines have been superseded by the "HORIZONTAL MERGER GUIDELINES" issued April 2, 1992, and revised April 8, 1997, by the U.S. Department of Justice and the Federal Trade Commission.) There are also guidelines for joint ventures and similar arrangements. Federal Trade Commission and U.S. Department of Justice, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000).

EUROPEAN COMMISSION

1. Objectives

1.1 In what way, if any, do the general objectives of your competition statute exert a strong influence in favour of one of the three types of substantive tests typically used in merger review, i.e. substantial lessening of competition, create or strengthen a dominant position, and public interest tests

The control of mergers is part of the EU competition policy which in turn is part of the general objectives of the Treaty of the European Community. Article 3(g) reads that the activities of the Community shall include "a system ensuring that competition in the internal market is not distorted". The foundation or competition statute of EU Competition Policy is, therefore, a competition test. Applied to merger control it means that its task is to safeguard competitive markets and conditions. The EC has opted for the dominance test for all mergers, except initially coal and steel mergers. The ECSC-Treaty had its own wording for the control of mergers in the coal and steel sector. However, the ECSC-Treaty has expired this year.

2. Nature of the substantive test

2.1 Please describe the substantive test applied to mergers in your jurisdiction, i.e. is it some variant of a substantial lessening of competition (SLC) test, a create or strengthen a dominant position (dominance) test, some mixture of the two, or a public interest test

The substantive test in all merger cases is the dominance test. Article 2(3) of the Council Regulation Nr. 4064/89 on the Control of Concentrations between Undertakings stipulates that a concentration

> "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."

Up until the expiry of the ECSC-Treaty 23 July 2002, there was a separate regulation for mergers in the coal and steel industry contained in Article 66(2) of the ECSC-Treaty, which stipulated that a proposed transaction will not give to the persons or undertakings concerned

> "the power to determine prices, to control or restrict production or distribution or to hinder effective competition in substantial part of the market"

This wording is more an economic wording as it focuses directly on market power. In practice, however, the Commission has applied the two regulations mutatis mutandis in the same manner.

Lastly, the ECMR also uses a test based on Article 81 as far as the "spill-over effects" of Joint Ventures are concerned (Article 2 (4)).

2.2 If your jurisdiction applies a public interest test to merger review

- does the test contain a competition element? If so, how much weight is that element given, and does it resemble more the SLC or the dominance test; and

- how and by who is the public interest test applied?

N/A

2.3 If dominance is a central feature of your substantive test, does it include collective as well as single firm dominance? Please explain why that extension has been made, or not thought necessary. If collective dominance is part of your test, kindly elaborate on what constitutes such dominance (one or more case illustrations would be particularly appropriate here)

The wording of Article 2 does not explicitly mention situations of collective dominance as such. As a result, there was some debate initially on the question whether the regulation offers a legal base for the control of oligopoly cases. Indeed the wording of the regulation does not make any reference to dominance by more than one firm. In addition, recital 15 of the merger regulation states that dominance is unlikely in cases where the market share of the merged entity does not exceed 25 percent. This seems to refer to the concept of single dominance. However, it is clear that in oligopoly cases, even a share of less than 25 percent of the merged firm can give rise to competition concerns. On the other hand, in the context of Article 82, the Court had accepted the notion of collective dominance, albeit under restrictive conditions (i.e. structural links between the undertakings) having particular regard to the wording of Article 82[1]. Thus, the concept of collective dominance was not entirely unknown in EC competition law.

The Commission examined already in early cases whether a merger could lead to anticompetitive situations of collective dominance.[2] In Nestlé/Perrier[3], a merger concerning the market for mineral water, the result of the merger would have been a duopoly in the market for bottled mineral water in France. The Court of Justice, in its first ruling on collective dominance under the ECMR in Kali+Salz, a case concerning the potash industry, confirmed the view of the Commission that collective dominance was indeed covered by the ECMR.

In Kali + Salz the Court extended its definition of a single dominant position adopted in United Brands[4] to "one or more undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and also of consumers."[5] However, the important difference between single and collective dominance is, that while in the first case only the relationship between the dominant firm and its (actual and potential) competitors has to be investigated, in the latter also the internal relations among the members of the oligopoly have to be examined. This internal relationship is meant by the Court's notion of "factors giving rise to a connection" between the oligopolists.

The Court has clarified in 1999 in another merger case, Gencor/Lonrho, which had been prohibited by the Commission on grounds of duopolistic dominance, that these linking factors are to be interpreted as economic factors including but not limited to structural links.[6] In Gencor/Lonrho the Court

has accepted that the Regulation covers also cases in which a merger leads to a situation of joint dominance of two market players, which do not have structural links but are linked through economic interdependence.[7]

In order to reach the conclusion that a certain merger may lead to a situation of collective dominance in the form of tacit co-ordination the European Court of First Instance has ruled in its recent Airtours decision that three conditions are necessary. First, the ability to monitor each other's behaviour, i.e. a sufficient market transparency, second, an adequate retaliation mechanism to deter deviators, and, lastly, the inability of competitors and consumers to contest the new equilibrium.[8]

2.4 In predicting whether or not a merger is likely to fail the competition element of your jurisdiction's substantive test, what weight is given to expect post-merger increases in quality adjusted market prices? What other factors, if any, are prominently featured in determining whether competition is likely to be harmed by a merger

An increase in quality adjusted prices is the ultimate result in all cases leading to anticompetitive situations. It is, however, often not possible and also not necessary to quantify the expected price increase resulting from a merger. It is sufficient that the competitive assessment establishes that the merging parties will have the ability and incentive to increase their prices post-merger.

Another decisive factor, although closely related, is capacity or output. The Commission has looked at output in many past cases. Output features particularly prominently in all cases involving high fixed cost industries. It might be the case that a restriction of output is the most likely course of action after the merger, leading to price increases as a result.

In other, rare cases the immediate result of a merger might even are a short-term decrease in prices. However, such a decrease might be only temporary in order to drive the remaining competitors out of the market. Such concerns have been raised in GE/Honeywell where the Commission concluded that through vertical integration into financing and maintenance service as well as bundling of products GE would ultimately be in a position to increase prices to the detriment of customers.

Other potential anticompetitive effects of mergers that may also be considered are a loss of variety of products and decreased innovation.

2.5 If you have recently changed your substantive test, please describe what motivated the change, and whether it appears to have achieved the desired effect

N/A

3. Exploring how the particular competition test, i.e. dominance (including collective dominance) versus SLC, might make a difference in specific mergers

3.1 Please explain why you do or do not believe, that the choice of SLC or dominance (including collective dominance) test would make a difference in reviewing mergers in each of the following hypothetical situations (please provide actual example(s) illustrating the basis for the difference you have in mind)

a) a series of small mergers which appears to be leading to the creation of a firm having significant market power, e.g. a series of small mergers used to build a chain of distributors;

b) in the pre-merger situation there is little in the way of competition in the pertinent market - e.g. the market is currently regulated but is scheduled to be liberalised; few sellers have

much in the way of excess capacity and there are significant barriers to entry; there is a tight oligopoly characterised by a high degree of conscious parallelism; or some other factor has the effect of reducing current competition to a very low level;

c) a merger is expected to lead to anticompetitive co-ordination among firms among whom there are no structural links; and

d) although the merged entity will not have a dominant position (or something closely analogous), it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors.

3.2 Please describe any other situations, preferably using one or more actual examples where the competition test, i.e. either the SLC or dominance (augmented to include collective dominance), would make a significant difference in how a merger is assessed

The Commission's experience to date does not support the proposition that there is a material difference between the two tests. Neither test can stand on its own but needs interpretation, either through guidelines or Court interpretation or both. Therefore, what matters is not only the wording of the test itself but also particularly the theories of competitive harm which are used in application of either test.

It has been discussed widely in the context of the Merger Review currently undertaken by the European Commission whether there is a "gap", i.e. a situation in which the dominance test would not be capable of dealing with adequately. This alleged gap refers to the situation of unilateral effects in horizontal mergers which take place in an oligopolistic market. The case usually cited here is the so-called "baby-food" merger in the US, where Heinz wanted to acquire Beech Nut to become number two behind Gerber in the market for baby food (catch-up merger). This type of merger would fall under the heading 1b) of the above list of hypothetical scenarios.

Generally, three broad categories of horizontal mergers (i.e. mergers between companies that operate in the same market) are commonly considered as causing potential competition concerns.

The first category covers cases of single dominance where the merger enables the merging parties to unilaterally impose a profitable post-merger price above competitive levels. The merged entity would thus be the only price setter in the relevant market, the remaining firms being relegated to a mere fringe and to a price taking role. This category of mergers, and the adverse effects on competition arising from them, is well captured under the dominance test.

The second and third categories of horizontal mergers concern cases in which the merger takes place in an already concentrated market (oligopoly, where there is more than one price setter) and enables the merging parties and/or some or all of the remaining competitors to raise prices above competitive levels.

A distinction is generally drawn between two scenarios depending on the nature of the detrimental effects which may arise following the merger.

In one category of cases (collusive oligopolies), it is considered that the increase of post-merger prices above competitive levels will be the result of tacit co-ordination between the oligopolists ("co-ordinated effects" doctrine). Such co-ordination may be possible in market contexts where there is sufficient market transparency (so that the oligopolists can monitor each other's behaviour), where there are effective retaliation mechanisms (so that the oligopolists have an incentive not to depart from the co-ordinated prices) and competitors and customers are unable to challenge the co-ordinated policy of the oligopolists. A merger, since it potentially affects all these factors, may render co-ordinated price increases likely.

In the other category of cases (non-collusive oligopolies), the increase of post-merger prices above competitive levels is not the result of co-ordination between the oligopolists, but stems from the fact that the merger removes a substantial competitive constraint each of the merging parties was facing previously. Whereas before the merger, the two merging parties exercised a competitive constraint on each other, in the sense that if one party would raise price, it would lose customers to the other party and vice versa, the merger lifts these constraints. In an oligopoly, to the extent that the other companies in the market exercise a less than perfect competitive restraint on the merging firms (because, for example, their products are differentiated in some respects from the ones offered by the merging firms, or because they are capacity constrained), the optimal choice of the combined merged firms is to raise their prices. The extent of the price increases will depend on what the merged firm anticipates the other remaining companies to do. In this scenario, also the other firms present on the market, would find it individually profitable to raise prices taking into account the likely pricing decisions of the newly merged entity. The incentive to raise prices on the side of the merging firms may lead to price increases for all firms that are present in the same market. These effects are linked to the high degree of interdependence which exists between the oligopolists because of the characteristics of the market and, in particular, the limited number of competitors. This merger scenario has been labelled as one of "unilateral effects".

The dominance test has, however, proven to be an instrument capable of being adapted to a wide variety of situations. Moreover, the test has been successfully used to assess the dynamic impact of mergers, and has not confined the Commission to making static market analyses. In that respect, one can refer to the fact that, in previous cases, the Commission has considered the closeness of substitute products in order to determine the expected effects of a merger on prices, in certain cases concerning markets for differentiated products[9] or homogeneous products[10], although none of these case resembled the catch-up scenario as in the Heinz/BeechNut case.

In this respect it should be stressed once more that it is not only the wording as such that matters but also the content. It was the Court in Gencor which stated that dominance in the sense of Article 2 of the ECMR refers to *"a situation where one or more undertakings wield economic power"*.[11] This language is similar to the language of the ECSC-Treaty which also talked about market power (Art. 66(2)) and which has now been incorporated into the ECMR with respect to merger of a European dimension. While the dominance test of the ECMR may be specific in terms of its wording, it has - at least so far - fulfilled its purpose.

In the context of the ongoing review of the Merger Regulation, the Commission intends to issue Guidelines in which it will further set out in detail the approach it takes and has taken in the application of the dominance test.

3.3 It is sometimes said that the SLC test permits approving a merger that in the absence of demonstrable, merger specific efficiencies would be blocked, whereas a dominance test finds such a "balancing" much more difficult to apply given that efficiencies might increase economic welfare but simultaneously contribute to a dominance problem. Do you agree with this statement?

There is no doubt that many mergers lead to considerable efficiencies that can be to the benefit of both consumers and society as a whole. The European Commission welcomes efficiencies as a means to foster dynamic competition and increasing competitiveness leading to economic progress. Therefore, there is clearly no efficiency offence in EU merger review. There is similarly no doubt that it is quite difficult to identify *ex ante* these mergers. It seems that under both tests the approach to efficiencies as a defence has so far been a restricted one. For that reason there are only very few cases, if at all, where efficiency arguments saved a problematic case.

As mentioned recently by Commissioner Monti the Commission is considering at the moment how it could be more explicit in its assessment of the positive effects of efficiencies.[12] The Commission aims at clarifying its view in the forthcoming guidelines on horizontal mergers.

3.4 Might the choice of competition test influence the choice of remedy for or against a structural solution?

The Commission's experience to date does not support the proposition that there is a material difference between the two tests. Neither test can stand on its own but needs interpretation, either through guidelines or Court interpretation or both. In this respect, if the assessment gives rise to competitive concerns, the same type of remedies may be an appropriate means to remove them, while maintaining the efficiencies generated by the operation. In particular, an effective remedy is often a structural one, regardless of the test applied. Behavioural remedies should be rather the exception. The experience of the European Commission in cases vetted also in the US and/or Canada shows that the type of remedies was in most cases the same.

4. Broader Policy Concerns

4.1 Does the choice of competition tests (i.e. SLC and dominance, including collective dominance) make a difference in the roles played by market definition and concentration data in merger assessment?

4.2 More generally, could the two competition tests lead to different emphases on economic analysis as opposed to legal characterisation?

As stated above the choice of the competition test should not produce materially different outcomes as long as the basic underlying concept, i.e. market power, is the same. Accordingly, economic tools analysing the impact of mergers would be similar under both tests.

4.3 Are there likely to be differences in legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) depending on which competition test is applied to merger review?

Legal certainty does not depend so much on the test but rather on its application. Both tests require interpretation. The dominance test as used by the European Commission is now in place for more than 12 years, there is an extensive body of decisions, all of which are made public, as well as Court decisions and explanatory guidelines. The same applies to the SLC-test as used, for instance, in the USA (save the publication of decisions).

4.4 What are the jurisprudential links between a dominance test in merger review and a prohibition of abuse of dominance? And between the SLC test used in merger review and elements of the prohibition of anticompetitive agreements? Do such jurisprudential linkages influence your preferred test for merger review? For example, what would be the implications for the application of a prohibition against abuse of dominance if, in merger review, two or more firms could be considered to be individually dominant in the same market? Would the

"substantial" element of an SLC test (i.e., that the effect is more than de minimis) also have implications for prohibitions on agreements that lessen competition?

It may first be underlined that the European courts appear to consider the concept of dominance as identical in both contexts, merger review as well as abuse of a dominant position under Art. 82.[13] As a result, a merger decision addressed to merging parties could be considered as having potential adverse effects on any other companies found to be in a (single or collective) dominant position on a market, thereby curtailing their ability to engage in certain types of commercial conduct.

However, the jurisprudence of the European Courts states that "a finding of a dominant position by the Commission [in a merger decision], even if likely in practice to influence the policy and future commercial strategy of the undertaking concerned, does not have binding legal effects »[14]. A finding of dominance in a Merger decision is confined to the circumstances assessed in this case : such a finding is the outcome of an analysis of the structure of the market and of competition prevailing at the time the Commission adopts each decision.

It is also worth noting that the obligations imposed on undertakings by Article 82 of the Treaty derive directly from that provision and not from a Commission decision[15].

4.5 Is it important, especially as regards mergers affecting international markets, that competition authorities seriously consider converging on one of the three generic merger tests (i.e. SLC, dominance or public benefit)?

From a business perspective it would arguably be an advantage to have one single test. However, what matters is not really the wording of the tests which are applied but the way in which they are applied. Indeed, rather more important than a universal test would be the application of sound economic theories leading to certain predictability as to the most likely outcome, as well as to the timing.

5. Conclusion

The Commission's experience does not support the proposition that there is a material difference between the two tests. Neither test can stand on its own but needs interpretation, either through guidelines or Court interpretation or both. Therefore, what matters is not really the wording of the tests themselves but the way in which they are applied.

NOTES

1. See Flat Glass Case (Case T-68/89, T-77/89 and T-78/89, SIV/Commission, [1992] ECR II-1403. Contrary to Article 2 of the ECMR, Article 82 explicitly refers to "one or more undertakings" being in a dominant position.

2. Case IV/M.012 Varta/Bosch, Commission Decision of 31 July 1991, OJ L320 of 22.11.91, at para.32.

3. Case IV/M.190 Nestlé/Perrier, Commission Decision of 22 July 1992, OJ L356 of 5.12.1992.

4. Case 27/76 United Brands vs Commission, [1978], ECR 207, at par. 65.

5. Joined Cases C-68/94 and C-30/95, *France and others v. Commission (Kali +Salz)*, 1998 [ECR] I-1453, at. para. 221.

6. Case T-102/96, *Gencor v. Commission*, at paras 275-276 of the judgement.

7. Case T-102/96, Gencor v. Commission, Judgement of the Court of First Instance, 25 March 1999 C.M.L.R. 1999, p. 971, at para. 276 of the judgement.

8. Case T-342/99, Airtours v. Commission, Judgement of the Court of First Instance, 6 June 2002, at para. 62 of the judgement.

9. Decisions M. 2256 of 02.03.2001, Philips/Agilent Health Care Solutions, or M.2817 Barilla/BPL/Kamps of 25.06.2002.

10. See e.g. Decision M.1693, of 03/05/2000, Alcoa/Reynolds.

11. Case T-102/96, Gencor/Commission, T-102/96, [1999] ECR II-753, par. 200.

12. Speech by Commissioner Monti before the British Chamber of Commerce in Brussels, 4 June 2002.

13. See Compagnie maritime belge et.al/Commission, cited above.

14. Cases T-125/97 and T-127/97, Coca-Cola/Commission, [2000] ECR II-1733, at par .81.

15. Case Coca-cola/Commission, at par. 80 ; see also Case T-111/96 ITT Promedia v Commission [1998] ECR II-2937, paragraph 139.

BIAC

BIAC commends the Secretariat for its very instructive and insightful Background Paper on the differences between the Dominance and the SLC tests.

BIAC welcomes the opportunity to provide comments on this very current and important topic.

The Background Paper identifies a number of differences that may exist between the SLC and Dominance standards and discusses potential points of tension in seeking to harmonize those differences.

- Harmonization of analytical frameworks and, more importantly, their implementation poses a challenging task, and identification of points of potential disagreement is a necessary step in the convergence process.

We would like to comment on several of the points of potential difference discussed in the Secretariat paper and in the submissions by Roundtable participants.

- The point was made that the dominance test may place greater reliance on market share presumptions, and consequently may be applied in a manner that is less sensitive to, among other things, efficiencies.
    - First, over-reliance on market shares is not an inherent requirement of the Dominance test. An integral part of the test is also whether competition would be significantly impeded.
        - A key question is how, in practice, competition authorities apply both parts of the test.
    - Second, there is a general recognition throughout the notes submitted by the Roundtable participants that many mergers lead to considerable efficiencies.
        - Increasingly, efficiencies are finding a place in merger analysis, not only under the SLC test, but also under the Dominance test – witness the plan of the European Commission more explicitly to consider efficiencies in its assessment of horizontal mergers and explain in detail how it will do so.
        - We commend these efforts and see no inherent reason that efficiencies be treated differently or given different weights under the two tests.
- The point also was made that the SLC test may cover a broader range of potential adverse competitive effects of mergers due to its greater focus on the creation of market power and the facilitation of its exercise, rather than focusing on dominance.
    - The Background Paper suggests, moreover, that expanding the coverage of the Dominance standard, could engender significant problems (including troublesome

implications for single-firm non-merger cases of expanding concepts of dominance). This concern deserves consideration.

- Overall, we do not see a risk that the use of the Dominance standard will produce challenges to significantly fewer mergers of anticompetitive significance due to its limited scope.

  - Rather, we see a risk that could arise from the widespread use of the SLC standard in unilateral effects cases. BIAC would underscore the remarks contained in the Background paper (§75) that the strict application of the SLC test in unilateral effects cases could evolve towards a merger policy that prohibits all oligopolies (or increases in concentration in more concentrated industries). Such a result that would be both inefficient to business and detrimental to consumers.

  - Certainly to the extent that use of the SLC test could broaden the authority (and discretion) of non-judicial administrative bodies to challenge mergers, that broadened authority must be accompanied by greater corresponding due process guarantees and timely and effective judicial review.

– Importantly, when both the SLC and Dominance tests apply, which is in most cases of any competitive significance, there seems to be no inherent reason that they must produce different results.

  - The Australians, who have experience successively with both standards, report in their Note that neither the legal or economic emphasis, nor the underlying economic and legal arguments, need have different import under the two regimes.

  - We agree with the view expressed by the European Commission that "[w]hat matters is not only the wording of the test itself, but also particularly the theories of competitive harm which are used in application of either test."

The Background Paper concludes with the view, with which we agree, that the particular label given the competition test is probably not as important as the way it is applied.

A major concern of the business community is that there be predictability in the way merger laws and regulations are enforced in practice. We endorse efforts toward convergence, to the extent possible, of the application of consistent analysis among jurisdictions.

– We agree with the position that a consistent set of sound economic theories centered on the protection of consumer welfare should be the sole guide in the application of merger regulation.

– We very much support the view expressed in the Secretariat Background Paper that the cause of legal certainty greatly would be enhanced by competition agencies publishing detailed guidelines setting out their analytical frameworks and factors to be taken into account, along with the publication of merger decisions and other explanatory materials, including the reasoning behind decisions not to challenge transactions that were the subject of intensive review.

– Application of complex analytical frameworks also, in our view, requires that decision-makers be subject to the discipline of a transparency, due process guarantees, and timely and effective review.

Finally, we commend to you the view of the ICC, which we share, that:

"Convergence in analytical frameworks [among the World's competition authorities], and ultimately their implementation, is crucial if merger enforcement is to work as a tool for economic progress, rather than as a source of uncertainty and inefficiency."

SUMMARY OF THE DISCUSSION

1. Differences in merger tests

The Chairman began with Chinese Taipei noting that its contribution states that: "…the general objectives defined in the Fair Trade law are not particularly in favour of the SLC test or the dominance test for merger assessment. The law applies a public interest test…." (para. 2) Chinese Taipei is one of the few countries having such a test. The Chairman asked Chinese Taipei to describe the elements taken into consideration to apply its test and whether those elements are specified in guidelines and are generally the same from case to case.

The delegate from Chinese Taipei stated that the objectives of his jurisdiction's Fair Trade Law (FTL) go beyond protecting and promoting competition to include as well "maintaining trading order", protecting consumers, ensuring fair competition and promoting economic stability and prosperity. The multiplicity of objectives is reflected in choosing neither the SLC nor dominance tests for merger review. Article 12 of the FTL specifies that the Fair Trade Commission shall not prohibit a notified merger if the, "…overall economic benefits of the merger outweigh the disadvantages resulting from the restraint on competition."

Competition is clearly one of the key elements considered in determining the net effects of a merger. Entry barriers, the number of players in the relevant market, and the level of concentration are also important elements to be considered. In addition, certain non-competition elements are considered such as whether one of the parties is a failing firm.

The Fair Trade Commission is currently working on merger guidelines expected to be ready by November 2003.

The Chairman next turned to the United States noting that it applies a substantial lessening of competition (SLC) test, takes a consumer surplus perspective and considers efficiencies in determining the competitive effects of a merger. The Chairman asked whether the US believes that international convergence in merger tests would be desirable. If so, has the US ever considered adopting the dominance test which is used by considerably more countries than the SLC test? If it has not, why not?

A United States delegate stated that both the SLC and dominance tests are concerned with whether a merger will create or strengthen market power so as to enable the merged firm either unilaterally or in co-ordination with other firms to raise prices above the competitive level. What is most important in terms of international convergence is that merger laws have the same objectives, apply the same basic standard to determining how much market power is too much, and employ the same analytical framework in evaluating that question.

In the US, anti-trust laws have developed mostly as common law rather than statute law. The verbal formulations in statutes are less important than the way they are applied, provided the verbal formulation does not interfere with an ability to analyse whether a merger is likely to harm consumers.

The SLC test, as applied in the US, meets that test. The US has insufficient experience with the dominance test to determine whether it too passes the test.

Section 7 of the Clayton Act prohibits acquisitions if they will either substantially lessen competition or tend to create a monopoly. To the extent that dominance is the same as monopoly, the US has both SLC and dominance tests. But because the SLC test permits challenging a wider range of mergers, the US competition authorities invariably apply the SLC rather than the "tend to create a monopoly" test. Since the US is largely satisfied with its current test, it has not considered switching to another test.

The Chairman next turned to Norway whose written contribution stated that: "The only objective of the Competition Act is economic efficiency which of course can be seen as a public interest test" (para. 2). But Norway is almost unique in that it applies a total surplus rather than consumer surplus test. This means an anticompetitive merger having efficiencies that offset a predicted increase in price could be tolerated. The Chairman asked whether that has ever happened.

A Norwegian delegate confirmed that Norway applies a total surplus approach hence concentrates on the size of the cake rather than how it is divided among market participants. Taken to the extreme, Norway's application of the total surplus approach could mean a merger might be accepted which increases total surplus while decreasing consumers' surplus. The delegate doubted there has ever been a case where this has happened.

In practice, Norway is reluctant to accept an efficiency defence if a merger considerably increases market power. There are at least two reasons for this: it is very difficult for the Competition Authority to assess efficiency claims; and a merger that reduces competitive pressure will tend to reduce the probability that claimed efficiencies will actually be realised. Efficiency claims have the greatest impact in borderline cases, i.e. where a competition reduction is expected but the Competition Authority is unsure whether it is significant.

The Chairman next turned to Germany as an example of a dominance test jurisdiction. Germany's test also applies to collective dominance, and efficiencies are reflected in the overall appraisal of market dominance. However the Federal Cartel Office, "…is of the opinion that, at least in cases of clear market dominance, mergers cannot be cleared solely on the basis of efficiency gains" (para. 20). The Chairman requested more detail concerning how Germany deals with efficiencies in merger review.

A German delegate stated that the third variant of dominance recognised in its law, i.e. paramount market power, is in practice the most important and the competition statute provides some important market share based presumptions regarding such market power. This is a starting point only, and other relevant criteria are also listed in the statute. Efficiencies are not included among the criteria.

Even if a merger will increase efficiency, Germany believes that competition would lose its steering and controlling function if these efficiencies are purchased at the cost of creating or strengthening a dominant firm. Efficiencies are accordingly dealt with as a non-competition issue and are left to the few cases where the Federal Ministry of Economics is asked to overturn a blocking decision by the competition authority. The Ministry applies a broad public interest test rather than one exclusively focused on competition.

The Chairman found two points of particular interest in the Brazilian contribution. First, while Germany's written contribution states that its dominance test basically includes the SLC test, Brazil says that the SLC test includes the dominance test. Second, many contributions maintain that the particular test does not make a big difference, but nevertheless discuss cases where the test indeed matters. Brazil is a

good example of this. Its Ambev beer merger case was assessed with different tests and results by CADE and the Ministry of Finance. The Chairman sought more information about this case and the source of disagreement between the reviewing bodies.

A delegate from Brazil stated that article 54 of law 8884/94 provides that: "Any act that may limit or otherwise restrain open competition, or that results in the control of relevant markets for certain products or services shall be submitted to CADE for review." Therefore, it seems that both dominance and SLC tests could be applied. However, even though the main section of article 54 contains the two tests, clause 1 of this same article establishes the rule of reason principle when reviewing a merger. This suggests that an SLC test should always be carried out because it alone, in the Brazilian view, incorporates efficiencies. The delegate also noted that the Brazilian competition law appears to permit the application as well of a public interest test but this has never actually been done.

The application of a dominance test that excludes consideration of efficiencies would have led to forbidding the Ambev merger. Instead, the SEAE and SDE found the merger would produce some efficiencies and recommended divesting total assets corresponding to the entire beer business conducted under one of the three main brands. CADE found, however, more in the way of efficiencies and therefore recommended divesting the total assets related to a weaker brand. This difference in views reflects the subjective element involved in efficiency assessment.

2. Changing the substantive test

The Chairman noted that Australia shifted from an SLC test to a dominance test in 1977 to encourage mergers to proceed. Then in 1992, it switched back to an SLC test to catch mergers raising issues of co-ordinated market power. The Australian submission includes a discussion of the Caltex/Ampol merger case and explains why this merger would have been adjudicated in different ways depending on whether an SLC or single firm dominance test were applied. The Chairman invited Australia to comment on this case.

An Australian delegate stated that the switch back to an SLC test involved accepting the view that all harmful mergers ought to be prohibited, not merely those creating or strengthening dominance. The change back was accompanied with writing some basically economic criteria into the statute to guide the courts. The delegate noted as well that Australian merger review includes a rarely used procedure under which an anticompetitive merger can be authorised if it can be shown that it will confer sufficient public benefit. There is a long history of public benefit being interpreted as being very largely economic efficiency that in turn has been viewed entirely in a competition context. Efficiencies are very unlikely to lead to allowing a merger that will reduce competition. This is because efficiency benefits are unlikely to materialise in a market where competition has been reduced.

The changeover to the SLC test went fairly smoothly as indicated, for example, by only small changes in the rejection rate by the anti-trust regulator. For a year or two after the change back to the SLC, the rate went up from maybe three or four percent to six or seven percent. This temporary increase was because business and lawyers were learning the meaning of the new test.

The Australian contribution contains a number of cases where adoption of the SLC test made a significant difference, including Caltex/Ampol. At the time there were five major oil companies. There was little import competition and high entry barriers into refining. In addition, the merging parties were the only ones supplying large independent retailers, and competition for their business was a very important contributor to competition in the retail market. It was only after very substantial undertakings were offered by the firms that the merger was approved.

In considering the change back to SLC, the politicians suggested a few compromises. One was that joint or collective dominance be added to the dominance test. In the end, this was regarded as a bad idea. It was better to have something that was very much clearer conceptually, and supported by a substantial body of case law including from the US, which also had guidelines that could be largely adopted in Australia. Moreover, if the courts in Australia were asked to deal with joint dominance they might interpret that as two rather than several firms. And collective dominance came too close to conveying the idea that a high probability of active collusion rather than just co-ordinated behaviour would have to be proved.

Australia is currently undergoing an enquiry into its Trade Practices Act. It is interesting that no one of importance has supported a return to the dominance test, including its old supporters.

The Chairman noted that in May 2001, New Zealand switched from a single dominance test to an SLC test. New Zealand also provided an interesting example of the same transaction being assessed under the two tests with different results. The Chairman asked for more detail about this.

The New Zealand delegate explained that the application for clearance of the Progressive/Woolworths merger was made the day before the test was changed, but was then amended the day after the change took effect. The initial clearance of this three to two merger was made using a single dominance test that had been narrowed to the point that only mergers virtually to a monopoly could be blocked. A competitor appealed the Commerce Commission's decision to apply the dominance test. Initially the Commission's decision was upheld but an appeal court reversed this decision. Progressive then appealed to New Zealand's highest court. As a precautionary measure, Progressive had also applied to the Commerce Commission for a clearance under the new test. Using an SLC test, the Commission determined that the elimination of a key competitor in the market (Woolworths), the small number of competitors in the market, and the presence of other factors seen to facilitate collusion and discipline – such as high barriers to entry, price transparency, and a mature market - would lead to the merger substantially lessening competition. This turned out to be irrelevant because Progressive won the final appeal so was permitted to merge based on the application of the dominance test.

3. Is there a material difference between the tests in general?

The Chairman kicked off this section of the roundtable by noting that Ireland believes not only that there is a material difference between the tests, but also that the SLC test is superior to the dominance test. He invited comment from Ireland.

An Irish delegate stated that the debate has little to do with mergers involving a firm enjoying single firm dominance. Instead, the real difference in the tests shows up principally in oligopoly markets where no single firm is dominant.

Mergers in oligopoly markets might harm competition either through facilitating collusion, tacit or explicit (i.e. co-ordinated effects), or through producing unilateral effects. For collusion, the significant question is whether firms will be able to co-ordinate and raise price post-merger. There is no rigid list of factors that will allow a high degree of certainty in making such predictions. In contrast, when it comes to unilateral effects there is more reliable theory based on comparative static equilibrium analysis. In some cases, prices may go up while in others they might not, due to Cournot or Bertrand behaviour by oligopolists. One of the most significant differences between co-ordinated and unilateral effects is that with the former a merger changes the whole nature of equilibrium interaction, whereas with unilateral effects there is merely a change from one equilibrium to another, less competitive, one.

There are three important differences between the SLC and dominance tests. First, the SLC test concentrates attention on the market outcome rather than on market structure. Dominance is a more structural concept. Second, and as a consequence of the above, a dominance test creates, an undesirable link with Article 82 cases concerning abuse of dominance. There is a danger that the *ex post* standard appropriate to an Article 82 matter, will be affected by the *ex ante* standard used for mergers. In addition, firms might justifiably fear the impact of being found "dominant" in a merger review because this could open them up to subsequent application of abuse of dominance prohibitions. The third difference between the tests, and the most important, concerns a significant risk that the dominance test will be associated with mis-characterising unilateral as co-ordinated effects.

This delegate explained that the mis-characterisation danger arises for several reasons. To begin with, it is clear, especially following Airtours, that there are a number of unilateral effects cases that cannot be captured under a dominance standard. The temptation is to characterise such mergers as presenting co-ordinated effects because that would make it more natural to argue that the mergers create or strengthen collective dominance.

Many mergers occur as a result of two small players merging to attain the same size as the larger competitors. They therefore tend to increase symmetry, which normally can be expected to facilitate collusion (either tacit or explicit). Hence it might then be tempting to assume on grounds of symmetry that a merger should be blocked because it will facilitate collusion even though the more relevant threat is likely to come from unilateral effects.

There is also a risk of mis-characterisation regarding mergers presenting both unilateral and co-ordinated effects. Consequently, due to greater theoretical clarity concerning unilateral effects, it might be better to proceed with a unilateral effects theory. Ironically, the dominance test may instead force reliance on the tacit collusion threat.

There are three reasons why the superiority of the SLC test, reflected especially in the preceding points about mis-characterisation, is important. First, in the context of reforming the European Commission (EC) Merger Regulation, attention tends to focus on the risk of blocking mergers that do not harm competition. Instead, competition authorities should be more concerned with situations where the EC Merger Regulation will fail to block anticompetitive mergers. There is less risk of this failure occurring with an SLC test. Second, there is a danger of adopting incorrect remedies under a dominance test because of the mis-characterisation risk imported by that test. Third, forcing unilateral effects into some kind of dominance story ultimately involves pushing things into a 'black box', and thereby fostering legal uncertainty.

If competition authorities are going to apply a number of distinctly different economic theories about anticompetitive harm, it would be helpful to have legal language that recognises the nuances distinguishing theories rather than obscures the differences. In this way legal certainty will be significantly enhanced.

The Chairman remarked that Mexico shares the view that there is a difference between the merger tests. Mexican competition authorities can choose between the SLC and dominance tests. The criteria driving that choice were not, however, clear from the written submission. The Mexican contribution presents the Bancomer/Aetna International/Ixe Banco/Afore XXI/Siefore XXI merger which seems to illustrate that the choice of test does matter.

A Mexican delegate stated that his competition authority must start with a dominance test (that can extend to collective dominance), and then consider other factors.

Economic theory is more supportive of the SLC test. SLC is a dynamic concept whereas dominance is static, and SLC is more attuned to the conditions of the market and the possible effects of the merger whereas the dominance test is based more on structural variables. However, from a practical, legal perspective the dominance test has some advantages. First, it is somewhat easier to write into the law and to implement. For a new competition authority, the dominance test is attractive since less technical know-how is needed to apply it. The dominance test is also more transparent, hence better for businesses and the courts. In short, the dominance test yields greater legal certainty. Mexico has so far not experienced any great practical problems in applying the dominance test, thus underscoring the point that it is better suited to new competition authorities with limited experience, know-how, and resources.

The Bancomer/Aetna International/Ixe Banco/Afore XXI/Siefore XXI transaction is an example of a merger that would not be blocked if one simply examined the market shares (i.e. approximately 50 percent of the market). For various reasons, however, the post-merger firm would have been able to control interest rates. This was the principal competition concern in the case. This merger was not actually blocked. Other concerned authorities did not go along with the merger and the banks dropped their plans. It is uncertain whether a decision to block would have been sustained by the courts.

The Chairman commented that as with Mexico, France argues that there is a difference between the tests, or more exactly between the European and US approaches. Differences were found concerning the assessment of anticompetitive effects and also the treatment of efficiencies. The French contribution thought these were both essentially rooted in a difference in time perspectives. He turned to France for more detail on this.

A French delegate explained that French law permits a synthesis of the two tests because it focuses on determining "whether a merger will likely harm competition, notably by creating or strengthening a dominant position." (Secretariat translation) In practice most merger decisions by the Minister of Finance are taken based on a simple or collective dominant position. Recently, the Ministry of Finance made two merger decisions featuring an SLC approach based on unilateral effects reasoning, i.e. M. Bricolage/Tabur and La Foire-Fouille/Pier Import. France therefore tends to apply a synthesis of the two tests.

The delegate drew attention to three differences between the dominance and SLC tests. First, the dominance test is less suited than the SLC test to taking account of unilateral effects. Second, efficiencies could be assessed differently under the two tests. It is simpler to take account of efficiencies using an SLC test. This point should not be exaggerated because estimating efficiency gains is inherently difficult and taking them into account may require comparing short term losses in competition with long term gains in efficiencies. Third, there is a difference in time horizon involved in applying both tests. The SLC test applied to unilateral effect imports a rather short term analysis. In contrast, the dominance test, especially collective dominance requires a long term analysis to estimate how the market will evolve following the merger.

Another French delegate noted that his country's merger test is better understood in the context of a three stage review involving the Minister of Economics and the Competition Council. He argued that, all things considered, the French test is close to the substantial lessening of competition test but also shares aspects of the dominance test. The delegate noted that in January 2002 the Competition Council applied the collective dominance concept relying on the criteria laid out in the European Union's Court of First Instance (CFI) decision in Airtours. The case involved an abuse of dominance by a duopoly operating in the water distribution and purification market. The market was highly transparent, there was a real possibility of retaliation for deviation from co-ordinated conduct, and competitors and consumers were not in a position to undo the effects of that co-ordination. This abuse of dominance was facilitated by creating a joint venture that allowed the two water companies to co-ordinate their conduct in bidding for local

government franchises. The Council asked the Minister to require the enterprises to modify or wind up their joint venture so as to undo the contribution it made to the abuse of dominance.

The Chairman remarked that Italy believes there is a difference in the tests but doubts it matters in very many cases. Italy's contribution also takes up the issue of how efficiencies are considered under both tests. He invited further comment from Italy.

An Italian delegate took issue with the Secretariat's background paper's view that the dominance and SLC tests have areas of overlap but also could apply differently in certain cases. This probably does not apply to European versions of the dominance test because the second branch of such tests requires that effective competition be reduced. It is not entirely clear what is meant by this second branch. If it is given an SLC interpretation, that would rule out the dominance test being able to block mergers where there is no SLC.

The delegate's second point was that countries such as Australia and New Zealand that changed from a dominance to SLC test had a dominance test that applied only to single dominance. In addition, the UK and Ireland which are now considering adopting an SLC test are jettisoning a public interest rather than a dominance test. Countries such as Italy currently applying a dominance test that includes collective dominance could come to a different conclusion about the advisability of switching to an SLC test.

The delegate agreed with his Irish colleague that there is a potential gap in the tests, especially after the Airtours court decision. He recalled, however, that the dominance test has evolved considerably and found no reason to believe that further evolution will be unable to reduce some of the gap in coverage. The CFI worked out a collective dominance test even though when the Merger Regulation was being debated in the Council, collective dominance was expressly excluded. In addition, it must be remembered that the SLC test is not the only possible alternative to a dominance test. One example would be an increase of market power to the detriment of consumers. This is more precise than an SLC which can in fact mean almost anything, hence is legally uncertain.

Concerning efficiencies, the delegate noted that the EU's two branch merger test means that efficiencies can possibly be considered, and the mention of consumers in the Merger Regulation makes this still more likely.

Reacting to the Italian delegate's presentation, the Chairman reminded delegates that the Australian contribution stated that the change from a dominance to an SLC test did not appreciably reduce legal certainty. He also noted that although few cases may fall in the gap identified by the Irish delegate, the number could still be significant given that few mergers are in any case anticompetitive.

The Chairman noted that the EC stresses that what matters is not so much the nature of the tests but the way they are applied. The Commission claims that its dominance test "…has…proven to be an instrument capable of being adapted to a wide variety of situations. Moreover, the test has been successfully used to assess the dynamic impact of mergers, and has not confined the Commission to making static market analyses" (para. 23). He called on the EC for more detail as to its views on the difference between the SLC and dominance tests.

A delegate from the European Commission divided problematic horizontal mergers into three groups: single dominance, which is clearly covered by a dominance test; co-ordinated effects in oligopolistic markets, also clearly covered by the dominance test according to several CFI judgements; and anticompetitive effects in oligopolistic markets which are not the result of co-ordinated effects. This third category, it is maintained, might not be covered by the Merger Regulation as it now stands.

The delegate disagreed with a common interpretation of Airtours. Instead of confining collective dominance to concerns about collusion, the CFI simply advanced formal criteria for establishing tacit co-ordination. It remained silent regarding unilateral effects.

Even if there is a perceived gap as regards unilateral effects, it may not be wise to change the Merger Regulation and adopt an SLC test. Such a change would create legal uncertainty and could also lead to problems of divergence between the laws of the EU member states and the EU itself.

The exact wording of the substantive test is not that important. What is needed is guidelines and interpretation by the courts. In Gencor, the CFI stated that dominance in the context of the Merger Regulation refers to a situation where one or more undertakings wield economic power. This interpretation is very close to market power, which most would agree is at the heart of merger review. It might not be necessary then to change the language of the EC's merger test. In any case, the EC is currently writing merger guidelines that will certainly address the possibility of a merger leading to anticompetitive effects in the absence of either single dominance or tacit collusion.

The Chairman next turned to Hungary whose contribution argued that there is no significant difference between the two tests. Hungary also referred to an interesting merger in the sugar refining industry. The Chairman sought more information about that transaction.

A Hungarian delegate began by noting that the Südzucker case is a recent example of the Competition Council applying a collective dominance approach to capture concerns about post-merger co-ordinated actions.

Another Hungarian delegate stated that in the sugar merger, the Competition Council made a distinction between two types of collective dominance. The first type was structural in nature. When the number of firms decreases from three to two, the intensity of competition lessens, because, in the case of homogenous products and market transparency, a new profit maximising equilibrium will materialise, probably with higher prices. These higher prices can be maintained because both companies would be able to retaliate in response to any deviation from those higher prices. In order to assess probability of this kind of harm in the Südzucker case, the value of the HHI was computed and barriers to entry assessed. The HHI would have increased from 3 400 to 5 300, and barriers to entry were found to be high.

The second possible competitive problem was behavioural in nature and basically had to do with how the merger might facilitate explicit collusion. Explicit collusion was rendered more likely by the parties meeting frequently in the Sugar Council, which is the preparatory body for dealing with regulations in this industry.

Fortunately, there was a remedy for the first or structural problem, which was also expected to solve the behavioural issue. The proposed merger was part of a multinational deal between Südzucker and Financière Franklin Roosevelt S.A.S. The merger was permitted under condition that Südzucker pass decisive control over one of the affected Hungarian subsidiaries to a third party. This meant the number of competitors in Hungary would not be reduced by the merger.

4. Is there a difference between an SLC and a dominance test in the review of the hypothetical mergers mentioned in the Secretariat note?

The Chairman referred to the four hypotheticals contained in the Secretariat note. There was a wide variety of answers concerning whether the test would lead to different results in those situations. A number of countries such as the EU, Germany and the Netherlands basically answered that there would be

no difference. Finland in contrast, believed there could be a difference as regards a series of very small mergers each of which was insignificant, but leading eventually to a loss of competition.

A delegate from Finland pointed out that his country's competition statute currently relies on the dominance test. If this were changed to an SLC test, the courts would have to attach some significance to that change. The delegate believed that the change would be interpreted as establishing that a wider range of mergers could be caught as anticompetitive. In that context, there could be a difference between the two tests as regards a series of small mergers. Due to the presumption that a newly adopted SLC would have a wider scope, such a change would probably make it easier to intervene at an earlier stage. There could also be a difference as regards a merger between the 2nd and 3rd biggest market players. Perhaps the doctrine of oligopolistic dominance would apply in this case, but the SLC would nevertheless be more flexible in such a situation. The SLC might also have a wider scope in mergers affecting innovation markets.

In closing, however, the delegate made it clear that how a test is applied is probably more important than the particular test itself.

The Chairman noted that the United Kingdom believed there could be a difference between the tests in situations in which there was little competition pre-merger, and in cases where there is no dominance but there is still a possibility that without co-ordination prices will rise post-merger.

A delegate from the United Kingdom focused on a recent proposed bank merger. In the UK the big four banks have for years together had about 70 percent of the market. There has been some new competition coming from the former building societies, i.e. savings and loans associations. Abbey National was the largest independent new bank of that kind. It had about five percent of the market while Lloyds, which proposed to acquire Abbey National, had about 22 percent. Abbey National was clearly competing in new ways not only for personal customers but in the small business market as well. In the end the merger was blocked essentially on SLC grounds.

If an EC style dominance test had been applied to this bank merger, the delegate believed there would have been enormous legal uncertainty about the result. The merger might not even have been referred for a second stage investigation since there was an absence of single firm dominance and little evidence supporting a risk of tacit co-ordination.

The banks merger shows that how a law is applied is not more important than how it is worded. One does not have total discretion in applying a law. In court, the words of the statute matter a lot.

The delegate wondered whether a dominance test, at least one similar to the EC's, is consistent with both analytical rigour and blocking mergers that substantially lessen competition. The CFI has recently required strict analytical rigour. It follows that there is now a choice of changing the words or retreating on policy. That choice should be made in favour of changing the words.

The Chairman characterised Spain as having a test that is fairly close to an SLC, but it also uses criteria identified by the Commission to adjudicate cases.

A Spanish delegate said that Spain does not consider there is a big difference between the tests. Both have the same objectives and focus on the market power of the merged entity. Much depends on how the tests are applied. If they are applied with flexibility considering all relevant variables, and in a predictable fashion, based on a rigorous, consistent analysis they should come to the same decision.

In principle one might think the SLC offers greater flexibility. Spain has an example where something close to an SLC was applied to a merger where a strict application of a dominance test might have produced a different result. It involved two large banks having share holdings in firms operating in

markets characterised by high concentration, e.g. electricity and telecommunications firms. The bank merger would have effectively united the two main players in electricity and telecommunications and would have had a negative effect on competition. Structural remedies were applied. Whereas the merging banks did not have or acquire a dominant position in these markets, their stakes in more than one of the main players in electricity and telecommunications would have eased their strategic co-ordination and thus damaged effective competition.

5. Does the test chosen have an impact on the consideration of efficiencies?

The Chairman noted that a number of countries say the test does make a difference to how efficiencies are considered, e.g. Norway, Ireland, and Brazil. Mexico also states in its contribution that: "The Market Dominance Test can have more predictable outcomes and low uncertainty, however it has the risk to lead to blocking a merger with substantial efficiency gains…." (para. 37). The Chairman also remarked that a number of countries such as Spain, New Zealand and the European Commission state that the test makes no difference to how efficiencies are considered.

The UK contribution takes the view that: "It is more difficult to frame an efficiency defence around the legal concept of dominance since the dominance test is not directly linked to the economic effect of a merger. Thus, any assessment of efficiencies, which in itself turns on the economic effect of the transaction is hard when that assessment has not been carried out" (para. 29). The UK comments on two cases: UK Neopost/Ascom (postal franking machines) and Prosper de Mulder Ltd/Croda International plc. The Chairman sought more information about these.

A United Kingdom delegate opted to concentrate on the postal franking case, a three to two merger where numbers two and three were merging and where the leading firm, Pitney Bowes, had well over 50 percent of the market. A serious possibility was raised in the phase I investigation that the merger would substantially lessen competition, so it was referred it to the Competition Commission. On referral, attention focused on the prospects of the merging parties in the absence of the merger. One appeared to be a failing force in any event and there were credible prospects of very substantial merger related efficiency gains that would make the merged entity a more effective competitor against the leading firm. The Competition Commission therefore concluded the merger did not produce an SLC and cleared it.

How would the franking machine merger have been dealt with under a dominance test? The delegate was unsure because there is a considerable degree of legal uncertainty surrounding that test. Post-Airtours many commentators have said that it is absolutely clear that collective dominance does not go beyond tacit collusion or structural linkages between firms. The delegate has also heard members of the EC's Merger Task Force argue that guidelines will be fashioned to show that the various alleged gaps can be filled by collective or perhaps oligopolistic dominance. The fact that two groups of such expert people can say such different things shows there is enormous uncertainty with the dominance test. The delegate disputed the idea that there is considerable jurisprudence explaining the dominance test. Most of the jurisprudence concerns Article 82 cases rather than mergers.

Returning to efficiencies, the delegate did not see how these would have been considered in the postal franking machine merger under a dominance test. He speculated though that efficiencies could perhaps be analysed through the second branch of the EC dominance test (i.e. "as a result of which effective competition would be significantly impeded").

The Chairman next turned to the Netherlands which has a dominance test and whose contribution states that, "…the competition legislation makes no provision for an efficiency defence. A balancing of the loss of competition on the one hand and the potential gains in economic welfare on the other hand has

thus never been required" (para. 20). The Chairman asked whether that meant efficiencies are not taken into consideration at all or are assessed in analysing dominance.

A Dutch delegate affirmed that efficiencies are not taken account of at all in analysing mergers in the Netherlands, including in the analysis of dominance. This is not an oversight by the legislator, as the efficiency issue was debated at the time the competition statute was adopted.

Arguments about efficiencies are very much affected by how broadly they could be defined and what proof is required to establish them. In theory, efficiencies passed on to consumers, even if realised by dominant firms, could have significant positive effects on the economy as a whole. Should parties therefore be provided an efficiency defence under the dominance test bearing in mind that merging parties would have the initial onus of proof? Assessing such a defence would increase the administrative burden on a competition authority especially when they operate under tight time constraints and parties resort to using very sophisticated techniques in favour of their claims.

The delegate believed that a balancing of efficiencies and other effects is easier under the SLC test, at least under certain circumstances. The US paper states that efficiencies almost never justify a merger to monopoly or near monopoly, and a similar view, with which the Netherlands agrees, was heard from Germany. Simply put, the larger the competition concerns the larger the efficiencies that should be required to offset them.

Moving to the Czech Republic, the Chairman commented that it applied a dominance test, i.e. the acquisition of a dominant position is a necessary but not sufficient condition to block a merger. The Czech Republic discusses the KMV/Podebradka mineral water merger that was blocked by the Office for the Protection of Competition. In its assessment, the Office considered certain economies of scale, and the Czech contribution states that: "[Economies of scale are] an advantage which strengthens negotiation position vis-à-vis supermarkets, hypermarkets or other big purchasers" (para. 2). Was this, the Chairman queried, an argument for or against the merger?

The delegate from Czech Republic noted that in this proposed merger between the two biggest producers of bottled mineral water there was very strong evidence of a potential anticompetitive impact, including concerns about a strengthened negotiation position *vis-à-vis* big purchasers.

The Czech competition authority's multi-criterion assessment of this merger included consideration of economies of scale. The acquisition of a strong negotiation position was a very important advantage in relation to other market players. It could lead to their leaving the market and that would be against the interest of consumers and competition. From this point of view, in this specific case, this was an argument to prevent the merger.

Calling next on Korea, which has both the SLC and dominance tests, the Chairman drew attention to the Hanhwa Petrochemical/Daelim Co 1999 case where an anticompetitive merger was allowed to proceed on efficiency grounds. He asked for more detail about this case.

A Korean delegate explained that this merger involved two conglomerates. Hanhwa Petrol acquired the low density polyethylene (LDPE) business of Daelim Industries. The merger was expected to reduce competition as the number of market players would drop from five to four. Nevertheless, the KFTC's merger review indicated that primarily production related efficiencies would outweigh the harm from increased market concentration and on this ground the merger was permitted. Interestingly, although Korean law requires efficiencies to be considered, it does not specify how they should be compared or balanced.

At this point in the roundtable, the Chairman noted that as regards remedies, there was once again a divergence of opinion reflected in the contributions received. Some countries say the test chosen influences remedies and others deny that. He also made some comments on legal certainty, reminding delegates of the United Kingdom's view that the dominance test is associated with a lot of legal uncertainty, a point disputed by a number of other countries. The Chairman then called on Lithuania whose contribution argued that there may be ways to address the legal uncertainty of the dominance test.

A delegate from Lithuania noted that his country's competition law explicitly refers to the creation or strengthening of a dominant position including collective dominance. Lithuania's experience with merger review began only at the beginning of 1993. No decisions have been appealed since 1999, when the law was altered to be EU compatible. This despite the fact that divestitures have been required and some mergers have been blocked.

The delegate noted that regardless of the test used, legal certainty would be enhanced through better explanation of the methods and criteria used in predicting unilateral and co-ordinated increases in market power. As a candidate for EU membership and therefore required to harmonise domestic legislation with that of the EU, Lithuania eagerly awaits the production of further guidelines by the EC dealing with market power and dominance.

6. General Discussion

A BIAC delegate pointed out that mechanical application of a dominance test, i.e. one overly based on market share, is not inherent in the test, nor does it necessarily exclude consideration of efficiencies. But if one is going to take a mechanical approach, at least the dominance test contains a threshold that could be used to define a violation. A mechanical application of the SLC test is much more problematic, as the record in the US in the 1960s and 1970s attests. There is also a risk that an SLC test could be used to block all mergers in already concentrated markets on the grounds of likely unilateral effects. If one adopts an SLC standard, it is very important that the range of discretion it confers be circumscribed by strong procedural safeguards and judicial review of agency decision-making.

The business community basically believes that the test is not as important as the way it is applied. Business desires predictability in merger review and finds guidelines to be particularly helpful in this regard. It also appreciates information about both blocking and permitting decisions as regards mergers that have been extensively investigated. The business community also very much supports convergence in the application of standards among agencies. A consistent approach based on sound economic principles of consumer welfare is appropriate.

The Consumers International (CI) delegate commented that consumer groups tend to dislike public interest tests being applied in merger review because they believe such tests have historically been used to jettison the public interest, introduce a certain degree of arbitrariness, and open the door to political interference. Giving politicians a role in merger review is extremely dangerous as it tends to open the door to business interests which can buy influence much more effectively than consumer groups.

On the SLC test, the CI delegate supported the UK's argument that the SLC test better reflects the economic analysis utilised in the merger review process, through its focus on determining whether a merger will significantly reduce competition. In contrast, the dominance test requires competition regulators to force the results of their economic analysis into a dominance framework. Not only does this compromise the integrity of the analysis, it also tends to reduce legal certainty. Although the EC maintains there is a great deal of ability to innovate with the dominance test, there is reason to doubt that assertion, especially as regards mergers in oligopolistic markets. Recent setbacks for the Commission at the

European Court of First Instance support this view. It may now be necessary, according to the CI delegate, either to change the existing EC dominance test to an SLC test or to recognise that the straightjacket of recent Court decisions may force the Commission to permit mergers which should be blocked.

A United States delegate pointed out that although more jurisdictions have dominance rather than SLC tests, the trend favours the SLC. In addition, jurisdictions having both tests tend to use the SLC. The delegate also indicated that there are three potential differences in the tests. One concerns the mechanisms likely to lead to price increases. As the UK and Ireland argued, the SLC test allows one to capture anticompetitive shifts in non-co-operative oligopoly equilibria. It might be more difficult to do so using a dominance test. A second difference is that the degree of market power required before one can challenge a merger is probably higher with a dominance test. The third difference concerns the treatment of efficiencies, a significant issue given the importance of dynamic efficiency to long term economic growth.

The delegate emphasised the need to move away from looking at market power alone, to instead consider the impact of a merger on consumer welfare or total economic welfare. Many mergers that increase market power to some extent will in fact make consumers better off in the long run by reducing prices and increasing output.

A clear definition is needed for dominance and for competition. Traditionally the European Courts have interpreted dominance to mean the ability to act independently of customers and competitors. But even a monopolist cannot act independently of its customers. It is constrained by competition from substitutes. Once one acknowledges that the legal definition of dominance has no economic meaning whatsoever, then it must be admitted that even a merger to monopoly might make consumers better off if it generates enough efficiencies. It is also worth noting that it does not take much in the way of efficiencies to outweigh a five percent increase in price, i.e. the hypothetical price increase used by the US in defining markets.

A delegate from New Zealand remarked when his country was considering making the switch from a dominance to SLC test, it was often stated that if one is rigorous in using analytical tools, it does not really matter which test is applied. The answer to that, reinforced in this roundtable, is that merger review requires taking some fairly sophisticated economic concepts and trying to turn them into legal language. The real issue then is which of the two tests best facilitates doing that, and in this, as the UK has also argued, the SLC appears to have the advantage.

A German delegate reminded delegates that there are a multiplicity of dominance and SLC tests, and that different pairs of these can actually be very similar. This is reflected, for example, in the US and German merger guidelines. As for legal certainty, the dominance test at least has fixed thresholds that might increase legal certainty. In addition, a great deal would be lost in legal certainty if jurisdictions applying the dominance test switched to the SLC. Germany does not say that one test is better than another, but whichever test is used, one should stick to it in order to increase legal certainty based on past jurisprudence.

A delegate from Switzerland said that the legal texts in his country are openly worded and able to combine the two tests. A dominance test is applied first and then efficiencies are considered. A merger must be blocked if it will create or reinforce a dominant position capable of doing away with effective competition. This could be interpreted as containing an SLC. The applicable Swiss law could therefore accommodate the market structure test as well as the SLC test. The practice of the last seven years, though, was particularly based on the market structure test. In view of the high thresholds, the SLC test may at times be particularly appropriate in smaller economies. Concerning efficiencies, Switzerland believes these should be considered by the competition authorities, and not merely in the context of applying a ministerial over-ride.

7. Chairman's closing remarks

In drawing the roundtable to a close the Chairman spoke approvingly of what the US said in its final intervention. There are cases, perhaps few, where there could be a difference in result depending on the test applied. Another important issue is should one start with the law, then make an economic analysis and subsequently try to fit that into the law even though it does not really reflect the economic thinking, or should it be the other way around. A third point is that it would be difficult to tell the outside world that there is no need to be concerned about the wording of a merger test because all competition authorities do roughly the same thing, and they do it well and nobody can control it.

RÉSUMÉ DE LA DISCUSSION

1. Différences entre les tests d'évaluation des fusions

Le Président ouvre la discussion avec le Taipei chinois, notant qu'il est indiqué dans sa contribution que « les objectifs généraux définis dans la Loi de régulation du commerce (Fair trade law, ou FTL) ne plaident ni en faveur du test de réduction substantielle de la concurrence ni en faveur du test de position dominante dans l'évaluation des fusions. La loi retient le critère de l'intérêt général » (paragraphe 2). Le Taipei chinois figure parmi les rares pays qui appliquent ce critère. Le Président demande au Taipei chinois de décrire les éléments pris en considération pour appliquer ce test, et de préciser si ces éléments sont indiqués dans les lignes directrices et s'ils sont généralement les mêmes d'une affaire à l'autre.

Le délégué du Taipei chinois explique que les objectifs de la FTL ne se limitent pas à la protection et à la promotion de la concurrence : la FTL a également pour mission « d'assurer le maintien de l'ordre en matière commerciale », de protéger les consommateurs, d'assurer l'équité de la concurrence, et de promouvoir la stabilité et la prospérité économiques. Cette multiplicité d'objectifs explique pourquoi ni le test de réduction substantielle de la concurrence (substantial lessening of competetion, ou SLC) ni le test de position dominante n'ont été choisis pour l'examen des fusions. L'article 2 de la FTL précise que la Commission de régulation du commerce ne s'opposera pas à une fusion notifiée si « l'ensemble des avantages économiques escomptés de la fusion sont supérieurs aux préjudices résultant de la limitation de la concurrence ».

La concurrence est clairement l'un des principaux éléments pris en compte pour déterminer l'impact net des fusions. Les barrières à l'entrée, le nombre d'acteurs du marché considéré et le niveau de concentration sont aussi des facteurs importants. D'autres circonstances non directement liées à la concurrence sont également examinées, notamment le fait que l'une des parties soit une entreprise en difficulté.

La Commission de régulation du commerce travaille en ce moment à l'élaboration de lignes directrices sur les fusions, qui devront être finalisées en novembre 2003.

Le Président se tourne alors vers les États-Unis, notant que dans ce pays, pour déterminer les incidences d'une fusion sur la concurrence, on applique le test de la réduction substantielle de la concurrence, en prenant en compte le surplus du consommateur et les économies d'échelle. Le Président demande si, de l'avis des États-Unis, une convergence internationale des tests appliqués aux fusions serait une chose souhaitable. Dans l'affirmative, les États-Unis ont-ils déjà envisagé d'adopter le test de la position dominante, qui est appliqué par beaucoup plus de pays que le test SLC ? Dans la négative, pourquoi ?

Un délégué des États-Unis explique que le test SLC, comme le test de la position dominante, a pour but de déterminer si une fusion va entraîner l'émergence ou le renforcement d'une puissance de marché de manière à permettre à l'entité fusionnée de pratiquer des prix plus élevés que le niveau concurrentiel, seule ou en coordination avec d'autres acteurs. S'agissant de la convergence internationale,

le plus important est que les lois sur les fusions des différents pays partagent les mêmes objectifs, qu'ils aient le même niveau de tolérance pour la puissance de marché et qu'ils appréhendent la question selon le même cadre d'analyse.

Le droit anti-trust américain s'est élaboré essentiellement par la jurisprudence et non par la loi. La formulation de la loi importe moins que la manière dont elle est appliquée, dans la mesure où la formulation n'affecte pas la possibilité d'analyser si une fusion est susceptible de porter tort aux consommateurs. Le test SLC tel qu'il est appliqué aux États-Unis obéit à ce principe. S'agissant du test de position dominante, les États-Unis n'ont pas suffisamment d'expérience pour déterminer s'il y est également conforme.

La section 7 de la Loi Clayton interdit les acquisitions si elles entraînent une réduction substantielle de la concurrence ou si elles donnent naissance à un monopole. Comme une position dominante équivaut à un monopole, on peut dire que les États-Unis appliquent à la fois le test SLC et le test de la position dominante. Mais comme le test SLC permet de censurer un plus grand nombre de fusions, les autorités américaines de la concurrence appliquent systématiquement le test SLC et non le critère « est susceptible de donner naissance à un monopole ». Étant donné que la pratique actuelle leur donne satisfaction, les États-Unis n'ont pas envisagé d'adopter une démarche différente.

Le Président s'adresse ensuite à la Norvège qui, dans sa contribution écrite, note que « le seul objectif de la loi sur la concurrence est l'efficience économique, laquelle équivaut à un test d'intérêt général » (paragraphe 2). Pourtant la Norvège est pratiquement le seul pays à appliquer le test du surplus global et non du surplus du consommateur. Cela signifie qu'une fusion anticoncurrentielle susceptible d'entraîner des hausses de prix peut être autorisée si elle permet des économies d'échelle qui compensent cet inconvénient. Le Président demande si la situation s'est déjà produite.

Un délégué de la Norvège confirme que la Norvège fait référence au critère de surplus global, c'est-à-dire que la taille du gâteau importe plus que la manière dont il est divisé entre les acteurs du marché. En poussant à l'extrême ce principe, une fusion pourrait être acceptée si elle accroît le surplus global tout en réduisant le surplus du consommateur. Le délégué doute que cette situation se soit jamais produite.

En pratique, dans le cas d'une fusion accroissant considérablement la puissance de marché, la Norvège ne serait pas disposée à donner préséance à l'argument des économies d'échelle escomptées. Il y a à cela au moins deux raisons : d'abord, les économies d'échelle escomptées sont très difficiles à évaluer pour l'autorité de la concurrence; par ailleurs, une fusion qui réduit la pression concurrentielle tend à réduire les chances de voir se concrétiser les économies d'échelle promises. C'est dans les cas limite – c'est-à-dire si une réduction de la concurrence est à prévoir mais que l'autorité de la concurrence n'est pas sûre qu'elle sera forte – que l'argument des économies d'échelle peut avoir le plus de poids.

Le Président passe ensuite à l'Allemagne, pays qui applique le test de position dominante. La position dominante collective est également prise en compte, et les économies d'échelle interviennent dans l'évaluation globale de la position dominante. Toutefois, l'Office fédéral des cartels « estime que, du moins dans les cas de position dominante claire, les fusions ne peuvent pas être autorisées uniquement sur la base des gains d'efficience » (paragraphe 20). Le Président demande plus de précisions sur la manière dont l'Allemagne intègre les économies d'échelle dans l'examen des fusions.

Un délégué de l'Allemagne explique que la troisième variante de la position dominante à laquelle fait référence la loi, à savoir la puissance de marché écrasante, est la plus importante dans la pratique, et que la loi sur la concurrence appréhende cette puissance de marché à partir d'hypothèses basées sur les

parts de marché. Il ne s'agit toutefois là que d'un point de départ, et la loi prévoit un certain nombre d'autres critères. Les économies d'échelle ne font pas partie de ces critères.

Même si une fusion doit accroître les économies d'échelle, l'Allemagne estime que la concurrence perdrait sa fonction d'orientation et de contrôle si ces économies d'échelle passent par la création ou le renforcement d'une position dominante. Les économies d'échelle sont donc traitées comme un aspect distinct de la concurrence et ne sont examinées que dans les rares cas ou le Ministère fédéral de l'économie est sollicité pour annuler une décision d'interdiction de l'autorité de la concurrence. Le Ministère applique alors un test fondé sur l'intérêt général plutôt qu'un test portant sur la seule concurrence.

Le Président note deux points particulièrement intéressants dans la contribution du Brésil. Alors que l'Allemagne indique dans sa contribution écrite que son test de position dominante inclut un test SLC, pour le Brésil c'est le test SLC qui inclut un test de position dominante. Deuxièmement, beaucoup de pays estiment dans leur contribution que la nature du test employé n'est pas très importante, mais s'attardent sur les cas où les deux tests produiraient des résultats différents. C'est le cas du Brésil. Dans l'affaire des brasseries Ambev, différents tests ont été appliqués par le Conselho Administrativo de Defesa Econômica (CADE) et le Ministère des Finances, avec des conséquences différentes. Le Président invite la délégation du Brésil à revenir sur cette affaire et à expliquer le pourquoi des divergences entre les organismes d'examen.

Un délégué du Brésil précise que l'article 54 de la loi 8884/94 prévoit que « Tout acte susceptible de limiter ou d'entraver une concurrence ouverte, ou de se traduire par le contrôle du marché de certains produits ou services, sera soumis à l'examen du CADE. » Il apparaît donc que le test de position dominante comme le test SLC peuvent être appliqués. Toutefois, si la section principale de l'article 54 fait référence aux deux tests, l'alinéa 1 de ce même article renvoie plutôt au principe de la règle de raison dans l'examen des fusions. Autrement dit, il faut toujours appliquer le test SLC puisqu'à lui seul il intègre le critère des économies d'échelle. Le délégué note aussi que le droit de la concurrence brésilien envisage également l'application d'un test d'intérêt général, mais que cela ne s'est jamais produit.

L'application d'un test de position dominante ne tenant pas compte des économies d'échelle aurait conduit à l'interdiction de la fusion Ambev. Mais le Secretaria de Acompanhamento Econômico (SEAE) et le Secretaria de Direito Econômico (SDE) ont déterminé que la fusion permettrait un certain niveau d'économies d'échelle et ont recommandé la cession d'actifs correspondant à l'ensemble de l'activité bière de l'une des trois marques principales. Le CADE a quant à lui estimé que les économies d'échelle seraient plus importantes et a recommandé la cession de l'ensemble des actifs d'une marque mineure. Cette différence de vues reflète bien le caractère subjectif de l'évaluation des économies d'échelle.

2. Changement des critères de fond

Le Président note qu'en 1977, l'Australie avait abandonné le test SLC au profit du test de position dominante, afin d'encourager le mouvement de concentrations. Puis en 1992 elle est revenue au test SLC, dans le but de faire obstacle aux fusions qui posaient des problèmes de puissance de marché coordonnée. La contribution de l'Australie comprend un exposé sur l'affaire de la fusion Caltex-Ampol et explique pourquoi ce dossier aurait connu une issue différente selon que l'on appliquait le test SLC ou le test de position dominante simple. Le Président invite l'Australie à commenter cette affaire.

Un délégué de l'Australie indique que le retour au test SLC supposait que l'on souscrive à l'idée qu'il faut bloquer les fusions pouvant avoir des effets dommageables, et pas uniquement celles qui créent

ou renforcent une position dominante. Lorsque les critères ont été changés, une liste de critères économiques de base a été insérée dans la loi pour guider les tribunaux. Le délégué note également que l'examen des fusions se double en Australie d'une procédure rarement usitée, prévoyant qu'une fusion anticoncurrentielle peut être autorisée s'il peut être démontré qu'elle sera apportera un bienfait suffisant en termes d'intérêt général. Selon une longue jurisprudence, l'intérêt général est interprété comme équivalant pour l'essentiel à l'efficience économique, laquelle est envisagée exclusivement dans le contexte de la concurrence. Il y a fort peu de chances que l'argument des économies d'échelle conduise à autoriser une fusion susceptible de réduire la concurrence. Il est en effet peu probable que les avantages des économies d'échelle se concrétisent dans un marché où la concurrence est réduite.

Le passage au test SLC s'est fait sans difficulté particulière et s'est traduit par une légère évolution du taux de rejets prononcés par l'autorité de régulation anti-trust. Pendant un ou deux ans, ce taux a atteint six ou sept pour cent, contre trois ou quatre pour cent avant le changement. Cette augmentation temporaire correspondait au temps d'adaptation au nouveau test pour les entreprises et les juristes.

La contribution de l'Australie relate plusieurs affaires dont l'adoption du test SLC a notablement changé l'issue. Le dossier Caltex-Ampol en est un exemple. Il existait à l'époque cinq grandes sociétés pétrolières. La concurrence des importations était faible et les barrières à l'entrée du marché du raffinage étaient élevées. En outre, les entités qui souhaitaient fusionner étaient les seuls fournisseurs des grands distributeurs indépendants, et la concurrence pour leur clientèle était un élément très important de la concurrence sur le marché de la distribution. Les entreprises durent prendre des engagements assez importants pour que la fusion soit approuvée.

Au moment du passage au test SLC, les responsables politiques avaient proposé quelques solutions de compromis. L'une consistait à adjoindre au test de position dominante celui de position dominante jointe ou collective. Cette idée avait été jugée inopportune. Mieux valait en effet retenir un critère conceptuellement plus clair, de préférence étayé par une jurisprudence fournie, provenant notamment des États-Unis, où existaient également des lignes directrices en grande partie transposables en Australie. De plus, si les tribunaux australiens étaient appelés à manier le concept de position dominante jointe, ils pouvaient l'interpréter comme se limitant aux configurations à deux entreprises (et non à plusieurs). Le terme de position dominante collective pouvait conduire à penser qu'il faudrait établir l'existence d'une forte probabilité de collusion active et non uniquement de comportements coordonnés.

L'Australie conduit actuellement une enquête sur la Loi sur les pratiques commerciales (Trade Practices Act). Fait significatif, quasiment personne ne se prononce en faveur d'un retour au test de position dominante, même parmi les anciens partisans de cette démarche.

Le Président note qu'en mai 2001, la Nouvelle Zélande a également abandonné le test de position dominante simple au profit d'un test SLC. Dans sa contribution, elle décrit un autre exemple intéressant de cas où une même transaction obtient des verdicts différents selon celui des deux tests qui est appliqué. Le Président invite la Nouvelle Zélande à fournir davantage de précisions sur ce point.

Le délégué de la Nouvelle Zélande explique que la demande d'autorisation de la fusion Progressive-Woolworths avait été déposée le jour précédant l'adoption du nouveau test, et modifiée au lendemain de l'entrée en application du changement. Dans un premier temps, cette fusion - qui aurait ramené le nombre des opérateurs de trois à deux - avait été acceptée sur la base d'un test de position dominante simple appliqué au sens étroit, qui revenait à n'interdire que les seules fusions entraînant la création d'un monopole. L'un des concurrents interjeta appel de la décision de la Commission du commerce au motif qu'elle avait appliqué le test de position dominante. Dans un premier temps, la décision de la Commission fut maintenue mais une cour d'appel rendit un arrêt contraire. Progressive saisit

alors la plus haute juridiction du pays. Par précaution, Progressive avait également déposé une demande d'autorisation auprès de la Commission du commerce selon le nouveau test. Appliquant un test SLC, et compte tenu de l'élimination d'un acteur majeur du marché (Woolworths), du faible nombre de concurrents sur le marché, et d'autres éléments perçus comme de nature à favoriser la collusion et la coordination (barrières élevées à l'entrée, transparence sur les prix, caractère mature du marché) la Commission détermina alors que la fusion entraînerait une réduction sensible de la concurrence. Cette détermination n'eut en fait aucune incidence parce que Progressive gagna en appel et fut donc autorisée à fusionner sur la base du test de position dominante.

3. Existe-t-il une véritable différence entre les tests en général ?

Le Président amorce la discussion en notant que l'Irlande estime non seulement qu'il existe une véritable différence entre les tests, mais aussi que le test SLC est supérieur au test de position dominante. Il invite l'Irlande à argumenter cette affirmation.

Un délégué de l'Irlande explique que le problème ne concerne pas les fusions faisant intervenir une entreprise bénéficiant d'une position dominante simple. La différence n'est vraiment significative que dans le cas des marchés oligopolistiques.

Lorsqu'elle intervient dans un marché oligopolistique, une fusion peut nuire à la concurrence, soit en ouvrant la voie à une collusion tacite ou expresse (effets coordonnés), soit en entraînant un effet unilatéral. Pour la collusion, la question est de savoir si les entreprises seront en mesure de se coordonner et de monter leurs prix après la fusion. Il n'existe pas de liste figée de critères sur lesquels baser une prédiction avec un degré de certitude élevé. En revanche, s'agissant de l'effet unilatéral, il existe une théorie plus fiable, qui s'appuie sur l'analyse statique comparative de l'équilibre. Les prix peuvent monter dans certains cas et pas dans d'autres, suivant que les membres de l'oligopole se comportent conformément à la théorie de Cournault ou à celle de Bertrand. L'une des principales différences entre l'effet coordonné et l'effet unilatéral est que dans le premier cas, la fusion modifie la nature même de l'interaction qui fonde l'équilibre, alors que dans l'effet unilatéral, on passe simplement d'un équilibre à un autre – moins concurrentiel.

Les tests SLC et de position dominante présentent trois différences majeures. La première est que le test SLC se concentre plus sur la configuration future du marché que sur sa structure. Deuxième différence, corollaire de la première, le test de position dominante peut avoir une influence négative sur les cas relevant de l'article 82 concernant l'abus de position dominante. Le risque est que l'analyse des faits passés, appropriée dans l'application de l'article 82, soit contaminée par l'analyse *ex ante* propre aux fusions. De plus, les entreprises peuvent à juste titre craindre d'être taxées de « dominantes », ce qui risquerait par la suite de les faire tomber sous le coup des interdictions imposées en cas d'abus de position dominante. La troisième différence, et probablement la plus importante, est que le test de position dominante peut conduire à qualifier à tort un effet unilatéral d'effet coordonné.

Le délégué poursuit en expliquant que ce risque de qualification erronée tient à plusieurs raisons. D'abord, il est clair, surtout depuis l'affaire Airtours, que beaucoup de cas d'effet unilatéral échappent au critère de la position dominante. Il peut être tentant de caractériser ces fusions comme produisant plutôt des effets coordonnés : il serait alors plus aisé de soutenir que la fusion crée ou renforce une position dominante collective.

Dans de nombreux cas, les fusions interviennent entre deux acteurs mineurs qui espèrent ainsi atteindre une taille comparable à celle de leurs plus grands concurrents. Ces fusions auront tendance à favoriser les parallélismes de comportement, lesquels peuvent eux-mêmes induire des collusions (tacites ou

expresses). Il peut donc être tentant de considérer sur la base de ce parallélisme qu'une fusion doit être censurée parce qu'elle facilitera des pratiques de collusion, alors même que le risque le plus réel est celui d'un effet unilatéral.

Il existe aussi un risque de qualification erronée pour les fusions qui combinent effet unilatéral et effet coordonné. Par conséquent, étant donné que le concept d'effet unilatéral est plus abouti, il peut être préférable de retenir cette théorie. Paradoxalement, le test de position dominante risque quant à lui de donner lieu à l'utilisation abusive du concept de collusion tacite.

La supériorité du test SLC n'est pas anodine pour trois raisons, particulièrement à la lumière des éléments développés précédemment sur la qualification abusive. D'abord, dans le contexte de la réforme de la réglementation des fusions de la Commission européenne, on s'est surtout préoccupé du risque de voir bloquer des fusions qui ne sont pas dommageables à la concurrence. Les autorités de concurrence devraient aussi se soucier des cas où la réglementation sur les fusions de la Commission sera impuissante à censurer les fusions anticoncurrentielles. Ce risque est moindre avec le test SLC. Deuxième aspect, du fait du risque de qualification erronée associé au test de position dominante, il se peut que les remèdes préconisés en fonction de cette analyse soient inadaptés. Troisièmement, le fait de faire rentrer artificiellement des effets unilatéraux dans une analyse de position dominante revient à créer un effet « boite noire » qui accroît l'incertitude juridique.

Si les autorités de concurrence doivent appliquer plusieurs théories extrêmement différentes sur les effets anticoncurrentiels, il sera utile que le libellé du règlement tienne compte des nuances entre les théories plutôt que de tenter de les gommer. La certitude juridique s'en trouvera accrue.

Le Président note que le Mexique partage l'opinion que les deux types de tests, SLC et position dominante, ne reviennent pas au même. Les autorités de concurrence peuvent choisir celui des deux qu'elles appliqueront. La contribution écrite n'indique pas clairement selon quels critères se fait ce choix. Elle décrit l'affaire de la fusion Bancomer/Aetna International/Ixe Banco/Afore XXI/Siefore XXI qui met en évidence la différence entre les deux tests.

Un délégué du Mexique explique que dans ce pays, l'autorité de concurrence doit d'abord appliquer un test de position dominante (qui inclut le concept de position dominante collective), et examine ensuite d'autres facteurs.

La théorie économique plaide davantage en faveur du test SLC. La SLC est un concept dynamique – et non statique comme la position dominante – qui rend mieux compte des conditions du marché et des effets possibles des fusions, alors que le test de position dominante est basé sur des variables structurelles. En revanche, d'un point de vue pratique et juridique, le test de position dominante présente certains avantages. D'abord, il est plus facile à traduire sous forme de loi et plus simple à mettre en œuvre. Pour une autorité de concurrence ne possédant pas une grande expérience, le test de position dominante est intéressant parce qu'il est moins technique à appliquer. Il est aussi plus transparent, ce qui est souhaitable pour les entreprises comme pour les tribunaux. En bref, le test de position dominante présente un plus grand degré de certitude juridique. Le Mexique n'a pas encore rencontré de problèmes pratiques majeurs dans l'application de ce test, ce qui confirme qu'il est mieux adapté aux autorités de concurrence possédant peu d'expérience, de savoir-faire technique et de ressources.

La transaction Bancomer/Aetna International/Ixe Banco/Afore XXI/Siefore XXI est un exemple de fusion qui recevrait le feu vert des autorités si elle n'était examinée que sous l'angle des parts de marché (environ 50 pour cent du marché). Toutefois, pour diverses raisons, l'entité fusionnée aurait été en mesure de contrôler les taux d'intérêt. C'était là le principal problème de concurrence soulevé par cette affaire. Finalement, la fusion ne fut pas vraiment interdite mais d'autres autorités concernées n'approuvèrent pas la

transaction et les banques renoncèrent d'elles-mêmes à leur projet. Il n'est pas sûr qu'un veto aurait été confirmé par les tribunaux.

Le Président note que, comme le Mexique, la France estime qu'il y existe des différences entre les tests, ou plus exactement entre les approches européenne et américaine. L'évaluation des effets anticoncurrentiels et le traitement des économies d'échelle ne sont pas les mêmes dans les deux cas. La France note dans sa contribution que cela tient essentiellement à une différence de perspective temporelle. Le Président invite la France à préciser ce point de vue.

Un délégué de la France explique que le droit français fait la synthèse entre les deux tests car il vise à déterminer « si une fusion est susceptible d'être préjudiciable à la concurrence, notamment parce qu'elle créée ou renforce une position dominante ». En pratique, la plupart des décisions prises par le Ministère des finances en matière de fusions reposent sur la notion de position dominante simple ou collective. Récemment toutefois, dans les affaires M. Bricolage-Tabur et La FoireFouille-Pier Import, le Ministère a eu recours à la théorie de l'effet unilatéral. On voit par là que la France tend à avoir une position de synthèse.

Le délégué souligne qu'il existe trois différences entre les tests de position dominante et de SLC. D'abord le test de position dominante est moins bien apte que le test SLC à rendre compte de l'effet unilatéral. Deuxièmement, l'évaluation des économies d'échelle peut produire des résultats différents avec les deux types de tests. Il est plus aisé de rendre compte des économies d'échelles avec le test SLC. Cet aspect ne doit pas être surestimé parce que l'estimation des économies d'échelle est de toute façon très délicate et leur prise en compte peut supposer une comparaison entre des réductions temporaires de la concurrence et des gains d'efficience à long terme. Troisièmement, il existe une différence d'horizon temporel dans ces deux tests. Le test SLC appliqué à l'effet unilatéral implique une analyse de relativement court terme. Par contraste, le test de position dominante, surtout de position dominante collective, exige une analyse de long terme, afin d'envisager comment le marché va évoluer après la fusion.

Un autre délégué de la France note que le contrôle de concentration pratiqué par son pays se comprend mieux dans le contexte de l'examen en trois phases du Ministère de l'économie et du Conseil de la concurrence. Il soutient que, tout compte fait, le test français s'apparente au test de la réduction substantielle de la concurrence, mais mâtiné de quelques aspects du test de position dominante. Le délégué note qu'en janvier 2002 le Conseil de la concurrence a eu recours au concept de position dominante collective sur la base des critères établis dans la décision du Tribunal de première instance (TPI) de l'Union européenne dans l'affaire Airtours. Le dossier français s'agissait d'un cas d'abus de position dominante par un duopole opérant sur le marché de la distribution et d'assainissement de l'eau. Ce marché était caractérisé par la transparence sur les prix ; la possibilité réelle de représailles en cas de déviation par rapport au comportement coordonné ; l'impossibilité, pour les concurrents comme pour les acheteurs, de contourner les effets de cette coordination. Cet abus de position dominante avait été facilité par la création d'une filiale commune qui permettait aux deux entités de coordonner leur comportement dans les réponses aux appels d'offres pour des franchises publiques. Le Conseil a recommandé au Ministère d'imposer aux entreprises de modifier ou de démanteler leur coentreprise afin d'annuler ses répercussions possibles en termes d'abus de position dominante.

Le Président observe que, aux yeux de l'Italie, ces tests sont effectivement différents mais ce n'est pas forcément déterminant dans beaucoup de cas. L'Italie examine dans sa contribution la manière dont les économies d'échelle sont prises en considération dans les deux tests. Le Président invite l'Italie à faire des commentaires sur ce point.

Un délégué de l'Italie conteste l'opinion formulée dans le document de référence du Secrétariat selon laquelle le champ d'application respectif des tests de position dominante et de SLC se

chevaucheraient dans certains cas mais seraient distincts dans d'autres. Ce n'est probablement pas le cas des tests de position dominante tels qu'ils sont pratiqués en Europe puisqu'ils comportent un deuxième volet qui exige qu'il y ait réduction effective de la concurrence. Le contenu de ce deuxième volet n'est pas tout à fait clair. En effet si on lui donne la même interprétation qu'un test SLC, cela signifie que le test de position dominante ne permet pas de bloquer des fusions sans qu'il y ait réduction substantielle de la concurrence.

Le deuxième point développé par le délégué est que dans les pays qui, comme l'Australie et la Nouvelle Zélande, ont abandonné le test de position dominante au profit du test SLC, le concept de position dominante était pris au sens étroit, c'est-à-dire limité à la position dominante simple. Par ailleurs, le Royaume-Uni et l'Irlande, qui envisagent actuellement d'adopter le test SLC, abandonneraient ce faisant un test de l'intérêt général et non un test de position dominante. Les pays qui, comme l'Italie, pratiquent un test de position dominante couvrant la position dominante collective pourraient parvenir à une conclusion différente sur l'opportunité du passage au test SLC.

Le délégué estime comme son collègue irlandais qu'il peut exister un vide juridique entre les tests, surtout depuis la décision du TPI dans l'affaire Airtours. Il rappelle toutefois que le test de position dominante a considérablement évolué et ne voit pas pourquoi il ne pourrait pas continuer de le faire afin de combler au moins en partie ce vide. Le TPI a appliqué un test de position dominante collective alors que, lorsque le Conseil avait expressément exclu la position dominante collective lorsqu'il a examiné le Règlement sur les fusions. En outre, il faut se rappeler que le test SLC n'est pas la seule possibilité autre que le test de position dominante. On pourrait par exemple retenir une augmentation de la puissance de marché au détriment des consommateurs. Cette notion est plus précise que la SLC, qui est en fait un concept fourre-tout qui entraîne donc une certaine incertitude juridique.

S'agissant des économies d'échelle, le délégué note que le test en deux volets de l'UE signifie qu'il est envisageable de les prendre en compte, éventualité encore renforcée par la mention des consommateurs dans le Règlement sur les concentrations.

Répondant à la présentation du délégué de l'Italie, le Président rappelle que l'Australie indique dans sa contribution que le passage du test de position dominante au test SLC ne diminue pas notablement l'incertitude juridique. Il note également que, même si un nombre relativement faible de cas tombent dans le vide juridique identifié par le délégué de l'Irlande, le nombre de ces affaires pourrait tout de même être appréciable sachant que rares sont les fusions qui sont intrinsèquement anticoncurrentielles.

Le Président note que la CE souligne que l'important n'est pas tant la nature des tests que la manière dont ils sont appliqués. La Commission indique que son test de position dominante « s'est avéré un instrument adaptable à un large éventail de situations. De plus, ce test a été utilisé avec profit pour évaluer l'incidence dynamique des fusions et il n'a pas du tout cantonné la Commission à des analyses statiques du marché » (paragraphe 23). Il invite la CE à formuler plus en détail ses vues sur la différence entre les tests SLC et de position dominante.

Un délégué de la Commission européenne explique que l'on peut classer les fusions horizontales « à problèmes » en trois catégories : position dominante simple, cas évidemment couvert par les tests de position dominante ; effets coordonnés dans des marchés oligopolistiques, également mis en évidence par les tests de position dominante comme l'attestent plusieurs jugements du TPI ; et effets anticoncurrentiels dans les marchés oligopolistiques ne relevant pas d'effets coordonnés. Cette troisième catégorie pourrait échapper au Règlement sur les fusions dans sa forme actuelle.

Le délégué n'approuve pas une interprétation souvent faite de l'affaire Airtours. Plutôt que de limiter la position dominante collective aux risques de collusion, le TPI a simplement eu recours à des

critères formels pour établir qu'il y avait coordination tacite. Il n'a nulle part fait mention d'effets unilatéraux.

Même si certains observateurs perçoivent un vide concernant les effets unilatéraux, il ne serait peut-être pas judicieux de modifier le règlement sur les fusions pour adopter un test SLC. Ce changement entraînerait une incertitude juridique et pourrait conduire à des divergences entre les législations des États membres de l'UE et l'Union elle-même.

La formulation exacte des critères de fond n'est pas le plus important. Ce qu'il faut c'est des lignes directrices et une jurisprudence pour guider l'interprétation. Dans l'affaire Gencor, le TPI a affirmé que la position dominante dans le contexte du règlement sur les fusions renvoie à une situation dans laquelle une ou plusieurs entités exploitent leur puissance économique. Cette interprétation est très proche de la notion de puissance de marché, laquelle est, nul ne le contestera, au cœur de l'analyse des fusions. Il n'est donc pas forcément indiqué de modifier la formulation de l'examen des fusions de la CE. En tout état de cause, la CE s'emploie actuellement à la rédaction de lignes directrices sur les fusions qui envisageront très certainement les cas de fusions entraînant des effets anticoncurrentiels en l'absence de position dominante simple ou de collusion tacite.

Le Président se tourne ensuite vers la Hongrie qui dans sa contribution estime qu'il n'existe pas de différence notable entre les deux tests. La Hongrie cite une affaire intéressante de fusion dans le secteur du raffinage du sucre. Le Président invite la Hongrie à donner plus de précisions sur cette transaction.

Un délégué de la Hongrie note pour commencer que l'affaire Südzucker est un exemple récent dans lequel le Conseil de la concurrence a eu recours au concept de position dominante collective pour évoquer les risques de comportement coordonnés après une fusion.

Un autre délégué de la Hongrie indique que cette affaire, le Conseil de la concurrence a établi une distinction entre deux catégories de position dominante collective. La première catégorie est de nature structurelle. Lorsque le nombre d'acteurs passe de trois à deux, l'intensité de la concurrence diminue parce que, dans le cas de produits homogènes avec transparence des marchés, un nouvel équilibre de prix s'établit pour maximiser les profits, conduisant le plus souvent à un niveau de prix plus élevé. Ces prix peuvent être maintenus parce que chacune des deux entreprises peut sanctionner l'autre en cas de rupture du parallélisme. Pour évaluer la probabilité de ce type de dommage dans l'affaire Südzucker, on a calculé l'indice Herfindahl-Hirschman (HHI) et évalué les barrières à l'entrée. La fusion aurait porté l'indice de 3 400 à 5 300 et les barrières à l'entrée ont été jugées élevées.

Le deuxième problème de concurrence tenait aux comportements, puisqu'il s'agissait de déterminer dans quelle mesure la fusion aurait pu faciliter des pratiques de collusion expresse. La collusion expresse était plausible du fait des rencontres fréquentes des parties au sein du Conseil du sucre, l'organe préparatoire de régulation du secteur.

Il existait heureusement pour le premier problème (structurel) un remède qui pouvait également résoudre le problème comportemental. En effet, la fusion proposée s'inscrivait dans le cadre d'une transaction multinationale entre Südzucker et la Financière Franklin Roosevelt S.A.S. La transaction reçut le feu vert des autorités sous réserve que Südzucker cède à un tiers son pouvoir de contrôle sur l'une des filiales hongroises concernées. Grâce à cette solution, le nombre de concurrents ne serait pas réduit par la fusion.

4. Existe-t-il une différence entre le test SLC et le test de position dominante dans l'examen des hypothèses de fusions évoquées dans la note du Secrétariat ?

Le Président se réfère aux quatre hypothèses exposées dans la note du Secrétariat. Des réponses très diverses ont été obtenues à la question de savoir si les résultats obtenus seraient différents selon le critère retenu dans ces situations. Pour un certain nombre d'intervenants, par exemple l'UE, l'Allemagne et les Pays-Bas, cela ne ferait aucune différence. La Finlande en revanche pense qu'il pourrait y avoir une différence s'agissant d'une série de très petites fusions dont chacune serait peu significative prise individuellement, mais qui pourraient aboutir finalement à une diminution de la concurrence.

Un délégué de la Finlande indique que dans son pays, la réglementation de la concurrence repose actuellement sur le test de position dominante. S'il fallait adopter le critère SLC, les tribunaux devraient attacher une certaine importance à une telle modification. Selon lui, ce changement serait interprété comme signifiant qu'une gamme plus importante de fusions pourraient être censurées comme étant anticoncurrentielles. Dans ce contexte, il pourrait y avoir une différence entre les deux critères lorsqu'on serait en présence par exemple d'une série de petites fusions. Du fait de la présomption qu'un test SLC nouvellement adopté aurait un champ d'application plus large, une telle modification permettrait probablement d'intervenir plus facilement de manière plus précoce. Il pourrait aussi y avoir une différence concernant une fusion entre les 2ème et 3ème plus gros opérateurs d'un marché par exemple. Peut-être la théorie de la position dominante oligopolistique serait-elle appliquée dans ce cas, mais le test SLC serait néanmoins plus souple dans une telle situation. Il pourrait également avoir un champ d'application plus large dans les fusions affectant des marchés innovants.

Pour conclure, le délégué précise toutefois que la manière dont un test est appliqué est sans doute plus importante que le test en lui-même.

Le Président note que selon le Royaume-Uni, il pourrait y avoir une différence entre les deux critères dans les cas où il y avait peu de concurrence avant la fusion, et dans les cas où il n'existe pas de position dominante mais où il est tout de même possible que les prix augmentent après la fusion sans pour autant qu'il y ait coordination.

Un délégué du Royaume-Uni détaille une proposition récente de fusion entre banques. Au Royaume-Uni, quatre grandes banques ont, pendant des années, détenu à elles seules quelque 70 pour cent du marché. Un peu de concurrence est venu de la part des anciennes « building societies », les caisses d'épargne, qui ont eu la possibilité de se transformer en banques. Abbey National était la plus grande des nouvelles banques de ce type, avec environ cinq pour cent du marché, et Lloyds, qui proposait de la racheter, détenait environ 22 pour cent du marché. Abbey National venait concurrencer les autres banques non seulement sur le créneau des particuliers, mais aussi sur celui des petites entreprises. A la fin, la fusion a été bloquée essentiellement pour des motifs de réduction sensible de la concurrence.

Pour ce délégué, si l'on avait appliqué un critère de position dominante du type de celui préconisé par la CE, le résultat aurait été entaché d'une immense incertitude juridique. La fusion ne serait peut-être même pas allée jusqu'à une deuxième phase d'investigation, car on n'était pas en présence d'une position dominante simple et le risque de coordination tacite apparaissait fort peu évident.

L'exemple des fusions entre banques montre que la manière dont la législation est appliquée n'est pas plus importante que la formulation des textes. En effet, on ne jouit pas d'une discrétion totale lorsqu'il s'agit de faire appliquer le droit : devant un tribunal, la lettre de la loi est très importante.

Le délégué britannique se demande si un critère de la position dominante, tout au moins s'il est semblable à celui de la CE, est bien compatible à la fois avec la rigueur analytique et avec la possibilité de

bloquer des fusions qui auraient pour effet d'amoindrir considérablement la concurrence. Le TPI a demandé récemment que les analyses soient menées avec la plus grande rigueur. Il s'ensuit que l'on a désormais le choix entre modifier les termes des textes ou reculer sur le fond. Sans hésitation il faudrait choisir de modifier les termes de la législation.

Le Président mentionne ensuite l'Espagne, qui applique un test très proche de la SLC, mais utilise également des critères identifiés par la Commission pour statuer sur les affaires de fusions.

Un délégué de l'Espagne répond que selon son pays, il n'y a pas de grosse différence entre les tests. Tous deux ont les mêmes objectifs et tous deux mettent l'accent sur le pouvoir de marché de l'entité issue de la fusion. En fait, tout dépend de la manière dont ces critères sont appliqués. S'ils le sont avec souplesse, en prenant en compte toutes les variables pertinentes, et d'une manière transparente, fondée sur une analyse rigoureuse et cohérente, ils devraient aboutir en fait à une même décision.

En principe, on pourrait penser que le test SLC offre une plus grande souplesse. L'Espagne peut citer un exemple de fusion où l'on a utilisé un test proche de la SLC et où, appliqué strictement, le critère de la position dominante aurait donné un résultat différent. Cette affaire concernait deux grandes banques ayant des participations dans des entreprises opérant sur des marchés à forte concentration, à savoir l'électricité et les télécommunications. Une fusion entre les banques aurait abouti dans les faits à réunir les deux principaux opérateurs d'électricité et de télécommunication, et aurait eu des conséquences négatives sur la concurrence. Des remèdes d'ordre structurel ont été appliqués. Alors même que les banques désireuses de fusionner n'occupaient pas et ne risquaient pas d'acquérir une position dominante sur ces marchés, le fait qu'elles détiennent des participations dans plusieurs des principaux opérateurs d'électricité et de télécommunications aurait facilité leur coordination stratégique et donc nui à une concurrence efficace.

5. Le test retenu a-t-il un impact sur la prise en compte des efficiences ?

Le Président remarque que selon un certain nombre de pays (Norvège, Irlande et Brésil par exemple), le test retenu a des conséquences sur la manière dont les efficiences sont prises en compte. Le Mexique indique également, au paragraphe 37 de sa contribution : « Le critère de la position dominante permet d'obtenir des résultats plus prévisibles et d'abaisser les incertitudes, mais il présente le risque d'aboutir à bloquer des fusions qui entraîneraient de substantiels gains d'efficience… » Cela étant, le Président note aussi que plusieurs intervenants, dont l'Espagne, la Nouvelle-Zélande ou la Commission européenne, estiment que quel que soit le test retenu, cela ne fait aucune différence dans la prise en compte des efficiences.

On peut lire au paragraphe 29 de la contribution du Royaume-Uni : « Il est plus difficile de bâtir une fondée sur l'efficience autour de la notion juridique de position dominante, dans la mesure où le critère de position dominante n'est pas directement lié aux conséquences économiques d'une fusion. Ainsi, il est très difficile d'apprécier des efficiences, qui amènent ensuite aux conséquences économiques d'une transaction, lorsque cette évaluation n'a pas été effectuée. » Le Royaume-Uni citait deux affaires : UK Neopost-Ascom (systèmes d'affranchissement) et Prosper de Mulder Ltd-Croda International plc. Le Président demande des informations complémentaires sur ces deux affaires.

Un délégué du Royaume-Uni choisit de revenir sur l'affaire de l'affranchissement postal, dans laquelle trois entreprises en présence devaient n'en faire plus que deux après la fusion des numéros deux et trois du marché et où l'entreprise la plus importante, Pitney Bowes, avait une part du marché largement supérieure à 50 pour cent. Au cours de la première phase de l'investigation, il est apparu qu'il existait un risque sérieux que la fusion réduise la concurrence de manière significative ; l'affaire a donc été portée

devant la Commission de la concurrence. Au cours de cette procédure, on s'est intéressé de près à ce qu'il adviendrait des parties concernées si elles ne fusionnaient pas. Il est apparu que l'une des entreprises était en déclin et il y avait tout lieu de croire qu'une fusion entraînerait des gains d'efficience très substantiels grâce auxquels l'entité issue de la fusion s'imposerait comme un concurrent plus efficace de l'entreprise dominante. La Commission de la concurrence a donc conclu que la fusion n'aboutirait pas à une réduction sensible de la concurrence et a décidé de l'autoriser.

Comment cette fusion aurait-elle été considérée si l'on avait appliqué le test de position dominante ? Le délégué ne peut répondre avec certitude, compte tenu du degré important d'incertitude juridique lié à ce test. Après l'affaire Airtours, de nombreux commentateurs ont déclaré qu'il était absolument évident que la position dominante collective se limite à la collusion tacite et aux liens structurels entre les entreprises. Le délégué a également entendu des membres de la Merger Task Force de la Commission européenne affirmer que les lignes directrices seraient conçues de manière à montrer que les différents vides juridiques supposés peuvent être comblés par les concepts de position dominante collective, voire oligopolistique. Le fait que deux groupes d'experts aussi distingués puissent aboutir à des résultats aussi différents montre le degré considérable d'incertitude associé au test de position dominante. Le délégué conteste l'idée selon laquelle il existe une jurisprudence considérable qui éclairerait le test de position dominante. Selon lui, l'essentiel de la jurisprudence concerne des affaires relevant de l'article 82 et non des fusions.

Pour revenir aux efficiences, le délégué déclare qu'il ne voit pas comment elles auraient pu être prises en compte dans l'affaire des systèmes d'affranchissement par le test de position dominante. Il suppose toutefois que les efficiences pourraient peut-être être analysées grâce au second volet du test de position dominante de la CE (« … [une position dominante] qui entraverait de manière significative la concurrence dans le marché commun… »).

Le Président passe ensuite aux Pays-Bas, qui appliquent un critère de la position dominante et qui affirment dans leur contribution : « … la législation sur la concurrence ne prévoit aucun moyen de défense fondé sur l'efficience. Une mise en balance de la perte de concurrence d'autre part et du gain potentiel de bien-être économique d'autre part n'a donc jamais été nécessaire » (paragraphe 20). Le Président demande si cela signifie que les efficiences ne sont pas prises en compte du tout, ou bien si elles sont évaluées lors de l'analyse de la position dominante.

Un délégué néerlandais affirme qu'aux Pays-Bas, les efficiences ne sont pas prises en compte du tout lors de l'analyse des fusions, notamment dans l'analyse de la position dominante. Ceci ne constitue pas un oubli du législateur, la question de l'efficience ayant été débattue lors de l'adoption de la réglementation sur la concurrence.

Les arguments relatifs aux efficiences dépendent très fortement de deux facteurs : quelle est l'ampleur de leur définition et quelles preuves sont requises pour établir leur existence. En théorie, les efficiences répercutées sur les clients, même si elles sont le fait d'entreprises exerçant une position dominante, peuvent avoir d'importantes retombées positives sur l'économie dans son ensemble. En conséquence, dans le test de position dominante, les parties devraient-elles pouvoir fonder leur défense sur les efficiences, étant entendu que les parties à la fusion supporteraient la charge initiale de la preuve ? Examiner une telle défense alourdirait la charge administrative des autorités de la concurrence, en particulier lorsqu'elles interviennent dans des délais très serrés et lorsque les parties ont recours à des techniques très élaborées pour défendre leurs dossiers.

Selon le délégué néerlandais, il est plus facile de faire valoir les efficiences ainsi que d'autres conséquences avec le test SLC, au moins dans certaines circonstances. La note des Etats-Unis indique que les efficiences ne justifient presque jamais une fusion devant aboutir à un monopole ou à un

quasi-monopole, et l'Allemagne partage cette vue, approuvée aussi par les Pays-Bas. En d'autres termes, plus les inquiétudes relatives à la concurrence sont vives, plus les efficiences nécessaires pour les compenser devront être importantes.

Le Président en vient ensuite à la République tchèque, qui utilise le critère de la position dominante, c'est-à-dire que l'acquisition d'une position dominante est une condition nécessaire, mais pas suffisante, pour bloquer une fusion. La République tchèque a cité le cas de la fusion KMV-Podebradka dans les eaux minérales, qui a été refusée par l'Office de protection de la concurrence. Dans son évaluation, l'Office a pris en compte certaines économies d'échelle, et on peut lire dans la contribution tchèque : « [Les économies d'échelle sont] un avantage qui renforce la position de négociation vis-à-vis des supermarchés, hypermarchés et autres grands acheteurs. » (paragraphe 2). Ceci, demande le Président, constitue-t-il un argument en faveur ou en défaveur d'une fusion ?

Le délégué de la République tchèque souligne que dans cette proposition de fusion entre les deux plus grands producteurs d'eau minérale en bouteille, l'impact anticoncurrentiel potentiel apparaissait avec netteté, notamment dans les inquiétudes relative au renforcement du pouvoir de négociation vis-à-vis des grands acheteurs.

Pour évaluer cette fusion, l'autorité tchèque de la concurrence a mis en oeuvre plusieurs critères, et en particulier elle a pris en compte les économies d'échelle. L'acquisition d'un pouvoir de négociation fort constituait un avantage très important par rapport aux autres acteurs du marché. Elle pouvait aboutir à évincer ces derniers, ce qui aurait été à l'encontre des intérêts des consommateurs et de la concurrence. De ce point de vue, dans cette affaire précise, ceci a été un argument pour bloquer la fusion.

Passant ensuite à la Corée, qui utilise les deux tests, réduction sensible de la concurrence et position dominante, le Président évoque l'affaire Hanhwa Petrochemical/Daelim Co de 1999 dans laquelle une fusion anticoncurrentielle a été autorisée pour des motifs d'efficience. Il demande des détails complémentaires sur cette affaire.

Un délégué de la Corée explique que cette fusion concernait deux conglomérats. Hanhwa souhaitait racheter l'activité polyéthylène basse densité de Daelim Industries. La fusion devait avoir pour effet de réduire la concurrence, puisque le nombre d'opérateurs sur le marché passerait de cinq à quatre. Néanmoins, lors de son examen, la KFTC a conclu que les conséquences positives des efficiences liées principalement à la production seraient supérieures aux dommages causés par la plus forte concentration du marché et c'est pour cette raison que la fusion a été autorisée. Il est intéressant de noter ici que si la loi coréenne impose la pris en compte des efficiences, elle ne précise pas de quelle manière elles doivent être comparées ou mises en balance.

A ce stade de la table ronde, le Président fait remarquer qu'en ce qui concerne les mesures correctrices, les contributions reçues témoignent là encore d'une grande divergence d'opinions. Pour certains pays, le test retenu influence les remèdes appliqués, ce que d'autres réfutent. Le Président fait également quelques commentaires sur la certitude juridique, rappelant aux délégués l'opinion du Royaume-Uni selon lequel le test de position dominante s'accompagne d'une grande incertitude juridique, ce que conteste un certain nombre d'autres pays. Le Président passe ensuite la parole à la Lituanie, qui affirme dans sa contribution qu'il existe peut-être des moyens de résoudre l'incertitude juridique liée au test de position dominante.

Un délégué de la Lituanie indique que le droit de la concurrence de son pays fait explicitement référence à la création ou au renforcement d'une position dominante, y compris d'une position dominante collective. Il rappelle que l'expérience de l'examen des fusions de la Lituanie ne remonte qu'au début de 1993. Aucune décision n'a fait l'objet d'un appel depuis 1999, date à laquelle la loi lituanienne a été

modifiée pour être mise en conformité avec les textes communautaires, et ce, en dépit du fait que des cessions ont été imposées et que certaines fusions ont été bloquées.

Ce délégué fait remarquer que quel que soit le test utilisé, la certitude juridique augmenterait si l'on expliquait mieux les méthodes et critères appliqués pour prévoir les augmentations unilatérales ou coordonnées du pouvoir de marché. En tant que pays candidat à l'adhésion à l'Union européenne et contraint de ce fait à harmoniser sa législation nationale avec la législation communautaire, la Lituanie attend avec impatience que la Commission européenne publie de nouvelles directives concernant le pouvoir de marché et les positions dominantes.

6. Discussion générale

Un délégué du BIAC souligne qu'une application mécanique du critère de position dominante, donnant une part prépondérante aux parts de marché, n'est pas inhérente au test, et n'exclut pas non plus la prise en compte des efficiences. Cela étant, si l'on veut adopter une approche mécanique, au moins le test de position dominante a-t-il l'avantage de prévoir un seuil qui peut être utilisé pour définir une violation. Il est beaucoup plus difficile d'appliquer le critère de la réduction sensible de la concurrence, comme le montrent les exemples recueillis aux Etats-Unis pendant les années 1960 et 1970. Le risque existe également qu'un test SLC soit utilisé pour bloquer toutes les fusions sur des marchés déjà concentrés en arguant de la probabilité d'effets unilatéraux. Si l'on adopte comme norme un test SLC, il est très important que la latitude qu'il confère soit encadrée par de solides protections d'ordre procédural et par le contrôle judiciaire de toute décision prise par une autorité.

Le monde des affaires est d'avis pour l'essentiel que ce qui est important, ce n'est pas tant le test lui-même que la manière dont il est mis en œuvre. Les entreprises sont à la recherche d'une visibilité dans l'examen des fusions et elles trouvent les lignes directrices particulièrement utiles à cet égard. Le monde des affaires est également très favorable à une convergence entre les différentes autorités dans l'application des normes. Pour les entreprises, il convient d'adopter une approche cohérente fondée sur des principes économiques sains de bien-être des consommateurs.

Selon le délégué de Consumers International (CI), les groupements de consommateurs sont généralement plutôt défavorables à l'utilisation du critère de l'intérêt général dans l'examen des fusions, parce qu'à leur avis, de tels critères ont été par le passé utilisés pour au contraire ignorer l'intérêt général, introduire un certain degré d'arbitraire et ouvrir la porte aux interférences politiques. Or, permettre aux politiques de jouer un rôle dans l'examen des fusions est extrêmement dangereux, car cela revient à ouvrir la porte aux intérêts des entreprises qui peuvent acheter leur influence beaucoup plus efficacement que les groupements de consommateurs.

En ce qui concerne le critère SLC, le délégué de CI est d'accord avec l'argument du Royaume-Uni selon lequel ce critère reflète mieux l'analyse économique utilisée lors de la procédure d'examen des fusions, parce qu'il s'efforce de déterminer si une fusion aura pour effet de réduire sensiblement la concurrence. En revanche, le critère de la position dominante oblige les responsables de la réglementation de la concurrence à faire entrer à tout prix les résultats de leur analyse économique dans le cadre de la position dominante. Cela compromet non seulement l'intégrité de l'analyse, mais tend également à réduire la certitude juridique. Bien que la CE soutienne qu'il existe de grandes possibilités d'innovation avec le test de position dominante, il est permis de douter de cette affirmation, en particulier en ce qui concerne les fusions sur les marchés oligopolistiques. De récents revers essuyés par la Commission devant le TPI des Communautés européennes viennent d'ailleurs conforter cette opinion. Pour le délégué de CI, le moment est peut-être venu soit d'abandonner le critère de position dominante actuellement utilisé par la CE au profit d'un critère SLC, soit de reconnaître que le carcan des décisions

récentes prises par le Tribunal risque de forcer la Commission à autoriser des fusions qui devraient être bloquées.

Un délégué des Etats-Unis relève que bien que les pays utilisant un critère de position dominante soient plus nombreux que ceux utilisant un test SLC, la tendance est plutôt favorable à ce dernier. En outre, les pays qui peuvent appliquer les deux tests ont tendance à privilégier le test SLC. Ce délégué poursuit en indiquant qu'il existe trois différences potentielles entre les deux tests. La première concerne les mécanismes susceptibles d'aboutir à des hausses de prix. Comme l'ont fait remarquer le Royaume-Uni et l'Irlande, le test SLC permet de saisir les variations anticoncurrentielles dans les équilibres d'un oligopole non coopératif. Il serait sans doute beaucoup plus difficile d'y parvenir avec le test de position dominante. La deuxième différence est qu'avec un test de position dominante, il faut probablement un niveau de pouvoir de marché plus élevé pour pouvoir contester une fusion. Enfin, la troisième différence concerne le traitement des efficiences, question fondamentale étant donné l'importance de l'efficience dynamique pour la croissance économique à long terme.

Pour le délégué américain, il faut cesser de considérer uniquement le pouvoir de marché et plutôt prendre en compte l'impact d'une fusion sur le bien-être des consommateurs ou sur le bien-être économique total. De fait, beaucoup de fusions ayant pour effet d'accroître dans une certaine mesure le pouvoir de marché seront en fait bénéfiques pour les consommateurs à long terme en entraînant une réduction des prix et une augmentation de la production.

On a besoin d'une définition claire des notions de position dominante et de concurrence. Les tribunaux européens ont toujours interprété la position dominante comme la capacité à agir indépendamment des clients et des concurrents. Or, même un monopole ne peut pas agir indépendamment de ses clients. Il est tenu par la concurrence des produits de substitution. Une fois que l'on a reconnu que la définition juridique de la position dominante n'a aucune signification économique, il faut donc admettre que même une fusion aboutissant à un monopole peut être avantageuse pour les consommateurs si elle génère suffisamment d'efficiences. Il convient ici de noter qu'il ne faut pas beaucoup de gains d'efficience pour contrebalancer une hausse de prix de cinq pour cent – soit la hausse de prix théorique utilisée par les Etats-Unis pour définir les marchés.

Un délégué de la Nouvelle-Zélande rappelle qu'au moment où son pays envisageait d'abandonner le test de position dominante au profit du test SLC, il a souvent été déclaré que si les outils analytiques étaient appliqués de manière rigoureuse, le test effectivement utilisé avait finalement peu d'importance. La réponse à cette affirmation, confirmée lors de cette table ronde, est que l'examen des fusions nécessite de faire appel à des notions économiques très complexes et de les traduire en langage juridique. Le vrai problème consiste alors à savoir lequel des deux tests se prête le mieux à cet exercice et de ce point de vue, comme l'a déjà souligné le Royaume-Uni, il semblerait que le test SLC l'emporte.

Un délégué de l'Allemagne rappelle aux délégués qu'il existe une multiplicité de tests de position dominante et de tests SLC et que des tests apparemment différents peuvent se révéler en fait très similaires. En ce qui concerne la certitude juridique, le critère de la position dominante a l'avantage de fixer au moins des seuils qui peuvent accroître cette certitude. En outre, une bonne dose de certitude juridique serait perdue si les pays utilisant le critère de la position dominante adoptaient le test SLC. L'Allemagne ne prétend pas qu'un critère est meilleur qu'un autre, mais quel que soit le test utilisé, le mieux est de s'y tenir de manière à accroître la certitude juridique fondée sur la jurisprudence passée.

Un délégué de la Suisse déclare que dans son pays, les textes juridiques sont rédigés de manière ouverte et qu'il est possible de combiner les deux tests. On applique d'abord le critère de la position dominante, et les efficiences sont ensuite prises en compte. Une fusion doit être bloquée si elle risque de créer ou de renforcer une position dominante capable de réduire à néant une concurrence efficace.

On pourrait interpréter ceci comme un élément de SLC. Le droit suisse applicable pourrait donc autoriser un critère de structure du marché aussi bien qu'un test SLC. Cela étant, dans la pratique, les examens pratiqués au cours des sept dernières années se sont surtout appuyés sur le critère de la structure du marché. Compte tenu des seuils élevés, le test SLC peut être quelquefois particulièrement indiqué dans les petites économies. En ce qui concerne les efficiences, la Suisse estime que les autorités de la concurrence devraient les prendre en compte dans l'analyse elle-même, et pas simplement comme justification de l'annulation ministérielle d'une décision.

7. Conclusions du Président

Pour clore cette table ronde, le Président conclut en approuvant la dernière intervention des Etats-Unis. Il y a des cas, sans doute peu nombreux, dans lesquels le résultat serait différent selon le critère retenu. L'autre élément important est de savoir s'il faut commencer par le droit, puis procéder à une analyse économique et ensuite, essayer de faire coïncider celle-ci avec le droit, même si cela ne reflète pas réellement la pensée économique, ou si la démarche inverse est plus indiquée. Enfin, il serait difficile de dire au public qu'il n'est pas nécessaire de se préoccuper de la formulation d'un test d'évaluation des fusions au motif que toutes les autorités de la concurrence font plus ou moins la même chose, qu'elles le font bien et que personne ne peut contrôler leur action.