THE DAVID HUME INSTITUTE

THE POWER OF THE LOBBYIST: REGULATION AND VESTED INTEREST

Michael Casey

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FOREWORD

Economic models of the interface between government and business simplify to the point where, in any transactions between the two, the latter is a passive adjuster to the former. For example, the introduction of a new safety measure can be depicted as an increase, say, in the overhead costs of the firm and a diagram can be drawn predicting how a firm will adjust price and output in order to take account of the change in cost structure. This may be a useful pedagogic device but it neglects important elements in the transaction process. Using the same example, the exact nature of the measure may have to be negotiated with the safety authorities and its installation and maintenance require monitoring by government authorities. The general point to be made is that public authorities and business are in continuous negotiation, and the outcome of negotiations may vitally affect the profitability of enterprises.

Negotiation imposes costs on businesses and the matters being negotiated may require specialist knowledge of government legislation and of the political process. It is rational behaviour on behalf of businesses to seek specialist advice of the kind which 'lobbyists' provide. Michael Casey directs a company which specializes in lobbying on behalf of business clients, but, as he explains, lobbying no longer connotes the seeking of influence with the legislature. The considerable discretion given to government departments and latterly EEC in such matters as merger activity explains the growth in the lobbying industry. Indeed, it could fairly be claimed that government departments would prefer to negotiate application of regulations with professional advisers rather than with someone unfamiliar with the process of government, if only because it saves bureaucrats' time.

The account of the lobbyist's activities offered by Mr. Casey reveals the workings of the regulatory process, particularly in regard to takeovers. His Paper is a useful adjunct to the series of Occasional Papers on Corporate Takeovers and the Public

Interest already published by this Institute, and has the advantage of being written by someone with vast experience at a senior level of both government and business. The Institute offers the usual disclaimer that the author has presented his own views only and that the Institute has no collective view on any issue. It is glad, nevertheless, to have the opportunity of publishing an account of lobbying which is as fascinating as it is authoritative.

Gordon Hughes
Executive Director.

CONTENTS

	Page
What is Lobbying?	1
Who are the Lobbyists?	2
UK Merger Control	3
Investigation by the OFT	6
Investigation by the MMC	10
The Secretary of State's Decision on MMC Report	11
European Community Merger Control	12
The Continuation of the Bid in the Market Place	16
Conclusion	17

The Power of the Lobbyist - Regulation and Vested Interest

In considering the subject of the lobbyist, regulation and vested interest, I propose to focus on two main themes. First, what is meant by lobbying, how do those who engage in it seek to exercise influence and what is the justification for lobbying? Secondly, within the main regulatory areas, how does the lobbying process interact with legal, administrative and political structures?

What is Lobbying?

Most English dictionaries define the verb "to lobby" as to seek to influence members of the legislature. That is a very narrow definition though it is the sense in which the House of Commons Select Committee on Members Interests is currently examining Parliamentary lobbying. A wider meaning is also given in dictionaries, namely to solicit the support of influential persons. In this context the term covers the opportunity for presenting a point of view to officials and others who enjoy discretionary and administrative powers of regulatory action. I intend to consider the process of lobbying in this wider meaning of communicating a point of view across the entire interface between Government including its departments and agencies on the one hand, and commerce and industry on the other.

The justification for lobbying in a democratic society is to be found in the enormous range of Government intervention in the business and commercial life of the nation. The ordinary citizen and business interests alike need to be aware of the impact upon them of Government action and be able to respond to it. A considerable proportion of the time of Whitehall departments is devoted to regulating commercial and industrial activity. Decisions of great importance are taken daily, affecting all walks of life and covering matters such as:

* Environment
* Energy policy
* Transport and trade
* Education and science
* Food and agriculture
* Health and safety
* Financial services and insurance
* Monopolies and mergers.

Indeed there is an almost limitless range of issues in which both the citizen and organised business can find themselves affected by regulation of one kind or another. Against this background it is hardly surprising that those affected by Government decisions consider lobbying to be a legitimate and necessary means of presenting their own point of view. And so it has been since the earliest times when the King was petitioned by his subjects. Today, lobbying activities will find expression in both Parliamentary representations and in submissions to departmental officials and others enjoying authority.

Who are the Lobbyists?

Lobbyists are those who are affected or likely to be affected by Government decisions and who represent their viewpoint to Government whether the issue is a grievance caused by an existing policy, a threat from some new decision or possibly a complaint about the manner in which authority has been exercised. A citizen will bring his concerns to his Member of Parliament. A business is more likely first to make representations to the Government department concerned with its affairs. A trade association representing commercial and industrial groups will maintain a continuing dialogue with Government officials and often with Ministers. There are many such lobbying organisations. They include the CBI, the Institute of Directors, trade unions, professional associations and a wide variety of interest groups.

A more recent phenomenon has been the growth of specialised consultancies working for individual commercial clients, offering advice and services in the field of public affairs. I suspect that it is the growth of these commercial consultancies, which include my own firm, which has given rise to a great deal of media and Parliamentary interest over the activities of so-called lobbyists. Such firms describe themselves in various ways:

* as Parliamentary consultants
* as public affairs advisers
* as Government relations consultants.

In my experience, all of them concentrate on providing their clients with a range of services, including:

* monitoring proceedings of Parliament
* advice on Parliamentary procedure
* advice on the structure of Government departments and on the workings of the machinery of Government and regulatory bodies
* advice on public policy generally and its interaction with corporate policy

* advice and other services *mutatis mutandis* in relation to the activities of the European Community.

I shall not dwell on the more specialised services of some of these consultancies, except to say that such consultancies now appear to form part of a wider body of practitioners, including bankers, lawyers, accountants and others, who advise clients on the work of Government and regulatory bodies.

I would like to move from this general survey of lobbying activities to more specific examples of the way lobbying interacts with the regulatory system. A good illustration can be found in the field of merger control by the competition authorities of the UK and of the European Community. Mergers are of course a normal part of the working of the market. It is said that they help keep management on their toes and ensure that resources are used efficiently. However, many commentators are convinced that the existing system of UK merger control could be much improved - for example see Allen Sykes's persuasive thoughts on the subject in an earlier Occasional Paper (Hume Occasional Paper Number 23).

All mergers come within the purview of the authorities but only a fraction falls to be examined and investigated in detail. It is a particularly suitable context in which to consider the scope for lobbying *because of the very significant element of discretion given to the merger authorities* in London and Brussels.

UK Merger Control

I need first to describe very briefly the key elements in the statutory framework of the Fair Trading Act 1973. This legislation vests responsibility for merger control in a Minister - the Secretary of State for Trade and Industry. Under the UK system, merger control is not the province of a court of law or even a statutory body, though two independent statutory authorities are deeply involved in the process - namely the Monopolies and Mergers Commission (the MMC) and the Director General of Fair Trading, chief of the Office of Fair Trading (the OFT).

The Secretary of State decides whether to refer mergers to the MMC for investigation and whether to act on an adverse MMC Report. In the great majority of cases he will be guided by the advice of the independent competition authorities but he is not legally bound to be so. The Director General of Fair Trading is the Secretary of State's adviser. He monitors actual or prospective merger situations which may qualify for investigation and makes recommendations to the Secretary of State about the appropriate action to be taken. The MMC investigates mergers referred to them by the Secretary of State. The MMC determines whether a merger situation exists and if so whether it operates against the public interest.

This legal framework gives the competition authorities considerable scope for the exercise of discretion and judgement. It is the existence of such discretion in the authorities and the fact that ultimate control rests with Ministers that has made lobbying such a feature of our system.

The 1973 Act defines a merger situation qualifying for investigation primarily by reference to asset tests and market share - section 64. These provide that mergers can only be referred to the MMC if the value of assets taken over exceeds £30m or if the merger itself creates or enhances a monopoly situation by securing or increasing a 25 per cent share of the market. However apart from these tests the Act lays down no statutory criteria for references to the MMC. Moreover as regards the 25 per cent share of market test, the Act allows considerable discretion to the Secretary of State and the MMC to apply whatever criteria they consider appropriate in formulating a description of goods and services - section 68. Markets may be considered on a regional as well as a national basis.

A familiar method of effecting a merger is through a takeover bid, but not all mergers involve the acquisition of majority shareholdings. This is because the legislation recognises three levels of merger, namely *material influence, de facto control* and *legal control through a controlling interest.* The concepts of material influence and de facto control are not defined by reference to an objective criterion such as percentage shareholding. The matter is considered on a case by case basis, taking into account factors such as the balance of other shareholdings in the target company, board representation, voting rights and other circumstances.

Finally, the criterion applied to allow or to block a bid is the public interest. Obviously this criterion is wide enough to admit many factors outside considerations of competition even though the present Government has made clear that, as a matter of policy, reference to the MMC will be made primarily on competition grounds. An interesting further development was announced by the Secretary of State on 26 July 1990. Mr Lilley, in answer to a Parliamentary Question, said (*):

> "In deciding whether to refer merger situations to the MMC, I shall in future pay particularly close attention to the degree of state control, if any, of the acquiring company. ... State-controlled companies are not subject to the same disciplines as those in the private sector. They tend to have the assurance of Government backing for their business activities and consequently do not compete on even terms with private sector companies which operate under the threat of financial failure. Their managements may be motivated to make non-commercial decisions. They may not deploy resources efficiently, and an increase in the resources they manage may well reduce competitive forces."

* House of Commons Official Report, Vol 177 (Part II), Thursday 26 July 1990, Column 415 to 416.

The Press has termed this the "Lilley Doctrine", and it demonstrates the Government's determination not to allow its privatisation policies to be reversed by "backdoor nationalisation" by foreign governments. In one sense the issue of state control *is* a competition issue, questioning the possible unfair advantage in the market place of state-controlled companies. In another sense, it is a new ground of public interest, with undercurrents of political motives.

The new policy has already led to five proposed and implemented mergers (*) being referred to the MMC despite advice from the Director General in some instances that no competition issues were raised. Since the start of 1991, the MMC has cleared the four mergers involving French government control (**) and has condemned a similar case involving Finnish government control (***) - but it is not the *Finnish* government which the Doctrine is targeting.

Pressure from the European Commission, following complaints from the French Government and the companies involved, have recently led to the UK Government revising the Doctrine to some extent. In future, mergers involving state control are likely to be referred to the MMC only where there is a reasonable chance that, in terms of market share, the mergers will be judged to be adverse to public interest: the cases will not *automatically* be referred once state control is established.

Large contested mergers have been accompanied in recent years by intensive lobbying directed at Parliament, Government departments, the regulatory authorities and the media. *A major reason for this is that a bid lapses if it is referred to the MMC for the duration of their investigation.* A reference is likely to take at least three months and from the standpoint of the target company this period will provide a time to muster other defences. It also offers to the target company the hope that the bidder may go away and abandon the bid. In addition, the 1973 Act has been amended by the Companies Act 1989 to prevent the bidder from acquiring any further shares in the target company for a period beginning with the announcement of the reference to the MMC and lasting for at least the duration of the MMC's investigations.

* Credit Lyonnais SA and Woodchester Investments plc; Kemira Oy and Imperial Chemical Industries' nitrogenous fertiliser business; guided missiles joint venture between British Aerospace plc and Thomson-CSF SA; Sligos SA and Signet Ltd; Societe National Elf Acquitaine and certain assets of Amoco Corporation.

** Credit Lyonnais SA and Woodchester Investments plc; British Aerospace and Thomson-CSF SA; Sligos SA and Signet Ltd; Societe National Elf Acquitaine and Amoco.

*** Kemira Oy and Imperial Chemical Industries' nitrogenous fertiliser business.

By the same token, the bidding company will have a keen interest in demonstrating to the OFT that the merger could not result in any detriment to the public interest and therefore would not merit investigation by the MMC.

It seems to me inevitable that the parties to a bitterly contested takeover bid will see the public interest as an ally or an enemy. In major bids the stakes are enormous and the parties will seek every legitimate avenue to advance their interests.

In terms of lobbying activity, a contested takeover bid can be divided into four possible stages: *first* the investigation by the OFT and the consideration by the Secretary of State of the Director General's advice as to whether or not to make a reference to the MMC; *secondly*, the period of investigation by the MMC, if a reference is made; *thirdly*, the interval between the MMC's Report and the Secretary of State's action on that Report; *finally*, the continuation of the contested bid, if it is allowed to proceed.

Investigation by the OFT

In the first of these periods, before the Secretary of State decides whether or not to refer the bid to the MMC, both the bidding and the target companies are likely immediately to lobby the competition authorities. They may do so at several levels. The first level is that at which each party to the merger presents its case directly to the Office of Fair Trading. The immediate task will be to make an assessment of the legal, economic and regulatory implications of the bid. The target company will emphasise anti-competitive elements and those which it perceives to be against other matters of public interest. The bidding company will argue to the contrary.

The Companies Act 1989 amended the 1973 Act to introduce two new procedures and both of these will now be of concern to the bidder and the target company. The details of the procedures are complex and I shall not go further than giving brief descriptions. The first new procedure is pre-notification of proposed mergers, which effectively makes the task of the bidder simpler. It is an entirely voluntary process allowing the company wishing to take over another to receive definitive pre-merger clearance. The bidder submits a standard-form Merger Notice to the OFT, providing basic details of the proposed merger. Under the Act, the proposals must already have been made public because the Director General may wish to seek the views of third parties such as competitors, customers and suppliers.

After receiving the Notice, the Director General will consider the proposals. The information provided in the Notice may in many cases allow the Director General, without further inquiries, to advise the Secretary of State that there are no grounds for an MMC referral. In such straightforward cases, the proposals are likely to be cleared within 20 working days of the submission of the Notice. However the Notice may reveal potential areas of concern or complexity, requiring further time to gather more information and to consider all the implications. In these cases, the Act allows the Director General to extend the initial 20 day Notice period by up to two further periods. The first extension is of 10 working days, the second of 15 working days.

Unless, within the timetable for the Notice period specified in the Act, *either* the Secretary of State has indicated his decision to refer the merger to the MMC *or* the Director General has rejected a Notice for various technical reasons, the merger cannot be referred to the MMC at any point in the future. However the Act allows the merger to be referred in the event of certain factors emerging after the end of the Notice period. For example a pre-notified merger can still be referred after expiry of the Notice period if the Merger Notice turns out to have contained false information, if the merger was proceeded with before the end of the Notice period or if the merger has not been completed within six months of the end of the Notice period.

Essentially this new procedure builds on the confidential guidance procedure which existed in practice before the 1989 Act. Under this informal system, a bidder who received confidential clearance could not be legally certain of avoiding an MMC reference (and possible subsequent divestment) until six months after the merger had taken place.

The second new procedure involves undertakings in lieu of an MMC reference. This procedure, unlike pre-notification described above, applies to both proposed *and* completed mergers. With the agreement of the Secretary of State, an acquiring company can give enforceable undertakings in order to avoid a reference which would otherwise be made. The undertakings must take the form of promises to divest. These might entail selling parts of the merged business or disposing of shares. The divestment must be aimed at remedying or preventing the adverse effects of the merger which the Director General has specified in his advice to the Secretary of State. If undertakings are given and accepted by the Minister, the merger cannot be referred to the MMC in the future. In the event of the parties failing to abide by the undertakings, the Act provides for enforcement by order of the Secretary of State. In addition any person may bring civil proceedings relating to any breach of the undertakings, as though that breach were a breach of a statutory order. Such proceedings may be to claim damages or to seek performance of the undertakings.

Before the 1989 Act, there was no means of *enforcing* undertakings given prior to a merger. Undertakings were only binding if they followed an MMC reference and adverse Report. So this new procedure is a logical addition to the flexibility of UK merger control.

The first time that undertakings were successfully negotiated and given under this procedure was in late 1990 when the Rank Organisation undertook to dispose of certain bingo clubs within a specified time following their merger with Mecca Leisure. Following preliminary discussions between Rank and the OFT, the Secretary of State announced on 1 August 1990 that the merger would be referred *unless* suitable undertakings were obtained to remedy the adverse effects on competition which would result from the merged ownership of the Rank and Mecca bingo clubs in Greater London. The undertakings subsequently agreed (announced on 2 October 1990) required the disposal of ten of Mecca's London clubs, identified in a Schedule to the undertakings. Nine of these had to be disposed of by 28 February 1991, with the Director General having a veto over the buyers.

Whether or not a merger involves either the pre-notification or undertakings procedures, from the outset of their dealings with the OFT the parties to a merger will prepare appropriate submissions. They will both have the opportunity to discuss all the matters raised with OFT officials. This is a lobbying activity but I am clear that it should be confined to the submission of evidence and argument relating to the public interest, concentrating primarily on competition issues, and perhaps the acceptability or otherwise of possible undertakings.

However, another level of lobbying activity occurring while the OFT is considering the implications of the proposed merger is far removed from the corporate submissions to the OFT. At this level, companies may seek to do two things. They may press particular Government departments to take an interest in the OFT's deliberations and they may lobby in Parliament with a view to influencing members of the Government.

Taking the first of these, Government departments are lobbied because matters of policy within their remit are relevant to competition and other public interest matters. There are many examples of contested mergers in which the parties have sought the backing of Government departments in the hope that they would intervene with the OFT.

A notable and public example occurred in October 1988 before the bid by Elders for Scottish & Newcastle Breweries was referred to the MMC. As was widely reported in the Press, Mr Malcolm Rifkind, then Secretary of State for Scotland, threw his weight behind Scottish & Newcastle when he said:

> "Scottish & Newcastle are an important company with deep roots in Scotland. There are strong arguments for referral to the Monopolies and Mergers Commission. Clearly, the Director General of Fair Trading will have to consider very carefully all the information which Scottish & Newcastle put before him."

Further examples include the interest shown by the Department of Energy and the Foreign Office in the stake built up by Kuwait in British Petroleum and the concern shown by the Ministry of Defence in the first GEC/Plessey takeover attempt. Cases raising a particular point of difficulty or principle which is apparent to a Government department will be taken to the OFT's Mergers Panel. This is a committee through which the views of interested Government departments are brought to the attention of the Director General.

Parliament, however, is the major focus for political lobbying. The targets of political activity are Members of Parliament who will bring their views to bear upon Ministers. At this stage, before a decision on a reference is made, the Secretary of State for Trade and Industry himself will refuse to comment in detail on a particular case in advance of the Director General's advice. He is unlikely to be willing to meet the representatives of the companies involved and he will emphasise his quasi-judicial position. His standard answer to Parliamentary Questions is that he is awaiting the advice of the Director General.

However, once he has received the Director General's advice on whether or not to refer the bid to the MMC, or whether or not to accept undertakings in lieu of a reference, his discretion appears to be total. When his decision is made, the Minister will be the target of a wide range of pressures from Members of Parliament. And he will be aware that he is accountable to Parliament for his final decision. In the past it has been rare for the Minister to go against the Director General's advice though recently, since the introduction in 1990 of the Lilley Doctrine, the Minister has demonstrated a willingness to do so by referring cases to the MMC when the Director General has advised against a reference.

A very wide range of political issues can arise in relation to mergers. For example they can affect the structure of industry, shareholders, management, consumers, employees and trade unions. In relation to the Lilley Doctrine they affect foreign governments. Mergers can even affect the economic development of the particular regions where the companies concerned are situated.

Members of Parliament representing the constituencies in which those affected live and work have a keen interest in the outcome of a bid. So it is hardly surprising that almost every major takeover bid gives rise to political argument. For example the effects on a particular region's economy were considered in the Scottish & Newcastle bid and in the Rowntree and Anderson Strathclyde cases. Prospects of localised unemployment were much discussed. The Rowntree case also prompted many to consider the wider political arguments involved in the bid-proof nature of some predators, particularly where the bid comes from a foreign company.

The question of national security raised its head when the first GEC bid for Plessey was being considered. The controversy over foreign ownership of important British companies became a live issue when Kuwait's stake in BP was attacked and divestment was subsequently ordered. The Guinness bid for Distillers and the long saga of the House of Fraser both gave rise to public policy questions as to the suitability of directors and the conduct of bids. The first reference to follow the introduction of the Lilley Doctrine came in the summer of 1990, soon after the Doctrine was announced. It involved the acquisition of shares in Woodchester Investments by the Credit Lyonnais bank. The crucial issue in this case was state control. The French government controlled the bank and had other interests in the same markets in which Woodchester operated.

Ways in which Members of Parliament communicate their concerns both to fellow Members and to Ministers include the Parliamentary devices of adjournment debates, Parliamentary Questions and Early Day Motions. It is interesting to note that each successive period of Government since 1979 has seen a significant increase in the number of Early Day Motions put down by Members of Parliament on the subject of contemporary takeover bids and also in the number of Parliamentary Questions on takeovers, including Oral, Written and Private Notice Questions in the Commons and Oral Questions in the Lords.

For example, the 1979-83 Conservative Administration saw only eight Early Day Motions put down on takeover bids; the 1983-87 period saw 60; and from the 1987 election until now there have been 143. Parliamentary Questions on takeovers have increased from 103 between 1979 and the 1983 election to 235 between the 1983 and 1987 elections to a massive 698 during the period since the last election.

This Parliamentary activity is intended to influence the Secretary of State for Trade and Industry when he is considering whether or not to make a reference to the MMC. However Parliamentary sentiment is also important in itself and is often the stimulus for serious Press discussions on major issues. A number of quite fundamental issues or principles have been aired in the course of takeover bids and will continue to be raised. These need to be looked at seriously by Government, Parliament and indeed by all concerned with regulation.

Turning for a moment away from the 1973 Act, there is another discretionary power which exists to block a bid but does not appear ever to have been used. This is under the Industry Act 1975 where there is the threat of a foreign take-over of a business wholly or mainly engaged in manufacturing which appears to the Secretary of State to be of importance to the whole or part of the United Kingdom. The Secretary of State is empowered to prevent the takeover taking place and in that decision the Office of Fair Trading has no function.

Although this Act has never been used, at least by this Administration, to block a bid, the Act has not been repealed. An onlooker may take the view that a statute which is still in force might have a purpose either in negotiations between Government and a potential predator or in blocking a merger giving rise to public interest considerations at some point in the future.

Investigation by the MMC

Returning to the 1973 Act and the role of the Secretary of State, it is important to emphasise again that the majority of mergers qualifying for investigation by the MMC are not in fact referred for investigation. In such cases, assuming that there is no European or other external jurisdiction, it is the end of the merger control process. The battle will be fought out in the market place where other regulatory bodies dealing with the conduct of bids have a supervisory role.

Once a decision has been taken to refer a proposed merger to the MMC, a crucial task for the parties to the bid will be the proper presentation of their cases to the MMC. The parties are required to deal specifically with the issues relating to the investigation which the MMC has a duty to undertake. MMC members are never lobbied individually. They receive, as an investigating body, all relevant evidence through the normal statutory procedures. The reference is published and the MMC often places advertisements in the Press in order to invite evidence from interested third parties. In addition particular companies, individuals and organisations which the MMC thinks might be affected by the merger may be approached directly by the MMC. Anyone submitting evidence must do so initially in writing to the MMC Secretary. Some parties may then be invited to give their evidence in person. Those giving

evidence may include competitors, suppliers, customers, trades unions, MPs with relevant interests, local authorities and members of the public. These groups will be carefully targeted and lobbied by the parties to the bid in an effort to secure their support before the MMC. It has become an increasingly important part of a company's merger strategy to plan and implement a communications programme with relevant Government Departments and with MPs, politically active Peers and MEPs.

With respect to Government Departments, this programme will be aimed at persuading Ministers and their advisers that it would be in their Departmental interests to give evidence to the MMC on matters which affect their responsibilities. Parties to a bid will also seek to alter Parliamentary opinion in their favour. This makes sense because the Secretary of State for Trade and Industry is accountable to Parliament for any action taken following an adverse MMC Report.

In recent years, the period prescribed by the Secretary of State for the MMC to complete an investigation has been three months. I would question whether this is long enough for some of the larger and more technically complex bids which are now increasingly common.

The Secretary of State's Decision on the MMC Report

Once the MMC has concluded its investigation, it will deliver its Report to the Secretary of State. If the MMC has cleared the merger, the Secretary of State has no discretion and the merger proceeds in the market place.

But if the MMC has found that the merger would *not* be in the public interest (either on competition or other grounds), then the Secretary of State has absolute discretion as to whether or not the merger should be allowed to proceed. He may consider using his Schedule 8 powers to order, for example, divestment. The merger is again in the political arena. The Minister will assess the Commission's findings on the public interest and receive advice from the Director General before coming to a decision. In this period a further phase of political activity is commonplace as efforts are made to influence the Minister who is ultimately answerable to Parliament.

At this stage, the acquiring company may choose to write to the Secretary of State. The company will not be certain whether the Report is favourable or adverse to the merger. However it may want to urge the Secretary of State to publish the Report as soon as possible, if it is indeed favourable, to allow the merger to proceed within the City Code timetable or without further expensive delay. In addition the company may wish to request that, if the Report is in fact against the merger, the Secretary of State should publish the Report and discuss its findings and suggested remedies with the parties *prior* to a firm decision being made by him on how to deal with it.

In practice the Minister usually acts on the findings of the MMC though he is not legally bound to do so. Exceptionally he may disagree with the Commission. Even after a final decision is made, the Secretary of State may find himself the object of continued pressure, particularly in Parliament where political and constituency issues (especially the threat that a disallowed merger may cause regional unemployment) will

play a large part. A recent decision, to prevent the merger of Kemira Oy and Imperial Chemical Industries' nitrogenous fertiliser business, led to the tabling of an Early Day Motion and various Parliamentary Questions.

The Secretary of State's decision is, of course, subject to judicial review. In the Anderson Strathclyde case the Divisional Court upheld the Minister's right not to accept MMC conclusions in respect of an adverse public interest finding. However judicial review is not an appeal on the merits of a decision but rather a consideration of whether the decision-making process was proper.

The UK procedure for the review of merger regulation is different from the procedures in both the United States and the European Community. In the United States, competition issues are decided by judges and there is a right of appeal on the merits. In the Community, the decision is taken by the European Commission (discussed below) with a subsequent procedure for an appeal, also on the merits, to the European Court.

European Community Merger Control

This account would be incomplete without reference to Europe and the recent EC Merger Control Regulation. The Regulation came into force in September 1990 and its effect is to make the European Commission responsible for regulating large mergers with a Community dimension. Articles 85 and 86 of the Treaty of Rome no longer apply to mergers falling within the Regulation.

Put very simply, the Regulation gives the Commission the jurisdiction over mergers where the merging enterprises have a total world turnover of more than 5 billion ECU (approximately £3.5 billion) and at least two of the merging enterprises each have a Community turnover of more than 250 million ECU (about £175 million). Mergers below these limits remain subject to domestic control. The thresholds will be reviewed (and probably decreased) four years after the introduction of the Regulation.

Unlike the position under the Fair Trading Act, mergers which qualify for investigation under the Regulation must be notified to the Commission, generally by the bidding company. Notification is by submission to the Commission of a completed standard Notification Form which requires answers to a series of extensive and complicated questions. These relate to financial and other information about the parties to the merger and to information about the relevant markets and factors affecting entry into those markets. The Commission will show some understanding of a bidding company's difficulty in providing some answers, for example with respect to details of some aspects of the target company's business. The completed Notification Form will be copied to Member States by the Commission.

Following notification, the Commission has four weeks (which may be extended to six weeks) in which to come to a decision. The Commission may decide to clear the merger. The Commission may fail to come to a decision within this time limit, in which case clearance will be presumed. But if the Commission comes to the decision within the time limit that there are serious doubts about the merger's compatibility

with the Common Market, it will initiate proceedings for a full investigation. This investigation should produce a final decision within four months (this can be extended in certain circumstances). Again, if no decision is made within this period, clearance is presumed.

During a full investigation, the Commission will analyse the merger with reference its own version of the public interest - it might be called the "Community interest". This means that the Commission will seek to prohibit mergers which are incompatible with the Common Market - mergers which create or enhance a dominant position and significantly impede competition in the Community or a substantial part of it. As an alternative to prohibiting such mergers, the Commission may seek undertakings from the enterprises concerned to cure the merger's adverse effect. For example, in May 1991 the Commission, using its powers under the Regulation for the first time, allowed Fiat to acquire the battery division of Alcatel (the French electronics group) only after it had agreed to sell its own French battery-making subsidiary. The Commission thus prevented Fiat from gaining a stranglehold over the French market for car batteries.

In considering compatibility with the Common Market, technical and economic progress can be considered and taken into account when it is in the interests of consumers and does not obstruct competition. Full investigation proceedings will normally involve the issue of a statement of the Commission's objections and an analysis of the parties' written observations. The Commission will hold oral hearings with the parties and may request further details of the merger. It may also consult an Advisory Committee and the relevant Member States, and may seek the views of third parties. Following full negotiations with the parties, the Commission will issue its final decision. The whole procedure means that, from notification to the final decision, the merger may remain blocked for a total of five months or, in certain circumstances, even longer.

But this picture of the workings of the Regulation is a simplification of the relationship between the jurisdiction of the Commission and that of the Member States' domestic competition authorities. Until some of the complexities of this relationship are understood, it is hard to appreciate the full role of lobbying in both Brussels and in the capitals of Europe. I have set out above the basic rules which determine the Commission's jurisdiction by reference to specific ECU thresholds. But there are three exceptions to these rules whereby, even if a merger *prima facie* fulfils the rules, it still falls to be controlled by the UK competition authorities.

The first exception is where a merger exceeds the thresholds but more than two-thirds of the Community turnover of each of the merging enterprises is in the UK. In this case the Regulation will not apply. The Community dimension is too small and the merger will be investigated by the UK competition authorities in the usual way, as though it were below the limits.

Another exception relates to non-competition grounds, sometimes referred to as "legitimate interests". The Regulation allows a Member State's competition authorities automatically to intervene in parallel to the Commission where the merger

threatens the Member State's security, its prudential controls or its media diversity. This could lead to a merger being blocked by the UK authorities despite clearance from Brussels. Where a Member State expresses concern on a non-competition ground *other than* these three, the Member State can intervene only if the Commission consents.

The third exception concerns national interests. The UK authorities may seek to demonstrate to the Commission that the merger will create or strengthen a dominant position, significantly impeding competition in a distinct market *within the UK*. In this case, the Commission may refer the merger to the UK authorities to look at that part of the merger which threatens the UK market. UK domestic laws will apply. The Commission is likely to conduct parallel proceedings to look at the effect of the merger throughout the Community. The Commission has made it clear that it will only allow domestic authorities to intervene under this exception if it considers that there is no other way to protect competition in that market.

I believe the Regulation is likely to lead to increased lobbying in Brussels, Strasbourg and London, on issues of both jurisdiction and substance. It may also involve lobbying the Governments in other Member States.

With regard to questions of jurisdiction, a company involved in a merger may lobby both the EC and UK competition authorities in order to show that the merger falls *inside* or *outside* the Regulation (or under *both* the Regulation and UK jurisdiction) depending on whether the company would prefer the merger to be investigated by the Commission or the UK authorities (or both) respectively.

Arguments as to turnover thresholds are often likely to occur. Borderline cases, which need detailed analysis to discover whether they fall under the Regulation, will be notified to the Commission because (as stated above) details of mergers which have a Community dimension *must* be notified to the Commission. So in any borderline case companies are well advised to be on the safe side - to notify first, and argue about jurisdiction later. Disputes may concern the interpretation of the Regulation's definitions or the actual measurement of world, EC or national turnover.

Where the Commission is considering a joint venture created by two or more parties, there may be argument as to whether a particular arrangement falls within the Regulation's jurisdiction. *Concentrative* joint ventures are ventures which establish permanent independent entities and which do not involve coordination of competitive behaviour between the parties or between the parties and the joint venture - these fall within the Regulation. *Cooperative* joint ventures are ventures where the parties remain independent but coordinate their competitive behaviour - these fall outside the Regulation and are dealt with under Article 85 of the Treaty of Rome.

Another area of the Commission's discretion which will attract lobbying is the question of legitimate interests. Parties to a merger may seek to persuade the Commission or the UK authorities that a particular interest does, or does not, justify intervention from London. Similarly, there is the question of national interests. Parties to a merger may try to persuade the Commission and the UK authorities that a merger

would, or would not, have such an impact on the UK's own market that the UK authorities should, or should not, be granted jurisdiction to investigate.

Another opportunity for lobbying stems from the fact that even if a merger does not have a Community dimension, the Regulation allows Member States to ask the Commission to intervene and investigate it on the grounds that it will not be compatible with the Common Market. However this provision is envisaged as being used primarily by Member States which do not have sufficiently sophisticated domestic merger control authorities of their own.

Companies can be expected to lobby on these issues of jurisdiction, the direction of the lobbying activity depending on whether they want the merger investigated in London or Brussels. But once the Commission has satisfied itself that it does possess jurisdiction, companies involved may continue to lobby the London authorities on questions of substance, as well as co-operating with the Commission's inquiries. This is because after the Commission has initiated proceedings it will consult relevant Member States on the competition issues involved. Because of the nature of the Community, judgments about the merger's effect on competition will be open to political assessment and intervention.

As to *how* to lobby on matters of jurisdiction or substance, I have already described some of the ways in which lobbying the UK competition authorities may be implemented. Companies may also wish to lobby in Europe. For these purposes advice from lawyers and economists will often need to be accompanied by practitioners experienced in Community policy matters, as well as in the procedures and machinery of European government.

Lobbying will be directed at areas of the Commission's discretion - on questions of jurisdiction or on questions of the Community interest. The companies will make representations to the Competition Directorate of the Commission - DG IV. They may also seek to gain the support of other Directorates which, because of the businesses involved, will have an interest in the issues raised. Companies may ask to have the bid examined by the Economic and Monetary Affairs Committee of the European Parliament and they may seek to influence the Commissioner through MEPs. MEPs may be able to influence proceedings by means of Parliamentary Questions, raising topics for urgent debate, requesting Commission statements and seeking meetings with the Commission to discuss the merger.

Companies may also seek to influence the Commission by approaching the Governments or corporations of other Member States, in order to encourage them to submit to the Commission their views on how the merger might affect their own commercial interests.

Though the process of decision-making under the Regulation is likely to take an initial four weeks, followed by another four months if a full investigation is initiated, lobbying activity may have to be concentrated into a shorter time period. This is because the Commission's decisions must be made in the first parts of these periods due to the complexity of the Commission's internal workings. For example, in the

initial four weeks to decide whether to initiate full proceedings, the actual decision may have to be taken within the first week in order to allow three weeks for translating the documents into the nine Community languages, for publication requirements and for allowing time for third party submissions.

Similarly, in the four month period for the full investigation, the detailed evaluation of the merger (necessary to allow the Commission to draft its statement of objection) must be completed within the first six weeks or so. This compressed timetable is due to the time taken to get replies to the statement of objection from the parties, to consult (where appropriate) the Advisory Committee, Member States and third parties, to organise and hold hearings, to translate the documents and to obtain the full Commission's formal decision.

Prior to the Merger Control Regulation, the UK and EC competition policies gave an opportunity for parallel jurisdiction which most commentators agreed was unsatisfactory. The same commentators looked to the Regulation to resolve this double jeopardy. To a large extent it has done so. But it may not have provided the "one-stop shop" which was expected due to the complex interrelationship between the jurisdictions of Brussels and London and due to the continuing need to lobby in both places.

The Continuation of the Bid in the Market Place

When a merger has been cleared by the competition authorities in London and Brussels, the bid can proceed. The City Panel on Takeovers and Mergers becomes the major regulatory body concerned with the conduct of the bid.

The Companies Act 1989 surprised some commentators by leaving the Takeover Panel and its City Code on a non-statutory basis. The Panel continues to operate on a voluntary, self-regulatory basis. In addition, the City Code allows the Panel to exercise a wide measure of discretion based on certain fundamental principles which protect the shareholder and allow efficient operation of the markets.

However the draft EC Takeover Directive might change this. The Directive, in the draft form proposed, would require the UK Government to legislate for a rule-based structure, without the flexibility associated with the existing City Code. This would encourage companies to turn to the Courts to intervene in the merger process and timetable. The UK Government hopes to introduce amendments to allow Member States to draw up their own rules within specified principles and general requirements. This would allow the UK Government to preserve, within the broad structure of the Directive, the self-regulation and flexibility of the existing system whilst reducing the existing barriers to cross-border takeovers.

Conclusion

Using the example of merger control in London and Brussels, I have tried to show that in practice lobbying comes from many different quarters. It is directed at many different audiences and is highly relevant to any situation where there is discretion within a regulatory system. One aspect of lobbying is political lobbying. At first sight political lobbying may appear to be an extremely narrow field, confined to influencing the formulation of legislation where the process of full and fair consultation is comprehensively entrenched and understood by Government and interest groups alike.

But it is in fact much wider. Political lobbying is also relevant in the exercise by the Administration of powers conferred by statute even though that statute has been enacted following a full period of consultation. Wherever such an exercise of powers permits a degree of executive discretion, the decision maker has a duty to ensure that the decision is an informed one. The interested parties have a right to be heard. I believe this is an accepted part of the democratic process; indeed it is an inherent part of the process. These rights and duties are surely a vital constitutional principle which illustrate the divide between a democratic and a totalitarian state.

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