

This paper comprises work in progress and is **NOT FOR QUOTATION**

Paper for ECPR/CRI Conference: Frontiers of Regulation: Assessing Scholarly Debates and Policy Challenges, University of Bath, 7-8 September 2006

The Reinvention of UK Competition Policy

Stephen Wilks*

1. Introduction

Why reinvention? The conventional account of UK competition policy is that it has been 'Europeanised'. This paper argues that something rather different has been taking place and the argument is rooted in public policy and political economy rather than in the more usual earth of economic principles and legal doctrines. Reinvention has taken the form of a fundamental shift in the core purpose of British competition policy from public interest regulation to an economic supply-side policy that targets industrial productivity and substitutes for the post-war pursuit of industrial policy (Beath, 2002). The shift originates in the seismic redefinition of the conditions for economic success which grew out of Thatcherite neo-liberalism but it takes its character in part from American economic experience and American antitrust. This distinguishes it from the core integrationist bias which has driven European implementation and litigation. In some senses we have seen 'Americanisation' as much as 'Europeanisation' of UK policy. This formulation takes the argument into the future of UK competition policy within the British polity and within Europe. As regards the UK, the British competition agencies are in danger of running out of time in their efforts to deliver on the productivity agenda. This is one source of possible policy change. As regards Europe, the decentralisation or 'modernisation' of European competition policy opens up a more pluralist future for the evolution of policy in which powerful and innovative national regimes may have a greater effect on the evolution of European policy. The particular political arena in which this is playing out pits the merits of the British neo-liberal competitiveness model against the Franco-traditionalist regulatory national champion model and gives micro-economic expression to the hostility to the 'Anglo-Saxons' seen in the French rejection of the EU Constitution. Under contention, it is suggested, is the shape of the 'economic constitution' of Europe and what it implies for the balance between private (market) power and public (regulatory) power in the operation of European democracy.

We come back to these elevated issues of political economy in the conclusion after evaluating the ten years of the development of competition policy under the Blair/Brown Labour Governments. Section 2 outlines the 'three faces' of competition policy and emphasises the Treasury focus on productivity. Sections 3 and 4 examine the 1998 Competition Act and the 2002 Enterprise Act whilst section 5 focuses on the agencies,

implementation and independence. Section 6 looks at the experience of enforcement by the OFT. Section 7 returns to the political economy issues of the deployment of power within the competition regime and concludes by stressing the constitutional implications of the juridification of economic law.

2. Competition policy as industrial policy

The past decade has seen the extraordinary emergence of UK competition policy as a powerful supply-side institution. After a fifty year history of hesitant and qualified legislation, two acts passed in 1998 and 2002 have produced an assertive and comprehensive body of law supported by a generous increase in resources for implementation. It could be claimed that the legislation comprises a modernised body of law which offers a model for a 'state of the art' competition regime. The scale of the revolution can be judged from the way in which competition policy has been re-conceptualised within the British political economy. Competition policy is rather obviously concerned with encouraging competition within markets in order to make them work more effectively. The effective working of markets has two faces. One is to increase efficiency, both productive efficiency (producing goods more cheaply) and allocative efficiency (supplying goods at prices close to costs to those who demand them). The second face is that of 'market regulation'. Ensuring that markets operate sufficiently smoothly to avoid the development and exploitation of market power. This approach is orientated towards equity rather than efficiency. It involves ensuring that monopolies are not rampantly exploitative and cartels are controlled so that trust in the market can be maintained. There is also a third face to competition policy. It has a symbolic and quasi-constitutional role of establishing a commitment to economic democracy and to a market system. This has been an important role in America where the term 'antitrust' is still used. It was also apparent in Germany where the 'cartel laws' are an important underpinning of the social market economy, and in Europe the competition rules are a bed-rock of the dominant imperative of market integration. In the post-Communist market economies competition rules play a similar role and a workable body of competition rules is a pre-requisite for membership of the OECD.

In the UK competition policy was originally conceived in 1943 as a way of achieving full employment in the post-war economy (Wilks, 1999, 12). But although it was prompted by ideas of market efficiency the first 25 years of policy development were hesitant and minimalistic. British policy stressed the 'second face' of policy, a limited form of market regulation aimed at curbing the worst excesses of monopolisation (which was rampant) and restrictive practices (which were shameless). The word 'competition' did not even appear in British legislation until 1980. The 'third face' of policy, that of a constitutional foundation, has never seemed so important in Britain where the market system has been so deeply

embedded and opposition to the excesses of capitalism came from the watered down socialism of the trade union movement. The ‘first face’ of policy – encouraging efficiency – was a pious hope rather than a serious goal.

The focus of British policy on equity and economic regulation was built into the decision-making process. Decisions on monopoly abuse, restrictive practices, mergers and utility price controls were all based on a test of ‘is this against the public interest?’ and were all ultimately taken by ministers. The public interest test was exceedingly malleable and, up until the 1980s, was used, among other things, to protect employment, to pursue regional development and to deter foreign takeovers. This focus began to change in the 1980s as part of the neo-liberal economic shift under Margaret Thatcher but the public interest test itself was not finally abandoned until April 2003.

From May 1997, under the New Labour Government, competition policy underwent a transformation. It was reconceptualised as a core element of supply side policy and as a key to improving economic efficiency and thus addressing a major political goal – ‘closing the productivity gap’. This shift from the regulatory second face of policy to the first face of economic efficiency had been building up for about ten years. It is a legacy of Thatcherite neo-liberalism and of guidance from free market ministers in the DTI who interpreted ‘the public interest’ as meaning strictly ‘increasing competition’. The first public policy shift came in 1984 when the Tebbit guidelines declared that ministerial policy would be to refer merger cases for investigation ‘primarily on competition grounds’ (DTI, 1984). During the 1980s ‘competition’ became an organising principle of public sector reform. The privatisation of the utility industries from 1984 onwards demonstrated that a combination of private management and the deliberate introduction of competition could squeeze out the quite extraordinary productivity gains that were seen in the telecommunications, gas, electricity, and water industries. In these privatised companies profits grew rapidly, partly due to reductions in the cost-base which was radically pruned with extensive cuts in the labour force. Those who were eventually to become the leadership of New Labour watched these developments in opposition. Tony Blair as shadow Trade and Industry and then Energy spokesman, Gordon Brown as a shadow Treasury spokesman (Rentoul, 2002). Whilst toeing the Labour line in debates it was during this period that Blair and Brown began to understand the power and the logic of the Conservative shift to market solutions. There is a (probably apocryphal) story from the mid-1980s that ‘Tony Blair was sitting quietly with his constituency agent, John Burton, when he suddenly exclaimed: “you know John, I understand it all. Finally, I’ve actually got it”. When Burton asked him what, Blair triumphantly replied: “Microeconomics!”’ (Finkelstein, 2003). As the 1980s gave way to the 1990s Blair and Brown must have been as perplexed as the rest the competition policy community about the inability of the Conservatives to embed their market solutions by means of new competition

legislation. An intention to legislate was announced by the DTI under Lord Young as early as 1987 but ten years later still nothing had been done.

When Labour's historic election victory was achieved in 1997 amongst the first economic legislation onto the statute books was the Competition Act 1998. The competition 'community' were delighted, industry was worried, the press were puzzled (no populism in competition law), political analysts found this a truly defining moment of a new neo-liberal ascendancy. The Thatcherite approach to the supply side that was implemented from 1979 onwards had been revolutionary and shocking. Hitherto the orthodox supply side policy had stressed a mixed economy and 'industrial policy'. That whole apparatus was demolished, talk of intervention, subsidy, incomes policy, planning, even dialogue, went out of the window to be replaced by measures to reinforce market pressures, introduce the market, reinforce incentives and increase competition. Government was not inactive, Gamble's (1988) phrase 'Free Economy, Strong State' sums up the posture perfectly. It worked hard to establish a market framework and in its second term embarked on the astonishing programme of privatisation.

It is salutary to look back to the 1980s to recall the incomprehension and the sustained opposition to the Thatcherite project. Right up until the 1992 election Labour was still harking back to a market-sceptical policy of state intervention. But from 1994 onwards, when Tony Blair became leader of the Labour Party, he and Gordon Brown moved rapidly to turn it into a social democratic party which accepted the market, private ownership, incentives, a 'hands-off' government, free labour and capital markets, and competition. The 1998 Competition Act symbolised the extent of that convergence. In doing so it also underlined the curiosity that a Conservative Government so wholly committed to competition had for ten years failed to legislate; a Labour Government which ten years ago had adamantly opposed much of what the Act stood for, passed legislation within 18 months. For political scientists the Act further confirmed the dawn of a new consensus on supply-side policy. Mrs Thatcher had noted that in 1979 "our analysis of what was wrong with Britain's industrial performance centred on low productivity and its causes" (Thatcher, 1993). This was also exactly the analysis undertaken by Gordon Brown and, in endorsing both the Conservative analysis and their embryonic legislation, he put an end to the disease in British industrial politics of 'adversary politics' (the syndrome in a two party system that each 'adversary' reverses the micro-economic policies of its predecessor when it gains power). With the end of adversary politics came a bi-partisan endorsement of market solutions underpinned by a robust competition policy.

Gordon Brown has become the most powerful Chancellor of the Exchequer for 50 years. His preoccupation with productivity has spilled out of the Treasury and become a preoccupation of other ministers, particularly in the DTI. On 9 April 2003 (unfortunately coinciding precisely with the

American troops entering Baghdad) Brown gave a characteristically triumphalist budget speech in which he proclaimed: “I can tell the House that – unlike America, Germany and Japan – the British economy has grown uninterrupted, free of recession, for every single quarter for the past six years”. In a large section on productivity he asserted: “That the productivity gap per head with Germany has narrowed to just 4 per cent, with France that gap is 16 per cent but has fallen significantly; and the productivity gap with Japan has been eliminated – with Britain now around 7 per cent higher”. But Brown’s real obsession, and the source of his inspiration, is the United States. He and the Treasury are far more inclined to look to Washington than to Brussels when devising supply-side initiatives and it is the US/UK productivity gap of around 40 per cent that is the Holy Grail. Accordingly Brown also promised that: “Our budget reforms will learn from American innovation, competition and enterprise and we will introduce new flexibilities into our economy (Brown, 2003). Productivity gaps are a staple of economic history. Britain agonised over its productivity gap with Germany in the 1890s and the 1950s were replete with comparisons with the United States and Anglo-American productivity missions (Broadberry and O’Mahoney, 2004, 73). It is again the American comparison that is inspiring Labour’s supply-side policy. As Gordon Brown has repeatedly emphasised, if the UK could reach US levels of productivity, then wealth and prosperity would be assured. Research on productivity was brought together in a joint Treasury/DTI discussion paper in June 2001 and the goal of closing the productivity gap was declared to be the key micro-economic aim of the 2001 Government. There has been extensive theoretical research and applied governmental research on productivity (CEP, ...). The governmental focus has been on labour productivity and the dramatic gap lies in productivity per hour worked where the UK is 20 to 30% less efficient than her main competitors (excluding Japan which is significantly less productive). The figures for productivity per worker are better because British workers work longer hours than the French or Germans. The figures for productivity per capita are even better thanks to the UK’s higher level of employment but through all these statistics the large gap with the United States remains. The 2000 figures thus show:

| | GDP per <u>hour worked</u> | GDP per <u>capita</u> |
|---------|-------------------------------|--------------------------|
| UK | 100 | 100 |
| Germany | 127.3 | 104.2 |
| France | 129.2 | 105.4 |
| USA | 126.5 | 139.3 |

(Broadberry and O’Mahoney, 2004)

The productivity figures are systematically analysed, refined and updated so that the latest figures show improvement in GDP per hour worked of five to six percentage points in comparison with Germany and France, but only about two percentage points against the USA (Treasury/DTI, 2006). The US appears to have experienced a productivity ‘miracle’ in the early 1990s which is thought to have been associated with effective use of ICT (information and communication technology) and it remains an elusive target, still well ahead in the productivity race.

The Treasury and the DTI have developed a forcefully argued, comprehensive and consistent productivity strategy which revolves around five ‘drivers’ of productivity. These

are competition, innovation, investment, skills and enterprise. The first among these is competition and the anchorage of competition policy in the productivity agenda can hardly be missed. The Enterprise Act White Paper is entitled ‘Productivity and Enterprise: A World Class Competition Regime’ (DTI, 2001) and the machinery of public service agreements between the Treasury and the DTI, and between both and the competition agencies stress productivity. The first clause of the OFT’s Memorandum of Understanding with the DTI states that “The Government is committed to promoting competition in the economy to improve the UK’s productivity performance and to make markets work well for consumers so as to achieve prosperity for all” (OFT, 2005). The emphasis on productivity and on the US productivity gap is consistent with the long term alignment of the UK and American models of capitalism in the Anglo-Saxon model. The alignment has been reinforced under Gordon Brown’s Chancellorship and, if the US is a model, it suggests that UK policy and agency actions should similarly be modelled on US antitrust. As discussed below, this is indeed one important element in governmental expectations but here we have an ‘antitrust gap’ to parallel the productivity gap. Surveys of competition policy consistently place the American system at the top of the league table providing a set of aspirations for the UK agencies.

The Anglo-American gaps raise important questions about the nature of competition policy as an institution and its fit with other elements of the British capitalist model. There are pressures to conform to an American model of micro-economic policy and competition enforcement, but there are even stronger legal pressures to conform to the European model of which the UK is an integral part. We come back to those tensions in section 7 after examining in some detail the reforms which have transformed UK policy.

3. Europeanisation and the Competition Act 1998.

The Competition Act reformed British policy on restrictive practices and abuse of monopoly power. Since 1973 British companies have been subject to parallel regulation through the competition provisions of the European treaties – article 81 which prohibits anti-competitive agreements, and article 82 which prohibits abuse of a dominant position. The 1998 Act took the controversial step of aligning UK law with European law by reproducing the European rules in British domestic legislation.

In some ways this is an obvious step but it was nonetheless controversial because it involved a major shift from a particular British model of policy to European practice. In particular the new Act creates a far more legalistic prohibition system in which the competition agencies (mainly the Office of Fair Trading, OFT) have greatly increased powers of investigation, powers of decision, and powers to fine companies in breach of the law by up to 10% of turnover over three years. Moreover, the prohibition is based on the test of agreements which ‘have as their object or effect the prevention, restriction or distortion of

competition' (Competition Act, sect. 2). This is an explicit 'competition' criteria. Further, the Act establishes a legal regime. The shift is momentous since the British system was agnostic, with few investigatory powers, few penalties (other than voiding agreements), and was 'administrative' with really very little legal apparatus, and ultimately under the control of a minister. British industry was torn between a desire for predictability, consistency and open markets on the one hand; and a fear of over-zealous prosecution, legalisation and a challenge to existing competitive advantage on the other. The lobbying from the CBI (Confederation of British Industry) was therefore ambiguous and not particularly influential.

The European influence is implemented not only through the wording of the Act but also through the novel provision that administrative and legal interpretation of the Act should draw on European legal cases, precedents and Commission documents. This is contained in the famous section 60 of the Act which is known technically as the 'governing principle' clause but is known jokingly among lawyers as the 'Eldorado' or 'Klondike' clause because it will generate so much work and client fees. The Competition Act therefore constitutes an unambiguous process of 'Europeanisation', in fact perhaps retarded Europeanisation as reform was delayed under the Conservatives partly due to the Eurocepticism of industry ministers (Cini, 2004) which meant that it followed in the footsteps of several other member states (Drahos and Van Waarden, 2004). In this process of institutional isomorphism the dynamics were mimetic and normative rather than coercive (DiMaggio and Powell, 1991). In other words, this was not 'top down' or enforced Europeanisation, the choice of a European model was dictated by domestic political forces (Zahariadis, 2004, 70; McGowan, 2006). Nonetheless, the pressures to go down the European legal route were formidable, it offered a mature, coherent and relatively successful body of law and the European provisions were in any case already applicable through the direct and superior effect of EU law. As Radaelli points out, the term Europeanisation needs to be used with care. The Competition Act signifies the alignment of UK competition policy with a pan-European competition community and opened up a process of debate and interdependence so that "the EU may provide the normative framework and the opportunities for socialisation of domestic actors who then provide exchanges (of ideas, policy, paradigms, powers, legitimacy) between each other" (Radaelli, 2005, 24). Europeanisation is not therefore simply about convergence, it signifies the creation of a wider policy arena. The truly startling aspect of Europeanisation was in fact the 'legalisation' or 'juridification' of the UK system with a radical introduction of economic law into business practices. Moreover, the adoption of a fully-functioning European legal *acquis* introduced unfamiliar assumptions and some poorly adapted legal principles into British law.

One example of problems of legal adaptation is the tension in European law between economic efficiency and market integration. While economic efficiency is important, the

imperatives of creating a single market and eliminating barriers to trade has meant that European officials and courts have often given pre-eminence to market integration. This provides unsuitable guidelines and precedents for law within one country and is already creating ambiguity over vertical agreements. Current Anglo-American economic orthodoxy (influenced by Chicago-School doctrine) holds that vertical agreements between companies at different levels in the supply chain do not inhibit efficiency unless those companies already have separate sources of market power. In European practice, however, vertical agreements have been attacked because they are seen to divide the market. The UK authorities have rejected the stringency of the European approach and exempted vertical agreements from UK legislation (Whish, 2003, 647). This is just one extreme example of the generic issue of creating a legal link between the accumulated body of European practice and jurisprudence, and the approach of the domestic law.

Much of the debate about the suitability of the Act was coloured by assessments of the effectiveness of European legislation. While alignment with Europe might be logical it was sensible only if the UK were aligning with an effective system. On the whole, legal and business opinion agrees that European law is effective in dealing with anti-competitive practices, the main concerns were with the administration of the regime, not the law itself. As regards control of monopoly, opinions are far more divided. In this area the European authorities are seen as hesitant, the substantive provisions unsatisfactory (with no efficiency defence for instance) the case law thin and unsatisfactory (eg. in definition of what is meant by 'abuse'), and with a poorly developed ability to deal with oligopolies. The British Government felt that oligopoly abuses were a more important element than the rarer case of abuse by a single company monopoly. Accordingly they retained the traditional British controls of scale and complex monopolies in the Act. The Competition Act therefore provides an updated and refined model based on European law together with retention of one of the more effective parts of the UK law. Given the thorough nature of the legislation it is ironic that the government may have gone too far down the European route. Just as the legislation was being passed the European Commission was preparing radical proposals on 'modernisation' of the procedures for implementing the European rules. The modernisation measures came into effect in May 2004 and are presented as measures of decentralisation. They required minor amendment of the Competition Act but the effect of the strength of the UK domestic regime is as yet unclear. The UK authorities are obliged to apply European law in preference to UK law where the European jurisdiction applies. The CAT is empowered but not the CC.

In addition to creating more stringent competition laws the Competition Act strengthened the competition agencies, created a new competition court, and removed the political influence of ministers. These three elements are discussed in the next section. The

revolutionary nature of the changes was reflected in the 16 month delay between the Royal Assent and the coming in to force of the Competition Act on 1 March 2000. This breathing space allowed business to size-up the fresh challenge and allowed the OFT to engage in consultation and issue guidance on the very complex procedural issues. Early experience of the new legislation was positive with complaints are coming in to the OFT at a rate of up to 3,000 per year (Bloom, 2001).

4. Americanisation and the Enterprise Act 2002.

The Enterprise Act was a shock and a revelation to the rather closed world of competition policy specialists. The Competition Act had been the product of years of consultation and was available ‘off the shelf’ for the incoming Labour Government to enact with relatively little change. Very few people expected Labour to finish the job by legislating on mergers and oligopolies and the leading academic lawyer observed, only half jokingly, that ‘we seem to have a clear 25 year cycle in our domestic competition law, and I have to say that I am really looking forward to 2023’ (for the next piece of legislation) (Whish, 2001, 114). In August 1999 Stephen Byers, DTI Secretary of State, had begun consultation on reforms of the system of merger regulation but the Labour election manifesto, published in May 2001, had promised only that ‘we will extend our fair and robust competition regime by giving more independence to the competition authorities’. The Manifesto was very detailed and programmatic but gave little evidence of a frenetic burst of activity in the Treasury.

At the heart of the new Act is comprehensive reform of the British system of merger control. Surprisingly this transformation has raised little press or public comment. When the first British merger control legislation was passed in 1965 a prominent economist noted that ‘perhaps the most important post-war extension of the powers of the executive in the affairs of the private sector was legislated with scarce a suspicion of public anxiety’ (Rowley, 1968, 83). Something similar could be said in 2002 about the extension of economic logic. There was no public anxiety about the fundamental change of principle which shifted merger evaluation from a public interest test to a much more specifically economic test of ‘substantial lessening of competition’ (SLC test). Officials would point out that the legislation was only formalising what had in any case become standard practice but the principled shift remains momentous. It bears emphasis that the Act changed the test of merger acceptability from a political to a legal-economic test, but also that it entrusted the application of law to independent agencies, the OFT and the Competition Commission. As emphasised below, this presents a hugely important parallel to the macro-economic independence granted to the Bank of England in 1998. Bank independence on monetary policy has attracted a huge weight of comment, OFT independence has attracted far less attention. Here we see a test of political acceptability being replaced by the independent application of economic law. This is almost a

constitutional shift (especially in a UK legal system which is uncomfortable with economic law). It represents the incorporation of market economics into the control of business power and narrows the discretionary ability of politicians to discipline excess.

The formal responsibility for competition policy lies with the DTI but the genesis of the policy incorporated into the Enterprise Act lay with the Treasury. This is Gordon Brown's Act and, while the Competition Act is clearly a 'European' enactment, the Enterprise Bill is equally clearly 'American'. Brown runs the Treasury through a closed group of advisers, semi-detached from his officials. In their internal debates about productivity Brown, his then economic adviser, Ed Balls, and their circle analysed the American experience, talked to leading American commentators such as Irwin Stelzer, and visited Washington. They decided to go down the US route. This involved a huge shift which has erected a legal apparatus of economic law completely foreign to the UK tradition. It creates genuinely independent competition agencies, makes the competition court fully independent, facilitates private actions for damages, allows class actions, increases investigation and enforcement powers and, most symbolic, creates a new criminal offence for individuals found guilty of operating a 'hard-core cartel'. This includes bid rigging and carries a term of imprisonment of up to five years. The merger regime is based on a US-style 'SLC' test and the Act also retains the ability to investigate whole markets.

The Treasury's urgency and impatience yielded the joint Treasury/DTI work programme on productivity immediately after the June 2001 election. It was issued over the joint names of Gordon Brown and the new DTI Secretary of State, Patricia Hewitt, but it was clear that this was the Treasury talking. It rehearsed the measures which were to be formally announced in the DTI White Paper in July and, as noted above, both documents advanced the competition policy/productivity rationale. To quote, 'competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness' (DTI, 2001, 1). Confounding Richard Whish's fears, the government did not wait 25 years to legislate, in just on two years from the Competition Act coming into effect a draft Enterprise Bill was published, on 26 March 2002. It was introduced into parliament with a punishing timetable which severely limited debate. One MP remarked 'it is extraordinary that a Bill of such complexity is to be pushed through Parliament with so little opportunity for detailed scrutiny and debate' he cited also the CBI's complaint 'especially since so much that was being proposed was new and unexpected' (Whittingdale, 2002). Making the same point, rather more colourfully, a colleague observed 'it was Bismark who once commented that those who love laws, like those who love sausages, should not see how they are made' (Waterson, 2002). The following table illustrates how the sausage factory churned out the Enterprise Act very rapidly, with much greater urgency than the Competition Act:

Competition Act

Enterprise Act

| | | |
|------------------------|-----------------|-----------------|
| published | 15 October 1997 | 26 March 2002 |
| Royal assent | 9 November 1998 | 7 November 2002 |
| comes into effect | 1 March 2000 | 1 April 2003 |
| time in Commons (days) | 250 | 91 |
| time in Lords | 141 | 136 |
| Total (days) | 391 | 237 |
| number of pages | 129 | 439 |
| number of clauses | 76 | 281 |
| days per page | 3.03 | 0.52 |
| days per clause | 5.14 | 0.81 |

On this very crude statistical profile it is clear that the Enterprise Bill was debated in Parliament much less thoroughly than the Competition Bill. Already lawyers are complaining about one side effect of this, which is a clumsily drafted and excessively complex Act which will charge a price on future generations of lawyers which could perhaps have been reduced by a little more patience from the Treasury.

The timing and speed of the passage of the legislation thus indicates the priority that Labour and the Treasury attached to the competition provisions. The Treasury imperative was enshrined in the Treasury's machinery of control. Under Gordon Brown the Treasury has negotiated 'PSAs' (public service agreements) with other ministries in return for their budgets. In the 'Commons summary of the Bill the DTI minister pointed out that 'there remains a productivity gap with our key competitors – France, Germany and the United States. My Department's No. 1 public service agreement target is to tackle this productivity gap' (DTI, 2002, 2). In response to Treasury pressure the DTI pulled out all the stops. The speed with which the Act came into effect also posed challenges for the competition agencies, which had to set up codes and procedures; for the legal profession, who had to advise their clients; and for business people who were faced with a new and rather intimidating apparatus of legal control.

There is nothing half-hearted about this legislation. Labour ministers are showing something of the zealotry of the newly converted. They not only want a good competition regime, in the spirit of targets and benchmarking they want 'the most effective competition regime in the OECD' (DTI, 2001, 15). To aid in this the DTI commissioned a peer review of all OECD competition regimes which identified areas where the UK needed to improve to become 'best in class'. This included the criminal cartel offence and the main recommendations fed into the Enterprise Act.

The Americanisation element of the Act is paradoxical. While the inherent competitiveness and productivity of the US economy is an inspiration it is unclear what role

US antitrust is playing. Enforcement of US antitrust law has been more relaxed since the Chicago School economic theories of the 1970s and 1980s began to influence the agencies which were simultaneously having support withdrawn under Reagan (Kovacic, 2004; Eisner, 1991)). A recent study observes that “business practices and mergers probably have a better chance of being allowed in the U.S. than in the EU” (Niels and Kate, 2004, 7). If, then, US antitrust is less interventionist what are the implications for Americanisation? There are a variety of diagnoses. One possibility is that antitrust has in any case little impact on productivity. There is a theoretical pre-supposition that increased competition will increase efficiency and the UK government has largely accepted Michael Porter’s ‘Harvard School’ conclusion that a strongly competitive domestic environment is conducive to better competitiveness (DTI, 2003). It seems logical to presume that antitrust does in fact promote a competitive environment. A second response is that US antitrust is informed by superior economic theory and that Chicago School prescriptions do indeed lead to a more competitive and productive economy. A third possibility is that transfer of the law is only part of the story, it is necessary to transfer ‘an institution’ which includes expectations, norms, and a competition culture. In the United States the vitality of antitrust is only partly the result of agency activism, it rests probably to a greater degree on private actions, triple damages, criminal penalties and an active legal community that reinforces deterrence. Building such an institution takes time and since private actions have not yet taken off in the UK, and there has been no prosecution under the criminal cartel offence, so deterrence has not reproduced US incentives.

Much of the literature comparing US antitrust compares it with ‘Europe’. In his brilliant essay on the democratic foundations of antitrust Amato (1997) suggests a fundamental difference of approach between the Americans, who are suspicious of public power and hence tolerate a greater degree of private (business) power, and the Europeans, who exhibit the opposite bias being tolerant of public power and hence accepting more intrusive regulation of business. But this is continental Europe. In the traditions of Shonfield’s analysis of state interventionism, Britain would be seen also as suspicious of public power, much nearer to the American view of liberal democracy. This, then, provokes the question of where the UK stands in the trans-Atlantic exchange of antitrust norms. If, as Mario Monti and others suggest (Monti, 2002; Niels and Kate, 2004, 17), the EU is moving closer to American antitrust, is the UK an accidental beneficiary or is it a pace setter, a sort of Trojan Horse threatening European solidaristic capitalism through neo-liberal competition policy?

The Enterprise Act displays clear US influences but in speculating on what Government expected to achieve by the Act, and how the powers have been deployed in practice, we need to turn to an examination of the agencies themselves.

5. The Agencies

As a compensation for this picture of radical legislative change there has been significant continuity in the agencies implementing competition policy. The role of the agencies is absolutely crucial and it is a source of irritation to read abstract discussions of competition law or economics which fail to take into account the design of the agencies, their resources, leadership, competence, credibility, doctrine and, above all, their use of discretion. There are three central UK agencies (excluding the important sectoral regulators):

OFT, Office of Fair Trading. Created in 1973, now the central player. Chairman, Philip Collins, Chief Executive John Fingleton, budget increased from £22 million (1998-99) to £54 million (2003-04) and staffing from 420 to 550.

CC, Competition Commission, formerly the Monopolies and Mergers Commission with a history that goes back to 1949. Chairman, Peter Freeman, up to 50 part-time members, budget increased from £7mn (1998-99) to £24 mn (2003-04) and staffing from 80 to 170.

CAT, Competition Appeal Tribunal, a specialist competition court created in 1998 and made fully independent in 2002. President, Sir Christopher Bellamy, former member of the EU Court of First Instance, budget 2005-06 £3.6 mn, staff 18.

Competition policy is particularly susceptible to the influence of the implementing agencies. There is a twofold basis for this internationally consistent rule. First, because the vast majority of competition regimes either have, or are moving towards, independent agencies. Second, because competition rules are breached pervasively and systematically in all market economies. The Sherman Act prohibition on actions “in restraint of trade” is so wide that the US developed the ‘rule of reason’ doctrine to allow reasonable agreements. Similarly the EU article 81(1) prohibition applies to “all agreements ... which have as their object or effect the prevention, restriction or distortion of competition”. This covers a huge swathe of business practices. On an expansive definition it could be hard to see what would not be caught. Given this hugely powerful legal weapon the way in which the agencies choose to define and deploy their powers gives them very substantial discretion which may be used to operate a minimalist regime, such as that operated under the Reagan administration 1981-89; or to operate aggressively and expansively, as in the EU, also during the 1980s. In the UK a rather passive and reactive policy stance became more assertive in the late 1980s and the Labour Government seeks to build on that record. It ‘wants to see a step change with the authorities looking beyond enforcement to a role of advocacy and promotion’ (DTI, 2001, 15).

The Labour Government might demand agency activism but it has surrendered direct control of agency operations. Ever since 1948 the operation of competition policy, and since 1965 especially of merger control, had been ‘majoritarian’ in that it has been under the

ultimate direction of ministers. It had therefore been subject to political priorities and has at times undoubtedly been ‘politicised’. These two acts break that historic pattern and give vastly increased independence to the agencies. In the government’s words, they will ‘respect the absolute independence of our competition authorities’ (DTI, 2001, 12). Here too we see the hand of Gordon Brown. One of his first, most dramatic, and most applauded acts when he became Chancellor in 1997 was to give independence to the Bank of England to set interest rates. The Enterprise Act reproduces in micro-economic policy the sub-contracting of responsibility that we have seen in macro-economic policy. Effectively power is being transferred to ‘non-majoritarian’ agencies controlled by people appointed rather than elected. This move to the delegation of competition policy provides one of the central problematics concerning the operation of the law and the effectiveness of the policy. How actively or aggressively will the authorities behave? How will they define the key terms and concepts of the law? Which approach will they take to the main economic issues such as efficiency, customer benefits and dynamic competition? How credible will they become? Which interests will they favour and who will be the gainers? And the political science question, how, as non-majoritarian bodies, will they establish their legitimacy and accountability? In order to answer such questions we need to have some theory of why delegation takes place and here we can borrow from principal-agent theory.

In earlier work I have advanced five rationales for the delegation of decision-making to independent agencies. They are expertise; insulation from party political influence; demands from business; blame avoidance; and the creation of an economic constitution (Wilks with Bartle, 2002). I suggested that in the early days of agency creation the third and fifth factors were of greater importance – a combination of demands for industry for a visible but weak agency and the need to reassure voters and consumers that the market economy would not be overly exploitative. But as policy has evolved, for over 100 years in the American case and over 50 years in the UK, so the agencies have built up greater competence, confidence and credibility. Governments have enhanced the powers of the agencies and accepted them as stakeholders and sources of influence. In recent manifestations of policy the rationale for independence has moved towards expertise, insulation from party political influence and blame avoidance. The agencies have influenced their own institutional design and have become substantially more powerful. To that extent there is a dynamic of path dependence at work.

From a principal-agent point of view, developed within a context of rational choice, the creation of an agency is an exercise in institutional design that not only solves current problems, but which pre-determines future patterns of action in ways that favour the creators and their constituencies. At the core of the approach is the concept of ‘credible commitment’. For an enacting coalition commitment problems arise when policy makers are unable to

guarantee the durability of future benefits. There is always the risk that future legislation will supersede current policy and future administrations will reverse current arrangements. The enacting coalition can reduce that risk by delegating authority to an agent that is relatively independent from legislative or bureaucratic influence. In order to maximise beneficial effects the agencies must be designed in such a way as to minimise divergences from the original distribution of benefits.

I find the US-style rational choice analysis of the vote-maximising goals and trade-offs of legislation unhelpful in the British context. But the principal-agent analysis does raise the useful concepts of credible commitment and institutional design. The 1998 and 2002 Acts, with their withdrawal of political intervention, their creation of competition tests, and their strengthening of independent agencies are precisely an exercise in credible commitment. They are not providing direct political benefits to legislators but they are providing the Treasury with a long-term and potentially irreversible commitment to competition economics in the state's regulation of business. This binds the DTI and future Secretaries of State, more particularly it signals to industry that there is no escape from the legal apparatus and the economic reasoning embodied in competition economics. The great benefit of agency independence to the competition authorities is that it ought greatly to increase voluntary compliance by companies. The rules are clear, the agencies have a mission to enforce them, the penalties are substantial, companies would be well advised to comply and in the process competitive pressures within the economy intensify and the outcome is improved labour productivity. Very logical, very effective and potentially rather cheap. But will it work? The following sections pick up some of the possible flaws in this model but for a moment let us stay with agency design.

There are two contrasting risks with agency independence. First, might the agencies become too independent and diverge from the competitive model currently envisaged? Second, is the independence sufficient. Is the appearance of complete independence a reality?

On the first risk there is a distinct possibility of excessive independence. Partly due to the possibility of a determined leadership with a distinctive interpretation of competition policy, but more likely as a result of developments in the economics or the law. Both these areas have an internal logic of their own and are discussed in the ensuing sections. On the second risk have ministers really granted complete independence? There are a number of avenues for continued political influence. First, the DTI appoints the Chairmen of the OFT and the CC, for up to five years, and the Lord Chancellor appoints the President of the CAT. The DTI also appoints the Board of the OFT and the membership of the CC. This power of appointments conveys considerable influence. Second, the DTI controls the budgets of each of the agencies. Third, the legislation includes various avenues for political intervention including a residual public interest over-ride for mergers (to protect the defence industry) and

reserve powers to over-ride the OFT in order to refer market inquiries to the CC. Fourth, the agencies remain civil service bodies and, whilst they are recruiting widely, their culture is attuned to the Whitehall ministries and this influence is reinforced by the appointment, especially to senior posts, of former officials from the DTI, Treasury and central ministries. These sources of influence are more likely to impact on the OFT than on the CC or the CAT which have the additional (although not absolute) strengths of the tradition of judicial independence. As far as the OFT is concerned, independence is in reality far from absolute. The Bank of England parallel is also a reminder that even in that case of ostensible independence the Bank is required to meet certain inflation targets and there are residual powers of ministerial intervention. Moreover, the British system of Parliamentary sovereignty allows ministers who control a Parliamentary majority in the House of Commons to legislate quickly and absolutely to repeal earlier legislation. The problem of 'credible commitment' is always more extreme in the UK than in the USA and the OFT's independence does not, at least yet, match that of the Independent Regulatory Commissions of the United States.

6. Independent Competition Authorities: the first three years

The reinvented UK system in its present form dates from 1 April 2003 when the Enterprise Act 2002 came into effect. The three major components of change were the complete autonomy granted to the CAT as a specialist economic court; the autonomy granted to the Competition Commission to make the final determination on referred mergers and to negotiate remedies; and the momentous shift in the OFT with the abolition of the DGFT to be replaced by a Chairman and a Board. The new system of independent agencies came as a pleasant surprise to the competition community. Many of the more positive features of the existing agencies were retained and the government created a set of checks and balances with decisions and fines by the OFT, in depth investigation of problematic mergers and markets by the CC and appeal from the decisions of both bodies to the CAT. Moreover, in its requirements for guidelines, transparent processes, consultation, annual reports, plans and clear criteria the system appeared to be creating a fair, transparent and potentially predictable process. It completed the legalisation (or 'juridification') that had been set in motion by the 1998 Competition Act.

Granting of independence is one thing, how it is exploited is quite another. In the case of the Bank of England the verdict within the financial markets is that independence has been an unalloyed success. Could the same be said for the competition authorities? Expectations could certainly be set high. The regime gave the authorities almost all the resources that could be demanded. The legal powers are modernised and extensive and include powers of investigation, decision, fines, divestiture, informal settlement and even criminal sanction. The

resources of staff and budgets have also been generously provided and are nicely symbolised by new accommodation, especially the imposing structure of Victoria House, the new home of the CC and the CAT. In these respects the UK had rather rapidly created a ‘state of the art’; competition regime. Is it living up to its promise?

As argued above and elsewhere, my longstanding contention is that agency activism and leadership is the absolute key to policy effectiveness (Wilks, 1996, 2005a). Agency independence raises the stakes and sets up new policy dynamics. The recent literature on ‘depoliticisation’ of policy under Labour (Burnham, 2001; Buller and Flinders, 2005) stresses the problems of legitimising agency actions in the absence of direct elected ministerial responsibility. Hence study of the early exploitation of independence by the competition authorities is of great importance, it seeks to identify the combination of forces which will determine how powers are used, leadership exerted, effectiveness judged and legitimacy established. For the sake of manageability the discussion concentrates on the OFT as the central actor which energises the system.

The effectiveness of the OFT can be evaluated in several different ways. Two dimensions that are not explored here are effectiveness within the larger European system, and the vexed question of compliance. The goal of all regulatory agencies is complete compliance which in turn depends on the deterrence effect of the agencies activities. There are acute conceptual and methodological difficulties in evaluating deterrence. Rather like a nuclear deterrent, complete agency inactivity may be a sign of absolute success. The fact of having warheads eliminates the need to use them. The OFT does not claim complete deterrence and instead we will focus first on enforcement activity and secondly on political acceptance.

As regards enforcement activity, Table 00 indicates the range of measurable activities undertaken by the OFT. These include Competition Act cases of restrictive practices and cartels, merger review and investigation of oligopolistic markets. For Competition Act work there was concern that the OFT had moved more slowly than expected to investigate, issue decisions and impose fines (Israel, 2002). This unease prompted the NAO to undertake an investigation into Competition Act, chapter 1 enforcement during 2005. In an excellent and timely report the NAO concluded that the OFT had been successful in establishing intellectual leadership but that its operational performance was disappointing. The Report merits fuller treatment than can be provided here and includes a creative section on the methodology and practice of performance measurement. One of its most interesting and controversial suggestions is that the OFT could estimate the ‘benefits to consumers’ from its activities. It cited the Competition Commission’s estimate of consumer benefit from remedies in the mobile phone call termination market at £325-700 mn over four years (NAO, 2005, 31). In response, and for the first time, the OFT estimated in 2006 that consumer detriment (now

avoided) in four of its cases amounted to £61.2 mn (OFT, 2006, Annex A). Such estimates make good headlines but they are very imprecise, it is not clear what is being measured but, although they would be a dangerous basis for policy, they come close to offering a measure of efficiency or productivity improvements and this methodology is likely to become popular.

The NAO Report was critical of long delays in investigations and this rather easy target was picked up by many commentators. It also criticised case handling, transparency and the ‘reactive’ posture of the OFT in responding mainly to complaints. But the NAO pointed out that this was also a very new regime and noted inevitable problems with recruiting and training staff, developing procedures, coping with compliance guidance and with one aspect that perhaps had been unexpected, which is the time taken up by appeals to the CAT. Most decisions have been appealed (indeed there is a new phenomenon of appeals against decisions NOT being taken) and the OFT has suffered several setbacks. For instance, the very first decision, the General Insurance Standards Council case, was overturned on appeal in September 2001. Legal challenges have created uncertainty, defensiveness and substantial additional work simply in arguing the cases. Even though the NAO Report was balanced it must be regarded as a serious source of criticism and a ‘wake up call’ for the OFT. That is certainly the tone of the public perception. Thus the Committee of Public Accounts held an extremely critical hearing in which the new OFT Chief Executive was told “that your performance is disappointing”; that there was a “state of lethargy in the organisation”, and that “the OFT has been too slow and cautious” (CPA, 2006, qu. 75,58,119, see also FT, 2006). Even more telling criticism has come from the President of the CAT himself. In his 2004 Beesley lecture Sir Christopher Bellamy (2005, 91) made the following extraordinary observation, “the system cannot develop without decisions. One has to say – and it is a subjective impression that may be misplaced – that we sometimes seem to be nearer in relative terms to a trickle, rather than a flood, of enforcement decisions, and there appears to be something approaching a complete drought in some of the regulated sectors”. This is criticism of a high order.

On the mergers and market investigations side of the house there is a mixed picture. Mergers are dealt with promptly on a tight and predictable timetable. When there are problems the large European cases go to DG Comp, the others to the CC and, although the OFT has faced legal challenges on its referral policy, the system works effectively. As regards market investigations there has been an equally surprising hesitancy to make referrals to the CC for market inquiries. The recent reference of the Groceries Market to the Commission is the first truly high profile case and even here the OFT’s hand was forced by consumer and parliamentary lobbying and intense press interest.

The record on enforcement is therefore disappointing. The OFT has used its powers, has created a substantial organisation, has raised its profile but has not risen to expectations in

the speed, ambition and impact of enforcement. The defects appear to be related to attitudes, confidence and the development of an enforcement mentality, they are, in other words, ‘cultural’ and that is a difficult area to address.

Turning to political support for the OFT, the poor NAO Report will have damaged the OFT in Parliament but many other agencies have survived CPA criticism and the Report also provides an opportunity for reform. The key political relationships are with the DTI and the Treasury as the two sponsor departments. The DTI has set great store by international peer review rankings of the UK agencies. In 2004 it repeated its peer review survey of competition policy commissioned through KPMG. The Survey generates an ‘overall competition regime performance index’ which stresses professional competence and political independence (DTI, 2004, 7). The 200 plus international competition policy specialists rank the regimes in the same order as 2001 as follows:

| | overall | merger | non-merger |
|---------|---------|--------|------------|
| USA | 1 | 1 | 1 |
| Germany | 2 | 2 | 2 |
| UK | 3 | 3 | 4 |
| Italy | 4 | 4 | 3 |
| EU | 5 | 5 | 5 |

UK merger control is seen to be the most effective part of the regime and cartel control the worst (DTI, 2004, 9,12). The Survey indicates a perception of substantial improvement and the annual survey of ‘users’ by the Global Competition Review (2005, 3) shows further improvement by 2005. Both the CC and the OFT registered substantial gains and the CC is now ranked as the third best agency in the world (after the US DoJ and FTC) with the OFT fifth, both ahead of the traditionally high-ranked Germans. The DTI has used these surveys to assert that they are meeting their public service agreement target to ‘have a competition regime that is among the best in the world by 2006’.

Of course there are many flaws in the league table game. It might promote agencies which are unduly sympathetic to business and it bears little direct relationship to policy goals. The OFT won a more significant battle in 2005, it retained, and indeed expanded, jurisdiction over consumer protection. In 1973, in an act of legislative expediency, the functions of consumer protection and competition policy were brought together as the responsibility of the Director General of Fair Trading (Wilks, 1998). There is no established rule that the two functions require joint administration. Some authorities, such as the Australian ACCC and the US FTC are also responsible for consumer protection, others, such as the German BkA and the Japanese JFTC are not. In 2005 the Hampton Report into regulatory reform suggested a whole raft of regulatory rationalisation including the proposal to create a new ‘consumer and trading standards agency’ including the powers of the OFT (Hampton, 2005, 10, 65). This

was a bombshell and it was widely thought that the OFT would be broken up. On the one hand that would have clarified its mission. On the other hand, as the OFT vehemently argued, break-up would separate two wholly complementary activities and destroy “the integration between consumer and competition policy Consumer policy must operate with a clear competitive market orientation – within a framework that is aimed as making markets work well for consumers and fair dealing businesses”(OFT, 2005, 3,4). Actually it is far from clear that control, often through local authorities, of deceitful, dishonest petty criminals is a by-product of competition policy but the OFT clearly felt that a wide remit and large budget was important to protect. The breakdown of the OFT’s budget indicates what a major reorganisation would have been required:

OFT allocation of resources, 2005-06

| | <u>people</u> | <u>£mn</u> |
|-------------------------|---------------|------------|
| competition enforcement | 232 | |
| markets and policies | <u>122</u> | |
| competition policy | 354 | 28 |
| consumer regulation | 294 | 20 |
| communications | <u>48</u> | <u>5</u> |
| | 696 | 53 |

(source, OFT, 2006, infrastructure costs allocated pro-rata)

The figures indicate that almost half the OFT staffing is devoted to consumer protection with the lion’s share of the competition funding going to Competition Act enforcement. The most successful aspect of the OFT’s work, merger control, appears astonishingly good value absorbing a mere £1.9 million. The OFT campaign proved successful and in December 2005 the Treasury announced that the OFT would assume national responsibility for trading standards, for the ‘Consumer Direct’ advice function and for coordinating policy. This notable success indicates continuing political support but may perhaps distract senior management from the competition agenda.

This discussion of enforcement activities and political support gives some indication of the effectiveness of the OFT but it is far removed from the productivity aspirations which inspired the reinvention of policy. It is now to be seen whether the new leadership of the OFT will shift the emphasis and begin more fully to exploit the extensive legal powers. During 2005 a comprehensive change took place in the senior management of the OFT. Sir John Vickers left on 30 September. He had presided over the OFT as Director General since 2000 and had combined the roles of Chairman and Chief Executive since April 2003 when the DGFT’s powers were transferred to the OFT Board. Also departing was Penny Boys as Executive Director, she had joined the OFT from the DTI, via the Competition Commission. The two were replaced by Philip Collins, as part-time Chairman, and John Fingleton, as Chief

Executive. Philip Collins is a Brussels-based competition lawyer and John Fingleton was an academic economist before moving in 2000 to Chair the Irish Competition Authority.

The new leadership will be working with a small board of seven including five non-executive directors (two lawyers, two consumer specialists and a business person) and they have a good platform for change. There is the stability of retaining the consumer protection activities, but also the vehicle for change in the form of the NAO Report. It is widely expected that John Fingleton will be energetic and pro-active with a mandate to shake things up (DTI, 2006). He comes with a reputation as a young (only 40), campaigning, almost evangelical leader who is expected to shift the emphasis from the more cerebral approach of John Vickers (who taught him at Oxford) to an enforcement emphasis which has already brought him into confrontation with powerful figures in business. His reputation and appointment, which was unexpected, indicates a DTI/Treasury desire for a more proactive and visible programme of enforcement. It will be interesting to see whether the productivity agenda is confronted directly. John Vickers put emphasis on getting the economics right and was consistently concerned with government-driven limitations on competition. The new leadership may be more pragmatic and in his covering letter to Alistair Darling, as Secretary of State for Trade and Industry, Philip Collins uses the 'p' word to observe that "our mission is to make markets work well for consumers, using our competition and consumer law powers to drive productivity in the UK economy" (OFT, 2006). At present, however, the plans and budgets for 2006-07 are very similar to those for 2005-06. In speeches and plans the OFT declares that it will become more proactive but it has retained the five priority areas identified by Vickers in 2003. A strict attention to the productivity gap would point OFT investigations towards markets, restrictive practices and cartels in those sectors where the gap is largest. DTI research identifies large gaps of 10 to 20% in five sectors with wholesale/retail and financial intermediation at the top of the list (DTI, 2006). There is as yet no indication that the OFT will target such sectors although that would be the logic of its political support.

In assessing the new regime's exploitation of its independence we therefore see a mixed picture. If, as I have argued elsewhere (Wilks, 1998), the retention of agencies was a sensible element of continuity, it may nevertheless have produced too much path dependence with a cautious, reactive culture. Curiously, the agency emerging as extremely powerful and capable of shaping policy is the new agency, the CAT. It has taken an expansive approach to its jurisdiction, it has developed doctrine, applied European precedent and been active in policy debates. Private actions have not developed, as some parties hoped, but a body of law is building up and juridification of UK competition law is being embedded.

7. Conclusions

The conclusions are speculative and still subject to further work. They take the form of four nested and interconnected questions:

- i) how will the OFT exploit its independence and will it pursue the productivity agenda?
- ii) will UK competition policy have a substantial influence on the evolution of the European regime?
- iii) how will economic doctrine be incorporated into the development of UK and European competition policy?
- iv) how will the development of economic law affect the UK and European political economies?

i) how will the OFT exploit independence?

This terrain is charted thoroughly above. It requires further empirical research.

ii) will UK competition policy influence Europe?

The European question has not been developed in this paper which primarily addresses UK policy. There have been immensely important European reforms developing in parallel with the UK changes. These centre on the modernisation of European policy which can be presented either as subsidiarity and the empowerment of national authorities, or as centralisation and the neutering of national regimes by DG Comp. My preference is for the latter interpretation (Wilks, 2005a)b)). There is no doubt that the UK authorities, as now one of the most powerful in Europe, will have considerable influence on European developments. The shape and intensity of that influence again requires additional research which will centre in large part on the operation of the European Competition Network.

iii) how will economic doctrine be incorporated?

The UK reforms have represent the final stage in the long march of the economists through the UK competition agencies. The first economists were not appointed to the predecessor of the Competition Commission until 1971, and even then were regarded with great suspicion. By 2003 economists held the top posts in both the OFT and the CC (Professors Vickers and Morris). Moreover, in 2002 the European Court of First Instance tore apart three major merger prohibition decisions and attacked the Commission for woefully inadequate economic analysis. The response was a reorganisation of DG-Comp which split up the Merger Task Force, gave far more prominence to economic reasoning, and appointed a chief economist.

Note: the conclusions and references will be available in hard copy at the presentation.

References:

* Stephen Wilks is Professor of Politics at the University of Exeter. He is a Member of the UK Competition Commission. None of the views expressed in this paper should be attributed to the Competition Commission. Many of the ideas discussed in the paper were aired in papers given to a special workshop of REITI in Tokyo, May 2003; and to the SASE Conference in Washington, July 2004. The author thanks participants in both those meetings for their comments.