British Merger Policy from an American Perspective

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> Size in itself is no solution . . . but size, provided it is industrially appropriate and under effective management, can provide the essential base for the large scale of effort that is increasingly required to prosper in world markets . . . .[1]
>
> Industrial Reorganization Corporation

On both sides of the Atlantic, the 1960's was the decade of the merger. By 1969 in the United States, acquired manufacturing assets reached a record yearly total of $20 billion;[2] eighty-seven giant corporations each with assets of more than $1 billion controlled forty-six percent of manufacturing assets and accounted for fifty percent of industrial profits.[3] In Britain, the situation was such that *The Times* could comment, "Anyone who charted the monthly value of assets absorbed during this period (1967-68) and plotted the curve into the next decade would find that the final merger takes place in November 1978 . . . . There would . . . be only one company left in the United Kingdom."[4]

This article examines from an American perspective the British government's policy toward mergers, primarily as reflected in the reports of the Monopolies Commission [MC]. Several characteristics of the American "antitrust" approach to mergers are sufficiently questioned by critics to justify serious attention to divergent approaches developed abroad. Such characteristics include the following:

1. In the field of horizontal mergers, the legacy of *Brown Shoe*[5] and *Von's Grocery*[6] has resulted in a rigid policy banning acquisitions

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1. INDUSTRIAL REORGANISATION CORPORATION, REPORT AND ACCOUNTS FOR THE YEAR ENDED 31ST MARCH 1969, H.C. 286, at 7.
2. FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON CORPORATE MERGERS 4 (1969) [hereinafter cited as FTC].
3. *Id.* at 164.
4. The Times (London), April 27, 1972, at 23, col. 4. Gerald Newbould and Andrew Jackson suggest that at the end of the 1970's only twenty-one "national firms" will remain. A. JACKSON & G. NEWBOULD, THE RECEDING IDEAL 130 (1972).
5. Brown Shoe v. United States, 370 U.S. 294 (1962).
6. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

of firms with minuscule market shares. For example, in *Von's Grocery*, the Supreme Court concluded that the merger of two supermarket chains in Los Angeles was illegal even though the two chains collectively had 7.5 percent of the market and the top twenty firms controlled only fifty-seven percent of sales.

2. The economies of scale and integrative efficiencies achievable by a merger are not considered relevant to its legality. As the Supreme Court stated in *Philadelphia Bank*, "A merger the effect of which, 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits or credits, it may be deemed beneficial . . . . Congress proscribed anticompetitive mergers, the benign and the malignant alike . . . ."[7]

3. With horizontal and vertical mergers under a legal cloud, about eighty-two percent of the American mergers during 1966-68 were product extension or conglomerate in character. Yet, a clearly articulated government policy toward rising aggregate concentration through conglomerate merger has yet to be defined. Instead, the case law has focused on arguably tangential aspects such as reciprocity or the stifling of potential horizontal competition.

4. Mergers are weighed in courts and the Federal Trade Commission, a legally-oriented institution; these are provinces of lawyers, not of economists.[8] Judicial notions of stare decisis are imposed across industries, arguably ignoring the complexities of industrial structure.

Critics such as John Kenneth Galbraith have examined the American system and pronounced it to be a "charade."[9] To him, this system of evaluating changes in industrial structure case by case with a bias toward small firms, is simply archaic. Others such as Milton Handler, hope for the day when antitrust will "swing toward a more analytical, factually based approach."[10]

British policy poses, in theory, an alternative model—one where economic factors are weighed rationally in an administrative forum dominated by "experts." In fact, the MC's record raises serious questions about the viability of such an approach.

7. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, at 371 (1963).
8. *See generally* M. Green, B. Moore & B. Wasserstein, The Closed Enterprise System (1972) [hereinafter cited as Nader] on the minimal role played by economists and economics in the development of American doctrine, especially at 128-29 and 368-84.
9. Galbraith, *The New Industrial State* in Monopoly Power and Economic Performance 125, 127 (E. Mansfield ed. 1968). Galbraith's essay is derived from congressional testimony. *See generally* J.K. Galbraith, The New Industrial State (1967), for his view of modern industrial structure.
10. Handler, *Twenty-fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 63 (1972).

I. Background for British Policy

A. *The Merger Movement of the 1960's*

Estimates by the MC of the impact of the 1960's merger movement on British industry present a context for comparing the British and American approaches. Surveying manufacturing companies with assets greater than £.5 million which were listed on a stock exchange—a group including eighty percent of all United Kingdom manufacturing assets—the MC came to the following conclusions:[11]

—The population of companies in this category decreased from 1,312 in 1961 to 908 in 1968, a thirty-one percent reduction.

—This trend of a diminishing number of firms is widespread among industries. In eleven of the seventeen examined industrial categories, reductions of firms ranged from twenty-three to forty percent.

—Overall concentration was increasing substantially. In 1961, the twenty-eight largest companies held thirty-nine percent of the total assets; by 1968 they owned fifty percent of the company assets in this classification.

—Mergers contributed significantly to this concentration trend. Over eight years about one-fifth of the assets of these companies were acquired by other quoted companies. Examining the internal growth record of specific companies in another similar survey, the MC staff found that between 1957 and 1967, forty-eight percent of the growth in assets of these corporations came from acquisitions. Interestingly, the MC found that "generally, a low internal (growth) rate (for a company) was accompanied by a high external rate . . . and a high internal rate by a low external rate."[12] The very largest firms seemed to grow basically from acquisitions, but the firms ranked from 40th to 120th in size tended to emphasize internal growth, according to this data.

—By composition, the mergers in Britain were still basically horizontal although the percentage of conglomerate mergers was increasing. Specifically, of the 318 major mergers during the years 1965-68, eighty-three percent were horizontal, five percent vertical and twelve percent "diversified."[13]

11. Monopolies Commission, *General Observations on Mergers* [hereinafter cited as *MC Observations*], in BOARD OF TRADE, MERGERS, annex 4 at ¶¶ 6-9 (1969) [hereinafter cited as BOT, MERGERS].
12. DEPARTMENT OF TRADE AND INDUSTRY, A SURVEY OF MERGERS 1958-68, at ¶ 22 (1970).
13. BOT, MERGERS, *supra* note 11, at ¶ 81.

Comparing concentration trends in the United States and Britain in recent years, M. A. Utton came to the following conclusions:

> Although the overall concentration level has again been increasing in both countries, the rate of increase appears to have been considerably faster in the U. K. than in the U. S. A. Similarly, since about 1951, there is some indication that market concentration has been increasing noticeably in numerous U. K. manufacturing industries while remaining fairly stable in the U. S. Furthermore, the contrasting attitudes of the Governments of the two countries to industrial concentration as reflected in their antitrust policies seem likely to maintain rather than reduce these differences in the future.[14]

B. *Theoretical Ambiguities*

The British have long been skeptical of the assumptions, drawn from neoclassical economic theory, which are reflected in American antitrust law. As one government report stated, "It would be wrong to introduce into the law any presumption that that monopoly is in itself undesirable."[15]

Neoclassical theorists such as A. C. Pigou[16] argued, with the help of elegant but heroically simplified models, that the lack of perfect competition in an industry will result in fewer goods at higher prices and a misallocation of resources. Over the years, critics such as Piero Sraffa,[17] Joan Robinson,[18] and E. H. Chamberlain[19] have located serious flaws in the neoclassical models. But the contemporary British attitude can be traced more directly to the criticisms of Joseph Schumpeter and his disciples. While neoclassical theorists largely ignored the growth of firms, Schumpeter stressed the dynamic forces of innovation:

> It is not sufficient to argue that because perfect competition is impossible under modern industrial conditions . . . the large scale

14. M.A. UTTON, INDUSTRIAL CONCENTRATION 95 (1970). More detailed statistics confirming the general concentration trends discussed can be found in George, *The Changing Structure of Competitive Industry*, 82 ECON. J. 353 (1972). *See generally* K.D. GEORGE, INDUSTRIAL ORGANIZATION (1971) especially at 14-40. At least one authority, Gerald Newbould, believes that concentration by merger is increasing more rapidly and steadily than BOT data shows. G. NEWBOULD, MANAGEMENT AND MERGER ACTIVITY 17-38 (1970) [hereinafter cited as NEWBOULD].

15. WHITE PAPER, MONOPOLIES, MERGERS, AND RESTRICTIVE PRACTICES, CMND No. 2299, at ¶ 8 (1964).

16. A. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932). Although Pigou pioneered the analysis of external diseconomies, the traditional competitive model was the basis for most of his welfare economics analysis.

17. Sraffa, *The Laws of Returns Under Competitive Conditions*, 36 ECON. J. 535, at 542 (1926).

18. J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2d ed. 1969).

19. E.H. CHAMBERLAIN, THEORY OF MONOPOLISTIC COMPETITION (8th ed. 1963).

> establishment or unit of control must be accepted as a necessary evil inseparable from . . . economic progress. What we have got to accept is that it has become the most powerful engine of that progress . . . . [P]erfect competition is not only impossible but inferior. . . .[20]

John Kenneth Galbraith has embellished the analysis by stressing that technological advances require not only large scale firms but control over the market, and indeed over general economic conditions, so that short-run fluctuations and uncertainties may be minimized.

> Industrial planning requires that prices be under control. Modern technology reduces . . . the reliability of the market. And it increases the commitment of time and capital that are required in production. For this reason prices cannot be left to the vagaries of the unmanaged market.[21]

The proper government response, for Galbraith, is not to fragment markets back to a competitive ideal but to regulate those large industrial enterprises necessary for technological change.

In the 1960's, British adherence to the Schumpeter-Galbraith approach was reinforced by the successes of French "indicative planning," which combines macroeconomic policy-making of the Keynesian variety with more detailed planning at the industry level.[22] Rather than fragmenting industrial structure, the French sought to entrench the position of leading firms and to bring the public interest to bear on corporate decisions through formal consultation between private management and public officials. Prominent British economists advanced this approach for modernizing British industry and increasing the economy's chronically sluggish growth rate.[23]

The neoclassical model assumes that the typical industry will consist of many firms even when each firm has attained minimum efficient scale. While Joe Bain's estimates indicate the validity of this assumption for the United States,[24] C. F. Pratten[25] has argued that British plants operating at minimum efficient scale for that nation's world markets would take up a large fraction of the domestic market,

20. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 106 (3d ed. 1950).

21. *See* J. GALBRAITH, THE NEW INDUSTRIAL STATE 189 (1967).

22. *See* G. DENTON, M. FORSYTH & M. MACLENNAN, ECONOMIC PLANNING POLICIES IN BRITAIN, FRANCE, AND GERMANY 80-107 (1968).

23. *See, e.g.*, A. SCHONFIELD, MODERN CAPITALISM (1965); J. MEADE, THEORY OF INDICATIVE PLANNING (1971).

24. J. BAIN, BARRIERS TO NEW COMPETITION (1956).

25. C. PRATTEN, ECONOMIES OF SCALE IN MANUFACTURING INDUSTRY (1971). There is a useful summary of his findings in tabular form at 268-77.

so that robust competition domestically may often be preserved only by sacrificing scale efficiencies essential to a strong international position. Even if scale economies were not sacrificed, the British tend to doubt that eliminating monopolistic imperfections in industrial structure would bring large benefits. Such doubts are not entirely conjectural. Arnold Harberger's estimates for the United States indicate that eliminating monopolistic imperfections would increase Net National Product by only .07 percent.[26]

That mergers increase market and overall economic concentration has thus not been considered a great evil in Britain. Several possible advantages of mergers are also stressed. First, as Stigler[27] and Marris[28] have argued, the threat of takeover bids may increase managerial efficiency, and actual takeovers may rid the economy of inefficient managements. Second, a multi-divisional conglomerate resulting from merger might discipline divisional management more effectively into efficient behavior than would a competitive market.[29]

While the British solicitude for market concentration and mergers thus has theoretical and empirical support, so also does the opposite view. Contrary to the Schumpeter-Galbraith thesis, Jewkes, Sawyers, and Stillerman[30] have found that large firms do not have a disproportionately large role in major inventions; if anything, their contribution has been remarkably minor. Harberger's estimates of the gains from eliminating monopolistic imperfections do not include the conceivably large increases in managerial efficiency.[31] The allegedly beneficial role of takeover bids has also been challenged. Ajit Singh has found that in Britain acquired firms are not generally of low profitability; nor do mergers increase profitability.[32] Newbould found that ninety-five percent of takeover bids were unresisted by management of the acquired firm,[33] and that acquiring firms generally aim for an

26. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77, 82 (Supp. May, 1954).

27. This viewpoint is reflected in WHITE HOUSE TASK FORCE, REPORT ON PRODUCTIVITY AND COMPETITION (Stigler Group, 1969), a summary of which may be found at 115 CONG. REC. 15653 (1969).

28. R. MARRIS, THE ECONOMIC THEORY OF MANAGERIAL CAPITALISM (1967).

29. O.E. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR 175 (1970).

30. J. JEWKES, D. SAWERS, & R. STILLERMAN, THE SOURCES OF INVENTION (2d ed. 1969). *See* Turner & Williamson, *Market Structure in Relation to Technical and Organizational Innovation*, in INTERNATIONAL CONFERENCE ON MONOPOLIES, MERGERS AND RESTRICTIVE PRACTICES 127 (J. Heath ed. 1971) [hereinafter cited as CONFERENCE] for a good summary of the work on innovation.

31. On the importance of managerial efficiency, often ignored in neoclassical formulations of allocational efficiency, see Leibenstein, *Allocative Efficiency Versus "X-Efficiency,"* 56 AM. ECON. REV. 392 (1966).

32. A. SINGH, TAKEOVERS 166 (1970).

33. NEWBOULD, *supra* note 14, at 50.

immediate increase in or consolidation of market share, rather than for integrative efficiencies.[34] Similarly, the FTC has found that recent American conglomerate mergers did not result in a noticeable increase in profitability.[35]

Economic science is insufficiently advanced to make a clear-cut judgment between British solicitude toward mergers and the hostile attitude of American antitrust law. Either bias can be cloaked in respectable theory and supported by statistics. American merger policy candidly exposes its prejudices by using fairly mechanical guidelines and spurning most "expert" evidence about the efficiency effects of individual mergers. The British MC purports to apply economic rationality—a "rule of reason"—to each case. As we shall see, biases are not thereby erased, but merely disguised.

C. *The Evolution of Policy*

Where American antitrust has populist origins, and often aims to protect the small businessman, British policy toward industrial concentration has aimed toward centralization, planning, and market stability.[36] With the onset of the depression in the late 1920's, the British government actively encouraged cartelization and restrictive agreements, hoping to stabilize the ailing economy.[37] Yet, it was during the highly planned economy of the Second World War that the foundations for Britain's anti-monopoly policies were established.

A 1944 White Paper argued that effective demand management, the prerequisite for a full employment policy, required a loosening of private restrictive practices.[38] The postwar parliament was quite reluctant to pass any monopoly legislation. Industry was content with the traditional cartels and as G. C. Allen points out, "Labour minis-

34. *Id.*

35. FTC, *supra* note 2, at 95-103. In January 1973, the FTC released a study which indicated that most of the praise and criticism of conglomerates was misbased. According to the FTC, the main problem with conglomerates is they cause an "information loss." However, it was noted that the conglomerates studied had made only minor changes in the companies which they had taken over and therefore added little in the way of efficiencies. *See* Wall St. J., Jan. 4, 1973, at 2, col. 3.

36. Despite the American assumption that the Sherman Act, in the words of the Senator, "applied old and recognized principles of the common law," the fact is that a series of English cases at the turn of the century resulted, in effect, in the legislation of cartels and restrictive practices. *See* P. AREEDA, ANTITRUST ANALYSIS 18-20, 22-24 (1967) [hereinafter cited as AREEDA]. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954) discusses the early common law cases. G.C. ALLEN, MONOPOLY AND RESTRICTIVE PRACTICES 58-60 (1968) [hereinafter cited as ALLEN] relates how the early precedents were reversed in Britain.

37. *See generally* G.C. ALLEN, THE STRUCTURE OF INDUSTRY IN BRITAIN 62-75 (3d ed. 1970).

38. WHITE PAPER, EMPLOYMENT POLICY, CMD. No. 6527 (1944).

ters brought up on Socialist doctrines saw little merit in free competition, and the Marxists among them thought of monopoly as a stage on the road to the State ownership of productive resources."[39]

Finally, after stiff resistance, the Monopolies Commission was established in 1948, but its mandate was limited to investigation.[40] Cases were referred to it by the government; it could not initiate on its own. Although it was to study monopoly situations and restrictive practices, the Act did not assume that these were evil. In the first seven years, twenty reports were completed, each taking about two and a half years. The Commission could not implement its own recommendations, and the Government only attempted to enforce one of the decisions.[41] As Allen observes, "The Government obviously had no intention at this time of pursuing a vigorous anti-monopoly policy."[42]

However, the findings of the Monopolies Commission did lead to establishment of the Restrictive Practices Court in 1956. Restrictive agreements were supposed to be registered, and a Registrar brought before the court those agreements which he believed inimical to the public interest. For the first time, the presumption was that restrictive agreements were illegal, although there were "gateways" which

39. ALLEN, *supra* note 36, at 62. Labor's early postwar positions on economic issues are described in J.C.R. DOW, THE MANAGEMENT OF THE BRITISH ECONOMY 1945-60, at 7-13 (1964).

40. Since the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948, 11 & 12 Geo. 6, c.66, the following British antitrust statutes have been passed:

— The Monopolies and Restrictive Practices Commission Act of 1953, 1 & 2 Eliz. 2, c.51, expanded the potential membership of the Commission from ten to twenty-five and authorized the establishment of separate panels so that a number of inquiries could be conducted simultaneously.

— The Restrictive Trade Practices Act of 1956, 4 & 5 Eliz. 2, c.68, established the Restrictive Practices Court and withdrew jurisdiction in the collusive agreements field from the MC. A Registrar attempts to get most significant deals publicly listed, and the Court determines whether they are legal. The presumption is that the public interest is violated unless the agreements qualify under specific "gateways," the most notable allowing the deal if its reversal would "deny to the public . . . substantial benefits or advantages." The MC was reduced in membership size and could no longer act in panels.

— The Resale Prices Act of 1964, c.58, outlawed collective, and most individual firm, enforcement of resale price maintenance.

— The Monopolies and Mergers Act of 1965, c.50, allowed the MC again to act in panels and authorized it to have twenty-five members. The scope of MC jurisdiction was expanded to include mergers and the supply of services. The Board of Trade refers mergers to the MC in its discretion, and the MC can recommend negative action only if it finds the deal to be against the "public interest." The Board of Trade can then forbid a merger or divest a past acquisition.

— The Restrictive Trade Practices Act of 1968, c.66, widened the coverage of the 1956 Restrictive Practices Act to include agreements to exchange pricing information, and stiffened penalties for non-registration in general, but also broadened the gateways.

41. C.K. ROWLEY, THE BRITISH MONOPOLIES COMMISSION (1966) covers these early developments but his perspective has been vigorously attacked by critics—*e.g.*, Cohen, Book Review, 76 ECON. J. 902 (1966).

42. ALLEN, *supra* note 36, at 88.

could be used as affirmative defenses.[43] As was illustrated by the controversial upholding of the cement industry's agreement for common delivered prices, these "gateways" were sometimes quite wide. The court reasoned there, in sharp contrast to American attitudes of per se illegality,[44] that there was a need for a relatively risk free profit to justify the low returns on capital.[45]

With the establishment of the Restrictive Practices Court in 1956, the Monopolies Commission began to concentrate its efforts on the problem of market power. The focus was primarily on conduct, not structure. Although some of the reports noted the tendency to amalgamate rivals as part of a monopolization tactic, the Board of Trade (BOT)—to which the Monopolies Commission reported—did not have power on its own to prevent mergers and was reluctant to support specific legislation implementing MC proposals.[46]

Meanwhile a takeover movement had surged in Britain, bringing mergers to public attention. By 1964 all three major parties favored including mergers in the Monopolies Act. The original Conservative Party proposals were contained in a White Paper which urged the establishment of a Registrar of Monopolies "who would be responsible for making the investigations into the facts and for setting out for the consideration of the Monopolies Commission the questions and issues involved."[47] Although the idea of a Registrar was dropped by the new Labour government, the tone of the 1965 Act is similar to that of the White Paper. Mergers are included within the scope of the MC's authority, and the BOT is empowered to stop amalgamations. Yet, as the White Paper stated, it was expected that only "a

43. For the most detailed general treatment of the Court until 1963 see R. STEVENS & B. YAMEY, THE RESTRICTIVE PRACTICES COURT (1965); a more up to date but briefer analysis is contained in V. KORAH, MONOPOLIES AND RESTRICTIVE PRACTICES 103-86 (1968) [hereinafter cited as KORAH].

44. *See generally* A.D. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 32-76 (2d ed. 1970) [hereinafter cited as NEALE].

45. Cement Maker's Federation, 2 RESTRICTIVE PRAC. CAS. 241 (1961). The opinion was heavily criticized in Sutherland, *Economics in the Restrictive Practices Court,* 17 OXFORD ECON. PAP. 385 (1965).

46. For example, the MC criticized two corporations, British Match and British Oxygen, for buying rivals, MONOPOLIES COMMISSION, REPORT ON THE SUPPLY AND EXPORT OF MATCHES AND THE SUPPLY OF MATCH MAKING MACHINERY, H.C. 161 (1953), MONOPOLIES COMMISSION, REPORT ON THE SUPPLY OF CERTAIN INDUSTRIAL AND MEDICAL CASES, H.C. 13 (1956), and divestiture of Imperial Tobacco Company's forty-two percent interest in its rival Gallaher was unsuccessfully recommended in MONOPOLIES COMMISSION, REPORT ON THE SUPPLY OF CIGARETTES AND TOBACCO AND OF CIGARETTE AND TOBACCO MACHINERY, H.C. 218 (1961). A general discussion of this period is found in KORAH, *supra* note 43, at 71-72. Note also that the BOT's name has changed periodically through various government reorganizations.

47. WHITE PAPER, MONOPOLIES, MERGERS, AND RESTRICTIVE PRACTICES, CMND. No. 2299, at ¶ 12 (1964).

small minority of mergers . . . may have harmful results,"[48] and "it would be wrong to introduce into the law any presumption that monopoly in itself is undesirable . . . ."[49]

The 1965 Act stipulates that any merger involving either an asset takeover exceeding £5 million or the formation or extension of a one-third market share can be referred by the BOT to the MC, if BOT sees fit. The MC can make analysis and recommendations, but the BOT decides what action should be taken, if any. In an investigation, the MC is charged with determining whether the merger violates "the public interest,"[50] but this term is left undefined. Only in the case of newspaper chains with circulation over 500,000 is reference to the MC required.[51] In fact, only about 3 percent of the mergers considered by the BOT are referred to the MC.[52] Although the BOT did publish a 1969 pamphlet trying to explain its reference policies, an observation by Gerald Newbould is more in point:

> The publication does not make clear that the real power of the U. K. merger policy lies within the hands of a small group of senior civil servants. This group, formed as a committee, is the basis on which any merger is either allowed or referred to the Commission, and once the merger is reported on, the same people also advise the President of the Board of Trade about acting upon the Commission's report.[53]

To accommodate its new responsibilities, the MC was expanded to 25 members, but they serve only part-time. In studying a particular case, a panel of about eight is used, and there is a support staff of 65. In the 1970-71 fiscal year the total MC budget was £141,783.[54] Although the Labour government proposed merging the MC into the Prices and Incomes Board[55] and the Tories indicated in the 1971[56] and 1972[57] Queen's Speech that they intended to introduce new legis-

48. *Id.* at ¶ 22.
49. *Id.* at ¶ 8.
50. A succinct statutory analysis is found in KORAH, *supra* note 43, at 74-83. Detailed explanations of procedures is given in BOT, MERGERS, *supra* note 11.
51. BOT, MERGERS, *supra* note 11, at ¶ 23. In selected circumstances, the cases can be acted on by the BOT alone.
52. *Id.* at ¶ 87-a.
53. NEWBOULD, *supra* note 14, at 219.
54. DEPARTMENT OF TRADE AND INDUSTRY, ANNUAL REPORT FOR THE YEAR ENDED 31 DECEMBER 1971, MONOPOLIES AND MERGERS ACTS 1948 AND 1965, H.C. 149, at 2-3, has the latest budgetary computations.
55. DEPARTMENT OF TRADE AND INDUSTRY, ANNUAL REPORT FOR THE YEAR ENDED 31 DECEMBER 1970, MONOPOLIES AND MERGERS ACTS 1948 AND 1965, H.C. 291, at ¶ 5.
56. ANNUAL REPORT, *supra* note 54, at 2.
57. 912 PARL. DEB., H.C. (5th ser.) 6 (1972).

lation, the 1965 system remains intact. A Fair Trading Bill, introduced last year, would effect only minor changes in the system.[58]

A twin institution, the Industrial Reorganization Corporation (IRC) was launched by Prime Minister Harold Wilson in 1966. Reacting to the lacklustre performance of British industry, the Labour government financed the IRC with resources of £150 million and ordered it to improve "[t]he international performance of our manufacturing industries by promoting structural reorganization."[59] Wilson prophesied that the IRC would "drag Britain kicking and screaming into the 20th century."[60] The IRC's own description of its function is illuminating:

> IRC has no interest in blue-prints unrelated to the practicalities of the situation. When fragmentation is impeding performance, the emphasis of the IRC approach is to support those managements of proven success in taking practical steps to concentrate effort and resources . . . . It soon became apparent . . . that . . . IRC would itself have to intervene directly on occasions: to act sometimes as an accelerator . . . and sometimes in a steering function . . . .[61]

The overall performance of the IRC is very difficult to measure. Writing in February 1970, *The Economist* observed:

> Since its establishment . . . the IRC has been directly involved in more than 50 projects concerning nearly 150 companies. Outstanding investment has reached £64 million, with a further £15 million committed. In 12 (of the 14 companies affected by IRC actions which reported subsequent results) . . . sales per head have gone up . . . but profit per head is down in seven . . . return on capital comes out even worse—down in all but four.[62]

Such preliminary statistics can be highly misleading. The IRC was interested in long term results, and the data cannot indicate strong causal relationships because there are no control variables. The success of the IRC was not, however, obvious.

The IRC was killed in October of 1970 by the Tory government, then in a non-interventionist mood. A future Labour government may resurrect it; arguably the Tories have already adopted a variation of

58. *See* pp. 688-89 *infra*.
59. Industrial Reorganisation Corporation, Reports and Accounts for the Year Ended 31st March 1969, H.C. 286, at 8 (1969) [hereinafter cited as IRC Reports].
60. W. Davis, Merger Mania 132 (1970) [hereinafter cited as Davis].
61. IRC Reports, *supra* note 59, at 8-9.
62. *Gunning for the IRC,* The Economist, Feb. 14, 1970, at 61.

the concept.[63] At any rate, the MC's role in the 1960's must be read against the background of the IRC's flamboyant activities. A prime illustration of IRC tactics was the startling transformation, within twelve months, of the British electrical industry, through the medium of Arnold Weinstock's General Electric Company (GEC).[64] In 1967, GEC had sales of £180 million, while English Electric's were £411 million and Associated Electrical Industries' (AEI) £260 million. By the end of 1968, Weinstock controlled them all—206,000 employees, about £1 billion in sales and all for a 140 percent equity dilution.

After a research paper and a bevy of 1967 conferences, the IRC decided the industry needed rationalizing and that Arnold Weinstock, who had tripled GEC profits in five years, was the wonder manager of the electric companies. He proposed to merge GEC with the sluggish AEI. The IRC agreed, initially offering a £15 million loan to the new company as a wedding present. AEI, however, was a reluctant bride. Resisting fiercely, AEI argued that its stock was undervalued and that profits were just beginning to climb. But when AEI issued a disappointing financial report, GEC launched a £120 million takeover bid. The IRC issued a statement lavishing support on the GEC bid, and the result was a victory for Weinstock and the IRC. Just as Weinstock was settling down with his new empire, Plessy made a surprise £260 million bid for English Electric. A distressed IRC quickly moved into the picture. A conference was called with the English Electric board and a deal was worked out: Weinstock would take over. Impressively, this deal was agreed to in principle, even before precise financial terms were known. The IRC proposals for a GEC-English Electric merger were debated by the Cabinet and finally clearance was given.

To put it mildly, mergers were not left to the market place.[65]

63. Marley, *A Free Pardon for the IRC*, The Times (London), June 7, 1972, at 21, col. 1, argues this point regarding the Conservatives' industrial policy.

64. *See generally* J. LATHAM, TAKEOVER (1969); R. JONES & O. MARRIOTT, ANATOMY OF A MERGER 265-313 (1970). The IRC explanation of its policy in the electrical cases is contained in IRC REPORTS, *supra* note 59, at Appendix 3. The Weinstock takeovers are analyzed in DAVIS, *supra* note 60, at 69-73. A good summary of the problems in the English Electric merger is found in *George, Arnold, Frank and John*, THE ECONOMIST, Sept. 14, 1968, at 57.

65. Among the IRC's other leading actions were its buying of equity in Cambridge Instruments to block a takeover bid, its reorganization of the ball bearing industry, and its role in an abortive attempt to bolster Rolls Royce. On Cambridge Instruments, *see* DAVIS, *supra* note 60, at 136-39; *IRC: Off With the Velvet Glove*, THE ECONOMIST, June 22, 1968, at 82. The IRC statement on the deal is found in IRC REPORTS, *supra* note 59, at app. 2.

On ball bearings, *see* DAVIS, *supra* note 60, at 140-44; *Cleaned Bowled*, THE ECONOMIST, May 17, 1969, at 91, gives details of the battle. The IRC viewpoint is presented in

Despite their difference in orientation, the IRC and the MC were regarded as complementary by British officials: if mergers which had negative public policy results should be blocked, those with a positive impact should be encouraged. Both kinds of intervention were necessary to a pragmatic industrial strategy. Unfortunately, this realistic balance was not sustainable, and the general presumption became that size meant efficiency and therefore that mergers should be encouraged, not stopped.

II. Merger Policy at the Monopolies Commission

From 1965 to July 1972, the MC has issued reports on sixteen mergers.[66] Of these, six were deemed by the majority to be not in the public interest. As the MC has pointed out, "It is not our function . . . to say whether the merger may be expected to be positively in the public interest."[67] Rather, the MC is supposed to recommend against only those mergers which are "against" the public interest.

INDUSTRIAL REORGANISATION CORPORATION, REPORT AND ACCOUNTS FOR THE YEAR ENDED 31ST MARCH 1970, H.C. 310, app. 2.

A general account of the events leading to the Rolls Royce bankruptcy is contained in G. TURNER, BUSINESS IN BRITAIN 396-410 (rev. ed. 1971) [hereinafter cited as G. TURNER]. The IRC's version is found in INDUSTRIAL REORGANISATION CORPORATION, REPORT AND ACCOUNTS COVERING THE PERIOD 1ST APRIL 1970 TO 30TH APRIL 1971, H.C. 443, at 19.

66. This article does not deal with vertical mergers. Only one MC case, PRESSED STEEL, concerned such a merger. The cases decided by the MC are: MONOPOLIES COMMISSION, THE BRITISH MOTOR CORPORATION LTD. AND THE PRESSED STEEL COMPANY LTD., H.C. 46 (1966) [hereinafter cited as PRESSED STEEL]; MONOPOLIES COMMISSION, ROSS GROUP LIMITED AND ASSOCIATED FISHERIES LIMITED, H.C. 42 (1966) [hereinafter cited as FISHING]; MONOPOLIES COMMISSION,THE DENTAL MANUFACTURING CO. LTD. OR THE DENTIST'S SUPPLY CO. OF NEW YORK AND THE AMALGAMATED DENTAL CO. LTD., H.C. 147 (1966) [hereinafter cited as DENTAL PRODUCTS]; MONOPOLIES COMMISSION, THE TIMES NEWSPAPER AND THE SUNDAY TIMES NEWSPAPERS, H.C. 273 (1966) [hereinafter cited as TIMES]; MONOPOLIES COMMISSION, GUEST, KEEN & NETTLEFOLDS LTD. AND BIRFIELD LTD., CMND. No. 3186 (1967) [hereinafter cited as BIRFIELD]; MONOPOLIES COMMISSION, BRITISH INSULATED CALLENDER'S CABLES LTD. AND PYROTENAX LTD., H.C. 490 (1967) [hereinafter cited as CABLES]; MONOPOLIES COMMISSION, UNITED DRAPERY STORES LTD. AND MONTAGUE BURTON LTD., CMND. No. 3397 (1967) [hereinafter cited as MEN'S SUITS]; MONOPOLIES COMMISSION, THOMSON NEWSPAPERS LTD. AND CRUSHA & SON LTD., H.C. 66 (1968) [hereinafter cited as CRUSHA]; MONOPOLIES COMMISSION, THORN ELECTRICAL INDUSTRIES LTD. AND RADIO RENTALS LTD., H.C. 318 (1968) [hereinafter cited as TELEVISION RENTALS]; MONOPOLIES COMMISSION, BARCLAYS BANK LTD. LLOYDS BANK LTD. AND MARTINS BANK LTD., H.C. 319 (1968) [hereinafter cited as BANKS]; MONOPOLIES COMMISSION, THE RANK ORGANISATION LIMITED AND THE DE LA RUE COMPANY LIMITED, H.C. 298 (1969) [hereinafter cited as RANK]; MONOPOLIES COMMISSION, UNILEVER LIMITED AND ALLIED BREWERIES LIMITED, H.C. 297 (1969) [hereinafter cited as BEER]; MONOPOLIES COMMISSION, GEORGE OUTRAM & COMPANY LTD. AND HAMILTON ADVERTISER LTD. AND BAIRD & HAMILTON LTD., H.C. 76 (1970) [hereinafter cited as OUTRAM]; MONOPOLIES COMMISSION, THE BERROW ORGANISATION LTD. AND THE COUNTRY EXPRESS GROUP, H.C. 224 (1972) [hereinafter cited as BERROW'S]; MONOPOLIES COMMISSION, BRITISH SIDAC LIMITED AND TRANSPARENT PAPER LIMITED, H.C. 154 (1972) [hereinafter cited as CELLOPHANE]; MONOPOLIES COMMISSION, BEECHAM GROUP LIMITED AND GLAXO GROUP LIMITED: THE BOOTS COMPANY LIMITED AND GLAXO GROUP LIMITED, H.C. 341 (1972) [hereinafter cited as DRUGS].

67. CRUSHA, *supra* note 66, at ¶ 111.

Operationally this standard has been defined as "strongly against." The following rough classification may be made of the MC's views of the various mergers.

MC's View Of Merger's Impact On The Public Interest

Very Good	Marginally Good	Indifferent	Marginally Bad	Very Bad
none	Y Times	Y Dental Products	Y Crusha	N Fishing
	Y Pressed Steel	Y Television Rentals	Y Outram	N Men's Suits
	Y Birfield	Y Beer	Y Berrow's	N Banks
			Y Cables	N Cellophane
			N Rank	
			N Drugs	

Y = MC approved Total Y = 10
N = MC disapproved Total N = 6

Certainly it can be debated whether any particular case should be in one column or the other, but the general point the chart makes is useful: Most of the mergers fall into the "indifferent" or "marginally bad" category, even by the MC's own analysis. Given this large number of mergers with ambiguous virtue, a slight shift in MC procedures or standards would change the outcome in many cases.

A. *Horizontal Mergers*

1. *Prevailing Trends*

In the MC's attitude toward horizontal mergers four points are of particular interest, and will be discussed in turn.

1. The MC seems to feel that increases in concentration are only minimally detrimental to the public interest, and therefore requires only a few documented efficiency benefits to approve a horizontal merger.

2. Production efficiencies are often assumed to exist for a larger company, although these are not documented.

3. The merger process is perceived as often being a positive force in itself.

4. The origin of many of the deals analyzed by the MC was quite haphazard, and in a number of cases the companies involved did not even attempt to quantify the benefits of the mergers.

British policy differs most dramatically from the American antitrust program in its attitudes toward concentrated markets and toward an "efficiencies defense" in anti-merger proceedings. In 1968 the Justice Department announced[68] that in a market already highly concentrated—*i.e.*, where the four largest firms have seventy-five percent of the market—the following mergers would be challenged under Clayton Act § 7:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15%	1% or more

If the market were less concentrated, the Department would challenge only in the following circumstances:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25%	1% or more

But if the acquired competitor were particularly "disruptive" to the market or had unusual potential, the deal would be challenged regardless of market shares. Furthermore, if there were an industry trend toward concentration, any acquisition by one of the large concerns of a company with two percent or more of the market would be challenged. The case law, as embodied in *Brown Shoe, Philadelphia National Bank, Rome Cable*[69] and *Von's Grocery* is as rigid as the Guidelines, if not more so.[70] In the words of Justice Stewart, "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[71]

68. UNITED STATES DEPARTMENT OF JUSTICE, MERGER GUIDELINES (1968) [hereinafter cited as GUIDELINES]. *See* NADER, *supra* note 8, at 85-88 for the background of the Guidelines.

69. United States v. Aluminum Co. of America (Rome Cable), 377 U.S. 271 (1964).

70. *See* AMERICAN BAR ASSOCIATION, ANTITRUST DEVELOPMENTS 1955-1968, at 76-80 (1968) [hereinafter cited as DEVELOPMENTS].

71. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

As for efficiency benefits, the Court stated in the *Clorox* case that, "Possible economies cannot be used as a defense to illegality."[72] The Justice Department contends that economic benefits should not be considered when evaluating mergers because a firm can expand internally to attain the economies, because there is great practical difficulty in proving or disproving efficiencies, and because the companies with the most to gain from efficiencies of scale—the smallest firms—have the greatest leeway to merge under the Department's market share guidelines.[73]

A prime example of the very different attitude of the British toward increases in concentration was the approval by the MC of the British Insulated Callender Cables (BICC) takeover of Pyrotenax.[74] Two firms that equally split ninety percent of the mineral insulated cable (mic) market were allowed to merge without any substantial showing of efficiency gains or other public benefits.

Pyrotenax, with sales of £6,355,000, was originally the only manufacturer of mic in Britain. In 1955, BICC, a diversified large cable producer, entered the market and had captured about half of industry sales by 1966. BICC's bid for Pyrotenax occurred by chance. Imperial Chemical Industries (ICI) owned 17.2 percent of Pyrotenax stock and in 1966 decided to sell. BICC, which had not contemplated a merger previously, suddenly found itself with the opportunity to buy a share in its only mic business competitor. As the MC pointed out:

> Economies and other benefits are claimed, but they appear to have been almost an afterthought. The truth is that the merger was prompted entirely by ICI's decision to sell its shareholding.[75]

BICC claimed a number of possible economies from the merger, but none of the claims was persuasive. Pyrotenax would save through obtaining its copper tubes at a substantially lower cost from BICC's new under-utilized factory—but, as the MC noted, Pyrotenax could easily build its own plant or change its suppliers. Exports would increase—but Pyrotenax had been expanding exports quite rapidly, practically doubling them in four years to account for some forty-seven percent of its sales. Perhaps most peculiar about the argument for efficiency gains was the promise by BICC to keep Pyrotenax as an independent operating company rather than integrate it with its

72. FTC v. Proctor & Gamble Co. (Clorox), 386 U.S. 568, 580 (1967).
73. GUIDELINES, *supra* note 68, at ¶ 10.
74. CABLES, *supra* note 66.
75. *Id.* at ¶ 135.

own mic division. No doubt this pledge was made in some degree to offset possible monopolization criticisms, but it also illustrates that plant scale economies were not envisioned as flowing from the merger.

The MC itself summed up the situation by stating, "The economic benefits which are expected to result from this merger . . . are not of sufficient importance to suggest that the public interest would suffer very much if the merger had not taken place."[76] As an aside, the MC mentioned: "We think it is regrettable that competition in this field has been reduced . . . ."[77] BICC did give some guarantees as to its future behavior, and arguably there was potential competition between mic and other cables. But by permitting a merger where the efficiency gains were perceived as so small, the MC seemed to consider the substantial increase in concentration to be of minimal importance.[78]

The three local newspaper cases—the *Times* takeover of Crusha & Son,[79] the George Outram purchase of two Scottish papers in the Hamilton group,[80] and Berrow's acquisition of *The County Express*[81] —also illustrate the MC's casual attitude toward market concentration. Interestingly, despite the feeling of many witnesses that the decline of local papers was "inevitable" because of their weak financial condition,[82] the acquired papers were quite strong in all three cases, and no substantial efficiencies from merger were shown. Yet, the mergers were approved.

The George Outram takeover of the Hamilton group is indicative of the MC approach. Outram, a subsidiary of a conglomerate, already had a formidable position in Scotland when it made its Hamilton bid. Aside from owning three major dailies, including the *Glasgow Herald* and a large share of Border Television Ltd., Outram owned papers with 21.2 percent of Scottish local readership. The purchase of the Hamilton group would give it another 11.5 percent of Scottish local circulation. Furthermore, Outram's holdings were geographically concentrated in lower and midwestern Scotland. It was argued that the Hamilton group papers needed more sophisticated printing equipment, but in fact the need for "additional capacity" would not occur

76. *Id.* at ¶ 161.
77. *Id.*
78. For a critique of the MC attitude in this case, see A. SUTHERLAND, THE MONOPOLIES COMMISSION IN ACTION 55-64 (1969) [hereinafter cited as SUTHERLAND].
79. CRUSHA, *supra* note 66.
80. OUTRAM, *supra* note 66.
81. BERROW'S, *supra* note 66.
82. *See, e.g.*, CRUSHA, *supra* note 66, at ¶¶ 67, 70.

"more than two or three times a year" and could be achieved by producing the newspaper in two parts. Again, approval was given to a merger substantially increasing concentration and producing few and minor efficiency benefits.

In analyzing the takeover of *The County Express* the MC acknowledged that a total monopoly would result in the city of Kiddeminster, but dismissed the consequences with an airy afterthought:

> We were told . . . there would be a danger that advertising rates might be increased. While we cannot rule out this possibility . . . there would in practice still be some restraint on advertising rates. If rates rose significantly, advertisers would be likely to reduce the frequency of their advertising.[83]

The neglected issue is *how much* room there is for monopoly profit-taking, but the MC failed to investigate the elasticity of demand for advertising space in Kiddeminster, and thus left the misallocation of resources unexplored.

In approving the bid by GKN, the largest British engineering company with some £353 million in sales, for Birfield,[84] an automobile component manufacturer with £45 million in sales, the MC simply assumed that bigness means increased efficiency. Until 1960, Birfield was the only British manufacturer of propeller shafts, a device used in vehicle transmission systems. Customers complained about the Birfield monopoly position, and eventually GKN moved into the business, taking a substantial share of the £20 million market. Claiming that its takeover of Birfield conformed to the rationalizing goals of the IRC, GKN said it could boost the profitability of Birfield by producing massive efficiencies. However, "GKN was not able to make any present estimate of the cost savings that might be achieved."[85] Commenting generally on GKN's assertions, the MC noted, "We do not think that the prospect of cost savings in the production and supply of propeller shafts played any great part in bringing about this merger."[86] Yet, the MC later asserted that in the propeller field, "Competition may have a slightly depressing effect upon the profit element in the price while a monopoly situation may have a slightly reducing effect on the cost element."[87] It seems curious that the MC could

83. BERROW'S, *supra* note 66, at ¶ 70.
84. BIRFIELD, *supra* note 66.
85. *Id.* at ¶ 107.
86. *Id.* at ¶ 130.
87. *Id.* at ¶ 133.

compute how competition depressed profits, but not how monopoly would inflate them.

The real key to the MC's reasoning was its assumption that the British auto industry inevitably required larger concerns. This assumption conformed with government policy, which culminated in the IRC-supported takeover by British Leyland of British Motor Corporation (BMC). As a result of that merger only one major auto company is now British owned.[88] In a key passage the MC summed up its views:

> We doubt whether Birfield could for long have survived on its own. If the future for motor component manufacture lies with large units, we do not think it can be said that there is any other potential partnership for Birfield that would have obvious advantages over the merger with GKN.[89]

It is rather ironic that this bigness per se doctrine was flaunted in a case where the MC could find no significant economies. Though its profits were less than GKN's, Birfield was not in desperate trouble. In fact, *The Economist* asserted that the lower profits largely reflected a rapid write-off of capital equipment. According to *The Economist*, GKN was hoping through buying Birfield to return to the old monopoly situation, calculating that no other entrant was likely in a field that GKN itself had found rather unprofitable.[90] One critic, Valentine Korah, after pursuing the sketchy basis for the MC decision, summed up: "This conclusion may well have been right, but it certainly could not be proved."[91] Or, as *The Economist* stated, "The Government is ranging itself on the side of the big battalions."[92]

Bigness was also interpreted to mean efficiency in the *Television Rentals* case.[93] The Ministry of Technology made a special plea that the merger be allowed between Thorn Electric Industries, a large television manufacturer and renter, and Radio Rentals, the largest rental firm in a country where half of the televisions are rented:

> [T]he television tube and set manufacturing industry must remain free to undertake the concentration of production necessary to reduce costs and maintain sufficient research and development

88. On the evolution of the motor industry, *see* G. TURNER, *supra* note 65, at 410-31. On the specific tactics of Stokes and British Leyland, *see* DAVIS, *supra* note 60, at 94-109.
89. BIRFIELD, *supra* note 66, at ¶ 156.
90. *Leaking at the Joints*, THE ECONOMIST, June 11, 1966, at 1240.
91. KORAH, *supra* note 43, at 88.
92. *Mr. Wilson and the Big Battalions*, THE ECONOMIST, Jan. 21, 1967, at 239, 240.
93. TELEVISION RENTALS, *supra* note 66.

> to enable it to match the prices and performances of its major overseas competitors.[94]

Perhaps the Ministry was right. British manufacturers had been sheltered from competition by high tariffs and technical barriers to entry, both of which were rapidly diminishing. Furthermore, the new technology of color broadcasting arguably created higher research needs than could be funded by existing companies. But these possibilities were never documented to the MC. As neither Thorn nor Radio Rental intended closing any of its factory lines, immediate economies of production scale were unlikely. As the MC noted, "Thorn and Radio Rentals had made no detailed plans for the coordination of their manufacturing activities."[95] After reciting a series of alleged economies and dismissing them as insubstantial or highly speculative, the MC suggested: "If a saving of say six to eight percent were achieved this would be beneficial."[96] Then, to compound the confusion, the MC noted: "[W]e doubt whether this proposed merger is likely to have any decisive effect . . . upon the future ability of the British television industry to compete with foreign producers."[97]

Against these rather ethereal efficiency gains, the costs of increased concentration were given very little weight. The MC did note that both firms were not under strong competitive pressures and that, even if there were savings on rental costs, "[t]here would be no compelling pressure to pass the savings on to the public."[98] However, the MC felt that the merger would have little actual effect on the consumer. This attitude was challenged by Professor T. Barna, who computed that Thorn, to justify the high price it had paid for Radio Rental, would be forced to jack up rental prices. This conclusion was reinforced by the fact that Radio Rental had previously been charging lower prices than Thorn. In effect, the MC majority sidestepped all the tough issues by assuming that increased concentration would have no consequences.

Beyond assuming that larger enterprises generally are more efficient, the MC views the process of merger itself as beneficial to the merger's enterprises. For example, in the takeover of *The Times*, an allegedly failing newspaper, by the *Sunday Times*,[99] the MC encouraged merger

94. *Id.* at ¶ 125.
95. *Id.* at ¶ 136.
96. *Id.* at ¶ 199.
97. *Id.* at ¶ 218.
98. *Id.* at ¶ 205.
99. TIMES, *supra* note 66.

as a proper route for shifting management. In the early 1960's, circulation of *The Times* remained static at about 250,000; advertisers complained about the high rates; profits were meager. Finally a campaign was waged to expand *The Times*'s circulation. The MC concluded that, although the cost of this promotional effort—some £140,000—was high, the company could be expected in time to reap the benefits and was not in dire financial straits. However, the MC felt, "[i]t is plain that the company no longer had confidence in its own ability to carry on successfully, and this in itself makes change desirable."[100]

This merger-as-tonic philosophy ignores the possibility that the incoming team too may lose its vigor. What then? Inevitably, the tonic solution leads to a spiral of concentration, and there is no guarantee that the ultimate behemoths created will not become phlegmatic themselves. Surely, merger is not the only available method of changing a management team—especially if the owners perceive the need for new blood.

Perhaps the most curious aspect of many MC cases is that the mergers were so haphazard in origin and the arguments presented by the involved corporations were so weak. Consider the prelude to the MC decisions in *Banks*. Within two weeks the entire structure of British banking was fundamentally transformed. First: the Westminister and the National Provincial, Britain's fourth and fifth largest banks, announced on January 26, 1968 their intention to merge and form an entity with 24.6 percent of gross London clearing bank gross deposits. Next: the Royal Bank of Scotland and the National Commercial Bank of Scotland indicated their desire to amalgamate into a firm with some £900 million in deposits. One day later, February 8: Barclays and Lloyds, which had ostensibly been competing to take over the Martins Bank with 4.9 percent of gross deposits, issued the startling statement that the rival bidders planned to merge themselves, and Martins as well. The triple merger would create "a super giant," with 47.2 percent of British clearing bank deposits—the second largest bank in the world.[101]

This unusual merger-rush was triggered by a major change in government policy. Reversing a policy against banking mergers existing since the 1918 Colwyn Report, the National Board for Prices and In-

100. *Id.* at ¶ 150.
101. BANKS, *supra* note 66, at ¶ 13 summarizes the market share figures.

comes stated in 1967 that Britain's banking industry could use "further amalgamations."[102]

Although the Westminster merger was not even referred to the MC, the Barclays-Lloyds-Martins deal was referred within eight days. According to *The Economist,* the reference to the MC "came directly from 10 Downing Street as a result of uneasiness that had been expressed to the Prime Minister by some members of the Labour Party."[103] The MC did vote six to four against the merger, and its recommendations were accepted by the government, although Martins was allowed to merge with Barclays.

If the circumstances leading to the merger mania in the banking industry were rather unusual, the rationale presented by British Sidac and Transparent Paper to justify their cellophane merger was unique: the chief reason for the deal was, the companies asserted, to raise prices. The MC studied the argument with deference but in the end demurred. Sidac claimed that higher prices would increase profitability, and this would in turn spur the industry to expand in the public interest.[104] Since there was no great demand for cellophane expansion, and British Sidac was already making a twenty percent return on employed capital in 1969, these arguments were rather perplexing, even to the MC. Perhaps more interesting than the MC's negative decision, however, is the fact that the BOT nearly refrained from referring the merger to the MC. When the possibility of a merger was originally discussed in 1966, the companies asked the government for an indication of attitude: "The Board of Trade, which was asked to give a view on whether the acquisition would be referred to this Commission, said that on balance, a reference was unlikely."[105] Time, a change in attitudes, or the election of the Tories altered government policy.[106]

In a number of cases, the companies involved made no attempt to quantify the benefits from merger. In *Cables,* as noted, descriptions

102. NATIONAL BOARD FOR PRICES AND INCOMES, BANK CHARGES: REPORT NO. 34, CMND. No. 3292 (1967) in effect reversed the policies articulated in REPORT OF THE TREASURY COMMITTEE ON BANK AMALGAMATIONS, CD. No. 9052 (1918) (Colwyn Report). See the discussion in BANKS, *supra* note 66, at ¶¶ 9-12, 21-22, 45.

103. *Merging for What?,* THE ECONOMIST, June 15, 1968, British Banking Supp. xi, xii.

104. CELLOPHANE, *supra* note 66, at ¶¶ 162-67.

105. *Id.* at ¶ 74.

106. An interesting aspect of the case is that in it the MC explicitly rejects the market elasticity findings used in the famous American cellophane litigation, United States v. E.I. DuPont de Nemours, 351 U.S. 377 (1956). For a critique of that case, see Stocking & Mueller, *The Cellophane Case and the New Competition,* 45 AM. ECON. REV. 29 (1955). The product in these cases is cellulose film. The name "Cellophane" in Britain is owned by British Cellophane.

of cost savings were very sketchy; the MC considered the benefits claimed in BICC's takeover of its mic rival Pyrotenax as "almost an afterthought."[107] In *Television Rentals,* "the total cost savings . . . cannot be quantified in any certainty, particularly as the companies have not yet considered in detail how the coordination of their rental interests would be implemented."[108] The trawling firms involved in *Fishing* measured the benefits from the merger using the following technique:

> What we have done there (to measure increased efficiency of a merged fleet) is to take a figure of two percent—it may seem to be a rather arbitrary figure, but that is what we took . . . .[109]

The MC itself generally criticized the assertions of the companies as being unfounded, but then, as has been seen, often allowed the merger anyway. In *Pressed Steel,* the MC's first case, neither the MC nor the companies made any serious effort at measuring efficiencies. As Sutherland noted, "No quantitative estimate either of the savings claimed by the companies or of those accepted as probable by the MC"[110] were given. Rowley, who usually disagrees with Sutherland, observed here: "The Commission's analysis of the alleged benefits arising from the merger is depressingly slim . . . ."[111]

Obviously, the purist trustbuster would be displeased with some of these British cases; but adherents of the Schumpeter-Galbraith thesis should be equally disappointed. If mergers were indeed required by modern industrial technology, why did the MC and the companies concerned have such difficulties substantiating their virtue?

2. *Possible New Directions*

In the late sixties, however, a change in British attitudes began to evolve which promises to make the MC more critical of mergers and more rigorous in its analysis. The switch by the BOT in the *Sidac* case, the 1969 speeches by BOT President Anthony Crosland, warning that uninhibited consolidation might merely increase Britain's quota of "sleeping giants,"[112] the warnings of Labour Minister Barbara Castle

107. CABLES, *supra* note 66, at 135.
108. TELEVISION RENTALS, *supra* note 66, at ¶ 151.
109. FISHING, *supra* note 66, at ¶ 95.
110. SUTHERLAND, *supra* note 78, at 65.
111. Rowley, *Mergers and Public Policy in Great Britain,* 11 J.L. & ECON. 75, 109 (1968). Other recent comments on the MC include Pass, *Horizontal Mergers and the Control of Market Power in the U.K.,* 17 ANTITRUST BULL. 811 (1972); Howe, *Rethinking British Merger Policy,* 17 ANTITRUST BULL. 283 (1972).
112. BOT, MERGERS, *supra* note 11, at 64.

about the harms of oligopoly[113]—all this has indicated a new appreciation that size and market concentration are, at best, mixed blessings. Indicative of these new attitudes is the 1972 MC decision in *Drugs*.

On December 2, 1971, Beecham Group Limited (Beecham) announced a takeover bid for Glaxo Group Limited (Glaxo). Glaxo spurned the offer and announced plans to defeat the bid by merging with The Boots Company, Ltd. (Boots). The following chart suggests the market positions of the three companies, based on the latest available data:[114]

	Glaxo	Beecham	Boots
Sales (million pounds)	£157.5	£219	£303
Profits (million pounds)	£ 25.1	£ 41.6	£ 35
Profits as a percentage of capital employed	23.1	34.4	29.1
Percentage share of prescription medicine supplies by all companies within United Kingdom	11	7	3

(Note that only thirty-six percent of the £280 million British pharmaceutical market was being supplied by British owned companies.)

In defending itself against the Beecham bid, Glaxo, predominantly an ethical pharmaceutical company, argued that Beecham's orientation toward consumer goods would detract from Glaxo's traditional market image. Beecham responded that Glaxo would benefit from Beecham's marketing know-how. Boots argued for a merger with Glaxo on the theory that Glaxo's international experience—some seventy percent of Glaxo sales were overseas—would help Boots, predominantly a retail drug store chain, to expand into Europe. Beecham responded that the Boots-Glaxo merger would create undesirable vertical integration, limiting the availability of other manufacturers' products on Boots' retail shelves.

In analyzing the Beecham-Glaxo proposal, the MC noted that both companies had been quite profitable at their current size and stated

113. *Mrs. Castle's New Recipe*, THE ECONOMIST, Jan. 24, 1970, at 54.
114. DRUGS, *supra* note 66, at Appendix 13.

that although some international advantages would flow from the merger, "Beecham's assessment of the advantages of the proposed merger is exaggerated."[115] For the first time the MC cast a critical eye on the arguments that large size means increased efficiency. The current size of British drug companies was found to entail "no material disadvantage in research and development."[116] According to the MC,

> Results of the available studies suggest that maximum efficiency in research and development may be achieved by a size of company well below that of the largest in the international pharmaceutical industry . . . . We think that any advantage which might accrue from the merger in the fields of overseas marketing and research and development would be outweighed by the disadvantages to research and development. These disadvantages can be summarized as 1—the removal of an incentive to Beecham to broaden the scope of its research; 2—the elimination of an important independent centre for deciding the allocation of funds for research and the direction and pattern of research work, which would jeopardize the discovery and development of new products in the British owned pharmaceutical industry; and 3—damage to the morale of the Glaxo research staff in a merged organisation.[117]

Using a similar analysis, the MC also rejected the arguments for a Glaxo-Boots merger.

Drugs offers a rather startling contrast to the other MC cases which have been studied. Because the takeover was contested, all the parties involved supplied the MC with information and arguments about their adversaries, and the MC's analysis was sharper as a result.[118] But the case also signals an important change in the MC's basic approach. For example, an appendix was supplied, surveying all the available information regarding the correlation between size and efficiency in the drug industry; statistics replaced conclusory assertion. Further, the MC stressed the virtues of competition manifest in having many and diverse research units, even while noting that the dominant buying position of the National Health Service and the strong role of imports in the industry made monopolistic pricing of little concern. Judging by the balanced tone and the quality of analysis in *Drugs*, the MC may finally be coming of age.

115. *Id.* at ¶ 246.
116. *Id.* at ¶ 247.
117. *Id.* at ¶¶ 247, 264.
118. *See id.* at ¶ 194.

B. *Conglomerate Mergers*

Eighty-two percent of merger activity in the United States in the late sixties was of a conglomerate or product-extension variety,[119] but antitrust policy in this field is a bewildering confusion of legal fiction and precedents stretched to the logical breaking point. The Justice Department's guidelines and the cases focus on three specific criteria: potential entrance by the acquiring firm into the acquired firm's market, reciprocity, and entrenchment of market power.[120] Though eighty-seven firms control over forty-six percent of manufacturing assets in the United States,[121] antitrust doctrine ignores the problem of aggregate concentration.[122]

The MC has decided two diversified merger cases, one rejecting Rank Organisation Ltd.'s bid for De La Rue Company Ltd. (*Rank*), the other approving the Unilever takeover of Allied Breweries (*Beer*).

In *Beer*, the MC "let the merger through not so much on the nod as on the shrug, as if two sleeping dogs might share the same hearth rug."[123] Allied Breweries was itself the product of a 1961 merger between three leading companies. With 10,000 retail outlets and assets of £307 million, it was the second largest brewery group, with 15.5 percent of the beer market, and the eleventh largest company in Britain. Unilever, formed in 1929 by an amalgamation of the British and Dutch soap and margarine trusts, was in 1969 the fourth largest British company, with some £1 billion in assets and with a wide range of products, including some overseas activity in beer. Unilever claimed that the merger was really "product extension" since drinks were a natural complement to its food business The MC's conclusions were quite guarded:

> We find that there are some indications that greater efficiency in the use of resources . . . are likely although they do not appear to us to be considerable in size. There is, we feel, some risk that little of those benefits will be passed on to the public . . . .[124]

119. FTC, *supra* note 2, at 63.
120. *See* GUIDELINES, *supra* note 68, ¶¶ 17-21. *See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) regarding reciprocity; FTC v. Proctor & Gamble Co. (Clorox), 386 U.S. 568 (1967) and The Bendix Corp., 3 TRADE REG. REP., ¶ 19,288 (FTC 1970), *rev'd on other grounds*, regarding potential competition. *See generally* DEVELOPMENTS, *supra* note 70, at 83-89.
121. FTC, *supra* note 2, at 164.
122. *Cf.* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1395 (1965). *But see* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 306 (1960) [hereinafter cited as Bok].
123. *It's Conglomerates They're After*, THE ECONOMIST, June 14, 1969, at 69.
124. BEER, *supra* note 66, at ¶ 124.

Although there thus appeared to be few advantages from the deal, the MC felt there were few disadvantages and approved the merger.

Rank, however, presents a more provocative approach. Rank, the thirty-eighth largest British company, with assets of £262 million and sales of £204.5 million, was seeking to diversify. The company had a spectacular growth record, but this was largely due to the role played by Xerox processes, which contributed about forty percent of sales and eighty percent of profits. Rank's target, De La Rue Company, was the 186th largest British company, with assets of £39.3 million, sales of £42.4 million and pretax profits of £3.66 million. De La Rue was a mini-conglomerate itself, with interests in banknote printing, formica, and heating equipment. When the Rank bid came, De La Rue waged a bitter defense, claiming the bid was underpriced, earnings were going up, and Rank was too dependent on Xerox. As William Davis stated the situation, "Instead of the customary happy walk up the aisle, it was going to be a classical case of rape."[125]

The MC admitted the merger would have virtually no impact on competition in specific markets because the two companies were in entirely different industries—a "pure" conglomerate merger. But instead of assuming increased firm size would reduce costs, as was done in many horizontal merger cases, the MC here noted a possible deterioration in efficiency. Using a survey by De La Rue's attorneys, the MC concluded that many top executives would leave after the merger, endangering sensitive business relationships in the formica and the banknote industries. This analysis was controversial. Normand Leyland observed that the survey technique itself should be regarded as "completely unacceptable."[126] *The Times* huffed, "simple arrogance."[127] And as J. P. Cairns noted, "[h]ad competitive effects alone been considered as . . . in the United States . . . the merger would have been cleared as harmless."[128]

But the Annex to the *Rank* report, General Observations on Mergers, indicates the MC was actually concerned about aggregate concentration. Although it states that "the absolute size of British companies does not, for the present at least seem to raise any important issues for the public interest,"[129] the rest of the annex rebuts that

125. DAVIS, *supra* note 60, at 270.
126. Leyland, *Monopoly Control from the Point of View of the Firm,* in CONFERENCE, *supra* note 30, at 106, 109.
127. DAVIS, *supra* note 60, at 228.
128. Cairns, *Competition Policy and Economic Objectives,* in CONFERENCE, *supra* note 30, at 45, 50 n.22.
129. MC OBSERVATIONS, *supra* note 11, at ¶ 26.

proposition. Though acknowledging that "large is a relative term" and that bigger British companies are needed to compete in international markets, the Annex underscores the dangers inherent in the depletion of middle sized efficient companies. The Annex also explains how conglomerate growthmanship can be obtained by accounting tricks, without any real net gain.[130] Although it urges better information, the *De La Rue* decision suggests that the MC may supplement stockholders' decisions where mergers neither threaten market concentration nor promise scale or integrative efficiencies—*i.e.*, where aggregate concentration is alone at stake.

The most obvious reconciliation of *Beer* and *Rank* is to limit *Rank* to its facts, *i.e.*, to a takeover of a business sensitive to managerial changes. However, *The Economist* fastened on a more interesting reading: "[B]igness has this Government's blessing; and . . . conglomerates in general have not."[131] That is: if pure conglomerate mergers have no efficiency benefits, the harm implicit in increasing aggregate concentration requires rejecting the merger. But, if there is even a vestigial efficiency benefit, the deal should be permitted, and the MC will often virtually assume benefits from the scale increase inherent in most horizontal mergers. As a result, horizontal mergers are treated more leniently than conglomerate mergers, a result in direct contrast to United States law.

Although American merger law generally gives little weight to efficiency benefits, an exception should perhaps be made for the conglomerate field. Turner advises considering the possible efficiencies from conglomerate mergers because their impact on market concentration is so uncertain. A better approach, based on *Rank*, would utilize the opposite presumption: If no clear efficiency benefit could be shown, a sizable conglomerate merger would be banned because of its negative impact on *aggregate* concentration. If the presumption were rebutted, the normal analysis in diversified cases would be used: The merger would be accepted so long as excessive market concentration or reciprocity were not threatened. The advantage of the *Rank* approach is that it introduces considerations of aggregate concentration into the analysis and does so by means of a rough presumption rather than through an exacting balancing test. The latter would convey a spurious impression of scientific accuracy.

130. *Id.* at ¶ 31.
131. *Mergers: Bigness Ain't Bad,* THE ECONOMIST, June 7, 1969, at 76.

III. The Impact of Procedure

Most MC cases occur in a grey area where a slight shift of applicable standards would alter the outcome, and the "public interest" standard is itself extremely vague. Therefore, it seems a fair guess that many mergers have been approved simply because the MC system has no prosecutor to marshal the case against approval. When a company comes before the MC, the only countervailing opinions are the "unbiased" views of the staff. The 1964 Merger White Paper recommended that there be a Registrar of Monopolies and Mergers, whose rule would parallel that of the Registrar of Restrictive Practices. He would be informed of all pending mergers and have the right to challenge any of them before the MC. Some such institution is required. The higher quality of analysis in cases where takeovers were contested, such as *Rank* and *Drugs*, shows that an adverse party, outside the MC staff, is needed to collect and present the facts of the situation.

The BOT refers only three percent of all merger cases to the MC. Although the BOT has issued a guide to its merger policies, how the BOT exercises discretion remains unclear. The BOT contends that for reasons "implicit in the legislation which adopts a broadly neutral attitude to mergers, it would not be appropriate in Britain to formulate precise guidelines to determine which mergers will be referred by the Board to the Commission."[132] The difficulty is that no coherent policy at all has emerged. By contrast, the principle of stare decisis and policy statements such as the Justice Department *Guidelines* give some consistency to American anti-merger policy. When the BOT decides not to refer a case, it is sometimes because the parties have given some commitment about their future behavior. Unlike the procedures surrounding the analogous American consent decree, however, there is little if any public record of either the negotiations or their result. The only information published about these deals is in the BOT's *Mergers*, which states: "In a number of cases, the Board, in deciding not to refer important mergers to the Commission, have taken into account assurances given by the parties about their future behaviour or intentions."[133] The BOT then simply lists eight large mergers.[134] With a Registrar or without one, fuller disclosure of the reasons for

132. BOT, MERGERS, *supra* note 11, at ¶ 4.
133. *Id.* at ¶ 86.
134. "Chrysler/Rootes; G.E.C./A.E.I.; International Computers Ltd.; EMI/ABPC; G.E.C./English Electric; General Foods/Rowntree; Ross/Associated Fisheries (trawling interests); Distillers/United Glass"; *id.* at 86.

investigating particular cases and "settling" others seems needed.

It may fairly be argued that American merger policy incurs high costs in relying, for its consistency, upon stare decisis and rigid prosecutorial guidelines. Litigants find themselves talking about confused and ancient dicta rather than about economic factors and theories pertinent to the case at bar; old cases are twisted to fit new challenges; simple rules are applied across industry boundaries with little attention to important inter-industry differences. But the British have not yet found a better way. The BOT could devise sophisticated and detailed "prosecutorial" guidelines for each industry grouping, changing these freely as economic conditions warrant. In this way, merger policy could be structured without being oversimplified. But the BOT has instead shrouded all its referral decisions in secrecy and has developed no useful and concrete principles to guide those decisions. As a result, businessmen have been confused, and the BOT itself has been embarrassed on occasion: Political pressure appears to explain the BOT referring the Barclays Bank merger to the MC but not referring the Westminster merger.

The MC has also been unable to lend consistency to British antimerger policy. Because it considers only three percent of all mergers, and these not of its own choosing, the MC cannot make detailed general rules on merger behavior. For instance, the MC professed itself impotent, in the *County Express* case, to deal with the trend toward concentration-through-merger in the newspaper industry, since its mandate ran only to the isolated transaction before it, not to industrywide conditions.[135]

Further, the MC treats each case as a self-contained event. There are no cross-references in the decisions, and thus little consistency between them. Consider for instance the definition of market shares. In *Cellophane,* the MC narrowly defined the market, explicitly rejecting the finding of cross-elasticity among all flexible packaging materials made in the famous American cellophane case. Similarly, in *Men's Suits,* the market was defined rather stringently. The two firms involved in the merger had about thirteen percent of male clothing sales, thirty-three percent of the men's suit market, eight percent of jacket and trouser receipts, and some forty-five percent of the low cost (below £20) men's suit market. The Commission focused on the suit market, with particular emphasis on the low price field. The market definition in *Fishing* is also narrowly circumscribed. Rather

135. BERROW'S, *supra* note 66, at 76.

than using the combined share (twenty percent) of all fish brought into Britain, the MC used the share (fifty-four percent) of Humber cod landings at the ports of Hull and Grimsby. And yet, the same MC defined the market expansively in the newspaper cases, *Cables, Television Rentals* and *Dental Products.* Such inconsistencies are typical. Sutherland briefly studied eight MC cases and commented:

> There is no very compelling reason on this crude basis for one to agree with the MC that the further reductions in competition in the five approved cases were any less of a threat than in the other three cases. . . . It is not easy to see, at this stage, the underlying logic of the MC's approach to mergers.[136]

Sutherland hoped that some standards might evolve over time. If they have, they are of such a subtle nature as to be undetectable.

IV. Conclusion

While British legislation "adopts a broadly neutral attitude to mergers,"[137] the BOT and the MC have been not so much neutral as benign. During the 1920's the government actively encouraged the cartelization of industry to meet the problem of surplus capacity.[138] The original American approach during the Depression was not very different. As A. D. Neale has pointed out, "President Roosevelt's 'National Recovery Program' involved a virtual suspension of the antitrust policy and industries were brought together under government auspices to devise measures for steadying price movements."[139] But the N.R.A. was short lived, and under Thurman Arnold the Justice Department's Antitrust Division was resuscitated.[140]

The resurgence of antitrust in America was not completely fortuitous; it reflected underlying attitudes not shared by the British.

> Two basic considerations underlying antitrust—the wish to disperse economic power and the wish to rely on judicial processes to do so—though no doubt present in British opinion, have a lesser impact . . . than in the United States.[141]

136. Sutherland, *The Management of Mergers Policy,* in THE MANAGED ECONOMY 69 (A. Cairncross ed. 1970).
137. BOT, MERGERS, *supra* note 11, at ¶ 4.
138. ALLEN, *supra* note 36, at 54.
139. NEALE, *supra* note 44, at 9.
140. NADER, *supra* note 8, at 67.
141. NEALE, *supra* note 44, at 479.

Neale has suggested that the dispersal of economic power would not find public support in Britain largely because it would "be widely believed that, if need be, economic power could be 'controlled' or dealt with in some other way . . . ."[142] The British have a great deal more confidence in the ability of their regulatory system to handle problems than Americans have in theirs. As Neale notes:

> One of the profoundest institutional differences between the two countries is the absence in the United States of anything corresponding to the amorphous but recognizable assemblage of public bodies and personages that we know in Britain as "the Establishment," and this has much to do, as both cause and effect, with American distrust of authority *per se*. In general the possession of power by established authorities arouses a much lesser degree of anxiety or resentment in Britain, where the emphasis is much more on the use of power.[143]

The British see little harm in increased concentration because of their view of modern industrial structure. The realities of countervailing power, behavioral regulation by government, and the role of government as a major force in the market all undercut the traditional assumptions of the perfect competition model. For example, a prime reason for approving a major merger in the dental products industry was that the National Health Service was the market's major customer and could therefore act as a check against rising prices. Similarly in *Birfield, Pressed Steel* and *Cables,* the MC relied heavily on guarantees given by the companies as to their future behavior patterns. The MC seemingly had confidence that, in the regulatory state, a guarantee to the government that monopoly power would not be exploited was as useful a weapon as competitive forces.

The lacklustre economic performance of Britain in the postwar era heightened the perceived need for more government action and for bigger corporations. But just as the neoclassical view of competition came under attack during the thirties, the more simplistic assumptions of centralized planning began to be questioned in the sixties, even within socialist regimes.[144] The British seem already to

142. *Id.* at 478.

143. *Id.* For a cynical view of the workings of the American establishment, see Fellmeth, *The Regulatory-Industrial Complex,* in WITH JUSTICE FOR SOME 244 (Wasserstein & Green eds. 1971).

144. *See generally* J. WILCZYNSKI, THE ECONOMICS OF SOCIALISM 49-59 (1970) (a brief discussion of the ideas of Evsei G. Liberman, a professor retired from Kharkov Technical University who was responsible for major policy changes in Soviet applications of micro-economics).

have begun to reconsider some of their attitudes. Politicians once entranced by the inherent logic of larger organizations have grown skeptical of the diversified takeover movement. Anthony Wedgwood Benn, a Labour spokesman, pressing in Parliament for the government to take more effective action against takeovers, recently articulated this new viewpoint:

> There is now a very wide feeling that it is time for a halt in some of these mergers, which have no industrial logic and appear to be based, in part at any rate, on tax advantages . . . .[145]

In the same debate Harold Wilson, who established the IRC, pressed the Conservative representative on the government monopoly policy:

> Is the right Hon. Gentleman not also aware of what is now becoming an almost obscene list of conglomerate takeover bids . . . and of the City becoming, in the words of Harold MacMillan, a casino, day by day? Is he not aware that in the case of many of these mergers the consumer is never consulted at all, and that in the case of those mergers and takeovers which are intended not for productive efficiency but for asset stripping or the sale of valuable properties, it means the closure of factories and redundancies without the workers being considered either?[146]

Business Europe summarized the atmosphere in late 1972:

> A wave of hysteria is emanating from the UK media and parliament on the social dangers arising from most mergers and particularly from the enhanced strengthening of conglomerates. This public resentment follows a decade during which mergers have become glorified.[147]

In late 1972, the government responded to these pressures by introducing a Fair Trading Bill.[148] The Bill would create a Director General of Fair Trading, who would assume the functions of the Registrar of Restrictive Trading Agreements, have general consumer protection responsibilities, and also have certain responsibilities in the monopolies and mergers area.[149] The importance of the Bill to merger pol-

145. 912 PARL. DEB. H.C. (5th Ser.) 327 (1972).
146. *Id.* at 330.
147. *Britain's Proposed "Fair Trading" Law to Alert Merger and Acquisition Practices*, BUSINESS EUROPE, December 15, 1972, at 393.
148. Fair Trading Bill, H.C. Bill 36, 1972-73. It should be noted that a reference to the MC can be made under the Bill if the value of the assets taken over exceeds £5 million or a one quarter market share is involved. *See* Clause 60.
149. For a summary of the bill, see the Explanatory and Financial Memorandum which precedes it.

icy is more in atmospherics than substance.[150] The MC was preserved, although renamed the Monopolies and Mergers Commission.[151] The old procedures of the MC are left virtually intact. The standard used in reports is still whether a merger is "against the public interest."[152] There is no explicit adversary procedure.

The most interesting aspect of the Bill is the role of the Director General. While references to the MC would be made by the Secretary of State,[153] the Director General would advise the Secretary of State as to which mergers should be referred.[154] Furthermore, the Director General would keep informed about actual or prospective mergers and make this information available to the MC. One can imagine a vigorous Director General using these statutory powers to develop a role as an adversary in presenting information to the MC, and thus—though the Bill does not so mandate—to become a kind of "prosecuting" Registrar.

The important changes in British merger policy, however, will not flow directly from the new Bill; rather, the key variables will be the number and type of cases referred to the MC and the changing attitude and approach of the MC itself. Given the present anti-conglomerate mood of the British public, it would not be surprising to see increasing vigor in British merger policy. While the hostility toward conglomeration need not necessarily spill over into horizontal mergers, it very likely will.

If the British are indeed about to invigorate the MC, several innovations are readily suggested by a study of past cases: a "prosecuting" Registrar, clearer articulation from the BOT or the Registrar as to the policy behind referrals, greater consistency in MC decisions, and more industry-wide studies. Further, British policy, like American law, urgently requires that injury from increased aggregate concentration be formally recognized. Unlike its American counterpart, British policy has also failed so far to appreciate fully the dangers of market concentration. The present balancing approach of the MC gives great weight to any possible efficiency gain, even if undocumented, and considers increased market concentration a marginal abstract harm, the costs of which are never estimated.

150. Part V of the Bill is concerned with mergers.
151. Fair Trading Bill, Clause 5.
152. *Id.* Clause 65.
153. *Id.* Clause 60. Interestingly, in the case of existing monopolies, the Director himself may make a reference to the MC, but it is subject to a veto by the Secretary of State. *Id.* Clause 46.
154. *Id.* Clause 71.

The MC experience illustrates the practical difficulty of using a rule of reason in the merger field. Until recently, it is true, there has been more of traditional bias than of reason in British policy, and the near future may see an impressive shift toward vigorous analysis on the part of the MC. But a rule of reason cannot be made to work merely by purging old prejudices. There must also be substantive and objective knowledge to carry the "reasoning." Unfortunately, economics is still too subjective a science—at least in the merger field—to dictate answers that are "correct." Even if efficiency benefits could be adequately determined for a given increase in firm size, two key factors are very hard to quantify: the degree to which any hypothetical optimum could be obtained in reality, given the managerial slack which may result from a lack of competition, and the precise costs, allocative and distributive, of a pattern of oligopoly. Furthermore, other legitimate concerns in constructing a merger policy, such as political and sociological impact, are simply not reflected in purely economic analysis. Derek Bok's generalization about merger law appears to have been right: "In striving to be flexible, we may simply be obscure."[155]

155. Bok, *supra* note 122, at 349.