SHOULD COMPETITION MONOPOLISE MERGER POLICY?

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Introduction

For most of the past twenty years there has been a broad consensus that, with limited exceptions, competition should be the touchstone of merger policy. Mergers that substantially lessen competition, and only those mergers, should be disallowed. Of course this leaves plenty of room for debate, even controversy, about which mergers substantially lessen competition, but there is agreement that competition is the right *question*. A growing number and range of voices have recently been saying, however, that it is the wrong question, or not the only question, and that competition should no longer dominate merger policy.

The competition focus is too narrow, they say. Economic welfare has various other components – equality, the environment, international competitiveness, and so on. Why not weigh these in the scales along with competition? Indeed, one might ask, why not make economic welfare itself the criterion for merger appraisal, and stop those that run counter to the public interest?

In case you think that is a purely hypothetical question, my time in competition policy started when the public interest *was* the statutory test for merger appraisal in the UK. I will begin by outlining how that system operated, and why it was replaced, in 2003, by a competition-oriented regime in keeping with the consensus mentioned at the outset. I will also comment on the 'dominance-versus-competition' debate around the same time about the EU merger standard. In considering calls for reform today, it is important to understand how we got here, and what we have learned along the way.

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I will then move on to some economics of the question of narrow versus broad remits for competition authorities, and indeed for other public agencies including central banks. This will involve some game theory of commitment, a public economics theorem of Diamond and Mirrlees. Beyond economics I will also look at some constitutional issues.

I will consider arguments for departing from competition-oriented merger policy in pursuit of social or environmental goals[2], or to advance European competitiveness, the subject of the wide-ranging Draghi Report (2024) published in September.

Finally, and in view of both Draghi and the proposal made earlier this month by the UK CMA to address anti-competitive concerns in the *Vodafone/Three* merger, I will comment on departure from competition-oriented *remedies* even if substantial lessening of competition remains the principal threshold for policy intervention. Should losses of competition ever be tolerated in return for other supposed benefits?

The public interest test

Merger control in the UK began in 1965, long after the US but generally ahead of the rest of Europe. The Fair Trading Act of 1973 developed the merger regime, and much else, in a way that would last for thirty years. There were three official players in the system, with the Government minister having ultimate power. The Office of Fair Trading (OFT) advised the Minister whether or not mergers that met the jurisdictional threshold should be referred to the Monopolies and Mergers Commission. Following investigation, the Commission reported to the Minister on whether or not referred mergers should be prohibited or made subject to remedies such as asset disposals. The Minister did not have to follow advice from the OFT or the Commission but usually did so, though with some notable exceptions. In this ultimately political regime, the courts were not of much relevance.

The standard for merger appraisal was the public interest. But what is, or was, that? The Act required the authorities to "take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regard to the desirability—

[2] This lecture owes a general debt to Tirole's (2023) discussion of socially responsible agencies.

(a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;
(b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom 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 United Kingdom; and
(e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom."

So the public interest had a strong competition flavour, but other flavours too, and a lot of discretion for the chef, including over new ingredients. The goal of international competitiveness appears in (e) but there is nothing explicit about the environment (unsurprisingly, as this is fifty years ago) or inequality.[3]

In practice, however, competition became dominant most of the time, especially following the promulgation of the so-called Tebbitt doctrine in 1984 that decisions would be made primarily on competition grounds. But this was not applied consistently. In 2000, however, the then Government announced that it would follow competition authority recommendations in all but exceptional circumstances. By then, therefore, the system in practice but not in law was competition-based and with the competition authorities determining the key decisions.

The Enterprise Act crystallised this position in law from June 2003, and largely removed Ministers from the scene. The UK adopted a substantial lessening of competition (SLC) test for mergers. Judicial oversight was greatly enhanced, by way of the Competition Appeal Tribunal (CAT), which had been created a few years earlier. It took no time for an OFT

[3] Lessening of competition in labour markets is relevant to inequality but is consistent with competition-focussed merger policy.

merger case to be appealed to the CAT, and for its judgment to be appealed in turn to the Court of Appeal.[4] In short, the UK moved from Ministers advised by competition authorities to the authorities taking decisions subject to active judicial oversight.

Two points from this experience seem especially relevant to current debates on whether the competition focus of merger policy should be broadened to take account of other public interest objectives. First, broad and especially ill-defined objectives require that ultimate responsibility lies with political decision-makers. Technocrats do not have the democratic legitimacy to determine or apply those standards, and the courts cannot effectively oversee their implementation short of procedural violations or sheer irrationality. Second, the broad public interest standard for merger appraisal evolved to be a primarily competition standard anyway, well before that was enshrined in law.

The dominance test

The substantive standard in EU merger regulation, which began in 1990, was much more specific than the public interest, but it was not specified quite in terms of competition. The question was whether or not a merger that came within EU jurisdiction "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded". In short, this was a dominance test.

It turns out that in 1965, when Douglas Jay, the responsible Minister, presented the UK's first merger legislation to Parliament, he commented on this very point: "I do not believe that it would have been enough simply to have included mergers which would have created or strengthened an existing monopoly situation […]. There could be cases where monopoly in this sense is not technically involved, but, nevertheless, the concentration of economic power would be such that the transaction should at least come within the field of public scrutiny".

Concern about this point led some of us to urge the EU to move to an SLC test when the EU Merger Regulation was reviewed in the early 2000s. This was the question of "the gap" – that is, whether there could be anti-competitive mergers below the threshold of creating or

[4] *OFT v IBA Health*, [2004] EWCA Civ 142.

strengthening a dominant position, even when invoking the notion of collective dominance. Depending on the meaning of “dominance”, we were concerned that this was a potentially big gap. For example, the basic economics textbook analysis of horizontal merger between oligopolists – whether Cournot or differentiated products Bertrand – involves lessening of competition and reduced consumer surplus by altering firm’s unilateral incentives even if the merged entity is not “dominant” in the usual sense of that term. There might be heightened risk of collusion as well, which is arguably a form of collective dominance, but it seemed unwise to rely on proof of that to block anti-competitive mergers. The *Airtours* judgment of 2002, annulling an EC prohibition decision, illustrated judicially the seriousness of this economic concern by clarifying that collective dominance covered coordinated effects but not unilateral effects.

Moreover, it appeared unsatisfactory for “dominance” to have different meanings in merger control and Article 102 (as it now is). In a speech in Brussels in 2002 I quoted Lewis Carroll from *Alice Through the Looking-Glass*:

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less". "The question is," said Alice, "whether you can make words mean so many things." “The question is,” said Humpty Dumpty, “which is to be master — that's all”.

Fortunately, Alice largely got her way, and the revised EUMR that came into force in 2004 stated the test in terms of whether the merger “would significantly impede effective competition … in particular as a result of the creation or strengthening of a dominant position”. Recital 25 of the Regulation made clear that the concept of significant impediment to effective competition went beyond dominance to cover non-coordinated (= unilateral) effects.

The Court of Justice in 2023, in setting aside the General Court’s annulment of the Commission’s prohibition of the UK telecoms merger between CK Hutchison and O2, confirmed that the regulation covers mergers giving rise to non-coordinated effects without creating a dominant position. Moreover, the Court clarified that, to establish a significant impediment to effective competition, it was not necessary to demonstrate both the

elimination of important competitive constraints between the merging parties and reduction of competitive pressure on other firms. It is a general lessening of competition test.

Growing public interest exceptions

Of course EU merger regulation is not *all* about competition. Article 21(4) allows *member states* to protect legitimate interests other than competition, and "public security, plurality of media and prudential rules" are stated as legitimate interests. UK legislation makes related provision for the Government minister to intervene in "public interest cases" involving plurality of newspapers and other media, financial stability (added in 2008), and public health emergencies (added in 2020). National security used to be on this list but following the National Security and Investment Act 2021 it now has its own independent regime, which includes but extends beyond mergers to other kinds of investment in defence and other identified sectors of the economy.

Not only is the list of non-competition factors s getting longer; action under them is growing. National security, for example, was almost never an issue in mergers during my five years at the OFT, but in the first full year of the new UK regime there were 866 notifications, of which 65 were called in for review, and 15 made subject to final orders. Of course I have no way of assessing national security risks in the current geopolitical situation, but the new level of intervention is strikingly different from not long ago. Indeed, the need for Europe to respond to a radically changed security environment, with supply chain vulnerabilities, is one of Draghi's three main themes. It has the implication for competition policy that, in some major sectors, relevant geographic markets for merger and other assessments might be significantly narrower than a while ago. In that case more competition policy intervention, not less, might be warranted as sources of international competition cease to be available.

Of major importance is whether intervention on non-competition grounds goes further than normal merger policy, as with media plurality, or whether it might allow mergers that normal policy would not. A cautionary tale in that regard is the UK case of Lloyds/HBOS in the autumn of 2008, when special legislation removed the competition authorities from the

scene in the name of financial stability. The hope was that acquisition by Lloyds of the failing HBOS would make HBOS stable. In fact, it increased the financial stability problems of Lloyds, which required Government rescue that involved acquisition of 43% of the bank in 2009. The suspension of normal competition policy in this case appears to have been bad financial stability policy as well as bad competition policy.

Expectations and commitment

I will now turn to some economics of setting agencies such as competition authorities much more focussed remits than the public interest as a whole, whatever that may be.

An important argument for narrow remits comes from the economics of expectations and commitment. A simple and well-known illustration concerns monetary policy. Let us take it that inflation and unemployment are both bad, and that both can be influenced by monetary policy. Why might it nonetheless be best to give the central bank a purely, or predominantly, inflation remit?

Following Barro and Gordon (1983), suppose that there is a short-run, but not a long-run trade-off, between inflation and unemployment in the sense that positive inflation surprises tend to reduce unemployment temporarily. So a burst of unexpected inflation can get unemployment down for a while. But if economic agents have rational expectations, they will anticipate the inflation temptation of an unemployment-oriented monetary policy maker. Then the perception that monetary policy is made partly with a view to unemployment ends up doing nothing to reduce unemployment; it just raises expected and actual inflation. So in this setting it is best to put *zero* weight on unemployment in the remit of the monetary policy authority no much how much you actually care about unemployment. Other policy instruments can address that problem better; monetary policy, in this simple setting, cannot address it at all beyond maintaining price stability.[5]

Even if there is some long-run trade-off between inflation and unemployment, for example when the zero lower bound for interest rates comes into play, it does not follow that

[5] This goes beyond the Tinbergen rule that *n* objectives require *n* policy instruments. In the simple setting here, monetary policy should focus on inflation even if there are no other instruments.

monetary policy should deviate from an inflation target. Rather, the implication might then be that the inflation target should be at say 2%, as commonly in fact, rather than zero.

What has this got to do with competition policy, and merger policy in particular? I will return soon to the question of whether other policies dominate competition policy in pursuing other objectives. But there is also an important point about expectations and commitment. Competition authorities do not decide which mergers take place. They decide which mergers, of those that the private sector proposes, to block or allow (or to allow subject to conditions). Depending on the stance of merger policy, the private sector, at least if well-advised, has a fair idea which mergers are liable to be blocked, albeit with extensive grey areas.

This matters for the question of whether merger policy should be about consumer welfare or 'total welfare' (i.e. including producer surplus). I discussed this in the Bellamy lecture (Vickers, 2024) earlier this year, emphasising that even if the ultimate *objective* is total welfare, that objective is not best achieved by adopting a total welfare *standard*. Indeed, with the private sector profit-focussed in forming merger proposals, greater total welfare might be achieved if consumer welfare is the standard for deciding which are allowed.[6] As Farrell and Katz (2006) put it, if you want to travel north-east "and firms always push eastwards, there is something to be said for someone adding a northerly force".[7] I will return to the question of the consumer versus total welfare standard later in the context of the debate on whether European "competitiveness" calls for a relaxation of merger policy.

The Diamond & Mirrlees production efficiency theorem

Let us consider further the question of whether non-competition objectives are addressed by other policy instruments in such a way that competition policy cannot usefully advance them. It is obviously the case that the first-best welfare optimum, whatever that may be, cannot be attained given informational and other constraints upon public policy makers.

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[6] The following example illustrates. Suppose that there are two alternative mergers. Merger A creates profit of 2 and consumer benefit of 1. Merger B creates profit of 3 and consumer detriment of 1. Under the total welfare standard both are allowed, and the firms will pick B, for total welfare gain of (3 – 1) = 2. Under the consumer welfare standard B is disallowed and they pick A, for total welfare gain of (2 + 1) = 3.
[7] Farrell and Katz (2006). For a general analysis, see Armstrong and Vickers (2010).

Does it follow that the instruments of say competition policy should be deployed to advance aims beyond competition?

An important perspective on this question comes, I suggest, from the famous (but not famous enough) production efficiency theorem of Diamond and Mirrlees (1971). They prove, subject of course to various assumptions, "the desirability of aggregate production efficiency in a wide variety of circumstances provided that taxes are set at the optimal level".

Redistribution should therefore happen through taxation, not by distorting production decisions. The basic idea is that a point inside the economy's production possibility frontier cannot be optimal because a Pareto-superior point on the frontier could be achieved by appropriate adjustment of taxes. The theorem has far-reaching implications. For example, production subsidies that distort efficiency are suboptimal. And as international trade is a kind of production technology, tariffs are suboptimal for a small economy for which the terms of trade are given, no matter how protectionist another country may be. Taxes, neutral between sources of supply, can do the redistributive job better.

Needless to say, competition policy is not all about production efficiency, but that dimension of efficiency would appear to be squarely relevant to it. Subsidy control is an element of competition policy, and production efficiency features in the assessment of abuse of dominance. More broadly, more efficient firms winning business from less efficient firms is a major part of what effective competition is about.

Suboptimality of other policies

Propositions such as the Diamond-Mirrlees productive efficiency theorem are benchmarks, not descriptions of reality. The assumptions upon which the theorem rests plainly do not hold exactly, but it does not follow that anything goes. Policy interventions involving departures from productive efficiency require justification, and should be designed with efficiency in mind.

The Diamond-Mirrlees proviso "that taxes are set at the optimal level" is obviously questionable. For all sorts of political economy reasons it is highly unlikely that non-

competition policies are set anywhere near optimally, which arguably opens the door for competition policy legitimately to pursue wider objectives. On the other hand, it seems strange, and contrary to proper incentives in other branches of government, to argue that competition policy should in part make good the shortcomings of other branches of government. What could give competition authorities that special status? Might they not be subject to shortcomings themselves, even with the judicial correctives that apply to them? What about the important constitutional question of accountability? And who is to say what optimality consists of in the first place?

Mergers and the environment

Green antitrust illustrates this dilemma. If one believes, as I do, that environmental policy has been far too lax, for example in respect of carbon taxation, there might appear to be a *prima facie* case to adjust merger policy to promote environmental objectives – for example to tolerate pollution-reducing mergers even when they are somewhat anti-competitive. But there are several reasons to be sceptical about such an approach (see further Schinkel and Treuren, 2024).

First, if the firms concerned are participants in the EU emissions trading system, then their merging will do nothing to reduce emissions unless it cuts the total number of pollution permits out there. Otherwise the merger, if anti-competitive, might lead to higher prices and lower output in the merging firms' sector, while recycling the permits to other sectors, for zero environmental gain. Second, even if, hypothetically, pollution permits were somehow extinguished as a result of the merger, the price increase due to lessening of competition might induce more imports of the sectors' products from outside Europe. Then emissions caused by European consumers might fall by considerably less, if at all, than emissions produced in Europe. The EU's Carbon Border Adjustment Mechanism, currently being phased in, seeks at last to neutralise this potential adverse effect. Third, competition can itself be pro-green if the firms' customers care about the environment, which many do.

In saying that scepticism is warranted I do not mean to imply that mergers (or joint ventures) cannot advance environmental goals. But where such claims are made, there are complex questions about the economic welfare standard underpinning merger policy.

Environmental gains benefit consumers, so are broadly consistent with a consumer welfare standard. But presumably only a small fraction of any such gains is likely go to "in-market" customers of the products supplied by the industry concerned. Most of any environmental benefits will typically be out-of-market, including-out-of-geographic-market given the global nature of much pollution.

On this the CMA has stated that it will count benefits to UK consumers from reduced carbon emissions among "relevant customer benefits" in merger appraisal. (Ditto greater innovation applying to products out of market.) Whether out-of-market benefits should weigh in other aspects of antitrust assessment is an interesting and important question. It has been controversial even whether consumer benefits on one or both sides of a two-sided market should count. Consistency of approach with respect to out-of-market benefits would seem desirable. Without discipline and limiting principles, purported out-of-market benefits could be a slippery slope for competition policy.

Constitutional issues

If competition policy is to go beyond competition criteria, important questions arise about who decides what. The wider the criteria for deciding cases, the harder it becomes to sustain the position that independent competition authorities should take the key decisions. When the UK had a public interest test for mergers, it made sense that government ministers were ultimately responsible for decisions, with accountability to Parliament. The transfer of power in 2003 to independent competition authorities, accountable to judicial authority, went hand-in-hand with the move from the public interest to an SLC standard. The substantive standard and the constitutional position were complementary. Conversely, moves away from that standard run the risk of eroding the acceptability of decisions being made by independent competition authorities. Their expertise and authority become less credible as they range wider, as does their ability to make policy trade-offs.

The scope of the powers of public agencies has recently been a strongly contested issue in the US, and is now set to become more so. Even if Europe does not import the same debates about the administrative state, it might be worth reflecting upon them. Two recent

cases before the US Supreme Court concerning the powers of executive agencies, relative to the legislature and judiciary respectively, illustrate the constitutional issues.

In the *West Virginia* case of 2022 the question was whether an Environmental Protection Agency (EPA) proposal to regulate carbon emissions by the electric power sector was lawful. The proposal involved "generation-shifting" to cleaner sources of electricity generation – from coal to gas and from gas to renewables – an obviously sensible policy goal. The Court's majority ruled however that the EPA lacked Congressional authority for such a policy. It gave rise to a "major question" in terms of administrative law, and only Congress could resolve such questions.

The issue in the second case was whether the courts should defer to an executive agency's reasonable interpretation of laws that it administers. Since the *Chevron* case of 1984, which also concerned the EPA, the US federal courts had sometimes been required to defer to agency interpretations where a statute was ambiguous or silent.[8] In June this year, however, the Supreme Court over-ruled the *Chevron* doctrine in the *Loper* case, holding that courts are required "to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous". The courts, and only the courts, are to say what the law is.

It remains to be seen what these curtailings of agency powers will mean for US antitrust (never mind what competition policies the next US administration will adopt). On point is the summary judgment granted in August by the District Court in Texas against the FTC's non-compete rule. Citing *Loper*, the court concluded that the FTC did not have authority to make substantive rules such as the non-compete rule, which it also found to be "arbitrary and capricious". The FTC has appealed to the Court of Appeals, and there are related cases elsewhere in the country.

[8] How much courts in Europe defer to agency interpretations of competition law, which is not free of ambiguity, is an interesting question, including for the status of guidelines issued by competition authorities. The CAT in *IBA Health* (see footnote 4) hardly deferred to the OFT, and the Court of Appeal in turn did not defer to the CAT.

I have mentioned these US cases to underline the importance of questions about who decides what. We as economists should perhaps pay more attention to them. In the case just mentioned the FTC is not straying beyond competition territory, so the question is about agency power within the competition sphere. If *non-competition* factors enter merger policy to a greater extent than they have already, questions about who-decides-what will become ever more difficult constitutionally, and not just in the US.

One approach would be for the competition authority to have multiple objectives – a sort of competition-plus authority. Another would be for the competition authority to remain competition-focussed but with parallel regulators alongside. Where that involves an additional veto on a merger on over-riding concerns, say national security grounds, that might be practicable. But if trade-offs are to be made, things would appear to be constitutionally more difficult, to the detriment, I suspect, of competition authority independence. With that in mind let me turn to the topical issue of European competitiveness.

Merger policy and European competitiveness

Some prominent calls for relaxation of European competition policy in general, and merger policy in particular, are made in the name of European competitiveness – the subject of the Draghi report. Before turning to aspects of that report concerning competition policy, some preliminary comments are in order.

The first is to clarify what is meant by "competitiveness". In our context I take it to mean *whole-economy productivity*, not the everyday notions of wanting to win or being better than others. I say "whole-economy" productivity in part to distinguish claims by particular sectors that their competitiveness deserves special promotion. In that regard I and others have been critical of the introduction into UK legislation of "competitiveness and growth" as an objective of financial services regulators. What is good for the financial services sector is not necessarily good for the economy as a whole, as we all saw around 2008. The economy as a whole needs *resilience* of financial services, which requires that banks and other institutions have plenty of equity capital in their funding structures. But invoking

"competitiveness", those institutions often resist higher capital requirements, and reduce equity capital by share buybacks as well as dividends.

Second, as a general matter competition is good, not bad, for productivity growth. When it works effectively, more efficient firms win business from less efficient firms, boosting aggregate productivity. And with respect to incentives there is a large body of theory and empirical economics on how competition spurs innovation and growth – a topic on which Chris Harris and I worked long ago, and then in a macroeconomic framework with Philippe Aghion and Peter Howitt (see Aghion et al, 2001).[9]

Third, it does not follow however that the way that competition policy is actually applied is necessarily good for productivity growth. As with any form of regulation, there are risks of both under-enforcement and over-enforcement. The latter could in theory occur, for example if unduly narrow market definitions, whether in product or geographic dimensions, led to overestimates of market power. Or if types of business arrangement were condemned on the basis of their form rather than economic effects. Or if insufficient regard was paid to efficiency defences of questioned business practices. But the right response to such risks is to do competition analysis well, not to depart from competition-focussed policy.

Anyway, I do not see substantial evidence that merger policy – whether the legal framework or its application by the authorities – has been over-enforced, either as a general matter or in controversial cases such as *Siemens/Alstom*. The likelier hypothesis on the facts is under-enforcement, though in my view not to the extent that some commentators argue. Under-enforcement can itself be bad for productivity and hence competitiveness in the whole-economy sense that matters.

Remedy design

An important distinction is between (i) lessening of competition as the threshold for policy intervention in mergers and (ii) competition preservation as the basis for remedies in

[9] Aghion et al (2005) find evidence of an inverted-U relation between competition and innovation.

mergers judged to be anti-competitive. A possible policy stance would be to retain (i) and depart, at least sometimes, from (ii).

An important proposal for the telecoms sector in the Draghi report (page 31) is on point here:

"To encourage consolidation, the report recommends defining telecoms markets at EU level – as opposed to Member State level – and increasing the weight of innovation and investment commitments in the EU's rules for clearing mergers. Country-level ex ante regulation should be reduced in favour of ex post enforcement in cases of abuse of dominant position".

I see three difficulties with this approach.[10] First, defining markets at EU level is a good idea if the facts of demand and supply indicate that the relevant geographic market is EU-wide, but a bad idea if not. Defining markets so as to "encourage consolidation" seems especially questionable. Second, even if some ex ante regulation is excessive, relaxing ex ante controls (of which merger policy is a prime example) in favour of ex post abuse of dominance enforcement would be a mistake. As discussed above, mergers can lessen competition well short of creating dominance, and abuse of dominance cases are hard, not least with respect to remedies and their enforcement. Third, and the focus of what follows, I am sceptical about "innovation and investment commitments" as remedies for anti-competitive mergers.

For concreteness, let us consider the *Vodafone/Three* case in the UK. The case concerns a proposal to combine the UK businesses of Vodafone and CK Hutchison, which operates the Three brand. In September the CMA found that this merger – which would reduce the number of UK mobile network operators from four to three and create the largest retail operator in the UK, the relevant geographic market on the facts – may be expected substantially to lessen competition in the supply of both retail and wholesale telecoms services. For example, the CMA concluded provisionally that the merger would lead to price rises or quality reductions for tens of millions of customers.

[10] See further Duso et al (2024).

On 5 November the CMA published a remedies working paper proposing that "a network commitment (with some time limited price protections in the retail and wholesale markets) would represent a less onerous solution and therefore be more proportionate than prohibition of the merger" if the provisional SLC finding is sustained. The network commitment, which has eight-year duration, is to minimum levels of integration of, and investment in, the parties' networks. They submit that this would give rise to such "rivalry enhancing efficiencies" as to offset any anti-competitive effects of the merger. The parties also offered some price cap commitments, which the CMA considers should apply for a limited period of at least three years, since the network commitment would take time to have effect.

Being far from the facts of this case I cannot say that the proposed CMA approach is necessarily wrong. But it is quite puzzling. First, as explained in paragraph 7.16 of the CMA's provisional findings: "efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals, for example, by reducing their marginal costs giving them the incentive to provide lower prices or a better quality, range or service … go towards the finding of whether or not there is an SLC". But here the CMA has provisionally found an SLC, indeed on a wide scale, notwithstanding incentive effects of the kind just described, and proposes investment commitments and time-limited price controls to remedy it. In short, it appears ready to tolerate less competition, for a number of years, in exchange for investment commitments and temporary price caps. This would seem to align with the spirit of Draghi (though fortunately not on geographic market definition).

Whereas structural remedies seek to safeguard competitive *incentives*, the investment commitment approach does not do so, for the commitment is presumably to undertake investments significantly above and beyond the level that the parties would themselves wish to do post-merger. Otherwise the commitment is costless to them and worthless to customers. On the face of it, then, the deal appears to be extra investment in return for extra market power. Viewed one way, this is a novel kind of investment subsidy.

On the other hand, I can just about see theoretical scope for an argument that says the following. The merged entity would not wish to invest anything like as much as the commitment, but if is required to do so, the end result, thanks to lower marginal costs etc,

will be no less competitive than the status quo ex ante. I stress *theoretical* scope because whether the facts fit is another question altogether, and prediction of how competition will be years into the future is fraught with difficulty. So great scepticism seems warranted, no matter how many economic models have been supplied by the parties to the competition authority. *Reculer pour mieux sauter* might be all very well in theory, but just *reculer* in practice.

Stepping away from this case, and the telecoms sector, a general question arises. Even if competition remains the threshold for policy intervention in mergers, should remedies of prospective anti-competitive effects ever trade non-competition benefits for competition losses? And if trade-offs are to be made, who is to make them? Moreover, and to return to a point stressed earlier, consideration must be given to the incentive effects of a policy stance that accepted trade-offs between competition and other objectives. For example, if promising extra investment increases the chance of getting my anti-competitive merger cleared, then my incentive might be to hold back investment ex ante in order to have more incremental investment to offer ex post. Incentive effects of that kind could be detrimental to the non-competition objectives that willingness to make trade-offs is intended to advance in the first place.

Concluding remarks

When I went to the OFT in 2000 I had a mentor, who was a retired senior public servant with a background in economics. He gave me some advice in terms like this: "We economists think we're good at analysing problems to work out the right answer. And we are good at that. The lawyers aren't. But they are far better than us thinking about process, and process really matters, so concentrate on that".

In that spirit, considering whether competition should continue to dominate merger policy requires economics but not only economics. There is no general theorem that non-competition factors should have zero weight in merger appraisal, but arguments for their inclusion are in my view weaker in economic terms than their proponents suggest. In particular, I do not see an economic case for relaxing merger policy to promote European competitiveness.

Beyond economics and turning to process, I regard the independent competition authorities that have been built in recent decades, like independent monetary authorities, as institutions of great value. As Jean Tirole (2023) stresses, independence requires limited and mandated powers. Diluting the remits or status of competition authorities would run risks of diluting the institutions themselves, and hence an important part of our economic constitution. In sum, I hope – for the sake of the public interest – that competition continues to dominate merger policy.

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